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Clerk, Supreme Court of Appeals

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Record No. 7306

In the
Supreme Court of Appeals of Virginia
at Richmond

J. F. OYLER, ADMR., ETC.

v.

WILLIAM TEX RAMSEY,
AN INFANT, ETC.

FROM THE CIRCUIT COURT OF THE CITY OF BUENA VISTA

RULE 5:12—BRIEFS

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

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

HOWARD G. TURNER, Clerk.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7306

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.

J. B. OYLER, Administrator of the Estate of ROBERT EDWARD OYLER, deceased, — Defendant in error.

against

WILLIAM TEX RAMSEY, an infant, who sues by his father and next friend, WILLIAM C. RAMSEY, — Plaintiff in error,

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From the Circuit Court of the City of Buena Vista
Paul A. Holstein, Judge

Upon the petition of J. B. Oyler, administrator of the estate of Robert Edward Oyler, deceased, a writ of error is awarded him to a judgment rendered by the Circuit Court of the City of Buena Vista on the 26th day of May, 1969, in a certain motion for judgment then therein depending, wherein William Tex Ramsey, an infant, who sues by his father and next friend, William C. Ramsey, was plaintiff and the petitioner was defendant; no bond being required.

RECORD

* * * * *

page 58 } INSTRUCTION NO. A

The Court instructs the Jury, that the operator of a motor vehicle owes to a passenger therein the duty not to operate the vehicle in a grossly negligent manner.

Therefore, if you believe from a preponderance of the evidence that Robert Edward Oyler was the operator of the vehicle in question and that William Tex Ramsey was a passenger therein and that Robert Edward Oyler operated the motor vehicle in a grossly negligent manner and did thereby cause injuries to William Tex Ramsey, and that the said William Tex Ramsey was free from fault, you should find a verdict for the Plaintiff.

Given
P. A. H.
12/30/68

* * * * *

page 60 } INSTRUCTION NO. C

The Court instructs the Jury that any person who has drunk enough alcoholic beverages to so affect his manner, disposition, speech, muscular movements, general appearance or behavior, as to be apparent to observation, is deemed to be intoxicated.

Therefore, if the Jury believe from a preponderance of the evidence that Robert Edward Oyler was the driver of the vehicle at the time of the accident, and that he was intoxicated, such intoxication may be considered together with all of the other evidence in your determination of the gross negligence, if any, of the defendant, and

Should you believe from a preponderance of the evidence that the defendant operated his motor vehicle in a grossly negligent manner, and that such negligence was the proximate cause of the accident, then you shall find for the plaintiff.

Given
P. A. H
12/30/68

* * * * *

page 70 }

* * * * *

ORDER

This day came the parties, by their respective attorneys, upon the two motions filed by defendant to set aside the verdict of the jury herein and to, in the alternative, enter final judgment for the defendant or to grant the defendant a new trial, the first of which said motions was filed on or about January 9, 1969 and the second of which was filed on or about January 17, 1969, and the Court, after having heard the argument of counsel with reference to the first of said motions and having considered each of the grounds set forth therein, doth overrule the same; whereupon, the Court proceeded to hear the argument of counsel with reference to said motion filed on or about January 17, 1969 and even though the factual allegations set forth therein were conceded to be accurate yet, the Court being of the opinion that, even so, the same did not constitute sufficient grounds to set aside the verdict of the jury and grant a new trial, it is accordingly, Ordered that said motion of January 17, 1969 be, and the same is likewise overruled, and it is further

page 71 } Adjudged and Ordered that the plaintiff, William Tex Ramsey, an infant, who sues by his father and next friend, William C. Ramsey, do have and recover of the defendant, J. B. Oyler, Administrator of the estate of Robert Edward Oyler, deceased, the said sum of $25,000.00, with interest thereon from December 30, 1968, and his proper costs in this behalf expended; whereupon, the defendant, by counsel, duly excepted to the foregoing rulings of the Court.

Whereupon, counsel for the defendant indicated his intention to apply for a writ of error and supersedeas to the judgment rendered herein and having requested the Court so to do, the Court doth hereby Adjudge and Order that the execution of such judgment be, and the same is hereby suspended for a period of ninety days and thereafter until the petition for a writ of error is acted on by the Supreme Court of Appeals, if such petition is actually filed within the specified time, provided the defendant shall give or file a bond in the Clerk's Office of this Court, with surety to be approved by the Clerk thereof, in the penalty of $500.00, conditioned according to law.

We request the entry of this Order:
Shuler A. Kizer
Bernard J. Natkin
Of Counsel for Plaintiff

Seen and excepted to:
W. O. Roberts, Jr.
W. H. Jolly
Of Counsel for Defendant

Enter:
Paul A. Holstein
5/26/69

* * * * *

page 72 }

* * * * *

NOTICE OF APPEAL

Notice is hereby given that the defendant, J. B. Oyler, Administrator of the Estate of Robert Edward Oyler, deceased, appeals to the Supreme Court of Appeals of Virginia from the order granting judgment in favor of the plaintiff, entered herein on May 26, 1969.

ASSIGNMENTS OF ERROR

The defendant hereby assigns as error the following action and rulings of the Trial Court:

(1) That the Court erred in failing to sustain the defendant's motion to strike the plaintiff's evidence and enter summary judgment for the defendant, which motion was made at the conclusion of the plaintiff's evidence and renewed at the conclusion of all the evidence in the case.

(2) The Court erred in granting plaintiff's Instruction A.

page 73 } (3) The Court erred in granting plaintiff's Instruction C.

(4) The Court erred in failing to sustain defendant's motion for a new trial on the grounds that one of the jurors was, at the time of the trial, an active client of counsel for the plaintiff and did not make this known to the Court or counsel for defendant on his *voir dire* examination, despite the fact that the Court, of its own motion, specifically inquired as to the existence of such relationship.

(5) The Court erred in failing to sustain defendant's

motion to set aside the verdict of the jury and enter final judgment for the defendant or, in the alternative, grant a new trial to the defendant.

(6) The Court erred in refusing to instruct the jury to disregard certain of the testimony of witness Linda Gardner, made by the defendant at the conclusion of all of the evidence.

Respectfully submitted,

J. B. Oyler, Administrator of the Estate of Robert Edward Oyler, deceased

By W. H. Jolly
Of Counsel

* * * * *

Filed in the Clerk's Office of the Circuit Court of Buena Vista, Va., on this 3rd day of June, 1969.
Frances R. Robens Clerk.
DC.

* * * * *

APPEARANCES:

Shuler A. Kizer, Esq.,
Kizer, Hess & Robey
Buena Vista. Virginia,
Bernard J. Natkin, Esq.,
Ganas & Natkin
Lexington, Virginia,
Of counsel for Plaintiff

W. H. Jolly and John R. Canterbury, Esquires,
Kime & Jolly,
Salem, Virginia,
William O. Roberts, Esq.,
Lexington, Virginia,
Of counsel for Defendant

The subject cause was tried, on the 30th day of December, 1968, before the Hon. Paul A. Holstein, Judge of the Circuit Court of the City of Buena Vista, State of Virginia, and a jury.

* * * * *

page 1 } The Court: Now, you thirteen gentlemen—of course, I will explain the nature of the case, and also propound certain questions which will qualify you as jurors.

You are called upon today as jurors to determine the issues in an action at law which is styled William Tex Ramsey, who sues by his father and next friend William C. Ramsey vs J. B. Oyler, Administrator of the Estate of Robert Edward Oyler, deceased. The amount sued for is $100,000. The Plaintiff alleges that on April 15, 1967, while riding in an automobile operated by Robert Edward Oyler, now deceased—riding in the automobile as a guest in the automobile, and as a result of the gross negligence in the operation of the automobile by Oyler—Robert Edward Oyler, there was an accident.

This car struck a concrete culvert, resulting in severe injuries to the Plaintiff. Of course, liability is denied by the Defendant in this case. And those are the issues for you to determine. Now, the Plaintiff is represented by Mr. Shuler A. Kizer and Mr. Bernard J. Natkin. The Defendant is represented by Mr. William O. Roberts and Mr. W. H. Jolly and Mr. John R. Canterbury.

page 2 } For you to qualify as jurors it's necessary that you answer in the affirmative or negative the following questions propounded by the Court:

Now, are any of your jurors related by blood or marriage to the parties in this case? Do any of you have any close business relations with either of the parties or any of the attorneys in the case? Do you have any interest in the outcome of this case? Have you expressed or formed an opinion of the case? You know of any reason whatsoever why you cannot give a fair and impartial trial to the parties, according to the law and the evidence? Any questions, Mr. Kizer or Mr. Natkin?

Mr. Kizer: No, sir.

The Court: Mr. Roberts, Mr. Jolly, Mr. Canterbury?

Mr. Jolly: No, sir.

* * * * *

page 3 }

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ROBERT SYLVESTER MUNGER, a witness of lawful age, sworn in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION

By Mr. Natkin:

* * * * *

page 4 }

* * * * *

Q. And where was he when you first saw William Tex Ramsey?

A. In the emergency room at the Jackson Memorial Hospital.

Q. And would you tell us what you observed as to his condition and as to what you did, sir?

A. I saw an unconscious man with a serious brain injury and, presumably, skull fracture—and that is as far as my recollection and notes carry me.

Q. And what did you do or recommend, sir, at that time?

A. He was sent to Roanoke Memorial Hospital.

Q. And why was it necessary that he be sent
page 5 } to another hospital, rather than be treated at the Lexington hospital?

A. The extensive nature of his head injury, brain injury, particularly.

Q. How were you able to—what did you actually see, that you came to the conclusion that it was necessary to send him on for treatment, rather than attempt treatment yourself?

A. I have no clear recollection of this. Let me say that Dr. William Old was likewise in on this case. I asked him again—and he, likewise, this morning has no clear recollection of the case. We do know he was seriously injured. I could not describe the location of the lacerations, for instance; I can only remember that he was unconscious and seriously ill from central nervous system injury, brain—

* * * * *

page 6 }

* * * * *

Q. And what you saw was an unconscious young man when they brought him in, and you examined him—or the other doctor, that you referred to, and you referred him to a specialist in Roanoke?

A. Yes, sir.

Q. And are you a general practitioner, sir?

A. Yes, sir.

Q. What time did you send him to Roanoke, do you recall?

A. I do not remember.

Q. You examined him, and felt the best thing to do was send him to a specialist—and that was done?

A. Myself and Dr. Old examined him, and knew he was seriously ill from a brain injury, and sent him to Roanoke; yes, sir.

* * * * *

page 7 }

* * * * *

BERNARD R. HUFFMAN, a witness of lawful age, sworn in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION

By Mr. Kizer:

Q. You are Bernard R. Huffman?

A. Correct.

Q. And are you Chief of Police of the City of Buena Vista, Virginia?

A. I am.

Q. For how long have you been Chief of Police of this City?

page 8 } A. Thirty-five years.

Q. Chief, were you on duty on the night of April 15, 1967?

A. I was.

Q. Did you receive a call in connection with an accident

which occurred on Long Hollow Road north of the underpass?

A. I did.

Q. And what time did you receive the call?

A. About 10:57.

Q. Approximately?

A. P. M.

Q. What did you do upon receiving the call?

A. Well, first aid—somebody turned it in about the same time—when I arrived there they were there about the time I was.

Q. Tell us where was the scene of this accident?

A. Well, it was north, I'd say, of the underpass; I estimate, maybe, one thousand feet, more or less.

Q. When you—

A. At a cement culvert across the highway, where there's a stream coming down; and this car had hit the right side —right abutment of this cement culvert, which is about—I don't know—three or four feet high, and it just ran right straight into it—a little bit to the right, and smashed into it.

page 9 } Q. Chief, you referred to the culvert; are you referring to the highway on Long Hollow Road that passes under the railroad?

A. It's a cement underpass—it's an underpass—and that is approximately one thousnad feet north of the railroad underpass or cement bridge or culvert, as we call it, on that highway there—631, I believe.

Q. Was this the situs or location of this accident in the city of Buena Vista?

A. Yes, sir; it is.

Q. Now, to what extent—what type of car was involved?

A. This was a 1960 Chevrolet convertible, and a 1966 license on it—375-427.

Q. You say it had a 1966 license plate on it?

A. Yes, sir; it did.

Q. And this accident occurred on what date?

A. On the 15th of April.

Q. Of what year?

A. 1967.

Q. When would that license tag have expired?

A. At midnight on the 15th—the same night.

Q. Midnight of the night on which this occurred?

A. Yes, sir.

Q. Now, where did you find the car, with relation to the bridge or abutment?

Bernard R. Huffman

page 10 } A. Well, the car was just rammed into the cement abutment of the culvert, and was still just smashed into it, and was sitting that way. (The witness gestures)

Q. To what extent was the car damaged?

A. I'd say it was a total loss.

Q. Can you recall, or do you recall what portion of the car, or did your investigation reveal—

A. The right of the front—I believe the right front wheel was off, went forward into a ditch, and it was all just smashed back—the radiator and everything was smashed back in towards the front seat.

Q. And you considered it a total loss?

A. Yes, sir.

Q. Did you observe any person injured there?

A. Yes, sir. There was four persons; one was in the car, and there were two on the right side of the car—one was laying near the—close—almost under the car, one out from it a piece; and I believe the other one was on the opposite side of the road near the fence.

Q. Did you have any conversation with any of the people who had been occupants of the car?

A. No. There was nobody able to speak at all.

Q. Did you find any skid marks in the highway.

A. No, sir; I didn't see a skid mark.

page 11 } Q. What happened to these people who were injured? You described four.

A. They were all picked up by the first aid members and taken to the hospital.

Q. Do you know whether or not they were all living at the time?

A. At this time I believe they were all living. Some died later—the next day or two.

Mr. Kizer: You may take the witness.

CROSS EXAMINATION

By Mr. Jolly:

Q. Chief, I believe you told us before that you made some notes relative to marks or lack of marks on the highway, but they had become misplaced?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Bernard R. Huffman

Q. In answer to the question that you were asked about skid marks, are you certain now whether there were or weren't any?

A. There could have been some, but I lost all my notes, and I am not sure. I wouldn't say either way that there are, because I don't really know.

Q. This culvert into which the vehicle collided, or with which it collided, would you describe it to the Court and jury, as far as the size of the culvert itself?

page 12 } A. (The witness does not respond)

Q. How tall was it above the road bed?

A. I say from three to four feet on each side of the abutment, and approximately, maybe, twenty-some feet in width. (Gesturing) And, of course, it's built like that, you know—the streams comes down, and sitting this way.

Q. At an angle?

A. At an angle; yes, sir.

Q. And how wide would you say the culvert itself is?

A. I would say it's around twenty or twenty-two feet, maybe more or less.

Q. I am not making myself plain.

A. It's twenty or twenty-two feet long.

Q. The culvert itself, how wide is the concrete—how thick is the concrete?

A. I would say, maybe, eight or ten inches on the sides.

Q. And when you got there the car was up on the culvert?

A. Yes, sir.

Q. The front part of the car was sitting up on top of the culvert?

A. Yes, sir—right against the abutment.

Q. And that culvert is there because there's a stream that flows under the road; isn't that correct, sir?

page 13 } A. Yes, sir.

Q. Now, earlier, Chief, I believe you looked at this diagram—which has been stipulated to—did you not, sir?

A. Yes, sir.

Q. And there's located on that diagram, at this point, a power pole with a street light attached?

A. Yes, sir.

Q. That's correct, is it not, sir?

A. Yes, sir.

Q. And is there another power pole, with a street light attached, from this end of the railroad underpass to the culvert where the accident occurred?

Bernard R. Huffman

A. No, sir; I believe not.
Q. There's one street light?
A. One street light.
Q. From your experience and your knowledge of the area, would you say that is the correct location, relative to the distance, that way to the culvert, and this way back to the underpass?
A. Yes, sir—that's nearer right.
Q. Could you identify which of the boys was where when you got there, which one was in the car?
A. No, sir. I don't know any of them.
Q. Have you since had occasion to meet with Jessie Wayne Oyler, who survived?
page 14 } A. Yes, sir; I have saw him.
Q. Can you tell us where he was, with reference to the vehicle?
A. Well, I am not sure. I thought he was in the car but I am still not sure. I didn't know any of them at that time they was picked up, and it was dark—and picked up these four and took them to the hospital. And I don't know one of them from the other one.
Q. You thought it was Jessie Wayne, but you are not sure?
A. Not sure.
Q. You are not absolutely certain? By the way, could you describe what type of automobile this was?
A. What type it was?
Q. Yes, sir? What was the body style?
A. It was a 1960 model Chevrolet convertible, top was down.
Q. The top was down?
A. Yes, sir.
Q. Thank you, sir.

REDIRECT EXAMINATION

By Mr. Kizer:
Q. Do you have the width of Long Hollow Road?
A. Do I have the?
Q. The measurement of the width of it?
page 15 } A. The street?
Q. Yes, sir.
A. Hard surface portion?
Q. Yes.
A. It's about eighteen to twenty feet.
Q. All right, sir.

Jessie Wayne Oyler

The Witness Stands Aside.

JESSIE WAYNE OYLER, a witness of lawful age, sworn in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION

By Mr. Kizer:
Q. You are Jessie Wayne Oyler?
A. Yes, sir.
Q. And where do you live?
A. Stuarts Draft.
Q. And what is your age?
A. Twenty-four.
Q. Are your married or single?
A. Married.
Q. Are you employed?
A. Yes, sir.
Q. Where?
A. Cronk & Shenandoah.
page 16 } Q. Was Robert Edward Oyler your brother?
A. Yes, sir.
Q. Do you recall when he was released from military service?
A. Fourteenth of April, I believe.
Q. What year?
A. Sixty-seven.
Q. Where did he live?
A. He lived in Roanoke.
Q. Lived where?
A. With my mother and father.
Q. Did you reside with your mother and father?
A. No, sir.
Q. Did your mother and father reside where?
A. Stuarts Draft.
Q. And you resided in Stuarts Draft?
A. Yes, sir.
Q. But in a separate house?
A. Yes, sir.
Q. I gather you and your family—your wife? You have children?
A. Yes, sir.
Q. You and your wife and children have a separate home?
A. Yes, sir.
page 17 } Q. From the home of your mother and father?

Jessie Wayne Oyler

Now, was Jessie Wayne married—Robert Edward?
A. No, sir.
Q. Do you recall how old he was?
A. Twenty, I believe.
Q. At the time of this accident?
A. Um-hum.
Q. When did you first see him after he was released from service?
A. Same day he got out.
Q. And that was on the 14th of April?
A. I believe so—something like that.
Q. Did you see him on the 15th of April, 1967?
A. Yes, sir.
Q. Where did you first see him?
A. At my mama and dad's house.
Q. How did you happen to see him there?
A. I was there.
Q. Do you recall what day of the week it was?
A. I believe it was on Thursday or Friday I seen him.
Q. For what purpose did you go to your mother and father's home?
A. I believe I got the word he was coming in on shore leave—we knew he was getting out.
Q. Well, on 4/15—the date of the accident—
page 18 } what time did you go to the home of your mother and father, where your brother lived?
A. It was in the morning. I don't know exactly the time.
Q. You would say something before noon?
A. Yes, sir.
Q. How far did you live from your father's home?
A. Approximately two miles—two and a half, something.
Q. When you got to your mother's home did you meet up with your brother Robert Edward?
A. Yes, sir.
Q. And what did you all do?
A. We went to Waynesboro to wash the car.
Q. Who went—made that trip?
A. Me and my brother.
Q. In whose car were you travelling?
A. Mine.
Q. And what type of car was it?
A. Sixty-one Chevrolet.
Q. And what style?
A. Convertible Impala.
Q. And you went to your father's home—from your father's home to Waynesboro to wash the car?

Jessie Wayne Oyler

A. Yes, sir.
page 19 } Q. And then where did you go?
A. I believe it was over at Staunton—went over to Staunton.
Q. And from Staunton where?
A. Went to Goshen.
Q. Why were you going to these various places?
A. Just riding around.
Q. Were you celebrating anything?
A. Well, I guess you could say, Yes.
Q. You say you would say you were celebrating something?
A. Yes, sir.
Q. What were you all celebrating?
A. Him coming in, I guess.
Q. Celebrating his release from the military service?
A. You could say that.
Q. And you went first to Waynesboro?
A. Yes, sir.
Q. And then to Staunton?
A. Yes, sir.
Q. And what, if anything, did you do in Staunton?
A. Went over to see about a car—he was going to get a car.
Q. Did you do anything else there?
A. No, sir.
page 20 } Q. And then where did you go?
A. Went to Goshen.
Q. To Goshen?
A. Yes, sir.
Q. For what purpose did you go to Goshen?
A. Just riding around.
Q. Stop in Goshen?
A. Yes, sir.
Q. And where did you stop?
A. Stopped quite a few times, riding over there.
Q. Stopped quite a few times?
A. Alongside the water, you know.
Q. Did you stop in any tavern?
A. Yes, sir; we did.
Q. And for what purpose did you stop?
A. Drink a beer.
Q. To drink beer?
A. Yes, sir.
Q. Who drank beer?
A. Both.

Jessie Wayne Oyler

Q. Both of you?
A. Yes, sir.
Q. And where did you start drinking beer?
A. I believe it was there we drinked.
Q. In Goshen?
page 21 } A. Yes, sir.
Q. And when you left there—left Goshen, where did you go?
A. Come around—I don't know the route—come up here on the —East Lexington.
Q. Came out at Lexington?
A. Yes, sir.
Q. Did you come out—drink any more beer?
A. Not there.
Q. Where did you drink your next beer?
A. I believe it was down here—I'm not sure.
Q. You think it was in Buena Vista?
A. Yes, sir.
Q. Where in Buena Vista?
A. One of these restaurants. I don't know exactly—this one up here, or this one down here. (The witness points)
Q. Did you stop in anyone's home?
A. Yes, sir—went to Delmas Clark's house.
Q. Delmas Clark's house?
A. Yes, sir.
Q. And where does he live?
A. Long Hollow Road, like you be going to #11.
Q. And you stopped there when?
A. I don't know exactly the time.
Q. Was it before you came to Buena Vista?
page 22 } A. Yes, sir; it was.
Q. And how long were you in Buena Vista?
A. I went to the dance down here quite a while.
Q. And what, if anything, did you have to drink down there?
A. Drinked a few beers in this tavern—I forgot which one it was.
Q. You are speaking of a tavern in Buena Vista?
A. Yes, sir.
Q. Did you go to more than one tavern?
A. No, sir.
Q. And you know how much beer you drank?
A. I don't know exactly.
Q. Now, were you and your brother Robert Edward drinking the entire evening?
A. No, sir; we weren't.

Jessie Wayne Oyler

Q. Where did you go—get separated?
A. At the dance—he went with somebody somewhere—I don't know where.
Q. You don't know where he went or with whom?
A. No, sir.
Q. And how long were you separated?
A. I don't know exactly—maybe an hour, maybe an hour and a half.
Q. Actually, when the dance—do you believe
page 23 } the—did you leave the dance before it was over?
A. No, sir.
Q. When the dance was over did you have any—were you with Robert Edward then?
A. No, sir. I went to my car by myself.
Q. Why weren't you with Robert Edward?
A. I didn't know where he was.
Q. And how did you eventually find him?
A. He came to the car where I was.
Q. And do you know a Donnie Gardner?
A. No, sir; I don't.
Q. Did you have someone in the car with you that night, other than Robert Edward?
A. Yes, I had.
Q. Sir?
A. Yes, sir; I had someone else in the car, but not at the time of the *car*, I didn't.
Q. Who was with you?
A. Delmas Clark.
Q. Where?
A. Well, we went to the tavern together and went down to the dance.
Q. When did you last see Delmas?
A. Just before I left.
Q. Before you left the dance?
page 24 } A. Yes, sir.
Q. Did you go to a tavern after you left the dance?
A. No, sir.
Q. Do you know a place known as the Sportsman?
A. Yes, sir.
Q. You go to the Sportsman?
A. I believe we was in there—one of these taverns we were in—I don't know exactly which one.
Q. And from there, tell me—at that time what license plates were on your car?
A. Sixty-six.

Jessie Wayne Oyler

Q. And when did they expire?
A. Twelve o'clock that night, I believe.
Q. Twelve o'clock that night?
A. I believe so.
Q. And after leaving the tavern where did you go?
A. Went home—where we was headed.
Q. Did you make any other stops?
A. Yes, sir. I remember stopping, but I don't know where.
Q. And for what purpose did you stop?
A. I don't know.
Q. Do you know of an establishment known as Corner Grocery?
A. Yes, sir.
page 25 } Q. Did you stop there?
A. So I hear—so people tell us.
Q. From your own recollection, do you recall whether or not you stopped there?
A. I just remember stopping there—I don't know if it was there.
Q. You knew a place known as the Corner Grocery?
A. I have known that for a long time.
Q. You have known that for a long time?
A. Yes, sir.
Q. But you are unable to tell this Court and jury whether or not your car stopped there?
A. Yes, sir; that's correct.
Q. You say "That's correct"—the statement I made?
A. (The witness nods his head)
Q. And for what reason can you give for being unable to tell the Court and jury?
A. I just don't remember.
Q. Had you had something to drink?
A. Yes, sir—I guess so—that's right.
Q. And would you say that your brother Robert Edward Oyler drank about the same amount as you?
A. I'd say approximately that.
Q. When you'd have a beer, he'd have a beer?
A. Not really—or when he'd have one, I wouldn't.
Q. You consumed somewhere in the neighbor-
page 26 } hood of approximately the same amount?
A. Approximately.
Q. But if you had stopped at the Corner Grocery, you are unable to recall it.
A. Yes, sir.
Q. Are you able to tell us who was driving that car at the time of this accident?

Jessie Wayne Oyler

A. No, sir.

Q. Had you had any conversations with your brother that day about his driving the car?

A. Yes, sir.

Q. What conversation?

A. He was driving earlier in Goshen.

Q. And how did he happen to drive?

A. He wanted to drive.

Q. You mean by that, he had requested that he be permitted to drive the car?

A. He asked me to—I let him.

Q. And why did you let him drive?

A. Because he liked to drive.

Q. Are you able to—if your car drove to the Corner—or stopped at the Corner Grocery, are you able to tell this jury who drove it to that location?

A. I believe I can, sir.

page 27 } Q. Sir?

A. I believe I did.

Q. You believe you did? Do you recall being slumped over the wheel—the steering wheel apparatus?

A. I might have been. I was sleepy, and I had a few beers, and I might have been.

Q. Do you recall your brother going into the store?

A. I remember somebody getting out.

Q. Did you get out?

A. No, sir.

Q. You remained in the car?

A. I don't remember getting out.

Q. You say you remember someone getting out?

A. Remember hearing a door slam.

Q. Who was in the car—and was anyone in the car, other than the two of you?

A. That's all I can recall.

Q. Then do you recall your brother coming out, and you being drooped over the steering wheel, and he pushed you over to the other side of the car, and he got under the wheel and drove off?

A. I felt like I slid over.

Q. You felt like you slid over?

A. Yes, sir.

Q. To what would be the passenger seat?

page 28 } A. I imagine so.

Q. And your car drove off?

A. I don't remember ever leaving.

Jessie Wayne Oyler

Q. Don't remember leaving?
A. No, sir.
Q. Don't remember the tries spinning?
A. No, sir.
Q. And that kind of thing?
A. No, sir.
Q. What is the last thing you remember?
A. Down here back of the dance hall, leaving the dance.
Q. Back of the dance hall? But you say you remember stopping, and someone getting out of the car?
A. Yes.
Q. And you remember sliding over to the passenger side?
A. I say I felt like I slid over.
Q. And you missed your brother for an hour or hour and a half while you were at the dance?
A. Yes, sir.
Q. He came up, I believe you said, after you had gone to the car?
A. Yes, sir.
Q. And did he tell you where he had been?
page 29 } A. No, sir.
Q. Didn't he tell you he had been across the street at a beer joint?

Mr. Canterbury: We object.
The Court: Objection sustained. He's your witness.
Mr. Kizer: Called as an adverse witness.
The Court: You called him as your witness.

By Mr. Kizer: (Continuing)
Q. Well, how long—I believe you already said that there was a period of about an hour or hour and a half when you and your brother were separated?
A. I say approximately.
Q. Approximately? During this hour or hour and a half, where were you?
A. At the dance.
Q. Was your brother at the dance?
A. He was at one time; yes, sir.
Q. I am talking about this period that you estimate to be an hour to an hour and a half?
A. He would have been—but, I mean, I didn't see him, but looking for him, some guys told me he went up the street with a couple of other guys I don't know.
Q. Did you—of course, you were injured in this accident?

Jessie Wayne Oyler

A. Yes, sir.
page 30 } Q. Did you see your car afterwards?
A. I seen a picture of it; yes, sir.
Q. You didn't see the car?
A. No, sir—not the car.
Q. What happened to the car?
A. The front end busted up.
Q. You say you didn't actually see the car; you say you saw a picture of it?
A. In the paper—in the newspaper.
Q. But you didn't actually see the car?
A. No, sir.
Q. It was your car?
A. Yes, sir.
Q. What happened to it?
A. I said the front end was busted up.
Q. Did you—where is the car now?
A. I don't know.
Q. How did you dispose of it? Have you disposed of it?
A. No, sir; I haven't had anything to do with it.
Q. Then—

The Court: Mr. Kizer, I believe we ought to have a discussion of this in the absence of the jury.
Mr. Kizer: I see—perhaps that's well, too. I haven't explored that with this witness.

page 31 } (Court and counsel conferred in chambers)

(Examination of the witness continues)

By Mr. Kizer: (Continuing)
Q. Do you recall any discussion about the license tag on the car that day, Mr. Oyler?
A. No, sir.

Mr. Kizer: You may examine.

By Mr. Kizer: (Continuing)
Q. Mr. Oyler, how far is your home from here—Buena Vista?
A. Approximately, maybe, six miles, approximately.
Q. Sir?
A. Approximately, maybe, about six or seven miles approximately, down the back road.

Jessie Wayne Oyler

Q. In which county do you live?
A. In Augusta County.
Q. You live in Augusta County?
A. Yes, sir.
Q. Do you live in Stuarts Draft?
A. No, sir.
Q. How far from Stuarts Draft?
A. Approximately two and a half miles.
Q. Two and a half miles?
A. Approximately, sir.

Q. You know how far it is from Buena Vista
page 32 } to Stuarts Draft?
A. No, sir; I don't.

Q. Coming from your home to Buena Vista, what route do you normally take?
A. I usually come down the back road—go down Long Hollow, where Cold Springs is—a little place called Cold Springs.
Q. Have you been to Buena Vista—ever been to Buena Vista before with your brother?
A. Yes, sir.
Q. Robert Edward?
A. Yes, sir.
Q. What route did you take?
A. Come up #11.
Q. Number 11?
A. Yes, sir.
Q. Had you ever been any other way?
A. Yes, sir.
Q. What other way?
A. Down the back road.
Q. What do you call the back road?
A. Long Hollow—I don't know the route in there.

CROSS-EXAMINATION

By Mr. Canterbury:

Q. You said—what you were just talking about, Jessie, going from Buena Vista to your home, it was your
page 33 } ordinary route to go up Long Hollow; is that correct?
A. I took either road—it all depends.
Q. But, ordinarily, you did travel Long Hollow? In other words, that was the shortest way home?
A. Yes, sir.
Q. And it's approximately how far?

Jessie Wayne Oyler

A. I say approximately seven and a half miles.
Q. How long does it take you, driving at an ordinary speed, to get to your home?
A. I never have timed it.
Q. Fifteen to twenty minutes, something in that nature?
A. A little bit longer.
Q. Thirty minutes?
A. Approximately.
Q. Now, going back to the night of the 14th, did I understand you to say you worked the night of the 14th?
A. Yes, sir.
Q. What time did you go to work?
A. Graveyard.
Q. And what time then did you go to work?
A. At 12.
Q. And what time then did you get off?
A. Eight-thirty.
Q. So, you worked Saturday between midnight and 8:30 in the morning; is that correct?
page 34 } A. That morning; yes, sir.
Q. The morning of the 15th?
A. I think it was the 15th—that's the night of the accident.
Q. It was the same day that you testified as to going to Staunton and Waynesboro, and so forth?
A. It was the day I got off from work. I don't know the exact date.
Q. We are talking about the same day?
A. I imagine.
Q. You say that you went to Waynesboro, I believe, and then to Staunton, and then to Goshen?
A. Yes, sir.
Q. And you stopped along the road at Goshen, watching the people picnic, and so forth, I take it?
A. Yes, sir.
Q. And then you went into the Town of Goshen?
A. Yes, sir.
Q. Approximately what time of day was this?
A. I don't know exactly—I don't—just don't—in the afternoon, I imagine.
Q. Would you say early afternoon? Would that be correct?
A. It wasn't real early—after dinner.
Q. Shortly after dinner hours, say two o'clock?
page 35 } A. Something like that.
Q. And you said you drank a beer in Goshen?
A. Yes, sir.
Q. Did you drink one beer?

Jessie Wayne Oyler

A. One or two, something like that.
Q. One or two?
A. Yes, sir.
Q. And this was approximately two o'clock in the afternoon?
A. Approximately.
Q. And then you left Goshen and you came back to Lexington?
A. Came back to Lexington.
Q. And where were you en route to at that point?
A. Went up here to the station and stopped and got gas, and went down to Clark's house.
Q. Down to Clark's house?
A. Yes, sir.
Q. Where does he live?
A. On Long Hollow Road. You can go out of #11—back of Fairfield.
Q. The community of Fairfield? So you drove out to Fairfield.
A. Yes, sir.
Q. Did you stop at Clark's house?
page 36 } A. Yes, sir.
Q. Did you spend some time there at Clark's house?
A. Oh, a few minutes, maybe.
Q. A few minutes?
A. Yes, sir.
Q. And did Delmas Clark leave with you; is that correct?
A. No—he left with us.
Q. He drove his own car, but you came together?
A. We followed him—yes, sir.
Q. At what time would that have been?
A. Three or four, something like that. I don't know exactly. I don't know the time.
Q. Did you have anything to drink at Delmas' house?
A. No, sir.
Q. In other words, four o'clock, and you had the beer at Goshen; is that correct?
A. One is all.
Q. One or two beers is all?
A. That's all.
Q. Now, you came down to Buena Vista, and Delmas followed you?
A. We followed him.
Q. You followed him?

Jessie Wayne Oyler

A. Yes, sir.

page 37 } Q. Where did you go when you got to Buena Vista?

A. Came down to some tavern.

Q. And did Delmas leave his car at some place?

A. Took it out—down to the dance park.

Q. In other words, you drove to the dance parking lot? Did you leave both cars there?

A. No, sir.

Q. Did you leave one of the cars?

A. Yes, sir—left Delmas' car.

Q. And he went on with you?

A. Right.

Q. Would you say that Delmas was with you, then, for the rest of the evening till you got ready to go home?

A. He was with me the whole time, but we wasn't together the whole time.

Q. Was he with you immediately after you left his car?

A. Yes, sir.

Q. And where did you go then from there?

A. From the tavern?

Q. That's right

A. To the dance.

Q. Now, what period of time elapsed from the time you left Delmas' car and the time you came to the dance?

A. Approximately an hour or hour and a half.

Q. Hour or hour and a half?

page 38 } A. Approximately.

Q. And what did you do during this period of an hour or hour and a half?

A. Sitting there in the tavern.

Q. Sat down in the tavern?

A. Had a few beers.

Q. And you drank a few beers? How many would you say?

A. Three or four.

Q. Three or four?

A. Yes, sir.

Q. Did Delmas stay there with you?

A. Yes, sir—we was in some tavern—he was with us.

Q. Some tavern? You are not sure which one?

A. I am not sure which one.

Q. Did Delmas know your brother Robert?

A. Oh, yes, knew him well.

Q. Were they friends?

A. Yes, sir.

Jessie Wayne Oyler

Q. And, in other words, Delmas had not seen Robert since he'd gotten back from the Army?
A. Yes, sir.
Q. So, you all were talking over experiences, I take it?
A. Yes, sir.
page 39 } Q. And during this period of time you drank beers?
A. Yes, sir.
Q. And you went back to the dance; is that correct?
A. Yes, sir.
Q. Did Delmas go back to the dance with you?
A. (The witness does not respond)
Q. Did Robert go back to the dance with you?
A. At the time.
Q. Did Robert stay at the dance for some period of time, then, after you got back?
A. He stayed there for a while. I say he disappeared.
Q. And you are not sure where he went?
A. No, sir.
Q. Did you see Delmas during this period of time?
A. Yes, sir; I seen him.
Q. And you and Delmas went to see if you could find Robert?
A. No, sir.
Q. You stayed at the dance?
A. Yes, sir.
Q. All right?
A. I was at the dance. I went out front and was asking guys if they'd seen him, and they said he went up the street.
Q. You were visiting around with friends and so forth at the dance?
page 40 } A. Yes, sir.
Q. Did you have anything to drink at the dance?
A. No, sir; not at the dance.
Q. Nothing to drink at the dance? And then—so, you got ready to leave the dance? And where was your car at that point?
A. In back of the lot.
Q. Had you gone any place else, other than this tavern and back to the dance?
A. Around the block.
Q. You came from the tavern, and left your car in the parking lot, and stayed until you were ready to go home; is that correct?
A. Yes, sir.

Jessie Wayne Oyler

Q. And as you were leaving the dance, getting ready to leave, Robert came back?
A. (The witness nods his head)
Q. Is that correct?
A. Yes, sir.
Q. Did you see Delmas at that point—was Delmas still there?
A. He was at the dance. I told him—a couple of other guys, "Have you seen my brother?" Said, "Went home with Clark." And I though he went home with Clark.
Q. Thought he was going home with Delmas?
page 41 } A. Yes, sir.
Q. And you and Robert, just before he left, did see Delmas?
A. Yes, sir.
Q. Now, you say, when you left the dance, you made one more stop; is that correct?
A. Yes, sir.
Q. And it's your recollection that when you left the dance, that you were driving the automobile?
A. (The witness nods his head)
Q. And you don't recall relinquishing control of that car—is that true?—you don't recall letting someone else drive the car after that?
A. It's possible. I don't remember.
Q. You just don't know?
A. I don't know.
Q. You don't know a boy named Donnie Gardner at all?
A. No, sir.
Q. When you stopped at this place, after you left the dance on the way home, do you remember anything at all after that?
A. I remember someone getting out of the car—like I said, I remember hearing a door slam.
Q. You remember hearing a door slam? At a place where you stopped?
page 42 } A. Yes, sir.
Q. And do you remember—
A. I remember someone asking me to drive—whoever I could hear it—someone wanting to drive.
Q. You don't remember who drove?
A. No, sir; I can't say.
Q. Now, were you injured in this accident?
A. Yes, sir.
Q. Would you describe your injuries?
A. Burn on my leg.

Jessie Wayne Oyler

Q. Pardon?
A. Got a burn on my leg and jaws were broke.
Q. Were you knocked unconscious?
A. Yes, sir; I imagine.
Q. I notice you have a scar on your face; is that a result of the accident?
A. This one here. (Pointing)
Q. And were you rendered unconscious?
A. Yes, sir.
Q. What's the next thing you remember after the accident?
A. After I woke up in the hospital.
Q. You were already in the hospital? Where in the hospital?
A. In the room.
page 43 } Q. I mean, what hospital?
A. Lexington.
Q. You remember the next thing—the next thing you remember, then, is the Lexington hospital, and you remember nothing between the time you left the store—or wherever you stopped—and the time you were in the hospital?
A. Huhn-un.
Q. On the day of this accident had you had some trouble with your car?
A. Yeah—it was missing.
Q. The car was missing?
A. And carrying on.
Q. Had you attempted to diagnose the difficulty with the car? Had you attempted to correct it in some way?
A. Yeah. I figured it was points and plugs and carburetor.
Q. In other words, you figured the car was not getting enough air?
A. Something like that.
Q. Through the carburetor? Did you remove the air filter from the car for that reason?
A. Yes, sir—it had been off.
Q. And that would make the car appear to be a little more noisy?
A. Yes, sir.
page 44 } Q. Because this air cleaner had been taken off?
A. Yes, sir.
Q. Was the car missing?
A. Yes, sir.
Q. And wasn't running properly at all?
A. No, sir.

Linda Gardner

Q. Is there any other reason the car would seem to be making an excessive amount of noise?
A. No, sir.
Q. Did it have two exhausts?
A. Dual exhausts.
Q. Would that make a bit more noise?
A. I imagine so.
Q. Didn't have these fiberglass mufflers, or anything like that?
A. Stock mufflers.
Q. And the car was missing, and not running properly that day?
A. Yes, sir.
Q. This was your automobile; is that correct?
A. Yes, sir.
Q. There's no question about that?
A. No question.
Q. Had you and Robert discussed purchasing the car?
A. Yes. He was talking to me about buying it
page 45 } from me—he wanted the car.
Q. But nothing else had been done about that?
A. No, sir.
Q. I think that's it.

REDIRECT EXAMINATION

By Mr. Kizer:
Q. Did I understand you to say Robert wanted to buy your car?
A. Yes, sir.
Q. Did I understand you to say, further, that at that place where you stopped, the door—you heard a door close?
A. Yes, sir.
Q. Do you remember Robert asking you to let him drive?
A. Yes, sir.
Q. All right, sir.

The Witness Stands Aside.

LINDA GARDNER, a witness of lawful age, sworn in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION

By Mr. Natkin:
Q. Would you state your full name, please?

Linda Gardner

A. Linda Gardner.

Q. And where do you live, Linda?

page 46 } A. I live at 6412 Gloucester Drive, Newport News, Virginia.

Q. And, taking you back to April of 1967, where did you live at that time?

A. I lived at 1365 Walnut Avenue.

Q. Buena Vista?

A. Yes, sir.

Q. And to whom were you married?

A. Charles Donald Gardner.

Q. Did you work while you were living in Buena Vista?

A. Yes, I did.

Q. Where were you employed?

A. At the time of the wreck, sir?

Q. Yes, ma'am?

A. Super-X Drugs.

Q. Lexington?

A. Um-hum.

Q. Now, taking you back to the day, or the night of this accident, had your husband been out somewhere?

A. Yes, sir.

Q. And did your husband have a nickname, or what?

A. I always called him Don.

Q. He was Charles Donald Gardner?

A. That's right.

Q. And you were home when he came in?

page 47 } A. Yes, I was.

Q. And approximately what time was that?

A. I would say between ten-thirty and a few minutes before eleven.

Q. And then, after your husband came home, where did you go?

A. We only had one set of keys to the car, and I asked him for the keys to the car to go to the Corner Grocery in Buena Vista.

Q. Had your husband had the car, or merely had the keys?

A. He just had the keys.

Q. The car had been left at home?

A. That's right.

Q. Now, when you went to the Corner Grocery, what was your purpose of going up there?

A. Doris Humphries was employed there, and her husband was planning a fishing trip for the next day, and she and I were making plans to go to Cave Mt. Lake, or do something, and I went to see her.

Linda Gardner

Q. To discuss your plans for the next day?
A. That's right.
Q. And you remember who else was in the Corner store when you got there—any time you were there
A. The only person that I remember seeing was
page 48 } Jimmie Darlington.
Q. Was he an employee of the store?
A. Yes, sir.
Q. While you were there did an Oyler boy come into the store?
A. Yes, sir.
Q. Now, do you know the Oyler boy's name, that came in?
A. His name was Robert.
Q. And did you know him prior to that time?
A. He was brought to my house—he came to my house with my brother—and in Raven, West Virginia—it was before Christmas, or during the Christmas holidays—and he was introduced to me as a long-lost cousin, and at that time I thought he was a Campbell—I thought his last name was Campbell, instead of Oyler.
But the way it was, the Campbells is my mother's cousin—she was a Campbell, and married an Oyler.
Q. Are you related, or were you related to Robert Oyler?
A. He would be my second cousin.
Q. Now, did he come into the—did Robert Oyler come into the Corner store?
A. Yes, he did.
Q. And did you have a conversation with him?
A. Yes, I did.
page 49 } Q. Would you tell us what that conversation consisted of?
A. He told me something about he just got back from service—and I can't remember whether he made other statements before—but after I talked to my husband, I found out they brought him home, and I do remember telling them, "Why didn't you take my husband along with you?"
Q. Your husband had been with them?
A. My husband had been with these boys.
Q. Tell us what other conversation you had?
A. Robert seemed to be in a hurry. He kept telling me he was in a hurry to get back to Stuarts Draft, because he wanted me to see the car that he had just bought, and he kept telling me to come out and see the car, and I went on out and looked at the car.
Q. What kind of car was it?

Linda Gardner

A. The only thing I could remember, it was a white car—was a white car, the top was down.

Q. Was the top laid back?

A. Yes.

Q. Did you observe Robert—how he walked when he went out?

A. All I remember is being—when he was talking to me, he smelled of alcohol, and I remember telling him—when he got into the car, he pushed the other boy over, page 50 } which was—I don't know—I didn't know it was his other brother—I never knew the other boy—he pushed this boy over and got into the car. And I remember telling him to take it easy because he was drinking. And he kept repeating that they would have to get back to Stuarts Draft because the license expired on the car at midnight.

Q. You had warned him to take it easy because he was drinking?

A. Yes, I did.

Q. Did you observe him talking?

A. Well, he seemed to be in a hurry going in—and coming into the store and out of the store, like I said.

Q. Were you—did you observe the manner in which he walked in?

A. Well, he walked as if somebody that was drinking would walk.

Q. Would you describe what you mean by that?

A. Well, he walked kind of heavy, like it was hard to pick up his feet.

Q. And how about the way he talked, as far as his voice?

A. Well, not knowing the boy any more than I did, he didn't talk any different from other people—or times that I had seen him. Like I said, I smelt the alcohol—was a very nice-talking boy, in fact.

Q. And where was this car parked, in relation page 51 } to the store?

A. As I came out of the door of Corner Grocery, it was sort of to the left of the store—sort of up here (The witness gestures)—the door—a few feet away from the steps.

Q. And did you see who drove the car as they left?

A. Robert.

Q. All right. Now, tell how he drove the automobile as he drove off—what were you able to see?

A. Like I said, he got in the car, and pushed the other boy over—which I didn't know was his brother at that time—and

he started it up—the car, and took off—the tires were crying when he left—in fact, I could still hear the tires crying when they were calling—somebody rushed into the *car* telling someone to call the first aid—in a matter of minutes the first aid was blowing.

Q. As he drove off, what did he do about the gravels?

A. The gravels were flying somewhat.

Q. Then after he got to what is called the Long Hollow Road, did he turn towards the underpass?

A. I didn't see him as he got to the road. All I saw was when he left. Like I said, he was parked to the left of the store; I stood there and I watched him till he got past the store. He went by the telephone pole—that's between the store—the telephone pole is right at the corner—instead of going out in the road, like you normally would,
page 52 } he went between the store and the telephone pole. And I saw him as—well, he was starting into the main road, let's say—that's all the further I could see.

Q. After you no longer could see him, you could still hear him?

A. I could hear the tires crying.

Q. And how long was it, then, before you knew that this car was involved in an accident?

A. It seemed like a matter of minutes.

Q. And how did you know about the accident?

A. Somebody come in and told somebody to call the first aid.

Q. Did you—

A. Then the first aid came and went up the hollow—I even stayed there until they pulled the car back down, and I knew it was my cousin's car that was involved in the accident.

Q. Did you see this car after the accident?

A. Yes, I did.

Q. Would you describe how it was demolished?

A. It was pretty well banged up.

Q. What part of it?

A. Well, as far as I can remember—I'm not real sure who the wrecker was—but Doris Humphries and I went out to see if that car—that was still locked to the wrecker—and the sides were all bent in; and, like I said, the top was down.

Q. How long was he at the store, altogether?
page 53 } A. I imagine I talked to him about a matter of ten minutes—I don't imagine it was any longer than that. Like I said, he rushed in and out.

Q. When he drove the car—when he left, was that the part

that was open to traffic—that you normally drive out of the Corner store, or was that some different place?

Mr. Jolly: What is "normally drive out"?

By Mr. Natkin: (Continuing)

Q. Describe where he drove the vehicle.

A. Most of the people drove out into the main road and go around the telephone pole to the main road—the curve that goes around the telephone pole, instead of going out into the main road, and go between the store and the telephone pole.

Q. And is that a relatively close area between the pole and the store?

A. It's enough for a car to get through. But I don't think, normally, people drive in and out of there like that—it can be done.

Q. And you described the manner—how he drove? And you warned him to take it easy; is that right?

A. That's right.

Q. Wayne was pushed over—first, describe how it later developed to be Wayne sitting in the car, and Robert got in and pushed him over? How far did he push him over?

page 54 }

A. I don't know if the other boy got all the way over to the other side of the car, or not. When I saw him, it seemed like to me the other boy was still in the middle of the car when he drove off from there.

Q. What was Wayne's position in the car, as to how he was sitting, when you first saw him—that was the one slumped over the wheel—describe his position in the car.

A. He was sitting slumped over the car.

Q. What do you mean, "slumped over the car"?

A. Slumped over the steering wheel, rather, with his—what hair he had—was bald-headed—I remember his hair being down over his eyes. All the time I was viewing the car, and out there, and he never said a word—I never remember him ever saying anything.

Q. That's all.

CROSS-EXAMINATION

By Mr. Jolly:

Q. Let's go back to the beginning here. You were at home the night of April 15, 1967, waiting on your husband; is that correct?

A. Waiting for the car keys.

Q. He had the car keys, and you were waiting on him to bring them?

A. Yes, sir.

Q. And I believe you and your husband are in

page 55 } the process of getting a divorce now?

A. Not then.

Q. Are you not represented by counsel in a divorce suit that's now pending at this time?

A. We were not getting a divorce.

Q. I am saying, at this time?

A. At this time; yes, sir.

Q. And who is your attorney?

A. Mr. Kizer.

Q. Mr. Kizer?

A. That's right.

Q. And you were waiting to get the car keys, and you wanted to get your car and go to the Corner Grocery?

A. Right.

Q. And tell the Court and jury why.

A. Why?

Q. Yes.

A. My husband and Doris' husband had planned a fishing trip for the next day, and I went to see Doris to find out if we were going to Cave Mt. Lake and lay in the sun, or what our plans were going to be.

Q. You remember having your deposition taken in November, in Lexington? You remember you came up from Newport News?

A. That's right.

Q. And didn't you testify under oath at that

page 56 } time you went to the store to ask Mrs. Humphries if her husband and your husband were going fishing?

A. I did. That was one of the reasons I went—to find out if she and her husband were going fishing, and if our plans were still the same.

Q. Then, let me ask you this: You were going to the Corner Grocery for that purpose? Why didn't you ask your husband —he was there?

A. My husband and I weren't getting along that well at that time.

Q. You mean you weren't speaking?

A. Yeah, we spoke.

Q. You didn't ask him if you were going fishing? You drove to the Corner Grocery to find out?

Linda Gardner

A. That's right.

Q. And how far is it from your home to the Corner Grocery?

A. I don't know. I don't know distances that well. From the end of Walnut—1365 Walnut to the Corner Grocery, it was too far to walk.

Q. I take it because you wanted to get the car?

A. That's right.

Q. The telephone pole—you testified that there's a pole in the parking lot of Corner Grocery; isn't that correct? It's gravelled all around the pole, and where people

page 57 } park; isn't that right?

A. Well, as you are going up the main road, as you round the corner, it's—well, yeah, it's gravelled around there.

Q. It's a pole sitting in a parking lot that's used by patrons of Corner Grocery, right?

A. I guess you'd say that.

Q. And as far as the distance from the pole to Corner Grocery, you can drive a tractor-trailer through there, couldn't you?

A. Like I said, I don't know distances that well. You could get a car through it easily enough.

Q. Now, that night you went to see Doris for the purpose that you have described here to the jury, and Robert came in; you recognized him?

A. That's right.

Q. As being a second cousin, I believe you said?

A. That's right.

Q. And Robert—you smelled the odor of alcohol, but you say he was a nice-talking boy; is that correct?

A. (The witness does not respond)

Q. That's what you said?

A. When I met him in my home he was one of the nicest boys I ever met—in fact, I liked the boy.

Q. I am not indicating you didn't like him—but you talked to him?

page 58 } A. That's right.

Q. You carried on a conversation?

A. That's right.

Q. And he took you out and showed you the car?

A. That's right.

Q. And you were there when they left?

A. That's right.

Q. Did he tell you about coming back from Viet Nam?

Linda Gardner

A. He said something about coming from service, and where I got Viet Nam was, I really thought he told me he come back from Viet Nam. He told me he come back from service.

Q. You testified to Viet Nam?

A. I did testify to Viet Nam. But where I had got that, when he was at my mother's home he was in the process of going, I thought, to Viet Nam.

Q. So, you were just mistaken?

A. I was speculating from that—that he had just got back from Viet Nam—that he had went—when I saw him at my home.

Q. Let's clear up one thing. Maybe I misunderstand you, on your direct examination. Did I understand you to say you now recall you told Robert, why didn't he take your husband along with him?

A. I recall that—yes, I do.

Q. That is the night of the accident?

page 59 } A. After finding out that my husband was with them. I remember the car driving up in front of the house and letting my husband out, and I remember the loud voices of the people, and all. But, like I said, I never knew who brought my husband home. All I knew, it was a convertible car, and boys in it, and—but, I, after thinking about this thing, when they contacted me a year or something later—you don't remember everything at once. After thinking about this thing, I remember telling Robert telling me that he had just let my husband out, and I remember telling him, why didn't he take him with him.

Q. When you testified in November—

A. I didn't remember that—I didn't remember the fact that he had. In fact, I didn't know that they had brought my husband home—I couldn't remember Robert telling me about it.

Q. Are you through? I didn't complete my question. When you testified and gave your deposition in November, you said that you had learned for the first time that day—that day in November, that Donnie had been with these boys when you had talked to him at his mother's, or your mother's, or somebody's mother's house, the day you gave your deposition; do you remember that?

A. Yes, sir.

Q. And that's all wrong?

A. And I remember Robert telling me that he had brought Donnie home—after thinking about this thing—and Donnie telling me about bringing him home, I remember

page 60 } me telling Robert, why didn't he take him with him.

Q. I asked you a simple question. Is what you testified to in November, about when you knew that Donnie was with the Oyler boy—that's all wrong now; is that correct?

A. No. I had just found out Donnie was with him, but I remember me telling Robert—Robert telling me that he had just brought Donnie home, after Donnie brought it to mind that he was with them. Like I said, I don't know who brought him home. All I remember is that convertible car and loud voices.

Q. And I am not trying to confuse you. I want to clarify this. On November 27, of 1968, in Mr. Natkin's office you were sworn, and gave a deposition, and I asked you a number of questions, and Mr. Natkin asked you; do you recall that?

A. Yes, sir.

Q. And at that time you testified that—on that day, the 27th of November, you—or the day before—the night before, you think, when he came up, you had talked to your husband, whom you are now in the process of getting a divorce from; is that correct?

A. That's right.

Q. And your husband told you on that occasion that he had been with Robert Oyler the night that he was killed, and that was the first time you knew that your husband had been with Robert Oyler on the night he was killed?

Mr. Natkin: Where is that in the deposition, sir?

page 61 } Mr. Jolly: Page 8.

By Mr. Jolly: (Continuing)

Q. And to refresh your recollection, I will read you several of the questions and answers. The question was:

"Q. You say you told him—your husband?

A. I told him about coming—I was telling him the reason I was up here, about the Oyler boy, you know, and he says I was with that guy that night and I do remember someone bringing him home.

Q. When did you talk to your husband about this?

A. This was after I talked with Mr. Kizer, you know, after I came up here and he was wanting to know what I was doing up here.

Q. You mean after you came up here on this trip—

A. Yeah.

Q. —that we are here about now?

A. I was talking about the Oyler boy, uh, huh, and he said well, he was with those guys that night, that they brought him home.

Q. What did you do? Just telephone him and tell him that you were in town?

A. Well, I was at his house, his mother's house.

Q. Your husband's mother's house?

A. That's right, uh, huh.

Q. You talked to him then in person?

page 62 } A. Yes, sir.

Q. And he told you that he had been out with them?

A. Yes, sir.

Q. Now, the night of April 15, 1967, when he came in you didn't know—

A. I didn't know that, no, sir."

By Mr. Jolly: (Continuing)

Q. Is that wrong or is that correct?

A. All that's true, except the part that comes back to me after hearing from my husband that he was with these boys. I remember Robert says that, "I brought your husband home," and I remember telling him, "Why didn't you take him with you?"

Q. So you did know the fact your husband was with them?

A. I couldn't remember at that time as to who he was with. I don't think it was ever brought up at that time, and until I came to his mother's I did not know he was with those boys, except the fact that it came back to me Robert told me that he had just brought my husband home.

Q. So, when you testified in Mr. Natkin's office, you were of the opinion you had not known it? Now, it turns out you knew Robert and your husband had been together on the night of the accident?

A. You have a conversation with someone—a year later you don't remember every word. I couldn't remem-

page 63 } ber him telling me he brought my husband home.

Q. Can you answer that question?

A. What are you asking me, sir?

Q. I say, at the time you testified in Mr. Natkins' office, you didn't recall having been possessed of the knowledge that your husband was with the Oyler boy on the night of April 15; you thought that you had found out, for the first time, in November?

Linda Gardner

A. At that time, I did.

Q. Right. But now, that turns out that's wrong—you had known all along; is that correct, or not?

A. By thinking over what Robert—the conversation he had with me, I remember now Robert telling me he brought my husband home.

Q. That is correct—what I said is correct?

A. Yes.

Q. Right.

A. I'm still under the impression that I didn't know that they brought them home—that these boys brought my husband home.

Q. On the night of April 15—I thought you just finished telling me Robert said, "We brought your husband home," and you said, "Why didn't you take him along with you?"

A. I do remember saying that now.

Q. All right. You talked to them, and they started out of the parking lot of the Corner Grocery; and I be-
page 64 } lieve you testified that you were going up the steps into the building as they left—drove off; am I correct?

A. That's right.

Q. And the only—the last time you saw the vehicle was as it went around the corner of the store—was on the parking lot?

A. That's right.

Q. Headed for the highway; is that correct?

A. I don't think you can see any further than that.

Q. I don't, either. I agree with you.

A. From there.

Q. And you never actually saw the vehicle on the Long Hollow Road at all?

A. No, sir.

Q. But you heard tires?

A. That's right.

Q. Crying? And did I understand you that you heard the tires crying right up until the time somebody came in for the rescue squad?

A. Yes, sir.

Q. You are certain of that?

A. Yes, sir.

Q. Absolutely?

A. It seemed like that those tires was still in my ears when somebody come in and said, "Somebody get the first aid."

Q. Did you know they stopped and picked up
page 65 } two hitchhikers?

A. I didn't know that.

Q. Before the accident?

A. No, sir.

Q. Obviously you didn't, or you wouldn't have heard the tires crying until the time somebody came in?

A. Like I said, when they left the store the tires were crying.

Q. Now, Mrs. Humphries was there?

A. Doris? Yes.

Q. And she talked to this boy, also?

A. Yeah.

Q. He bought something, and she was the cashier, and he paid her, I assume; isn't that correct?

A. He talked to Doris. They also—Jimmie Darlington was there, so who he paid, I don't know. But I remember him buying a bag of potato chips.

Q. And that's the last you saw of them, and what happened after that, you are not in a position to know?

A. When he went out of the store I went out behind him to see the car.

Q. After you saw the car leaving, it was on the property of the parking lot of the store—that's the last thing you know about this entire transaction?

page 66 } A. I saw the car.

Q. Until after the accident?

A. That's right.

REDIRECT EXAMINATION

By Mr. Natkin:

Q. How long was it after that accident before you discussed this case with anyone?

A. Mr. Kizer notified me the first time.

Q. About a year?

A. That's right.

Q. Now, when you are talking about this ringing in your ear, describe to the jury what you mean by continuing to hear it—it kept ringing in your ears, such a noise—

Mr. Jolly: That's a little leading.

A. When they left the store the gravels were flying, and the tires were screeching—and especially the tires screeching on the pavement, it seemed to be still in my ears when somebody called the first aid.

Q. Approximately how much lapse of time was it between the time you last heard those tires actually crying, or last saw this car as it went out of sight, and when someone told you there had been an accident?
A. Seemed like a matter of minutes.
Q. That's all.

The Witness Stands Aside.

page 67 } JAMES DARLINGTON, a witness of lawful age, sworn in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION

By Mr. Kizer:
Q. Your name is James Darlington?
A. Yes, sir.
Q. Speak up, Mr. Darlington, loud enough for these gentlemen and the Court to hear you. And what is your initial?
A. James Darlington.
Q. No middle name?
A. No.
Q. Where do you live, sir?
A. Fourteenth Street, Buena Vista.
Q. Would you give us your age?
A. Fifty-three.
Q. Where are you employed?
A. Lewis Service Station.
Q. Where?
A. Lewis Service Station.
Q. Do you recall the night of April 15, 1967?
A. Yes, sir.
Q. Where were you that night?
A. Working at Corner Grocery.
page 68 } Q. Corner Grocery is located where?
A. Corner of Orchard Street and Buena Vista Road—I think it was Long Hollow Road.
Q. Were you employed there at that time?
A. Yes, sir.
Q. Did you see a boy named Robert Edward Oyler in that store that night?
A. Yes, sir.
Q. Just describe to the Court and the jury what you observed about Robert Edward Oyler.

A. Well, he come into the store. He was loud-spoken, and he bought a few things, and I waited on him, and I couldn't smell it, but I know he had been drinking. He stayed there for a while and left, and when he left, I heard car wheels take off squealing, when he took off.

Q. You heard what squaling?

A. The wheels of this car. He was rather talkative, real loud, and talkative.

Q. Did you see him walk?

A. Yes, sir.

Q. How did he walk?

A. Well, he walked all right, I would say.

Q. And did you detect any odor about him?

A. I couldn't smell a thing on him.

Q. Why was he talking?

page 69 } A. I imagine he was a young boy, drinking, just out of service, too.

Q. How do you know he was just out of service?

A. He told me so.

Q. Did he tell you when he had gotten out of service?

A. He didn't say. He said he was discharged from the service.

Q. Did you see the car he was in?

A. No, sir.

Q. You didn't go outside?

A. No, sir.

Q. You recall who else was in the store?

A. Well, it was two of us employed there at that time; one was Humphries—Doris Humphries.

Q. Is that Doris Humphries?

A. Yes, sir. And the girl—was one girl in there, but she was Linda Walker, I believe—what is her married name—she has a married name.

Q. Do you know whether or not—

A. I knowed her as Linda Walker.

Q. You knew her as Linda Walker?

A. I think so.

Q. You said you heard the tires squaling as they left from there? Could you tell in which direction the car went?

A. Well, it seemed like to me the car was—

page 70 } Mr. Jolly: I object to that, if he didn't see the car.

The Court: Objection sustained.

James Darlington

By Mr. Kizer: (Continuing)

Q. Did you understand whether or not there'd been an accident that night up Long Hollow?

A. An accident?

Q. Yes?

A. It was just a few minutes afterwards somebody come in the store.

Q. That's what I wanted to ask you about. How much time elapsed from the time that car left and the time someone came in and reported this accident?

A. I wouldn't say it was over five minutes, something like that—four or five minutes.

Q. Did you see the car after that?

A. No, I didn't go out. I left the store.

Q. I should ask you, whether you ever saw the car?

A. I seen it afterwards.

Q. Where did you see it?

A. Well, it was from a distance I seen it.

Q. Where was it?

A. It was hooked to the wrecker that was going down the highway.

Q. Could you tell me anything about the damage to it?

A. No. It was from a distance—I looked out a
page 71 } window afterwards. I couldn't even tell what it was.

Q. That was the first time you actually saw the car?

A. The first time.

Q. Did anyone else come into the store at that time when Robert was in there, other than Robert Edward Oyler?

A. It seemed like to me somebody was in there—I was trying to think, but I can't think. There was somebody else came in, but I can't think who it was.

Mr. Kizer: You may examine.

CROSS-EXAMINATION

By Mr. Canterbury:

Q. How many boys came in the store?

A. Well, I understand that's just the one.

Q. I am asking you what you know?

A. One from the car. There was somebody else come in there, and I had mixed them up with somebody being in the car.

Q. Do you recall discussing this with me earlier, before this case?

A. Yes, sir.

Q. And do you recall telling me at that time that both brothers came in the store?

A. I said I thought the other boy in the car was in the store.

page 72 Q. And didn't you tell me at that time you didn't know why you were being called as a witness, didn't know anything about it?

A. I said I didn't know why I was going to be called as a witness, because I hadn't discussed it with anybody.

Q. Have you discussed it with someone since?

A. No, sir.

Q. No one at all?

A. But you.

Q. I mean, since that time?

A. No.

Q. You do recall telling me that both brothers came in the store?

A. I remember telling you there was two in the store—I didn't say both of them was in the car.

Q. Don't you recall telling me one of them had been in the service, and one of them had not, and went to the door and saw the bald-headed one that was not in the service?

A. I don't remember mentioning the bald-headed one to you—I never mentioned the bald-headed one.

Q. Did you go outside of the store?

A. No, sir.

Q. You stayed inside the store?

A. Yes, sir.

page 73 Q. And do you recall when I asked you the question on this earlier occasion, Mr. Darlington, "You recall anything about the way they took off?" And didn't you say, "No, I don't recall anything."

A. I told you the same thing I told him—the wheels squealed and left black marks on the driveway.

Q. Did you tell me that?

A. I told you that; yes, sir.

Q. Did you at first say you didn't recall anything unusual about the way they drove off?

A. Didn't say anything to you like that.

Q. Didn't say anything like that?

A. No, sir. I told you the same as I told him.

Q. How is it you happen to remember this night? Mr. Darlington, is it true that you also had a wreck that night, yourself?

A. That's right.
Q. Was it before or after this?
A. It was after.
Q. And were you injured as a result of this accident?
A. Well, slightly.
Q. And have you employed counsel to pursue a recovery in this instance?
A. Well, does that pertain to this case?
Q. I asked the question—Have you employed counsel?
A. Yes, sir.
Q. Who is that counsel?
page 74 } A. Mr. Kizer.
Q. No other questions.

The Witness Stands Aside.

WILLIAM P. TICE, a witness of lawful age, sworn in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION

By Mr. Natkin:
Q. For the record, would you state your full name?
A. William Preston Tice.
Q. And your profession?
A. Medical doctor.
Q. And your—do you have any specialty?
A. Specializing in neurological surgery.
Q. Doctor, would you give your background and training in this specialty?

Mr. Jolly: We readily concede Dr. Tice is an expert in his field. I have known him for many years.
Mr. Natkin: We would like to have it in the record, sir.

A. I graduated from medical school at Tulane University in 1941. After a year of internship I was in the Army for four years; after that I started neurosurgical
page 75 } training at the University of Alabama Medical School in Birmingham. After two years there I went to the Columbia Presbyterian Medical Center in New York, at the New York Neurological Institute, where I was—had another two years in neurosurgical training. I returned to Birmingham for an additional year as the Chief Neurosurgical Resident, and then returned to—started my practice

in Roanoke in 1950. In 1952 I took and passed the Neurological Board Specialty—Board examinations.

By Mr. Natkin: (Continuing)

Q. What is meant by the field of neurological surgery specialty?

A. That is treatment of conditions and injuries of the nervous system, wherever it be—whether it be brain, spinal cord, peripheral nerves.

Q. Doctor, did you have as a patient William Tex Ramsey?

A. Yes, sir.

Q. And when did you first see him, sir?

A. I first saw him at the Roanoke Memorial Hospital on April 16, 1967. He had been in an automobile accident a few hours earlier on the 15th of April, was transferred to the Roanoke Memorial Hospital from—I believe from the Stonewall Jackson Hospital in Lexington.

Q. And, Doctor, would you describe his condition, or what you found his condition to be when you first saw him, sir?

page 76

A. When I first saw him in the emergency room he was unconscious. There was a cut above the right eye, there was a palpable defect of the skull—incidentally, the X-rays of the skull did show that there was a fracture of the skull—and this area—the right frontal area. (Pointing to forehead)

He also had a palpable fracture of the jaw—a mandible of the lower jaw, and he was quite restless.

On the neurological examination he did move his extremities on painful stimulation. He had what we call a positive Babinski reaction.

Q. Tell us what that is.

A. That is neurological sign that—a test that we do to see if there has been any injury of the nervous system. It's a sign of disease. This consists of stroking the bottom of the foot, and if the big toe—ordinarily, when we—the sole of the foot is stroked, the toe goes downward; when it's a positive or abnormal test, the toe will extend upward.

Q. What is that indicative of?

A. This is an indication of involvement of the motor pathways from the brain—so-called pyramidal system; these are the tracts—the nerves that carry the motor impulses from the brain to the muscles. They react in this way.

Q. By "positive", you mean what? It was some—

A. The toe did extend upward.

William P. Tice

page 77 } Q. Doctor, when you—I believe you said there was a palpable fracture of the frontal bone? Was this depressed?

A. There was some minor, slight depression; yes, sir.

Q. If you would, just go right ahead and tell us what treatment you gave him.

A. He was in right serious condition at the time. He was unconscious. I did not feel that the fracture of the skull was causing any pressure on the brain, or that the depression was sufficient to justify immediate surgery and, consequently, the wounds were sutured in the emergency room, and he was taken—after X-rays were made, he was taken to the ward.

For the period of the next ten days he had to be fed either intravenously or through tubes. And after the—about—it was on the 10th day in the hospital that he had—his condition improved sufficiently that Dr. Brobst—who is the plastic surgeon—was able to go ahead and reduce the fractured jaw and wire his jaw together. This was done on the 10th hospital day. From then on his recovery was uneventful.

Q. As far as surgery to correct the fracture of the frontal bone?

A. No surgery was performed on this because, as I said, I did not feel that the fracture was depressed sufficiently to cause pressure on the brain. There was no evidence that the covering of the brain had been torn, and the depression was not enough to cause any marked cosmetic defect.

page 78 } Q. Is the depression still there?

A. There's a small depression still present.

Q. Doctor, what causes unconsciousness—or did cause unconsciousness in this particular case?

A. The unconsciousness is caused by a commotion or actual blow—force exerted against the brain—to the brain.

Q. Doctor, would you describe to the jury the course—what the brain is composed of, and how it's located within the skull, sir—just in general terms, of course?

A. Well, this would be—to be quite general, I think, oh, most people that have a mental picture of what the brain looks like—a series of convolutions, although there are three main divisions.

We have what we call the cerebral hemispheres—right and left hemispheres, and cerebellum hemisphere—that part of the brain that's located in the back of the head. And running from these hemispheres there is—that is, from these lobes of the brain down to the spinal cord, we have what we call the midbrain. So, we have the brain divided, roughly, into

the three main parts of the cerebrum, cerebellum, and midbrain.

Q. And, Doctor, there is a sac or cover to the brain within the skull?

A. Yes. This is actually three coverings of the brain—meminges. The dura, which is the tough membrane—the outer covering of it, which is attached in places—it's attached to the skull—it's closely adherent to the skull.

page 79 } And then beneath that is a thin membrane which is called the aracnoid; it's a transparent membrane, somewhat like Saran wrap, that covers the brain, and keeps the fluid—the spinal fluid circulating over the surface of the brain. This aracnoid prevents the fluid from escaping.

Q. In this particular case was there an actual contusion of the brain itself, sir?

A. I think there was; yes, sir.

Q. Could you tell the—would you tell the Court and jury what a contusion to the brain itself is—what we mean medically by that?

A. Contusion would be a bruise. Contusion means a bruise; in other words, this is the next step beyond a contusion, and a contusion might be a jarring or shaking up of the brain which would result in a momentary loss of consciousness. But with a blow of more force, which would cause an actual injury to the brain, with localized injury, that would be called a contusion.

Q. And did you have a medical opinion as to whether this particular case—there was an actual contusion of the brain itself, sir?

A. Yes. I think that the fact that he was unconscious for longer than just an hour or two is a sign of contusion. And the positive Babinski reaction—which I referred to—was another sign of a brain—localized brain injury.

page 80 } Q. Do the medical records indicate how long he was unconscious, or how long it was before he regained the use of his various motor functions?

A. Approximately ten days.

Q. Doctor, where there had been unconsciousness for approximately ten days—an actual contusion of the brain, as in this case—is there any medical possibility that he may in later life develop some form of epilepsy?

Mr. Jolly: I object to that strenuously.

The Court: Objection sustained. I think, Mr. Natkin, you are again going into irrelevant conjecture. I believe the Doctor can state his opinion as to any permanent partial disability resulting from the injury.

By Mr. Natkin: (Continuing)
Q. Doctor, rephrasing it—the words the Court has suggested, sir—is there a medical possibility of any future injuries—

The Court: What's his opinion?

By Mr. Natkin: (Continuing)
Q. What is your opinion as to the medical possibility of future injuries?

Mr. Jolly: Say, "with reasonable medical certainty."
The Court: I think that is probable. The Doctor is accepted as an expert in the field of neurosurgery, and as such an expert—it supports an opinion—he may
page 81 } state his opinion as to possible future disability, but it must still stay within the rule of reasonableness. It's not a case where a witness is an expert, or not an expert, that he can get into the matter of conjecture. Just ask the Doctor what his opinion is, with reasonable certainty, as an expert, knowing the nature of the injury, whether, in his opinion, there be permanent disability, and the percentage of permanent disability.

By the Court:
Q. In other words, Doctor, with reasonable certainty, what is your opinion?
A. The last time I examined this boy was in my office on May 22, 1967—which was approximately two and a half weeks following his discharge from the hospital; I have not seen him since that time. But the examination on that occasion showed no positive or abnnormal neurological findings; in other words, his physical and neurological condition at that time were normal, he was functioning properly.
Following such an injury, there is a possibility that one could—might develop post—what we call post-traumatic epilepsy or convulsions. If one goes for a period of one year, and does not have any such seizures, there is little likelihood that they will develop these. But there is still
page 82 } a three to five percent of the possibility, even at this time.

William P. Tice

By Mr. Natkin: (Continuing)

Q. Doctor, you say there's a three to five percent possibility that he will develop post-traumatic epilepsy? What is that—what is the percentage of possibility—what will happen to him if that develops?

Mr. Jolly: Is that within the realm of reasonableness—a year having elapsed?

The Court: I think it's a matter of argument. The Doctor says after a year elapses, and there's no indication of such results, then the chances are three to five percent.

Mr. Natkin: We put the Doctor on out of order.

A. Shall I answer it?

By Mr. Natkin: (Continuing)

Q. Yes.

A. A convulsion is a loss of consciousness, and this may occur or be manifested in several ways. It can be a simple blackout with loss of consciousness, or it may or may not be accompanied by what we call convulsive movements—that is jerking of the extremities, biting of the tongue, and so forth.

Q. Doctor, now, assuming—and that will be—we will put evidence on to show this—assuming that he recently has had a blackout—as a matter of fact, two of them—would there be a change in your percentage of possi-
page 83 } bility of him developing this epilepsy?

A. If he's had any blackout, of course, I don't know about it; and if he were to have a convulsion, it would—they'd be so worried about it they certainly would have consulted a doctor. I doubt he's had any of any significance. I don't know.

Q. Doctor, apparently there was, to the extent the life saving crew was called—of course, my question is, assuming that he had—has had some blackouts—

The Court: Resulting from the injury?

By Mr. Natkin: (Continuing)

Q. Would that change your percentage of possibility of his developing epilepsy?

A. Well, not having seen him, or not having observed it, or having an opportunity of running special tests, I can't give an opinion. I wouldn't change my estimate.

William P. Tice

Q. Doctor, there, apparently, was a large laceration of the mid-frontal area; would you mind pointing out where this laceration was?

A. (Indicating on Plaintiff) You can see that there is a scar here that comes down and goes throught the eyebrow, and over this point here, so that it extends roughly U-shaped from here to here. It's very tiny depressed area in here.

Q. I believe you stated that—I want to be sure—Dr. Brobst treated him for the fracture of the mandible?

A. Yes, sir.

page 84 } Q. Doctor, when you examined him did you find any difference in regard to the pupil of the right eye, as compared to the left, sir? Does this have any significance?

A. I didn't mention that in my original—I was giving the findings on the original examination. The right pupil at the time was larger than the left.

Q. Does this have any medical significance?

A. Well, yes, it's significant, but I think this is due to the fact, of course, he received a blow, with a lot of swelling directly in this area. It could also result from a—what we call a partial paralysis of the third nerve, which is the nerve which sends fibers to the pupil which causes it to dilate—that is the mechanism of the dilated pupil—is the non-functioning third nerve, or partial paralysis of the third nerve.

Also, this can result from a direct blow to the eye, such as—which, I think, in this case is true.

Q. That's all.

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REDIRECT EXAMINATION

By Mr. Natkin:

Q. The right frontal bone—what is meant by "communited fracture"—the words "communited fracture"?

A. Compound means it's open; in other words, it's exposed to the exterior; comminuted means that there's more than one fragment—it's fragmented.

Q. And did he have a compound comminuted fracture?

A. Yes, sir.

Q. The bone was laid open?
A. The bone was exposed through the laceration—through the cut. It was—and it's like breaking an egg—there's more fragments in—more than one piece, and wasn't just one single piece of bone; it was fractured into little—cracked into smaller pieces.

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CHARLES *DONAL* GARDNER, a witness of lawful age, sworn in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION

By Mr. Kizer:
Q. What is your full name?
A. Charles Don Gardner.
Q. Speak loud enough so the Court can hear you, and everybody can hear you.
A. Charles Donald Gardner.
Q. Were you married to Linda Walker?
A. Yes.
Q. Gardner?
A. Yes.
Q. On April 15, 1967, did you know Robert Edward Oyler?
A. Yes.
Q. And where were you living at that time?
A. 1365 Walnut Avenue.
Q. You and your then wife?
A. Yes.
Q. Did you see Robert Edward Oyler that day?
page 89 } A. Yes, I did.
Q. Where did you first see him?
A. The night of the accident—was at the Sportsman.
Q. The Sportsman is the place?
A. Yes.
Q. And how did you happen to see him there?
A. Well, I was already in there, and when Robert and his brother came in—and Robert recognized me and sat with me.
Q. Sat with you?

Charles Donald Gardner

A. Yes.
Q. You occupied the same booth?
A. Same booth.
Q. Who was in that booth?
A. Myself, Robert, and his brother; there was another boy sitting with me, but I can't remember who he was, but he left as soon as they sit down.
Q. You know about what time that was?
A. Around a quarter of ten, or ten o'clock.
Q. And you were already in there?
A. Um-hum.
Q. And then they came in?
A. Yes, sir.
Q. And how long did you all stay there?
A. We stayed about forty-five minutes.

page 90 ⟨ Q. And what did you do during this 45-minute period?
A. Just sat and talked and drank three or four beers.
Q. Who drank three or four beers?
A. Myself and Robert and his brother.
Q. Did Robert make any remark about having been released from military service?
A. He told me that he had just been discharged, and they were out celebrating.
Q. Did he tell you how they were celebrating?
A. Said they was drinking and having a good time.
Q. Tell you for how long he had been drinking?
A. He said since that morning.
Q. Since that morning?
A. Yes, sir.
Q. I understand you to say each of you had three or four beers while you were in the Sportsman restaurant?
A. Yes, sir.
Q. And you were there, you said, approximately forty-five minutes?
A. Yes, sir.
Q. Where did you go when you left there?
A. I asked them to take me home, and we got in the car and rode down to the new car wash and turned around and rode up some of the back streets.
Q. And did they take you home?
A. Yes, sir.

page 91 ⟨ Q. Were you invited to go anywhere else?
A. They wanted me to go with them; said they would drop me off at my father-in-law's.

Q. And did you go with them?
A. No, sir.
Q. Why didn't you go with them?
A. Well, the way they was driving and carrying on.
Q. How's that?
A. The way they was driving and carrying on. Robert was sitting on the back seat up on top of the seat—singing on top of the back seat.
Q. Did you say, singing?
A. Yes, sir.
Q. Who was driving the car at that time?
A. Jessie.
Q. Jessie?
A. Yes, sir.
Q. And they invited you to go with them, said they'd leave you at your father-in-law's?
A. Yes, sir.
Q. Who is your father-in-law?
A. He lives up in Vesuvius.
Q. Vesuvius?
A. Yes, sir.
Q. And you didn't go because of what?
page 92 } A. They were drinking and driving pretty reckless, and I knew my wife would be mad because I stayed, anyway.
Q. After leaving the Sportsman, did you all have anything to drink?
A. We drank one or two beers after that.
Q. Where did you drink that beer?
A. In the car, driving around.
Q. Who had the beer?
A. I don't know which one had it. It was in the back part of the car, down between the back seat.
Q. And who drank that beer?
A. All three of us.
Q. And where did you get out of the car?
A. In front of my house.
Q. Now, when you left the Sportsman with these Oyler boys, where was the car parked?
A. It was around on the side street about where Dr. McCann's office is.
Q. What street is that?
A. I believe it's Twentieth Street.
Q. You are not speaking of Magnolia Street that comes in?
A. Yes, sir.

Charles Donald Gardner

Q. Did you have an opportunity to see Robert Edward Oyler walk on that occasion?

page 93 } A. Yes, sir.

Q. How did he walk?

A. Staggered.

Q. Within 45 minutes, you say? How did he talk?

A. Pretty loud, carrying on, telling jokes and everything, and singing.

Q. And was it Robert Edward that told you that they were celebrating by drinking since that morning?

A. Yes, sir. I didn't know the other too well. I did know Robert, and I noticed it, talking to him.

Q. Was anything said about license plates on the car?

A. They told me that they had to be back home before twelve o'clock, because they expired.

Q. And they let you out at your house?

A. Yes, sir.

Q. Can you tell me about what time that was?

A. It was about ten-thirty, I believe.

Q. Do you know whether or not there was any beer in the car after you got out of the car—when you got out of it?

A. There was still beer left in the car when I got out.

Q. Unopened beer?

A. Yes, sir.

Q. You know how much?

A. No. It was, I believe, two bags in the back

page 94 } seat, but I don't know how much was in it.

Q. Who drank the most on this occasion, Robert or his brother?

A. I believe they drank just about the same.

CROSS—EXAMINATION

By Mr. Jolly:

Q. Mr. Gardner, you say you had been at this place how long before the two Oyler boys came upon the scene—was it the Sportsman?

A. Well, that was the—the original name was changed to Buena Vista Inn.

Q. What time did you get there that night?

A. I'd been there, maybe, an hour.

Q. You had gotten there about nine?

A. About a quarter of nine or nine o'clock.

Q. And they came in, I believe you said, around ten?

A. Yes, sir.

Q. And you stayed there 45 minutes?

Charles Donald Gardner

A. Yes, sir.
Q. And drank three or four beers?
A. Yes, sir.
Q. And then they took you where?
A. I asked them to take me home, and we was going around Magnolia, and we turned around at the car wash—where the car wash place is.

page 95 } Q. Did they stop anywhere?
A. No, sir. We turned around.

Q. I'm not that familiar with Buena Vista. Was that out of the way, to go direct to your house? You were riding around a while before you got to your house?
A. He had missed the turn; I wanted to go up to Nuckol's Service Station, and the car wash place is about three blocks below that.
Q. How long did it take you to get from what used to be the Sportsman to your house?
A. Took about, I say, ten minutes.
Q. Ten minutes?
A. Yes, sir.
Q. Then, tell us, if you can, how did you get home at 10:30, if they got there at 10, and you'd been there an hour? Were you drinking beer before they came?
A. Yes, sir.
Q. How many had you had before they got there?
A. I drank about two, because I was playing the machine.
Q. Playing the machine?
A. Yes, sir.
Q. Pinball machines?
A. Pinball machines.

page 96 } Q. And they were there 45 minutes, and that was 10:45, and ten more minutes to get you home; and the officer testified he got the call the wreck had already happened at 10:57, aren't you messed up about that time?
A. I didn't say—they come in around ten—I said around a quarter of ten, or ten.
Q. A quarter of ten or ten? How do you reconcile this differential? The wreck had already happened, and the Chief of Police had gotten the call at 10:56—
A. Yes, sir.
Q. How could this have happened?
A. I don't know.
Q. I don't know, either—that's the reason I am asking you.

Charles Donald Gardner

A. I'm not certain of the time—being a quarter of ten, or around before ten.

Q. If they brought you home at 10:30, then they were there 45 minutes, were they?

A. I said around forty-five minutes.

Q. I understand. And I want you to get it as straight as you can. How much beer had you had, all told?

A. Counting what we drank together?

Q. Counting everything you drank that night?

A. With them, about six beers.

Q. Not—I don't mean just with them; everything you had to drink, yourself, that night?

page 97 } A. About eight beers.

Q. About eight beers? And your wife has already testified that you all are in the process of getting a divorce; is that correct?

A. No, sir—it was not.

Q. Not was—but are now?

A. Yes, sir.

Q. And who is your attorney?

A. I don't have one.

Q. Didn't Mr. Natkin represent you?

A. That was on a different thing he represented me.

Mr. Natkin: I don't represent him. I didn't represent him in any divorce. And I don't believe—

The Court: Gentlemen, the scope of cross-examination is rather unlimited, and whether it has any materiality.

Mr. Jolly: I was basing it on your statement that you represented him. I misunderstood you.

By Mr. Jolly: (Continuing)

Q. This is the only period of time you were in the automobile, and Robert wasn't driving; is that correct?

A. No, sir; he wasn't driving.

Q. Jessie was driving?

A. Jessie.

Q. And who was driving when they drove off

page 98 } from in front of your house?

A. I don't know. I went straight in the house. But I believe Jessie was driving.

Q. Excuse me?

A. I think Robert got out of the back and got up front.

Q. And when you went in the house was your wife there?

A. Yes, sir.

Q. What happened when you went in?

A. She asked me for my car keys.
Q. Did she tell you why she wanted them?
A. Going to the Corner Grocery.
Q. Did she say anything to you about drinking?
A. She always did.
Q. What happened there at the time they left you out in front of your house, as far as the operation of this automobile is concerned, and the accident, you know absolutely nothing; is that correct?
A. No, sir—not after they left the house, I don't.
Q. That's all.

The Witness Stands Aside.

J. B. OYLER, a witness of lawful age, sworn in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION

page 99 } By Mr. Kizer:
Q. Mr. Oyler, you are the father of Jessie Wayne Oyler who testified?
A. Yes, sir.
Q. And is your son Robert Edward, who was, unfortunately, involved in this matter—
A. Yes, sir.
Q. Where do you live?
A. Stuarts Draft.
Q. How far is your home from Buena Vista?
A. Where I live, I reckon it's twenty miles, I guess.
Q. Did you see the car—really, it was Jessie Wayne's car—after this accident?
A. Yes, sir.
Q. Did you see the damage done in the accident?
A. Yes, sir.
Q. To what extent was it damaged?
A. Right front wheel knocked off, like they said, I mean.
Q. Did you yourself dispose of the car?
A. No, sir.
Q. You know where the car is?
A. No, sir.
Q. Where did you see it?
A. Sitting down behind this fence in this Pure
page 100 } Oil station, belongs to the Chevrolet station, I believe—fenced in.

Q. That's all.

Mr. Jolly: No questions.

The Witness Stands Aside.

WILLIAM C. RAMSEY, a witness of lawful age, sworn in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION

By Mr. Natkin:

Q. For the record, would you state your full name?

A. William Claude Ramsey.

Q. And where do you live, sir?

A. Live Route 1, Long Hollow Road.

Q. And is William Tex your son?

A. Yes, sir.

Q. And since the accident, after he was released from the hospital some time thereafter, he was living with you?

A. Yes, sir.

Q. Now, in your own words, I want you to just describe to the jury what difference you have noticed in your son's behavior, his actions, and anything that's different about him, than before the accident.

A. He don't remember as well, because they had a curfew—

page 101 } he had to be off the street by eleven o'clock, and was at his girl firend's house, and stayed after eleven o'clock, and they got him, had him in court, and couldn't remember being caught that night.

Q. Other occasions you noticed he had difficulty remembering things?

A. A couple of other things.

Q. How about physically—what has happened to him on any occasions as to physical?

A. Well, he's blacked out three times, to my knowledge.

Q. Describe what you mean by "blackout"—where it happened, and how it happened?

A. Well, he's up at the house—of course, I wasn't there at the time it happened—he blacked out and the rescue squad come and picked him up and taken him to the doctor—I believe Dr. Eason over here. And he had another blackout this past Saturday; they tried to get the doctor, and the doctor was out of town, and he laid around on the bed at his wife's house.

William C. Ramsey

Q. When did this happen?
A. The past Saturday.
Q. You know how long he was unconscious?
A. At the time he blacked out, he told me he had a hurt in his chest, and I went up the road to get fluid for my car, and when I got back they had called his wife, and she had come and got him to take him to the doctor in town.
page 102 } Q. That happened when he passed out?
A. Yes.
Q. Have you talked with his wife since he's married, since this accident?
A. That's correct.

CROSS-EXAMINATION

By Mr. Roberts:
Q. How old would he be now?
A. He's 17.
Q. And he's married since the accident?
A. Yes, sir.
Q. When did he get married?
A. He got married back there in—I don't remember.
Q. You don't remember when he got married, either, do you?
A. No, sir.
Q. He got married in '68?
A. Yes.
Q. Where is he living now?
A. With his wife's daddy and mother—she's crippled, and so his wife does all the cooking.
Q. He lives with his in-laws?
A. Yes, sir.
Q. Doesn't live at your house?
A. No, sir.
page 103 } Q. You say he blacked out once at your house?
A. Twice.
Q. Before he was—
A. He was next door to—
Q. Before he was married?
A. One time before he was married; yes, sir.
Q. Well, you said the first time you weren't home?
A. I wasn't at home—he was there. Told me he had pains in his chest, and when I come back he blacked out.
Q. When?
A. This past Saturday.

William C. Ramsey

Q. This past Saturday?
A. Yes.
Q. Where was that?
A. When he was having pains?
Q. Yes?
A. At my house.
Q. At your house?
A. Yes.
Q. And you said he had pains in his chest?
A. Yes.
Q. And where did it happen this first time, you said you weren't home?
A. When he blacked out the first time? He was on his way to see his girl before they was married, and he
page 104 } blacked out close to her house.
Q. You weren't there?
A. No, sir.
Q. You don't know what happened that day?
A. No, sir.
Q. And you say that on this last occasion when—which was last Saturday, prior to what you call "blackout", he said that he hurt in his chest?
A. Yes, sir; said he hurt in his chest, when he left, went up to his granddaddy's house—which we left right close together there—that's his grandmother. He said he sat there, and all at once he fell out in the floor.

* * * * *

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REDIRECT EXAMINATION

By Mr. Natkin:
Q. Did you visit him when he was in the hospital in Roanoke?
A. I was up there every day.
Q. How long was he unconscious?
A. I really don't—honestly state how long it was. A real good while.
Q. Did he have his—possibly you can describe how his jaw was wired up, if it was?
A. Something in his mouth. He couldn't open his mouth to talk.

Q. Did they have to feed him only liquids?
A. Yes, sir.
Q. And you know how long a period of time it was?
A. No.
Q. Did they feed him liquids over a long period of time?
A. Yes, sir.
Q. That's all.

The Witness Stands Aside.

WILLIAM TEX RAMSEY, a Minor, sworn in his own behalf, testified as follows:

page 107 } DIRECT EXAMINATION

By Mr. Kizer:
Q. You are William Tex Ramsey?
A. Yes, sir.
Q. Call you "Tex"?
A. Yes, sir.
Q. You are going to have to speak out loud enough so the Court can hear you. If the Court can hear you, we all can hear you. How old are you?
A. Seventeen.
Q. Where do you live?
A. 1972 Cedar.
Q. And when were you married?
A. May 24.
Q. Of what year?
A. Sixty-seven—'68.
Q. Sixty-eight.
A. Um-hum.
Q. May 24?
A. Twenty-four.
Q. What were you doing at the time you received these injuries in April of '67?
A. What do you mean?
Q. Were you employed anywhere?
A. I was working for Kenneyburger—Kenny
page 108 } Tolley in Lexington.
Q. Where were you living at that time?
A. With daddy.
Q. And where is that?
A. Route 1, Long Hollow.

William Tex Ramsey

Q. Was it in Buena Vista or out in the county?
A. It's in Buena Vista.
Q. Within the City?
A. Um-hum.
Q. And, now, where did you go in the night of April 15, 1967?
A. Skating rink.
Q. And with whom did you go to the skating rink?
A. Steve Blankenship.
Q. Steve Blankenship?
A. Um-hum.
Q. Was Steve Blankenship—now deceased, having lost his life in this accident?
A. Yes.
Q. Was Steve Blankenship in any way related to you?
A. Cousins—first cousins.
Q. Where does he live?
A. He lived in Baltimore, Maryland.
Q. And how did he happen to be in this area?
A. He was visiting.
page 109 } Q. Visiting you?
A. Um-hum.
Q. You and Steve went to the skating rink?
A. Yes, sir.
Q. Which skating rink?
A. (The witness does not respond)
Q. Where is it located?
A. Going toward Lexington, up there where you go to the top of the hill—Top Service Station.
Q. On Route 60? Do you know at or about what time you went to the skating rink?
A. I couldn't say, really.
Q. How long were you at the skating rink?
A. I couldn't say that, either.
Q. Was it a matter of five or ten minutes, or hour, two hours? Could you give us—
A. It was around an hour.
Q. How did you get there?
A. Hitchhiked.
Q. And when you left the skating rink where did you go?
A. Went over to my girl friend's house.
Q. Where did your girl friend live?
A. Right across the street from the rink.
Q. And how long where you at your girl friend's house?
A. We were over there long enough for Steve
page 110 } to call his girl friend.

William Tex Ramsey

Q. Steve made a telephone call?
A. Yes, sir.
Q. And after leaving your girl friend's house, which, as I understand, is opposite the skating rink—
A. Yes, sir.
Q. —where did you go?
A. We started back towards home, I guess.
Q. How did you travel?
A. On foot.
Q. Walking?
A. Um-hum.
Q. And how far did you walk?
A. I couldn't say.
Q. If you remember?
A. We must have caught a ride.
Q. Do you have any recollection of it?
A. (The witness does not respond)
Q. Can you recall it?
A. (The witness shakes his head)
Q. What is the last thing you remember that night?
A. Going up Long Hollow Road.
Q. Going up Long Hollow Road?
A. Yes, sir.
Q. How were you travelling?
page 111 } A. We were walking.
Q. You remember being picked up?
A. Yes, sir.
Q. Who picked you up?
A. A man—Wayne Oyler boy—the Oyler boys.
Q. Do you know where you were riding in the car?
A. Back seat.
Q. You know who else was on the back seat?
A. Steve.
Q. Do you know who was operating the car?
A. Yes, sir.
Q. Who?
A. I don't know his name—the one that got killed.
Q. The one that was killed?
A. Yes, sir.
Q. You saw one Oyler boy here—testified here this morning; was that boy operating the car?
A. No, sir.
Q. It was the other one?
A. Yes, sir.
Q. What type of car was it?
A. 1960 Chevrolet convertible.

William Tex Ramsey

Q. And you and the Blankenship boy were on the back seat, did I understand?

A. Yes, sir.

page 112 } Q. And you tell the Court, Robert Edward Oyler was operating it?

A. Yes, sir.

Q. What is the last thing you remember, Tex?

A. The guy's living now, he was sitting about middleways of the seat, and he turned around and asked me where we was going.

Q. The one that's living now turned around and asked you where you were going?

A. He was sitting about middleways of the seat.

Q. You remember anything after that?

A. No, sir.

Q. What's the next thing you do remember after that?

A. Waking up at the hospital.

Q. You know when it was you came to in the hospital?

A. I didn't even know where I was in the hospital when I woke up.

Q. Did you find out which hospital you were in?

A. Roanoke Memorial.

Q. And how long did you stay there?

A. I was unconscious for about two weeks—must have stayed for about three or four weeks, I guess.

Q. You notice anything about your mouth?

A. Yes, sir.

Q. What?

page 113 } A. I couldn't talk.

Q. Why?

A. They had my jaw wired up.

Q. Were you able to eat?

A. No, sir—they fed me by fluid.

Q. By fluid?

A. Um-hum.

Q. Why weren't you able to eat?

A. Because I had rubber bands holding my teeth together.

Q. How long was it you had to be fed fluids?

A. Just a couple of days after I woke up.

Q. Did you notice anything else about your head?

A. Yes. When I looked in the mirror—I didn't know it until I looked.

Q. What did you see?

A. I seen that scar.

Q. How were you feeling?

A. Light-headed. I was weak.

William Tex Ramsey

Q. And after you left the hospital where did you go?
A. Back home.
Q. Whose home?
A. Living with my father.
Q. And after getting home, were you up and about, in bed, or what?
page 114 } A. I laid around a whole lot.
Q. For how long?
A. A couple of months.
Q. Was the apparatus that held your teeth together, was that removed before you came home, or after?
A. After I came home.
Q. How long did you have wear that apparatus that held your teeth together?
A. Two or three months, I believe.
Q. And who took it off?
A. Dr. Brobst.
Q. And after coming home, did you go—make any trips back to Roanoke?
A. Yes, sir.
Q. How many?
A. About ten.
Q. For what purpose?
A. He kept checking on my jaw for me, to take the braces off.
Q. Who kept checking on you?
A. Dr. Brobst.
Q. Did you see Dr. Tice at any time?
A. I seen him, but I don't remember it.
Q. How is that?
A. Well, I know he was my doctor, but I don't
page 115 } remember it.
Q. You remember going back to him, in May, I believe, and at his office?
A. No, sir.
Q. You don't recall that?
A. No, sir.
Q. Did you go to Dr. Brobst?
A. Yes, sir.
Q. Do you recall that?
A. Yes, sir.
Q. And how many times did you go to Dr. Brobst?
A. Four or five times, I guess.
Q. Have you seen any other doctors since then?
A. When I passed out.
Q. Who did you see on that occasion?

A. Dr. Eason.
Q. You happen to know where Dr. Eason is now?
A. California, I think.
Q. Now, you said when you passed out—on how many occasions have you passed out since this accident, since you recovered from the accident?
A. About two or three times.
Q. And what happens to you on those occasions?
A. I get real dizzy and light-headed, and just pass out.

page 116 } Q. When did that last one occur?
A. Saturday.
Q. Last Saturday?
A. Last Saturday.
Q. Where were ou?
A. I was up to the house here—up to my mother's and father's house.
Q. Do you know how long you were passed out or unconscious on that occasion?
A. Just for a few minutes.
Q. When was the time before that, it occurred?
A. Going up to my girl friend's house.
Q. How long before?
A. A few months, I guess.
Q. Three months?
A. (The witness does not respond)
Q. What happened on that occasion?
A. I done the same thing—felt light-headed and passed out.
Q. Were you in a car, or on the street, or what?
A. Walking.
Q. And did you fall, or what happened? Go ahead and tell us what happened.
A. I fell—just completely passed out.

page 117 } Q. Did you get any assistance?
A. First aid picked me up.
Q. What did they do?
A. Took me up to Dr. Eason's.
Q. Do you know how long you were out on that occasion?
A. Two or three hours, I believe.
Q. Have you passed out on any other occasions?
A. Passed out three times—I can't remember.
Q. How's that?
A. I passed out three times—but I can't remember the other one.
Q. You have any difficulty remembering things now?

William Tex Ramsey

A. A whole lot of things I can't remember.
Q. You have any difficulty in remembering before this accident?
A. No, sir.

CROSS—EXAMINATION

By Mr. Jolly:
Q. Tex, let's go back to the happening of the accident—if I may call you "Tex". You and your cousin had been to town, and had been to the skating rink; is that right?
A. We went to the skating rink; yes, sir.
Q. And then you went to see your girl friend?
A. Yes, sir.
Q. And you had left home, and you walked, and—probably had gotten a ride part way? And at this time
page 118 } were you walking out Long Hollow Road, and waiting for a car to come by; is that correct?
A. Yes, sir.
Q. You are familiar with Long Hollow Road? You live on it?
A. Yes, sir.
Q. And do you know where there's a street light after you go under the underpass going, I guess, in a generally northerly direction?
A. Well, it's there.
Q. Where were you when you were picked up on Long Hollow Road—can you identify the spot?
A. At the house where you go up through the culvert.
Q. At this house where you go through the culvert?
A. (The witness nods his head)
Q. Didn't you testify in discovery depositions on October 11, '68, that you were picked up—you all were standing under the street light when you were picked up?
A. Yes, sir.
Q. Well, then, is that correct—you were standing under the street light when you were picked up?
A. Yes, sir.
Q. Pardon me?
A. Yes, sir.
Q. Now, you got in the car, and Jessie Oyler,
page 119 } who you later—you did not know the Oylers at all at this time?
A. No.
Q. And they stopped and you got in, and you say that

William Tex Ramsey

Jessie was sitting in the right front seat and the other boy that was killed was driving; is that correct?

A. Yes, sir.

Q. And you all got in the back seat?

A. Yes, sir.

Q. And you remember Jessie—or who turned out to be Jessie—turned around and said to you, "Where are you all going?"—is that correct—or words to that effect?

A. Yes, sir.

Q. Now, from that time until you woke up in the hospital, do you know anything that happened?

A. No, sir.

Q. Nothing whatsoever?

A. Well, I got a slight glimpse of—when he was putting braces on my teeth—it was hurting so bad.

Q. That was after the accident?

A. Right.

Q. From that time—from the time you got in, and Jessie turned around and said, "Where are you going?"—and you woke up in the hospital?

A. That's correct.

page 120 } Q. Did you observe the condition, or do you remember anything about the condition of the driver or Jessie, as far as alcoholic beverages are concerned?

A. No, sir—I didn't get that close.

Q. Well, you climbed over the seat to get in the back seat of the convertible?

A. Yes, sir.

Q. And you didn't notice anything?

A. No, sir.

Q. You testified here about the—that you laid down for several months—that wasn't on account of the injuries you received, was it?

A. I was weak; yes, sir.

Q. Now, son, let me again try to refresh your recollection. On page 88 of your deposition, which you gave, I asked you:

"Q. And how much did you lose from work as a result of this accident?

A. I quit after the accident. I didn't work after I got out of the hospital. I worked a little bit out there after I got out of the hospital, but I didn't think it was too much over there.

Q. What I am saying, from the time of the accident until you got out of the hospital and could go back to work, how

much time was in that space? How much time
page 121 } would you have lost, if you had wanted to go
on working for Kenneyburger?

A. Just the time I was in the hospital.

Q. When you got out of the hospital you could have gone back to work then?

A. Yes, sir."

By Mr. Jolly: (Continuing)

Q. Were those statements correct?

A. That's what I said.

Q. Why did you say them, if they are not correct?

A. I don't remember straight. I went back to work for Kenneyburger's about a month after I got out of the hospital.

Q. So, the deposition that you gave, insofar as I have read it back to you, is incorrect? It's not the truth?

A. To a certain extent, I guess some of it.

Q. I think it's very plain. I asked you the question, "When you got out of the hospital you could have gone back to work then?" "A. Yes, sir." "Q. Is that correct?"

A. I did go back to work.

Q. Did you lay around for a couple of weeks or go back to work, or were you able to?

A. I laid around for about a month, and then went back to work.

Q. You testified under oath in Mr. Natkin's office you were not precluded from going back to work?

A. Like I said, I can't remember a whole lot
page 122 } of stuff.

Q. All right?

A. Can't remember everything.

Q. Excuse me. Now, you testified that you blacked out three times, and you recall two instances, but you don't recall the third; and you went to see Dr. Eason who, apparently, is in California. Was Dr. Eason called in by the rescue squad at the time the rescue squad took you—

A. I went to his office.

Q. Did the rescue squad take you to his office?

A. Yes, sir.

Q. Did you go to see any doctor, other than the two occasions?

A. No, sir.

Q. And you had three blackouts? When you physically fell to the ground and were unconscious, why didn't you go back

William Tex Ramsey

to Dr. Tice, the neurosurgeon—the specialist who treated you?

A. I just didn't go back. It was just I couldn't ask daddy to take me back; I didn't want to bother him, because he was working, and he's got five kids to take care of, and he's get more than he can handle.

Q. Excuse me, again. I think you are finished. I don't mean to interrupt you. You thought it would be too much trouble to bother about going back to see Dr. Tice, even though you had three blackout spells? And you never have been back, have you?

page 123

A. No, sir.

Q. You never have been back to see Dr. Tice to this very day?

A. When I said I just lost my memory—I can't remember everything.

Q. You lost your memory, and you have had these blackout spells, and yet, since May 22, 1967, you haven't seen fit to consult anyone about it?

A. I have been going to Dr. Brobst.

Q. That has nothing to do with your blackouts, though, does it?

A. I don't guess.

Q. When did you go to Dr. Brobst?

A. I don't remember the last time it was.

Q. How many times have you been since you got out of the hospital?

A. Four or five times.

Q. To remove stitches, and so forth?

A. I think he removed stitches before I left the hospital.

Q. And you went back four or five times?

A. Yes, sir—because he kept checking on the braces a while before he'd take them off.

Q. And you testified in your deposition that "Other than seeing Dr. Eason, have you ever seen a doctor, other than the doctor that treated you after the accident?" "That's right."

page 124

Is that correct?

A. Dr. Brobst—I went to see him.

Q. But, from the time you got in the car—and I want to get this crystal clear in the record—Jessie turned around and said, "Where are you going?", you know nothing about what happened?

A. No, sir.

Q. That's all.

Henry Thomas Brobst

The Witness Stands Aside.

(The proceedings were recessed for lunch. The Court admonished the jury not to discuss the case.)

HENRY THOMAS BROBST, a witness of lawful age, sworn in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION

By Mr. Natkin:
Q. For the record, sir, would you state your full name?
A. Henry Thomas Brobst.
Q. And your profession, sir?
A. Physician.
Q. And do you have a specialty?
page 125 } A. Yes, sir.
Q. And what is it, sir?
A. Plastic and reconstructive surgery.
Q. Doctor, would you give us your background and training in plastic surgery or reconstructive surgery?

Mr. Jolly: We concede Dr. Brobst is an expert.
He's operated on every member of my family, including me.

By Mr. Natkin: (Continuing)
Q. Doctor, it's conceded you are an expert in the field, and we will go right ahead. Do you know William Tex Ramsey?
A. I do.
Q. And do you know him as a patient of yours?
A. Yes, sir.
Q. And when did you first see him, sir?
A. I first saw this patient, Mr. Ramsey, at the Roanoke Memorial Hospital the morning after he was admitted to the hospital following injuries in an automobile accident on April 17—the night we saw him.
Q. All right, sir. Doctor, just in your own words, tell us what your examination revealed.
A. At the time the patient was first examined he was semiconscious, sort of stuporous, and it was obvious he was not—had wounds involving his right upper—his right forehead and brow region, and at that time he had in-
page 126 } ability to open and close his mouth properly, in addition to the unconsciousness, or semistuporous state he was in.

Henry Thomas Brobst

He, at that time, did respond to spoken stimuli, but would not converse—could not go into details as to the accident itself. The wound in the forehead had been repaired by one of the house staff officers on the morning of his admission. I saw him the morning he was in the hospital.

That was about his general condition.

Q. And did you determine what was the cause of his inability to move his mandible?

A. Yes. He had a fracture, dislocation of his left tempromandibular joint—that's the joint that connects the mandible of the lower jaw to the skull. The upper part of this bone was broken off and the condylar head was dislocated out of the fossa—the little cavity which is supposed to hold it—and this was deviated into the cheek.

Q. And what is your—what method of treatment did you use for this injury, sir?

A. This patient was not in any shape to do any surgery to him at that time, and it was approximately ten days later that we were able to take him to the operating room, and there, under local anesthesia, we applied traction wires to his teeth so that the teeth could be brought into occlusion. The teeth were out of occlusion—the teeth did not meet properly—and we could bring them into proper relationship, and could be held there with rubber bands which page 127 } were attached to these wires. This was a—what we felt was going to be a temporary method, but it turned out to be the only method. He was treated for fractures, dislocation mended, and in spite of the dislocation, he ultimately did come back into good occlusion.

It was not necessary for us to open up the joint and reduce this joint.

Q. Doctor, when you talk about wires, where are those wires attached?

A. There are some instances we put what we call arch bars on the teeth, and in other instances we have an adequate number of teeth, and if the teeth are in good condition—as this boy had—it's possible to use I-loop bands. These are wires which are put around the teeth and left, and then are twisted so as to make a loop, and run a rubber band from that tooth to another loop, and put a number of these, instead of using an arch, and this acts in the same way.

Q. For what period of time did you have to leave these wires and bands in his mouth, sir?

A. I think with this gentleman we had his teeth together—usually it's between six and eight weeks—I believe we had

him about two weeks longer than that. He wasn't able to have a general diet during that time.

Q. Would you describe how he was able to take nourishment during this period of time?

page 128 } A. Liquid was all at first. He could take soups and milk products and broth and juices, and so forth—these maintain an adequate diet.

Q. And did he return to your office to have this apparatus removed, or was it done in the hospital, or what was the basis of the return?

A. Yes, he returned to the office on many occasions, and the wires were removed, actually, on June 14, 1967.

Now, the wires are allowed to remain until we are certain there's going to be no slipping of the teeth out of the occlusion, so we leave them two or three or four weeks longer, until we are certain.

Q. These wires remained until June 14, 1967?

A. Yes, sir.

* * * * *

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page 131 } (JAMES DARLINGTON, having been previously sworn in this cause, is recalled to the witness stand)

DIRECT EXAMINATION

By Mr. Natkin:

Q. Mr. Darlington, you testified earlier that you saw Robert Edward Oyler in the Corner Grocery shortly before that accident; is that correct, sir?

A. Yes, sir.

Q. Did he make any statement to you, with reference to being in a particular hurry?

A. Yes. He said that he had to be either in Stuarts Draft or Waynesboro at twelve o'clock, his license expired at that time.

Q. You know how far Stuarts Draft is from Buena Vista?

A. No—thirty or forty miles.

Mr. Natkin: Take the witness.

James Darlington

CROSS—EXAMINATION

By Mr. Canterbury:

Q. Where did you say he was going?

A. (The witness does not respond)

Q. Is it that you don't recall—one or the other?

A. It was either one or the other—Stuarts Draft or Waynesboro.

Q. You are not sure which it was?

A. Not certain.

Q. You know how far it is to either one of
page 132 } those places, or are you just guessing?

A. I was just guessing.

The Witness Stands Aside.

Mr. Natkin: We rest.

(The following took place in chambers:)

Mr. Jolly: Now, may it please the Court, and at the conclusion of the evidence for the Plaintiff, counsel for the Defendant moves the Court to strike the evidence of the Plaintiff and enter summary judgment on behalf of the Defendant, on the grounds that the Plaintiff has totally failed to make out even a *prima facie* case of simple negligence, much less gross negligence.

The evidence in this case as to what caused this accident is totally non-existent—the last evidence as to what the car was doing and where it was when the hitchhikers were picked up. And the surviving hitchhiker has testified that from the moment when Jessie turned around and said, "Where are you going," he remembers nothing. Now, the Exhibit that's on the board in there, which has been admitted in evidence—it's a distance of 313 feet from the street light, under which their own evidence shows he was standing when they picked him up, to where the acccident happened.

page 133 } Now, there is some evidence from Mrs. Gardner that she saw them leave the Corner Grocery, but she never saw the car get to the highway, much less travel on the highway. And I submit to the Court that the jury would be speculating—how would they know the wheel didn't come off—we know the steering wheel didn't break; how do we know somebody didn't run him into the culvert—it leaves no earthly explanation as to how it happened. The burden

is on the Plaintiff to make out a *prima facie* case of gross negligence. He was a guest passenger, and no more.

And this jury, I think, is powerless at this stage to come to any rational conclusion. There's nothing from which a reasonable inference could be drawn as to what happened. We have an unexplained accident. And as the Court is well aware, the old stock instruction—the mere happening of an accident doesn't mean anything; the burden is on the Plaintiff to prove that it was brought about by, in this case, by the gross negligence of the Defendant. Now, the causal relationship is just dehors, anyway.

The Court: I don't recall from the evidence which culvert was struck. Was it the one on the lane in which
page 134 } the boy was travelling, or was it on the opposite side of the road?

Mr. Jolly: The lane on which the boy was travelling.

The Court: He was travelling north—in a northerly direction?

Mr. Jolly: Yes, sir.

The Court: And it would have been on the east culvert, rather than on the other culvert?

Mr. Jolly: And the books are just full of cases where the car hits a chuckhole and gets off the hard surface—and all of this is dramatically demonstrated on this Exhibit which is before the Court. The culvert—the dimensions are on there —the culvert, it's right at the edge of the pavement.

The Court: The reason I asked this question, if he had struck the culvert on the wrong side of the road, then he would have been required—or his evidence—your evidence would have been necessary to establish the reason why he was over on that side—that doesn't enter into the picture—that's why I asked which culvert had been struck.

Mr. Jolly: There absolutely is no evidence as to how this accident happened. And as I say, the Court has
page 135 } set forth in several opinions that it could have been caused by somebody else, it could have been caused by the tire blowing out, the right front wheel was off of the vehicle. The uncontradicted evidence—

The Court: You don't feel, because a man is under the influence, that this of itself would be gross negligence?

Mr. Jolly: No, sir—not unless you can show that—

The Court: That is incidental to the operation of the automobile.

Mr. Jolly: There is no evidence of that—

The Court: There's evidence to go to the jury on his intoxication.

Mr. Jolly: No evidence that his intoxication had anything

to do with hitting the culvert—there's no evidence of anything that had anything to do with it. And we think we are sincere as possible. We are entitled to have this evidence stricken. They have not borne any burden of proof. All they proved, this accident happened, and this boy was injured.

There some—and I will be completely candid with the Court—I think the evidence is stronger that
page 136 } Robert was driving, than the other—I couldn't stand here and face the Court and not say that.

The Court: That's a factual issue, certainly.

Mr. Jolly: But even that issue is somewhat in doubt. The inconsistencies and the changes of position by some of the witnesses has demonstrated—by going back to the depositions. I think the whole case just doesn't meet the test of—what are you going to tell the jury? If you instruct the jury, if you believe that that's what happened, the Plaintiff's entitled to a verdict. I don't know what happened. Nobody knows.

The Court: Well, thus far in the evidence, I feel like the factual issues are there for the jury to determine, in regard to the intoxication. I don't think there's any question he was the driver—by the direct evidence—when they left this Corner store, and he was behind the wheel of the automobile; just a few minutes later somebody came yelling for the rescue squad, and the accident happened. The facts of the issues—about the manner in which he took off from the Corner store, as he spun the wheels and shot the gravels, and there was a scream—of one witness—of tires; one witness
page 137 } said the wheels screamed as it went down the highway. Your objection to that latest testimony about which direction he was going was sustained because she didn't see it, she just heard the noise.

Mr. Jolly: You have got an intervening circumstance here.

The Court: Stopping and picking up the hitchhikers?

Mr. Jolly: The hitchhikers didn't get on the witness stand and undertake to testify—any inference you might draw from her testimony they went 1100 feet from the store under this one-way culvert before they stopped and picked up the hitchhikers—he didn't testify they came roaring down the road and slid all four wheels. They saw him and his friend, and stopped, and got in the car, and turned around and said, "Where are you going"—and that's it.

I just don't know what conclusion the jury can come to from this evidence, as to what caused the accident.

The Court: I will hear from Mr. Natkin and Mr. Kizer.

Mr. Natkin: Judge, of course, the evidence here is a jury

question, as far as we are concerned. The evi-
page 138 } dence shows, in looking at it in the most favor-
able light, that this boy—and a total drunk—
had a total of ten beers, operating in a frivolous manner; he had been sitting in the back of the car singing loudly, that you have him, just seconds or minutes before the accident, being definitely under it—raising a jury question whether he was under the influence, whether his manner was affected, his speech was affected, when he walked—was it affected.

The Court: In other words, that's a factual issue as to the intoxication. What caused the accident? Was it between the intoxication and the accident itself?

Mr. Natkin: It becomes a jury question in any case of a person who is under the influence, who has an accident that—an unexplained accident, actually, because in this particular case the evidence is that he drove straight, without even applying his brakes. You've got to remember there was no evidence in this case of skid marks, any swerve marks, sudden emergency, or anything of that nature—he drove straight into a concrete bridge. You go on to say, not drive
the automobile while under the influence, keep
page 139 } a proper lookout for culverts, other people using
the highway.

The Court: If he failed to do so, and such failure was a proximate cause—

Mr. Natkin: That's the jury issue. Was his failure to see this culvert, was his failure to stop his car before, was he driving under the influence, was all of these combinations; was the fact that his own statement, "I'm in a hurry. I have got to get there before midnight." The way he took off—wasn't all of that the combination of all of them? It's a very factual issue that is for the jury to determine the proximate cause of the accident.

The Court: Suppose he had come into court and said, "My front wheel ran off without any anticipation or any warning"?

Mr. Natkin: There would be physical evidence that that happened. If your wheel come off prior to hitting the culvert, the axle drops and leaves marks.

The Court: I put this hypothetical question: If he were alive, and he were to come into court and say, "Gentlemen of the jury, if Your Honor please, I am going down the road
here, and it's true I might have been driving a
page 140 } little too fast—which is not, of course, gross neg-
ligence of itself—and my wheel came off. I had no warning that wheel was coming off." There's a theory that would be consistent.

Mr. Natkin: If he was also under the influence, and then he'd be into the question, first, there was physical evidence that this did happen, because if the wheel had come off, and the axle would have dropped to the ground, there would have been marks leading to it. The evidence going to the jury is that the wheel came off after the accident. As a matter of fact, the father said it happened after the accident. there's no physical evidence that it happened before the accident. If he would have said that, it still would go to the jury on the question of proximate causation. Keeping your car under control, without that happening in sudden emergencies. How far back was it? If he wasn't drunk, could he have stopped?—each of these things are matters that the jury can consider.

The Court: The evidence is such as to be shocking to a reasonable, prudent person?

Mr. Natkin: Yes, sir.

The Court: In substance it is reckless?

page 141 } Mr. Natkin: Gross negligence—that's what we say you have here. A boy under intoxication—under the influence, his manner of operating the vehicle right up until the time of the accident, his own statement of how he was going to speed, the warning given to him before he left there, the complete disregard of the warnings.

Mr. Jolly: What statement of speed? Who testified he said he was going to speed?

Mr. Natkin: He said he had to get there before the *tires* expired.

The Court: License.

Mr. Natkin: And Linda told him, "Don't drive fast"—and he drove off spinning his wheels and crying his tires.

Mr. Jolly: I think Mr. Natkin points out that it's purely speculative—the wheel didn't come off because it didn't leave a gouge mark. How do we know it would leave a gouge mark?

The Court: He argued as a matter of common knowledge.

(There was an off-the-record discussion among counsel and Court)

The Court: There are factual issues. I won't comment on the strength of those factual issues. I have

page 142 } taken the position there are sufficient issues to go to a jury. I think the issue of proximate cause, the issue of gross negligence, the issue of contributory negligence—I don't see where we have that in this case—I think are jury questions, and I am going to overrule your motion, and then you can save your point, and then renew your motion at some other phase of the case, if you so wish.

Mr. Jolly: We respectfully except to Your Honor's ruling.

(The trial resumes in open court)

DELMAS CLARK, a witness of lawful age, sworn in behalf of the Defendant, testified as follows:

DIRECT EXAMINATION

By Mr. Canterbury:

Q. Would you state your full name for the Court, please, sir?

A. Delmas Clark.

Q. And your address?

A. Right now I'm—it's South Carolina, Fort Jackson.

Q. What unit are you in?

A. Headquarters Detachment, First Brigade.

page 143 } Q. How long have you been in the service?

A. A year and a half now.

Q. A year and a half?

A. Yes, sir.

Q. From the time of this accident until now you have spent most of your time in the service?

A. Yes.

Q. Now, as I understand the evidence in this case, you were with these boys during the afternoon, and you went to the dance with them; is that correct?

A. That's right.

Q. Did you have occasion to see Robert from time to time throughout the evening?

A. Right. He was with me at all times except for—at the dance, he was there except for, maybe, half an hour.

Q. Did you see Robert shortly before he and his brother Jessie left the dance?

A. Just prior to them leaving, before they went out to the car.

Q. Did you see them on the way out?

A. Yes.

Q. Did you have an opportunity to observe Robert's condition at that time, Delmas?

A. Yes, I did.

Q. Have you been around people who have

page 144 } under the influence of alcohol?

A. Yes.

Q. Would you describe for the Court, Delmas, how Robert acted at that time?

Delmas Clark

A. To me, he did—he wasn't intoxicated—or he wouldn't have been at the dance, really.
Q. He wasn't intoxicated, or he wouldn't have been at the dance?
A. Yes.

Mr. Natkin: I object to that statement.

By Mr. Canterbury: (Continuing)
Q. Did you have a conversation with him?
A. Not prior to his leaving. It was about an hour or so before, he was talking about a girl.
Q. Did you and he talk at that time?
A. Oh, yes.
Q. Seemed to talk all right?
A. Yes.
Q. Did you see him walk at that time?
A. Yes, I did.
Q. Was he walking normally?
A. Yes.
Q. Did you see him walk at the time he was leaving the dance?
A. No, I didn't.
page 145 } Q. You say you saw them depart?
A. I saw Wayne go out; I believe Robert was still there—anyway, I was occupied at that time. I didn't see him leave.
Q. O. K.

CROSS—EXAMINATION

By Mr. Natkin:
Q. Delmas, what time did you get with these boys that day?
A. It was in the afternoon about three-thirty or four.
Q. And did they come by your house?
A. Yes.
Q. And could you tell they had been drinking when you first saw them—had some beer?
A. No, I talked to them at this car down from my house.
Q. You didn't observe them enough to say they weren't drinking?
A. I couldn't say either way.
Q. Couldn't say either way? And did you all come into Buena Vista together, or in separate cars?

Delmas Clark

A. Separate cars.
Q. Where did you go when you first came to Buena Vista?
A. Well, I took my car down at the War Memorial building and parked it, and he picked me up there.
Q. And then where did you go?
page 146 } A. We rode around a little bit, and came up here to one of these bars; I can't—
Q. Go to the Sportsman restaurant—I believe now known as the Buena Vista Inn—big one up the street here?
A. I couldn't say which one. It's been a long time.
Q. You remembered what kind of condition you were in, and don't remember where you went?
A. I can remember what kind of condition he was in, because I was talking to him.
Q. You went to a beer place, anyway?
A. Right.
Q. Where they serve beer? You don't remember which one?
A. Right.
Q. What time was that?
A. Well, I am going, mostly, under assumptions.
Q. If you don't know, say you don't know.

Mr. Jolly: Let him finish.
A. I don't know the exact time. It was in the late evening.

By Mr. Natkin: (Continuing)
Q. Now, the three of you go in together, or you go in at separate times?
A. All three of us went in together.
Q. Did the three of you sit together?
page 147 } A. Yes, sir.
Q. Did anyone else sit with you at that time?
A. Not that I can remember.
Q. How many beers did each of you have on this occasion?
A. Well, we was mostly talking, so I couldn't give you a—
Q. As much as five?

Mr. Jolly: I object to your interrupting the witness.
The Court: Make your objection to the Court.
Your objection is well taken.

By Mr. Natkin: (Continuing)
Q. Do you know how many beers you had?
A. Well, I can't give you an exact count. We stayed there, I would say, maybe an hour and a half, and we were talking

Delmas Clark

a lot, because the youngest boy, Robert, had just got out of the service, and I was getting ready to go in, and we were talking mostly about the service and what it was like.

Q. Do you have any idea of how many beers was drunk during this hour and a half of sitting there in a beer joint together?

A. I can say, maybe, four or five.

Q. Four or five each?

A. Yes.

page 148 } Q. It would be correct—you would be correct to say at that time Robert had four or five; is that correct?

A. Yes.

Q. Then, when you left there where did you go?

A. I believe, when we left the bar, we went over to the dance, and we went in there about eight or eight-thirty.

Q. Eight or eight-thirty?

A. Yes.

Q. Now, did Robert stay there? When did he leave?

A. Well, I couldn't account for about an hour—maybe a half an hour.

Q. Did he later tell you where he was during that half hour to an hour's time?

A. No.

Q. But he'd gone out somewhere, did he not?

A. Yes, sir.

Q. And what time did you next see him?

A. I guess it was about ten-thirty.

Q. All right. Did you leave with him and his brother when they left?

A. No, I didn't.

Q. Did you know where they went?

A. Well, they were a little late for Wayne—Jessie, he had to be at work at twelve o'clock, and it was about eleven, or maybe a few minutes after eleven when they left,

page 149 } and it's about a thirty-minute drive—thirty-five-minute drive.

Q. You say Jessie had to be at work at twelve o'clock?

A. Yes, sir.

Q. Well, did you know that they left with Donnie Gardner?

A. I wasn't with them when they left.

Q. You know whether they left, met up with someone—Donnie Gardner and went back to the Sportsman restaurant?

A. No. I was inside the dance, and they told me they were going straight home so they could go to work.

Delmas Clark

Q. You don't know anything about going back to the Sportsman restaurant?

A. No.

Q. Do you know anything about them buying some beer and having it in the car? Did you see beer in the car?

A. No.

Q. You don't know anything about whether they went and bought beer and had it in the car?

A. Wasn't any in it when I got out.

Q. Whether they bought any after that, you don't know?

A. Correct.

Q. You don't know what they had to drink when they went back to the Sportsman, and you don't know what Robert had to drink, if he had anything, when he left the dance, during this period of time; is that correct?

page 150 } A. Well, let's see, they left about eleven or ten —a few minutes after eleven, and well, I left—it was ten minutes till twelve, and I went straight up the road, and I saw the car—police were there—they had already gone and took them to the hospital.

Q. Now, let's go back to when you say you saw them at the dance at eleven o'clock or a moment before eleven.

A. Right—and they left.

Q. Did you look at your watch, or something?

A. They have a big clock.

Q. And you looked at that clock, and you say it was eleven o'clock when they left there?

A. We checked the clock. I was afraid of, you know, he'd be late for work, so we was keeping a pretty good eye on the clock.

Q. That was at eleven o'clock?

A. Well, I told you a little bit—a few minutes after eleven.

Q. A few minutes after eleven?

A. Yes.

Q. If I would tell you that the accident happened before eleven o'clock, would you want to change your testimony here?

A. No, sir. What was your question again?

page 151 } Q. If I would tell you the evidence clearly shows the accident happened before eleven o'clock, do you want to change your testimony as to what time it was when they left?

A. I really couldn't believe it happened before eleven o'clock.

Q. Could you possibly have read that clock wrong, and really was a few minutes to ten when they left?

Delmas Clark

A. Couldn't have been.
Q. You are standing on it was after eleven o'clock when they left?
A. Very few minutes after eleven.

REDIRECT EXAMINATION

By Mr. Canterbury:
Q. What you are saying, regardless of what the clock—it could have been five or ten minutes fast? You looked at it?

Mr. Natkin: I object to leading the witness.
That is his witness. I object to asking a leading question.
The Court: I sustain the objection.

By Mr. Canterbury: (Continuing)
Q. Could you state how much time elapsed from the time you left the dance until they left the dance?
A. I say about forty minutes.
Q. Certainly not an hour and a half?
A. No.
Q. And then they left? They seemed to be in
page 152 } good condition at that point?
A. Yes.

RECROSS—EXAMINATION

By Mr. Natkin:
Q. How much had you had to drink? If it was a question as to what time it was, what all had you drunk that day?
A. I was at home all day until they came down, and we went in and had four or five beers there and, let's see, that was about it for that night.
Q. About it?
A. Yes.
Q. You didn't have anything else to drink?
A. No.
Q. You didn't go out with them when they went across the street to get beer?
A. I was occupied with a girl at that time.
Q. What?
A. I was occupied with a girl at that time.
Q. You was occupied with a girl at the time?
A. That's right.

The Witness Stands Aside.

Mr. Jolly: We rest.

(The following took place in chambers:)

Mr. Jolly: I renew my motion at the conclusion of all of the evidence; counsel for the Defendant
page 153 } renews his motion to strike the evidence, and enter summary judgment for the Defendant, for the reasons heretofore stated in the record.

Instruction A—Given.

Mr. Jolly: Counsel for the Defendant objects to the giving of the instruction submitted, and particularly for the failure to specifically set out that the gross negligence must be the cause of the injury.

Mr. Natkin: If he wants the words, "proximately caused."

The Court: I am going to give it as you have tendered it, gentlemen. There's no point—now, I am going to say this: If I feel an instruction is proper in its form, I don't expect counsel to suggest an amendment to it. I am not going to do it that way. I am giving it as it is, and you can note your exception to it.

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Mr. Jolly: For the record, of course, counsel for the Defendant objects to the giving of any instructions.

We did not make an objection at that time,
page 157 } and perhaps the Court will feel it's too late; we feel the jury should be instructed to disregard the testimony of Linda Gardner as to the way the vehicle was driving on the parking lot at the store, in that it is too remote in point of time to be of probative value.

The Court: I don't think the Court should be taken advantage of at this time. If you had requested that I instruct the jury to disregard it. I note your objection. They are average intelligent people. It's your privilege, if you wish to make a point of it.

Mr. Jolly: I am afraid not.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk

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