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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 7363

In the
Supreme Court of Appeals of Virginia
at Richmond

WILLIE C. BAGLEY

v.

WILLIAM BEVERLY WEAVER,
ADMR., ETC.

FROM THE HUSTINGS COURT OF THE CITY OF NEWPORT NEWS

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.

NOTICE TO COUNSEL

This case probably will be called at the session of court to be held MAR 1971

You will be advised later more definitely as to the date.

Print names of counsel on front cover of briefs.

Howard G. Turner, Clerk

Record No. 7363

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 3rd day of December, 1969.

WILLIE C. BAGLEY,

Plaintiff in error,

against

WILLIAM BEVERLY WEAVER, ADMINISTRATOR OF THE ESTATE OF RICHARD W. BAGLEY, DECEASED,

Defendant in error.

From the Hustings Court of the City of Newport News
Samuel R. Buxton, Jr., Judge

Upon the petition of Willie C. Bagley a writ of error is awarded him to a judgment rendered by the Hustings Court of the City of Newport News on the 3rd day of June, 1969, in a certain motion for judgment then therein depending, wherein William Beverly Weaver, administrator of the estate of Richard W. Bagley, deceased, was plaintiff and the petitioner was defendant; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said court below in the penalty of $500, with condition as the law directs.

RECORD

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page 1 }

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MOTION FOR JUDGMENT

You are hereby notified that in accordance with the herewith attached notice the undersigned moves the Hustings Court for the City of Newport News, Virginia, in the Courthouse thereof, for a judgment against you in the sum of Fifty Thousand Dollars ($50,000.00) together with the costs of these proceedings, on the following grounds set forth, to-wit:

1. That on or about the 13th day of July, 1968, at approximately 10:40 P.M., the undersigned while a passenger in the vehicle being operated by you, the said Willie C. Bagley, travelling on North Church Street, not at an intersection, about 300 feet north of Commerce Street in the town of Smithfield, Virginia, was injured when you, the said Willie C. Bagley, while operating a certain 1961 Ford sedan in a northerly direction drove your said automobile in a grossly negligent, careless, reckless and unlawful manner into and collided with a bridge abutment and as a direct and proximate result of your gross negligence, as aforesaid, and your fail-
page 2 } ure to keep a proper lookout, maintain control of your car, apply the brakes, and your excessive and unlawful speed, and in your gross failure to use the proper care and caution in the management, operation and control of your vehicle, directly and proximately caused the plaintiff, who was free from fault himself, to sustain serious and permanent injuries to his body and person, which rendered him lame, sick, sore and disabled, and in particular caused him to sustain injuries to his right leg, neck, head and back, further causing injuries to his soft tissues, veins, cartilages, ligaments, muscles and nerves, and to his emotional and nervous system, all of which injuries will be permanent, causing him to be hospitalized and be treated by physicians and to expend large sums of money for his medical care and attention, and further causing him to lose a long time from employment and earnings, and which injuries will, in fact, cause him future diminution of his earning capacity.

2. As a result of the said injuries the plaintiff has received, and in the future may receive, additional medical

and hospital care and treatment furnished by the United States of America. The plaintiff for the sole use and benefit of the United States of America, under the provisions of Title 42 U.S.C. sections 2651-2653, and with its expressed consent, asserts a claim for the reasonable value of past and future care.

Wherefore the undersigned, Richard Bagley, demands judgment against you, the defendant, in the sum of Fifty Thousand Dollars ($50,000.00) and costs.

Richard Bagley
By
Counsel

Filed in the Clerk's Office the 2nd day of January, 1969/
Teste:
Geo. S. DeShazor, Jr., Clerk

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page 6 }

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ANSWER AND GROUNDS OF DEFENSE

To the Honorable Judge of the Hustings Court for the City of Newport News:

Now Comes the defendant, by counsel, and for his Answer and Grounds of Defense to the Motion for Judgment filed herein, states as follows:

1. That on or about 13 July 1968 at approximately 10:40 p.m., or at any time prior thereto or subsequently thereafter, the defendant denies operating any motor vehicle in the town of Smithfield, Virginia, in a grossly negligent, careless, reckless, or unlawful manner, and the defendant further denies that he at any time failed to keep a proper lookout, or failed to keep control of the car, or failed to at any time apply the brakes when in the exercise of ordinary care they should have been applied, and further yet denies that he operated such motor vehicle in an excessive or unlawful speed or failed at any time to use proper care and caution in the management, operation and control of said vehicle.

2. With respect to the injuries sustained by the plaintiff, the expenses incurred by him, and loss of earning suffered by him, as alleged in the Motion for Judgment, the defendant has no knowledge and calls for strict proof thereof.

3. The defendant further denies that he is in any way and in any manner and to any extent indebted to the United States of America in any wise pertaining to the
page 7 } claim alleged on behalf of the United States of American (under the provisions of Title 42, U.S.C. Sections 2651-2653) more particularly set forth in paragraph 2 of the Motion for Judgment.

4. The defendant alleges that the proximate cause of the plaintiff's injuries, if any, was the plaintiff's own negligence.

The defendant will rely upon any defense disclosed by the evidence or any incident of trial, and additionally reserves the right to amend his Answer and Grounds of Defense as he may be advised.

Wherefore, the defendant demands judgement in his favor and his costs in this behalf expended.

Penelope D. Coffman
Counsel

* * * * *

Filed
January 20, 1969.
By Geo. S. DeShazor, Jr., Clerk

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NOTICE TO TAKE DISCOVERY DEPOSITIONS

Now come the plaintiff, Richard Bagley, by counsel, and hereby gives notice that on the 28th day of January, 1969, at 3:00 o'clock P. M. at the office of Hoyle & Short, Attorneys at Law, 120 28th Street, Newport News, Virginia, the undersigned will take the discovery depositions of Willie C. Bagley and Dr. D. S. Maxwell, as provided by Rules 4:1, 4:3, 4:5 and 4:7 of the Rules of the Supreme Court of Appeals of Virginia.

Richard Bagley

By William V. Hoyle
Counsel

* * * * *

Filed
January 23, 1969.
Geo. S. DeShazor, Jr., Clerk
By Geo. S. De Shazor, Jr.

* * * * *

page 18 }

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SUGGESTION

Now comes the defendant, by counsel, and says to the Court:

I desire to have the death of the plaintiff suggested on the record.

Attached to this pleading is a certified copy of the Certificate of Death issued by Dean Huxtable, State Registrar.

Willie C. Bagley

By Penelope D. Coffman
Counsel

* * * * *

Filed
February 20, 1969.
Geo. S. DeShazor, Jr., Clerk
By Geo. S. DeShazor, Jr.

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NOTICE AND MOTION TO SUBSTITUTE PARTY

You are hereby notified that the undersigned will on the 4th day of April, 1969, at 9:30 o'clock A. M., or as soon thereafter as he may be heard move as follows:

This day comes William Beverly Weaver, City Sergeant for the City of Newport News, Virginia, by counsel, and represents unto the Court that he, on the 21st day of March, 1969, qualified as the personal representative and administrator of Richard Willie Bagley, deceased, who died in Newport

News, Virginia, on the 18th day of January, 1969, of natural causes not connected with an automobile accident which occurred on or about the 13th day of July, 1968, with reference to which the above styled suit has been filed. A certificate of qualification is attached to this petition brought in accordance with Rule 2:16 and 3:17 of the Rules
page 23 } of the Supreme Court of Appeals of Virginia, together with other applicable statutes in the State of Virginia, notice of this motion having been served on Willie Bagley, Penelope D. Coffman, his attorney, and John B. Browder, agent for service of Dairyland Insurance Company.

The undersigned moves that the motion for judgment be revived and that he be substituted in the name, place and stead of the deceased plaintiff as a party to this action, and that the style hereinafter be William Beverly Weaver, *Administrator of the Estate of Richard W. Bagley, deceased,* v. *Willie C. Bagley,* for the purpose of maintaining and conducting the action hereinabove.

William Beverly Weaver

By William V. Hoyle
Counsel

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* * * * *

ANSWER AND DENIAL TO REQUEST FOR ADMISSIONS

Now comes the plaintiff, William Beverly Weaver, Administrator of the Estate of Richard W. Bagley, deceased, and denies that the plaintiff decedent assigned to the Veterans Administration his claim against Willie C. Bagley for the cost of medical care furnished by the United States Government and its agents to him, the said Richard Bagley, but says affirmatively that he verily believes that Richard Bagley assigned, in writing, to the United States of America all claims to the extent authorized or required by 76 Stat. 593, 42 U.S.C. sections 2651-2653 for hospital, medical services and dental care and treatment furnished by the Veterans Administration of the United States Government and its agents, against Willie C. Bagley and/or any other person

or corporation including Dairyland Insurance Company, due him by way of contract or tort as a result of the treatment received by him resulting from injuries received in an automobile accident on the 13th of July, 1968.

A photostatic copy of said Power of Attorney and Assignment is hereto attached.

William Beverly Weaver,
William Beverly Weaver, Administrator
of the estate of Richard W. Bagley,
deceased

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* * * * *

Filed
April 14, 1969
Geo. S. DeShazor, Jr., Clerk
By Addie Burgess, D. C.

page 47 } POWER OF ATTORNEY AND ASSIGNMENT

For a valuable consideration I hereby assign to the United States of America to the extent authorized or required by 76 Stat. 593, 42 U.S.C., §§2651-2653, all claims, demands, entitlements, judgments, administrative awards, and the proceeds thereof, and all causes of action which I now have, and which I may have hereafter for hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances).

I hereby irrevocably appoint the Attorney General of the United States or his designee, my attorneys-in-fact in the premises, to do all acts, matters and things deemed necessary or desirable by any such authorized person, with full power and authority in my name, but at the cost, risk and charge, and for the sole benefit of the United States of America to sue for, or compromise, and to recover and receive all or part of the amount hereby assigned; and irrespective of assignment, to collect and disburse such funds in my behalf; and to give releases for the same; but no such action shall limit or prejudice my right to recover for my own benefit all sums in excess of those amounts representing the reasonable value of said care and treatment, or other sums to which I may be entitled.

Dated this 30th day of July 1968.

Richard Bagley
(Signature of assignor)

Witness: A. Stone
(Signature of witness)

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MOTION

Now Comes the defendant, Willie C. Bagley, by motion to strike the allegation charged in paragraph #1 of the Motion for Judgment hereinbefore revived by order of this Court, states as follows:

1. That insofar as the allegations of paragraph #1 may be construed to include damages for pain, suffering and mental anguish, the same, not being specifically described, but only inferentially alluded to as damages to the "emotional system" and "rending . . . sore," are hereby objected to as insufficient at law to be a claim for mental anguish, pain and suffering, and furthermore, in the name of the administrator are inadmissable and of law are not allowable in an action revived by reason of death, and therefore for both of the foregoing reasons, or for either, the allegations referred to are objected to and requested struck, deleted, and dismissed.

Willie C. Bagley

by Aldine J. Coffman, Jr.
of Counsel

* * * * *

Filed
April 15, 1969.
Geo. S. DeShazor, Jr., Clerk
Geo. S. DeShazor, Jr.

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MOTION

Now Comes the defendant, Willie C. Bagley, by a motion to strike the allegation charged in paragraph #2 of the Motion for Judgment hereinbefore revived by order of this Court, states as follows:

1. That insofar as any action brought pursuant to Title 42, USC, Section 2651-2653, the plaintiff is without standing to assert the same; that the right to assert the same, in accordance with the statutes referenced lies solely in the United States, and may be enforced 1) by intervention of the United States in original suit filed; or 2) if no suit is filed within six months of the date of the first day of medical care, then by direct suit of the United States in the name of the United States or of the injured, or in a suit in conjunction with the injured; that since suit was commenced within six months from the date of the injury alleged, manifestly the only statutory remedy left is by intervention of the United States, which intervention has not occurred; that since the United States has failed to intervene, the claim on its behalf cannot be asserted.

Wherefore, the defendant prays that paragraph numbered 2 of the Motion for Judgment be dismissed without prejudice to the United States.

Willie C. Bagley

by Aldine J. Coffman, Jr.
of Counsel

Filed
April 15, 1969.
Geo. S. DeShazor, Jr., Clerk
Geo. S. DeShazor, Jr.

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REQUEST FOR ADMISSION

Now Comes the defendant, pursuant to an order of this Court hereinbefore entered, in which is recited the parties' agreement to waive statutory provisions and rules of court

with respect to pleadings filed after the allowance of a substitution of parties, and in reliance upon that order, particularly with respect to the waiver of statutory requirements (in this matter, the requirements of Virginia Code 8-111.1 of the service of this notice and the 10 days allowed before answer), the defendant doth request that an answer be filed on or before April 22, 1969, admitting or denying the following:

1. Did the plaintiff's decedent, Richard Bagley, assign in writing to the Veterans Administration his claim against Willie C. Bagley for the cost of medical care furnished by the United States Government and its agents to him, the said Richard Bagley?

Willie C. Bagley

by Aldine J. Coffman, Jr.
Counsel

Filed
April 15, 1969.
Geo. S. DeShazor, Jr., Clerk
Geo. S. DeShazor, Jr.

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ORDER

On April 22, 1969, the parties hereto by their attorneys appeared before the Court and argued three Motions to Strike. They had been filed by the Defendent in this cause on April 15, 1969. The Court, having heard the arguments, took the matter under advisement and does now make the following Order.

The motion to strike the allegations charged in Paragraph One of the Motion for Judgment concerning the diminution of future earnings and loss of earnings is sustained in part and overruled in part to the effect that the Plaintiff is entitled to show loss of earnings from the time of the accident to the date of the death of Richard W. Bagley, if any.

The motion to strike the allegation in Paragraph One of the Motion for Judgment concerning damages for pain, suffering and mental anguish as not having been specifically described is overruled.

The motion to strike the allegation charged in Paragraph Two in the Motion for Judgment is overruled.

Enter this 7th day of May, 1969.

S. R. Buxton Jr.
Judge

* * * * *

page 87 } Instruction No. D

The Court instructs the jury:

That the law places upon every person the duty to take such precautions for his own safety as a reasonably prudent person would take under like circumstances and conditions, and the failure to do so constitutes negligence at law. Therefore, if you find from a preponderance of the evidence, that the plaintiff continued to ride in *defnedant's* automobile after he knew or had discovered, or by the exercise of ordinary care should have known or have discovered, that the defendant was without sleep, or was tired, or was or should have been *drwosy,* or in the exercise of due care should have known the same, and yet rides with the defendant without protest, without making any effort to keep the defendant awake, but nonetheless himself goes to sleep, then the plaintiff would be guilty of negligence, and if you further find that such negligence contributed to the plaintiff's injuries, then he cannot recover.

Denied SRB Jr

page 88 } Instruction No. F

The following Tables of speed and stopping distances show the results of experiments made with automobiles, unloaded except for the driver, equipped with four-wheel brakes, in good condition, on dry, hard, approximately level stretches of highway free from loose material.

These Tables create no presumption in law.

SPEED IN		AVERAGE STOPPING DISTANCES		TOTAL STOPPING DISTANCES
Miles per Hour	Feet per Second	Auto Brakes (In Feet)	Average Driver Reaction Time (3/4 Second) (In Feet)	Autos (In Feet)
10	14.67	5	11	16
15	22.0	12	16	28
20	29.34	21	22	43
25	36.62	32	27	59
30	44.0	47	33	80
35	51.3	63	38	101
40	58.7	82	44	126
45	66.0	104	50	154
50	73.3	128	55	183
55	80.7	155	61	216
60	88.0	185	66	251
65	95.3	217	71	288
70	102.6	252	77	329
75	109.9	289	82	371
80	117.2	328	88	416
90	132.0	425	99	524
100	146.6	514	109	623

Denied SRB Jr

page 89 } Instruction No. I

The Court instructs the jury:

That little significance can be attached to the defendant's failure of recollection. In light of the evidence that he had received serious injuries, his failure to relate more of the circumstances of the accident suggests that the injury may have been responsible for his inability to explain the accident more fully and satisfactorily.

Denied SRB Jr

page 90 } Instruction No. K

The Court instructs the jury:

That in a situation of sudden peril, the law does not require of a person the same degree of care as one who has had equal opportunity for the exercise of his judgment, and if you believe from the evidence that the defendant in the operation of his car came without warning upon a default in the road, and that he was free of gross negligence at the time he came upon the default, and that the defendant reasonably

did confront himself with the situation of sudden peril then he was not guilty of gross negligence when he made such a choice of action as an *ordinaty* person placed in such a position may have made; even if you believe that some of his action was not the wisest action to take, some other course may have been more judicious.

Denied SRB Jr

* * * * *

page 92 } Instruction No. N

The Court instructs the jury:

In order to rely upon the defense of sudden emergency, the party relying on such defense must himself have been free from gross negligence in bringing about such sudden emergency; therefore, if you believe from the evidence that there was any sudden emergency in this case and that the defendant was guilty of ordinary negligence which wholly or partly produced it, then the plaintiff cannot recover.

Denied SRB Jr

page 93 } Instruction No. O

If the jury believe from the evidence that the defendant, without negligence on his part, was confronted with a sudden emergency, then he was not required to exercise the same good judgment in such sudden emergency as would have been required of him in the absence of such sudden emergency; and the defendant cannot be held liable for any error in judgment on his part in such sudden emergency if you believe from the evidence that he exercised such judgment as a person of ordinary prudence would have exercised in the same or similar circumstances.

Denied SRB Jr

page 94 } Instruction No. P

If the jury believe from the evidence that the defendant was negligent and that such negligence was a proximate cause of the collision, nevertheless if you further believe from the evidence that the plaintiff was also negligent and that such negligence efficiently contributed to cause the collision, then your verdict shall be in favor of the defendant.

The law does not undertake to apportion or balance the negligence of the parties where both are at fault in order to ascertain which one is most at fault, but the plaintiff is barred from recovery if he committed any act of negligence which efficiently contributed to cause the collision.

Denied SRB Jr

* * * * *

page 98 } Instruction No. 8

The Court instructs the jury that gross negligence may be a single act or a combination of several independent acts of simple negligence, and if you believe from a preponderance of the evidence that the defendant was guilty of one single act of gross negligence or several independent acts of simple negligence so combined in their cumulative effect under the circumstances then existing that they constituted gross negligence, then you must return your verdict for the plaintiff.

Denied SRB Jr

* * * * *

page 105 } Instruction No. 1

The Court instructs the jury that as a matter of law the plaintiff is not guilty of contributory negligence.

Granted SRB Jr

page 106 } Instruction No. 2

The Court instructs the jury that in the operation of a motor vehicle the following duties devolve upon a motorist operating his vehicle over and along the streets and highways of this Commonwealth:

1. To operate his vehicle in a reasonable manner and to maintain reasonable and proper control of his said car.
2. To keep a reasonable and proper lookout for other vehicles or objects on the street or highway.
3. To avail himself of what such lookout discloses so as to avoid injury to himself or others.
4. To timely and seasonably apply the brakes of his vehicle when to do so would avoid a collision.

5. To operate a motor vehicle at a speed which is reasonable under the circumstances and conditions then obtaining.

6. To use reasonable care to avoid collision with a bridge abutment or sidewalk adjacent to a street or highway.

7. To maintain his vigilance and be alert and keep wide awake and if aware of tiredness or sleepiness to stop his car and refrain from driving.

8. To put his lights on high beam on the highway in the nighttime to avail himself of the optimum, or best
page 116 } available vision, provided that the operation of his lights on high beam would not interfere with the vision of on-coming cars or other persons.

And if the jury feels from a preponderance of the evidence that the defendant failed to observe or keep any one or more of the foregoing duties and such failure amounted to gross negligence, and that such gross negligence on his part was either the sole proximate cause of the accident or that it efficiently contributed to the accident and collision, then you shall find your verdict in favor of the plaintiff.

Granted SRB, Jr.

page 107 } Instruction No. 3

The Court instructs the jury that if you believe from the evidence that the defendant, Willie Bagley, was guilty of several acts of negligence, no one of which would in itself amount to gross negligence, you may nevertheless find for the plaintiff; and if it appears by a preponderance of the evidence that after considering all of the facts and circumstances together you are of the opinion that all of the acts and conduct of the defendant amounted to gross negligence, you must find your verdict for the plaintiff against the defendant in a sum not to exceed the amount sued for.

Granted SRB, Jr.

* * * * *

page 111 } Instruction No. 10

The Court instructs the jury that the maximum speed limit at the time and place of the collision herein was 40 miles per hour; and if you believe from the evidence that the defendant was driving his vehicle in excess of 40 miles per hour then he was guilty of negligence, and if you believe that such excess speed together with other acts of negligence was, in

fact, gross negligence you shall find your verdict in favor of the plaintiff.

Granted SRB., Jr.

page 112 } Instruction No. 11

The Court instructs the jury that if from the evidence and the other instructions of the Court you find your verdict for the plaintiff, then in assessing the damages to which he is entitled you may take into consideration any of the following which you believe from the evidence to have resulted from the collision:

1. Any bodily injuries sustained and the extent and duration thereof;
2. Any effect of any such injuries upon his health according to its degree up to time of death.
3. Any physical pain and mental anguish suffered by him in the past and suffered by him until his death on January 18, 1969;
4. Any disfigurement or deformity resulting to him and any humiliation or embarrassment associated therewith;
5. Any doctors, hospital, nursing and medical expenses incurred to the time of his death on January 18, 1969;

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

Granted SRB, Jr.

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Now comes the defendant, by counsel, and notes unto the Court his exception to the order of the Court, entered on the 9th day of May, 1969, and to each order contained therein.

Willie C. Bagley

By: Aldine J. Coffman, Jr.

Filed
June 2, 1969
Geo. S. De Shazor, Jr., Clerk
By Clyde R. LaRue, D. C.

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page 123 } VIRGINIA: Hustings Court of the City of Newport News, Tuesday, the 3rd day of June, 1969.

* * * * *

This day again came the parties in person and by counsel, and the jury heretofore empaneled in this cause again appeared and took their seats in the jury box and after hearing the evidence of the plaintiff, the defendant, by his attorney moved the Court to strike the evidence of the plaintiff, which motion the Court doth overrule, to which ruling of the Court, the defendant, by his attorney, excepted, and the evidence, instructions of the Court and arguments of counsel being fully heard, the defendant, by his attorney, renewed his motion to strike the evidence of the plaintiff, which motion the Court doth again overrule, to which ruling of the Court, the accused, by his attorney, excepted, and thereupon the jury retired to their room to consider of their verdict, and after sometime returned into Court having found the following verdict: "We, the jury find the defendant, Willie Bagley, guilty of gross negligence and do award William Beverly Weaver, Administrator of the estate of Richard Bagley, deceased, plaintiff, the sum of ($15,000.00) Fifteen thousand dollars. Emery E. Smola, Foreman".

Whereupon the defendant, by his attorney, moved the Court to set aside the verdict of the jury as being contrary to the law and the evidence (and various other reasons assigned at the bar and urged for leave to argue same) and grant the defendant a new trial, and renewed his motion to strike the evidence of the plaintiff, which motions the Court doth overrule, to which ruling of the Court, the defendant, by his attorney, excepted.

Therefore, it is considered by the Court that the plaintiff recover against the defendant, the sum of Fifteen Thousand Dollars ($15,000.00), together with interest thereon after the rate of six (6%) per centum per annum from the 3rd day of June, 1969 until paid and his costs herein expended.

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ASSIGNMENTS OF ERROR

1. The trial court erred, in the ruling of the 7th day of May, 1969, in denying defendant's motion to strike the allegation of Paragraph One of the motion for judgment concerning damages for pain, suffering, and mental anguish, because said allegation as set forth in Paragraph One of the Motion for judgment failed to allege pain, suffering, and mental anguish, in language proper to put the defendant on notice that such were being claimed as damages.

2. The trial court, in its ruling of the 7th day of May, 1969, denying defendant's motion to strike Paragraph Two of the motion for judgment, which set forth, through the plaintiff, the claim of the United States of America, pursuant to Title 42, United States Code, section 2651-2653, erred because,

a) it allowed the plaintiff to assert a claim which was theretofore assigned to the United States Government; and

b) allowed *in* improper person the United

page 129 } States Government to obtain recovery in violation of Title 142, United States Code, section 2651-2643;

c) it created a situation in the Courts of Virginia wherein mutuality of parties was lacking by reason of the failure of the United States to submit to the jurisdiction of the Commonwealth so that set-offs, counterclaims and any other grievance of the defendant against the true party in interest, i.e. the United States of America, could not be asserted.

3. The trial court erred, in pre-trial ruling on the 2nd day of June, 1969, in allowing the defendant's plea of guilty (the charges or reckless driving arising out of the accident in litigation) to be admitted in evidence.

4. The trial Court erred in pre-trial ruling of the 2nd day of June, 1969, in asserting the propriety of depositions taken of the defendant subsequent to the death of the plaintiff, but prior to the revival of the action by petition and court order; which ruling gave the plaintiff's counsel wide license in their use throughout the trial, as evidence in-chief and evidence of impeachment, without delineating the use or instructing the jury as to their merit respective of their various uses.

5. The trial court erred in ruling that testimony on behalf of the defendant regarding another single car accident at the same location, striking the same abutment within approxi-

mately 4 hours of the accident in litigation, was inadmissible, with specific reference to testimony which would have been elicited from the witness, M.A. Cochran, who investigated both the accident in litigation and the subsequent accident, and of Mildred Herns, the driver of the car involved in the second accident, who was likewise present in court.

6. The trial court erred in over-ruling defendant's motion to strike the plaintiff's evidence in the case because such evidence failed to show any basis in law to allow the jury to determine the issue of the gross negligence of the defendant.

7. The trial court erred in over-ruling defendant's motion to set aside the jury verdict as contrary to the
page 130 } law and the evidence in this case because the evidence of the plaintiff was, as a matter of law, insufficient to allow the issues of the defendant's gross negligence to go to the jury.

8. The trial court erred in granting Instruction #1.
9. The trial court erred in granting Instruction #2.
10. The trial court erred in granting Instruction #3.
11. The trial court erred in granting Instruction #8.
12. The trial court erred in granting Instruction #10.
13. The trial court erred in granting Instruction #11.
14. The trial court erred in denying Instruction #D.
15. The trial court erred in denying Instruction #F.
16. The trial court erred in denying Instruction #I.
17. The trial court erred in denying Instruction #K.
18. The trial court erred in denying Instruction #N.
19. The trial court erred in denying Instruction #O.
20. The trial court erred in denying Instruction #P.

Given under my hand this 1st day of August, 1969.

Willie Bagley

By Aldine J. Coffman, Jr.,
Counsel

* * * * *

Filed
August 1st, 1969
Geo. S. DeShazor, Jr., Clerk
By Virginia Underwood, D. C.

page 1 }

* * * * *

Following is a stenographic transcript of the testimony in-

troduced and proceedings had upon the trial of the above entitled case in said court, on the 2nd and 3rd days of June 1969, before the Honorable Samuel R. Buxton, Jr., Judge of said court, and a jury.

APPEARANCES:

William J. Hoyle, Esq.,
Hoyle & Short
Counsel for Plaintiff

A. J. Coffman, Esq.,
Coffman & Coffman, and
Gordon Scott, Esq.,
Counsel for Defendant

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page 4 } IN JUDGE'S CHAMBERS

(10:15 a.m. Present: The Court, Mr. Hoyle, Mr. Coffman, Mr. Scott, and the court reporter.)

Mr. Hoyle: If Your Honor, please, I would like to cut this thing down and get rid of it in one day. I would like permission to explain to the jury why Mr. Weaver is here and I would like to ask permission of the Court to have Mr. Weaver, personal representative of the deceased, Richard Bagley, to be excused after my opening statement and my explanation to the jury as to why he is here and why he is allowed to leave. I think we would like, of course, to release him and let him go.

The Court: Do you have any objection to this?

Mr. Coffman: No objection.

Mr. Scott: It is my understanding you wish to put Sergeant Weaver on to testify that he did qualify on the first date, or whatever date it was, and it was just a perfunctory thing he did.

page 5 } Mr. Hoyle: I don't see any need to have him testify.

Mr. Scott: I just want to understand in my mind.

Mr. Hoyle: Will you stipulate he did qualify on the 21st day of March 1969?

Mr. Coffman: I will stipulate to that much.

Mr. Hoyle: In the opening statement I would like—and through the trial—there is to be no reference made to the heirs and beneficiaries under the statute.

It is as though it was awarded to him through the estate. Who the beneficiaries are or not would be the matter of another hearing before this or some other Court.

I just don't want anything brought up about that because I don't think it would be proper.

The Court: What is your opinion?

Mr. Coffman: I don't intend to bring it up but if it should come up through his witnesses, I will explore it

page 6 } further.

Mr. Hoyle: We are ready to go. We have some eleven, twelve, thirteen stipulations to bring up at the right time.

I understood Mr. Coffman had some motions, whether you wanted to hear them now or whether you wanted to hear them later.

Mr. Coffman: I think the two points are going to be coming up in Mr. Hoyle's statement.

First, I believe Mr. Hoyle intends to rely upon a plea of guilty to a case heard in Smithfield to reckless driving.

The admissibility of this plea of guilty I would like to review with the Judge, if he could, now.

The law with respect to it is whether or not we could send it to the jury at the present time.

The Court: All right.

Mr. Coffman: The issues for the defendant's plea of guilty, and his consequent conviction, with respect to the charge of reckless driving, be admitted as evidence in a

page 7 } civil case?

In 18 ALR 2d 1307—in that particular annotation and the supplement, there is no Virginia case cited supporting the position that the plea of guilty can be admitted in a civil case, to prove the point in issue. Other than two limited exceptions, there are no cases to be found in the Virginia law.

One is the Honaker case: 60 *Va.* (19 *Gratt*) 55, *Honaker* v. *Howe,* which has been overruled by implication, and the sole case involving a conviction of arson as a bar to a recovery under a fire insurance policy.

The only other case was a conviction of fraud for recovery.

These are two limited exceptions that Virginia has handled.

All the cases in the Commonwealth fall within the premises set forth in detail in 201 Va. 466, at page 472:

"In Virginia, the general rule is that a judgment of conviction or acquittal in a criminal prosecution does not establish in a subsequent criminal action the truth of

page 8 } the facts on which it is rendered, or constitute a bar to subsequent civil action based on the offense of which the party stands convicted or acquitted, and such judgment of conviction or acquittal is not admissible as evidence."

That is, I believe, the Dixie Van Line case.

In the case 200 Va. 385 and 201 Va. 466, we have not only a conviction of evidence but the Supreme Court acknowledged the fact that there was a plea of guilty to the charge in a subsequent conviction, and the Court held it to be inadmissible in civil suits in Virginia.

I have the two cases—comments noted—which we affirm or acknowledge the Court's reaffirming the history in criminal proceedings in the State of Virginia.

Now, the latest annotation in ALR 2d, Vol. 18, page 1258, which discusses the admission of conviction and pleas, and which takes a stand in favor of such admission, cites no Virginia annotation.

page 9 } There is found, however this comment at page 1290, 18 ALR 2d:

"It may be, however, reasonably argued that the rule of exclusion should be continued as to the conviction for minor traffic violations and other offenses of the kind, where the safeguard afforded the accused may be more or less perfunctory, and a moderate fine may be accepted as a matter of convenience, since such a conviction may be given undue weight in a civil action involving large sums of money."

The case at bar supports this very fear. The defendant pled guilty to one charge which was actually dismissed because that plea was so ill-advised.

In areas where there are statutes prohibiting the admission of convictions or evidence of convictions, these statutes have also been held to exclude evidence of the plea upon which the conviction was based.

I would urge the Judge to read the case; 201 Va. 466 is the latest law I can locate. It sets forth very

page 10 } forecefully the four reasons that the Court has held this way, the fact that it seems proceedings between two parties are not binding on a third party.

Mr. Hoyle: In the first place, he's missed the last citation, *Fulcher* v. *Whitlow,* 208 Va. 34.

First of all, I am trying to get in a plea of guilty made in proper person by the defendant to a charge of reckless driving in a criminal case.

One of our stipulations, and I think Mr. Coffman will

agree, was that he would not object to the fact that the record was not here.

I had prepared a subpoena directed to Mrs. Ida Chapman to produce the record here, so the stipulation—and we can get to it if you will look in the file itself—reads that the record is not necessary.

In 208 Va. 34, the plaintiff was not allowed to question the defendant as to whether or not she pled guilty for failure to yield the right of way, and they didn't allow
page 11 } them to question the State Trooper to show she entered the plea.

The reason was that the record did not show how the plea was but it merely showed a conviction.

In other words, the Court's making a distinction between a forfeiture and a finding of guilty by the Court.

I am not saying that a plea of guilty is *res judicata.* It is not a *res judicata* situation that I am guilty of something that is a matter of law in a subsequent civil suit. However, a plea of guilty shows a state of mind of the individual at the time that he made that plea. He thought that he was guilty. This can be shown.

Now, in the Fulcher case, the inference there is that it could have been shown had the record been there to sustain it, and I have got mine marked. I don't have it here. It is a most important case though, Judge, and I think it follows the Honaker case.

The plaintiff pleaded guilty. That is what hap-
page 12 } pened here. He pled guilty and was found guilty and so forth.

It is not *res judicata* but it is something for the jury to consider—what his state of mind was at the time.

I would like to call attention to the 201 case. It is true the Court says it is not admissible.

In that case, the defendant failed to appear and was convicted, and the Court said it was not a plea or forfeiture. They did not raise the question as a matter of fact that it was a declaration against interest. The failure to appear and forfeiture of the bond is a plea of guilty. They used the words in there.

You have read the 208 case?

The Court: Yes.

Mr. Hoyle: The trial court erred in the first trial by refusing to permit her to question the defendant as to whether or not she pled guilty to failure to yield the right of way and permit her to show that by the state trooper.

The situation arose in this manner. The defen-
page 13 } dant, as I understand you, pled guilty. They

couldn't contradict him without the record. I have also got a deposition in which the defendant admits this. I am not trying to contradict him.

In the discussion which ensued, it was disclosed in the records of the County Court that the defendant was convicted but did not show what plea was admitted.

They wouldn't let them ask the trooper what the plea was because that would be hearsay. "If the records don't show it, we will have to exclude it."

With reference to the stipulation that they would admit to the authenticity of the record without my having to subpoena Mrs. Chapman, that Dixie Lines case is utterly and completely separate from this case.

As I said, in that case the man failed to appear. He was convicted.

Well, I agree that you can't show a conviction of somebody else, but this is prior to statement if he denies it is a declaration against interest, it is showing the state of
page 14 } mind.

In 34 *S. E.* 2d 357, *Utt* v. *Herold,* et al; a West Virginia case:

"Court records showing plea of guilty in a criminal case, being a rebuttable admission of person entering such plea, may be admitted in evidence on trial of a civil action, if relevant."

Of course, if they can show that he can explain it, he can say why he pled guilty. He can attempt to explain it but we don't have the situation here like we have had before.

The man has pled guilty, and under the Honaker case, I submit, if Your Honor, please, that it is proper.

If you are not convinced, I would ask the Court to read the *Smith* v. *Dixie Lines.*

I think that is appropo, and I do know—for whatever it is worth—that both Judge Smith and Judge Garnett do allow it in *in* the proper person but not by reason of a forfeiture or conviction.

This is something he did and it is not as to the truth of whether he was in fact guilty of it, but that
page 15 } he pled guilty of it, and then he can explain it.

Mr. Coffman: Your Honor, this case we are referring to, the 208 case, I believe the language quoted was a quote from the trial court. We will have to exclude it.

The Supreme Court says, "We adopt the trial court's view, and that disposes of the assignment of cross-error."

The Court makes no opinion one way or the other. There is no prior law.

Again, pointing out in the case of 200 Va. 385, the Court held that there was a plea of guilty and a conviction—the technicalities of any foundation of inadmissible evidence. That is what the lower court was discussing—the foundations of the admissibility of any evidence. There is no right to the admissibility.

Sometimes with traffic accident cases, it gets rather serious, and in solving major criminal cases you have the problem of where the accused has to consider the
page 16 } civil liability of his criminal proceedings.

Therefore, the point is warped and should not be allowed to interfere.

The Honaker case and the Eagle case—in both cases the guilty pleas were to specific charges. One was to a specific assault and battery and the other to a specific burning of a building.

The charge of reckless driving is so varied that the plea of guilty does not admit anything specific to this accident.

So you have first a very varied statute, and having pled guilty to it, it will serve nothing in meaning to the case.

You have your sound Virginia law stated in 201 Va. 466. You have the case at 200 Va. 385, which mentions the plea of guilty. The Court acknowledges the plea of guilty, and it says the case is inadmissible.

You have a colored man of very low education. I believe he couldn't read or write. He pled guilty to the three charges.
page 17 } I think the stipulation so indicates that the judge, in spite of his plea of guilty, threw the charge out.

The Court: Did he have evidence of the man being ill advised?

Mr. Hoyle: I asked the Court not to convict, and I was representing the other man.

I might say that he cited 200 Va. You might look at that. That is not—in all due respect—what the case stands for.

The judgment in a criminal proceeding does not establish the true facts in a later proceeding. It is something to be considered along with other things.

You are talking about this man doesn't know what reckless driving means. I asked him—page 36 of his deposition, we asked him what reckless driving means, and he says, "Reckless driving means you are not driving right."

Mr. Coffman: I think he also says that he was driving when he had the accident. The deposition was not taken in the litigation.

page 18 } Notice was given after death. Death occurred and no change in status took place.

The Court: What else do we have?

Mr. Coffman: Again, I am going to have to give you this copy.

Mr. Hoyle, in talking to me, has indicated that he expects to put in evidence from a witness as to his estimate of what the speed of the vehicle was at the time of the accident.

I have cited a case in the brief, a late Virginia case, in which a University of Virginia professor was taken to the automobile and shown the automobile and shown photographs of the accident and studied the scene. At the end of the study he computed the speed.

The Supreme Court held that it was inadmissible, that the facts as to what happened, the condition of what happened—this was admissible, but this was the right of the jury to determine, and therefore, the testimony was inadmissible.

The Court: Don't we have to find out first

page 19 } whether he proposes to use such evidence?

Mr. Hoyle: This had to do with the brief. My particular case is: I have got Max Cochran out there, Chief of Police of Smithfield, and on his police report, he merely puts down there, "Estimated speed at time of impact, 90 miles an hour."

It goes 367 feet from a point of impact and hit, and from the circumstantial evidence he determined that the man was going 90 miles an hour at the time of impact.

I think it might be—in all frankness—I think he is absolutely wrong on the plea of guilty. I think that is inadmissible in proper person.

Mr. Coffman: I expect the officer wishes and intends to testify to this without being in response to any question.

I would like to point out in chambers that he is not to testify to such facts.

Mr. Hoyle: I haven't told him to say it.

page 20 } The Court: If it is improper evidence, I see no objection in the Court asking him not to testify as to improper speed.

Mr. Coffman: The notice, I believe, was given prior to death of the plaintiff. However, the deposition was taken during the interim and the reviving of the action by order of this Court in April.

This, as such, does not fall within the framework which allows the depositions to be taken during the course of litigation or before litigation begins for petition to the court for leave to do so.

Mr. Hoyle: If Your Honor, please, first of all, with ref-

erence to the deposition, unless he is gone, Willie Bagley, the defendant, was out there this morning, I don't have to rely on the deposition except from the standpoint if he varies from them, I can certainly use them to contradict him.

I think we relied on this some weeks or months ago. I think the Court has already determined and over-
page 21 } ruled—but the point is, if Your Honor, please, that the case was pending, of course, when my man was living, and I would have to get my pleadings out—I think the notice to take depositions was given immediately after he died. Frankly, I was afraid the defendant would leave.

This goes gack to the old question of whether this is a revival or a new suit. Well, it is not a new suit under all your rules which I think you have already determined. This is not a revival of a continuing action.

I certainly don't have to wait sixty days to do something so I served notice under the old rule.

If you look at 1 American Jurisprudence—and I am quoting—"Revival deals with the process necessary to carry on an action which does survive."

It is still surviving. It is not a new action.

Section 8-640: "If a plaintiff dies pending the action, upon suing, the action shall not abate." That means
page 22 } "die".

"But by reason of death, pleadings shall be in an amended action and the case proceed."

If you amend something, it is something that is existing. It doesn't drop and die.

Those two things, I think, are right on the point. I think the rules give you it and specify what you are to do.

Richard Bagley—obviously I can't call him—in an anti-collateral opinion case, in the absence of a witness who you can't get, the deposition may be read—even though it is a discovery deposition—as a *de bene esse* deposition.

He made certain mistakes on that, and he went to sleep. It is a prior inconsistent statement. Also being a deposition under oath where his wife and a member of the firm was there, who did not object to taking the deposition at the time and who cross examined her own client. Under no theory could this discovery deposition not be admissible.

He has already stipulated as to the authenticity
page 23 } of the proceeding.

I subpoenaed Mr. Schneider and released him because he testified that it was correct.

Mr. Coffman: It was not taken during the pendency of

the trial. The objection was not taken at the time because it is not necessary to take the objection at the time of the deposition. Our objection can be saved for later, which it has been.

I believe my wife was actually notified of the death of the plaintiff at the moment the deposition began.

The Court: I am going to rule that the depositions are proper. I don't think the action had abated, discontinued, when the suit was subsequently renewed by the qualification of the administrator.

I am also ruling that the plea in the traffic matter is proper evidence, and as to the police officer, I will tell him not to testify as to the speed of the vehicle in his testimony.

Now, do you have anything else?

page 24 } Mr. Coffman: I would like to note my exception to both the Court's rulings.

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page 26 }

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The Court: Is there any motion for separation of the witnesses?

Mr. Scott: So moved.

(Witnesses separated.)

Witness: I know nothing about this case.

Mr. Scott: We subpoenaed this witness, and if she has any remarks, I suggest that they be made outside the presence of the jury.

The Court: Just a minute.

(Jurors excluded from courtroom.)

page 27 } Witness: I don't have anything to do with this at all. I had an accident myself, I think, on this bridge, before these people—later or something—I don't know, but I know nothing about this accident whatsoever. I had nothing to do with it, and I have been instructed by my lawyer not to say anything because this has no bearing on my accident or this one whatsoever.

Mr. Scott: It is anticipated that the evidence will show this particular witness was—four hours after the accident which we are here on—this particular lady was the driver

of an automobile that struck the self-same bridge that it is alleged the defendant here struck, and we feel her testimony is going to be material in this case.

Witness: Why would mine do any good if I didn't see it?

Mr. Hoyle: I agree. I don't see where either one would have any relation to the other.

This had to do with the negligence of Willie
page 28 } Bagley. How they could relate what happened
at some different time or place, I don't understand.

Witness: I was subpoenaed Friday, I believe it was. This was left in my door. I found it stuck in the door.

I couldn't imagine what it was about, and I called my lawyer and he told me not to have anything to say.

The Court: Who is your attorney?

Witness: Hugh West in Suffolk.

Mr. Scott: Your Honor, I don't wish to reveal our line of defense at this particular point, but it is our opinion that this witness is material in this case.

Witness: How can I be a witness when I haven't seen anything and don't know anything about this?

The Court: They are trying to explain to you without going into the theory of their case, for you to testify that you had an accident and struck this abutment on the bridge,
even though it was four hours later.
page 29 } Witness: This one happened at the opposite end
from where I had my accident.

Mr. Scott: May it please the Court, I talked to the witness this morning and asked her whether it was the same abutment, and she advised it was.

Witness: I beg your pardon. I did not say that. If I was there and knew something about it, I would gladly testify. I have nothing to say. I had nothing to do with this accident and know nothing to tell and nothing to say. I don't think I should be here to testify against something I know nothing about.

The Court: When did you have your accident?

Witness: 14th of July.

The Court: Where?

Witness: Pagan Creek Bridge.

The Court: How long is this bridge?

Witness: That I couldn't tell you.

The Court: Could you estimate?

Mr. Hoyle: About 300 feet, more or less. I don't want
to take that as a fact.
page 30 } Mr. Scott: The bridge itself is 467 feet long,
Your Honor.

Witness: I was leaving town, going—

The Court: Which direction was the defendant traveling?

Mr. Scott: The same way my client was traveling.

Mr. Hoyle: I don't believe you can let this lady testify as to her hitting the bridge. The defendant is being charged with an act of negligence, not this lady.

I am sure there's been hundreds of accidents—that bridge has been there for hundreds of years. As to the conditions of visibility, what the conditions of each driver, it would be completely inadmissible that somebody else had some accident—as to the standard of care that is required of this defendant here. She may or may not have had her own standard of care.

page 31 } The only person on trial here today is Willie Bagley, and if he wants to describe the physical conditions, Mr. Cochran can do that.

Witness: I had rather get in touch with my lawyer because he advised me to say nothing.

Mr. Scott: We are not in any way alleging that she is at fault in the accident.

The fact it was an accident—the time was very close to the time of our accident. The car was proceeding along the same highway and, in fact, on the same bridge.

Witness: I know nothing about that.

The Court: He just simply wants to ask you in effect as to whether or not you had an accident on whatever day it was, and if you were going in a certain direction, and what you struck in your accident. That's all.

Witness: What has that got to do with this, Your Honor?

The Court: He's trying to show maybe it's a condition of the bridge.

page 32 } Witness: I have been through a whole lot and I have got an appointment with my doctor today, and I can't see why I have got to go through all of this again.

The Court: Let the Court explain to you this way: while you may not see why it is necessary you have anything to do with the case at all, it is really not for you to decide. It is up to the attorneys and I can't see how there could be any objection on your part to mention the time you had your accident or how you struck the bridge or what.

If you cannot remember, all you have got to say is you cannot remember.

Witness: I do not know.

Mr. Hoyle: I am going to object to it at this time, and I am certainly going to object at this time to even letting this lady stay, because I could not conceive—I knew nothing

about that—I cannot conceive how what this lady did could be admissible in evidence.

I want to make sure that the Court might instruct these gentlemen in their opening statement, that they page 33 } are not to mention there has been any other accident. It has nothing whatsoever to do with this.

If they can't show by Virginia law that they drove back there forty miles an hour and bring in physicists to estimate this or that, she can't testify to that.

She had an accident on that particular bridge that particular night, with different people.

The only question before the Court is whether or not this man was negligent in a matter to make him liable in a civil matter.

The Court: I don't know, but can you answer his argument as to why it would be immaterial?

Mr. Scott: I am somewhat taken aback by Mr. Hoyle's attitude.

I do not wish to reveal the theory of my case. I am under no compulsion so to do. However, this witness, I think, is very material to the case, as will become evident later on in the case, and I am willing to make this offer: that page 34 } this witness should remain. If she wants to get her lawyer here, that is fine with me.

I think she does have information pertaining to this particular law suit, which is germane, and I feel this witness ought to remain and give testimony in this particular cause.

If she has any legal reason why she should not remain, I will be glad to listen to it or her lawyer on it.

Witness: I have had my trial and my lawyer has told me not to say anything, and that is all I know what to do.

The Court: I would suggest, sir, that you talk to her attorney. If he's instructed her not to answer any questions, if you can talk to her attorney as to what questions you propose to ask her and then, if he is agreeable, then he can tell her if it is all right to answer those questions.

We will recess for a few minutes.

(Court in recess.)

The Court: Mr. Scott, were you able to reach her page 35 } attorney?

Mr. Scott: Your Honor, I was able to reach her attorney, and her attorney has instructed her it is all right.

Mr. Hoyle: For the record, I object to keeping her. I will at the proper time object to any evidence from her.

I will also ask the Court, because I can anticipate what

her evidence will be, that no statement be made in an opening statement to the jury about any other accident that night from any other car.

We have got here a case involving Willie Bagley, and the question before the Court is his standard of care at the particular time of this accident, and I will subsequently ask the Court at that time to have them properly reproved because I am going to certainly object to any evidence from her out of the presence of the jury.

I think that untold damage prejudicial to the plaintiff will be done if they are allowed in their opening
page 36 } statement to bring out evidence very prejudicial to our case, nor will they discuss it.

The Court: All right. If you will go into the witness room.

(Witness leaves courtroom.)

The Court: I don't know who to address as counsel for the defendant.

Mr. Scott: I will be making the opening remarks.

The Court: What is your position?

Mr. Scott: Your Honor, I will make no reference to this lady's accident in my opening remarks, and no other accident on that bridge, except this one.

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WILLIE BAGLEY, Defendant, called as an adverse witness by Attorney for the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Examined By Mr. Hoyle:

* * * * *

Willie Bagley

page 39 }

* * * * *

Q. Did you, on the 8th day of November 1968, appear before the trial justice in the town of Smithfield and plead guilty personally to a reckless driving charge?

Mr. Coffman: This question is most leading, and I object to it in the present form.

page 40 } The Court: I just ruled you don't have the right of cross examination until he proves adverse.

Mr. Hoyle:

Q. Did you appear in Smithfield in the Trial Justice Court on November 8th?

A. Yes, sir.

Q. Why did you appear?

A. Because my aunt told me to—I had to go to court.

Mr. Hoyle: I didn't understand you.

The Court: He said his aunt told him he had to go to court.

Mr. Hoyle:

Q. Were you charged?

A. She just told me I had to go to court, and when I got there, they locked me up.

Q. In that court, were you charged with a traffic offense?

A. Yes. I found later on what I was charged with.

Q. Did you find out in court?

A. Right.

Q. What were you charged with?

page 41 } A. Leaving the scene of an accident and no driver's license.

Q. You were charged with reckless driving?

A. Yes, sir.

Q. How did you plead?

A. Well, I pled guilty to it because I had a reason why I pled guilty.

Q. Have you talked to these two gentlemen?

A. Yes, and I told them why I pled guilty.

Q. Why did you plead guilty?

Willie Bagley

A. Because I had four years parole, plus if you plead guilty, you won't go back to the penitentiary.

You asked my why did I plead guilty. Because I'm out on four years parole.

Like I said—well, if I pled guilty, I might come out a little better, plus no driver's license. He could have sent me to the penitentiary.

Q. Who told you that?

A. The judge.

Q. As a matter of fact, was I there?

A. Yes. You was there.

Q. I did not represent you, did I?

Mr. Coffman: He is leading the witness.

page 42 } Mr. Hoyle:

Q. Do you remember giving a deposition in my office?

Mr. Coffman: I object, Your Honor.

Mr. Hoyle:

Q. On the 28th day of January 1969, before Mr. Morris Schneider, and swore to it?

Mr. Hoyle: This has been stipulated, Your Honor.

Mr. Coffman: Your Honor, there is no reason for putting this in evidence at this time.

Mr. Hoyle can ask the witness what happened but the leading questions as to documents not in evidence is not permissible.

The Court: He asked if he had been in his office, taking depositions.

Mr. Hoyle:

Q. Were you in my office taking depositions?

A. I was there.

Q. Were you sworn?

A. Yes.

Mr. Coffman: Are you laying a foundation for

page 43 } this?

The Court: He hasn't offered to submit the document yet.

Willie Bagley

Mr. Hoyle:
Q. At the trial in Smithfield, who was present?
A. What you mean, the lawyer?
Q. Name the lawyers who were present.
A. I don't know the lawyers' names.
Q. Was I there?
A. Yes. You was there.
Q. Was Richard Bagley there?
A. Yes. He was there.
Q. Was Clinton Johnson, the man who owned the car, there?
A. Yes.
Q. Was a man by the name of Joe Louis Bagley there?
A. I wasn't at his house, but he seen me later.

The Court: Was he at the trial?
A. Yes, sir.

Mr. Hoyle:
Q. Were you driving the car on the 13th of July 1968 in which you and Richard Bagley were riding?
page 44 } A. Yes, sir.
Q. Do you remember anybody intervening on your behalf in that court so that you wouldn't get convicted of a felony?
A. You spoke up for me while the court was going on.
Q. I did not tell you to plead guilty, did I?
A. Like I said, I just explained why I pled guilty.
Q. Would you tell these gentlemen what reckless driving is?

Mr. Coffman: I object to that question.
That calls for an opinion.
The Court: I will let him answer what his opinion is.

Mr. Hoyle:
Q. What is your opinion of reckless driving?
A. I really don't know. I can say what the judge said reckless driving was—no license, speeding, or leaving the scene of an accident, or something like that. I really don't know.
Q. Do you remember the answer that you gave in my office to that in January 1968?
A. No, I don't. You can read it off to me.

Willie Bagley

page 45 } Mr. Hoyle: If Your Honor, please, I would like to now introduce this and read off his answer.

Q. Did you not say then that "Reckless driving means you are not driving right."?
A. If I give you a statement, I can't recall it.
Q. You don't deny it, do you?
A. If I give it to you.
Q. Do you agree that reckless driving means you are not driving right?
A. If a person has a reckless driving, quite naturally—
Q. You knew that when you pled guilty to reckless driving in Smithfield?
A. I knew the effect of it, but like I said, I am out on four years parole.

* * * * *

page 46 } Q. When did you first see Richard Bagley, your uncle?
A. That Friday night.
Q. What did you decide to do?
A. The next day we went to Longshoremen's and got off.
Q. He worked at Longshoremen's?
A. Not that much. He didn't have any permanent job. I used to go catch Longshoremen's at the same time he did.
Q. What did you all do when you went Saturday morning? What did you do then?
A. We decided we would go home.
Q. Where is home?
A. Actually it is in Holland, but we went to Whaleyville.
Q. Your daddy lives in Newport News, doesn't he?
A. He lives over there. My daddy lives here.
Q. You testified in January you lived at 2614 Wickham Avenue?
A. Yes, sir. I was on parole, but then he transferred over there.
page 47 } Q. Don't you mean your grandmother's home in Whaleyville?
A. Actually my uncle and grandmother lived over there.
Q. Your grandmother was Richard Bagley's mother, is that right?
A. Yes, sir.
Q. You decided to go to Whaleyville? What did you do at Whaleyville?

Willie Bagley

A. Went over to visit my people. I hadn't seen them in about five and a half years.

Q. You saw—who did you see there?

A. My grandmother, uncles, cousins, first cousins and friends.

Q. Did Richard see your family too, the same group?

A. Yes, and then I goes to my uncle's house and gets a hour's sleep.

Q. You went to sleep while you were in Whaleyville in the afternoon?

A. Right.

Q. Richard knew you went to sleep, didn't he?

A. I don't know because when he and June took off, I was messing with the horse. When he came back,

page 48 } Robert came in the house and woke me up.

Q. While you were down there, did you all have anything to drink?

A. Not that evening—early in the morning, we had a bottle of beer apiece.

Q. That's all you had?

A. Yes.

Q. That's all Richard had?

A. I'm pretty sure.

Q. You only had one beer?

A. Yes.

Q. You weren't drinking and intoxicated?

A. No.

Q. Now, what time did you all decide to leave Whaleyville?

A. I guess about 8:00 or 8:30.

Q. Are you talking about the evening?

A. It might have been a little later.

Q. Who drove down with you?

A. I drove down there, but like the guy riding, he drove it home.

Q. Where is home? Whaleyville?

A. Yes.

Q. Are you sure of that?

A. Positive.

page 49 } Q. Richard was in good physical shape before this accident, wasn't he? Nothing wrong with him, was it?

A. My point of view of saying this—like, I won't say he was—well, I remember the time he started running his mouth, I could tell he had been drinking.

Q. Was he drinking on this trip?

Willie Bagley

A. I say if he was running his mouth on this trip.
Q. Didn't you say then—what time did you all leave Newport News?
A. We left Newport News Saturday morning.
Q. About what time?
A. It was after 7:00.
Q. In the morning?
A. Yes.
Q. And you said he had one bottle of beer and that's all you all had that day?
A. Yes.
Q. And he didn't appear to have anything to drink?
A. When I give him my car keys, but any time he started running his mouth, he had been drinking.
page 50 } Q. Do you remember back to this deposition, this question: "You each had one bottle of beer?"
The answer: "Right."?
A. I remember telling you that.
Q. Do you remember the question: "You weren't intoxicated?"

Answer: "Neither one of us."?
"That's between quarter of 12:00 and 1:00 o'clock? You can count the hours between?"

A. During that time.
Q. You are changing your testimony now, is that right?
A. I want to answer what you asked me. I forgot about that. I should have wrote it down.
I forgot.
Q. What caused you to hit the bridge?
A. A hump in the road.
Q. How fast were you going?
A. You asked me this before. I didn't know. I still don't know.
You said forty or fifty-five. You or him asked me.
I still don't know how fast I was going.
Q. When did you decide you hit a hump in the
page 51 } road?
A. Because I felt it.
Q. Have you seen Chief Cochran?
A. He said I talked to him at that accident. I don't remember.
Q. Do you remember telling him you went to sleep?
A. No.

Willie Bagley

Q. Do you deny it?
A. I am going to deny it because I don't think I went to sleep.
Q. Did Willie know where you had gotten this car?

Excuse me, Richard. You all didn't discuss where you got the car?
Mr. Hoyle: If Your Honor, please, I am taking it as adverse because he changed the story here today.

A. I told you the man didn't ask me anything. I think I had a hole in my head if they talked to me, so it's not that I am changing my testimony, anything like that.
Q. On page 35, do you remember my asking you: "Why were you in a hurry, Willie?"

page 52 } Answer: "I wasn't in a hurry. I didn't know the speed limit. I thought the speed limit was fifty-five, and that's what I was driving."

Do you deny that?
A. I am not going to say.
Q. Now, you say, I am suggesting you are doing forty or fifty-five. Are you trying to accommodate me?
A. I am not trying to accommodate you. I just thought the speed limit was fifty-five.
Q. And that's what you said you were going?
A. I don't know what I said.
Q. Did you have on high or low beams?
A. I guess high beams. I don't remember.
Q. You don't remember much about your depositions, do you?
Incidentally, and I will come back—on page 11, I think, I asked you: "Richard was in good physical shape at that time, before the accident? Nothing wrong with him?" Do you remember that?

page 53 } Mr. Coffman: This document which Mr. Hoyle continually refers to may be placed in evidence properly, if the proper foundation is laid, but to raise questions that the document may tend to contradict, to read it into evidence—let him ask Mr. Bagley the question. If the question contradicts the documents, that is the time to bring the document up.
With no answers at all from Mr. Bagley, he says, "Isn't that the answer you gave to such and such a question?"

It has not been ruled on. I have several objections to it.

Mr. Hoyle: I will read to Your Honor the stipulation.

Mr. Coffman: I am going to object to that.

Mr. Hoyle: I am moving now for the admissibility as to the depositions, the original, in the court record, and I will be happy to have the Court follow me if there is any question about my reading these questions and answers correctly.

Mr. Coffman: I do not believe you have ruled on the document or its admissibility at this point.

The only way it would be admitted as a document would be on the contradiction of the witness.

page 54 } He is reading questions, giving answers, and asking the witness: "Isn't this what you said?"

The Court: I understood when he asked the witness as to what the previous physical condition of the deceased was, he said he could tell when he was running his mouth, that he had been drinking.

Now, he is asking him to refresh his memory, and I don't think that is improper.

Mr. Hoyle:

Q. Do you remember the answer you gave in January 1969?

A. Like I said, if I gave you an answer on that, I am not going to say I didn't give you one or did you give you one.

Q. The record says, "Nothing wrong with him."

Do you agree that is what you said?

A. I am not going to say.

Q. Do you agree that he was working as longshoreman?

A. I should have told you he caught corners, because that's what he did. I do know that's what he did.

Q. Do you remember I asked you a minute ago

page 55 } what lights did you have on?

A. You asked me high beam or low beam. I told you I didn't know.

Q. What did you say?

A. Just a few minutes ago?

Q. Do you know now what you had on?

A. I still don't know. I said I had them on high or low beam.

Mr. Hoyle: I will vouch for the record that he had on high beam.

The Court: I understood him to testify that he didn't know.

Willie Bagley

Mr. Hoyle:

Q. Do you remember back on the deposition again in January, the question: "Did you have your lights on?", and your answer was, "Right."

"Were they on high beam or low beam?"

Answer: "Low beam."

Do you deny that?

A. I might have told you.

Q. Was it true?

A. Did I tell you it was low beam?

Q. That's your answer.

A. I am not sure.

Q. You told the truth then, didn't you?

page 56 } A. I called myself telling it. Sometimes a person will be a little nervous sometimes.

Q. Were there any cars coming towards you at the bridge at that time?

A. I don't remember.

Q. You don't remember much of anything you remembered in January. Do you remember page 20, line 23? Question: "Were there any cars coming towards you as you approached that bridge?

Answer: "No."

Do you remember that?

A. You wrote all this stuff down.

Q. I didn't write anything down.

A. If I told you this, I might have told you this. I am not going to deny I told you any of the words.

Some of them I might have told you and some of them I might not have.

Q. I ask you the next question: "Were there any cars behind you?"

Do you remember your answer then?

A. I think I said no.

Q. That was the truth then, there were no cars behind you? Is that right?

A. I don't think.

page 57 } Q. Were there any in front of you?

A. There was none in front of me.

Q. There were not any in front of you.

What was Richard doing as you left Smithfield, going towards Surry and Pagan River Bridge?

A. I think I said he was laying over by the door and I think he was asleep.

Willie Bagley

Q. When did he go to sleep?

A. I don't know exactly, but I know he was catching a little snooze coming through Suffolk.

Q. He was still asleep when you came through Smithfield?

A. I think we was in your office then, and the things you asked me, I think I told you I was pretty sure of what you asked me.

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page 58 }

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Q. All right. When did Willie go to sleep? Did he go to sleep before he got to Suffolk?

A. I don't know where he went to sleep, before Suffolk or not.

Q. He was asleep at the time of this accident?

A. If he was asleep during the accident, why did he get out of the car?

Q. I am asking you whether he was asleep? Do you remember testifying before?

A. I don't know if I knew he was asleep. If I told you he was laying up side the door, catching a little snooze. During the accident, right at the spur of the moment, I don't know whether he was asleep or not.

Q. Do you remember page 12? "All right. When did Richard fall asleep?"

Do you know your answer?

A. No, I don't.

Q. "I guess on the other side, when we left Whaleyville, I guess a little before we got to Suffolk."

A. If you have got it down there.

page 59 } Q. That's true then? "He didn't wake up before you got to Suffolk and he didn't wake up after that, did he?

Do you remember your answer then?

A. No, sir.

Q. Your answer is line 6: "No, but one time we got out of Suffolk and through Suffolk, and I told him and he went back to sleep."

That's true, isn't it? He was asleep before this accident and when it happened, wasn't he?

A. I'm not for sure he was asleep all the way.

Willie Bagley

Q. The next question, Line 9, page 13: "He didn't wake up again until after the accident, is that right?"

Line 11, answer: "Right."

Is that your answer?

A. I can't say that because like, during the accident, and the officials told me I had left the scene of the accident and they caught me the other side of Smithfield, and I can't say whether he was still asleep.

I don't remember leaving the accident. I don't remember them talking to me. I don't remember the sheriff taking me back to court.

page 60 } Q. You remember your answer on January 28th?

A. I don't remember telling you that he was asleep during this accident, that split second.

Q. I will vouch for the record on page 13: "He didn't wake up until after the accident, is that right?"

Answer: "Right."

Q. Did he have anything to do with your driving?

A. No.

Q. He had nothing to do with your driving? You had been driving properly up to Smithfield?

A. I think so.

Q. Your car behaving properly? Lights on?

A. Yes.

Q. Brakes work all right?

A. Yes.

Q. You hadn't had but one beer that morning?

A. No.

The Court: Let him answer. You are talking and he is talking.

A. I remember hitting this hump. When I landed, it was on the top.

Mr. Hoyle:

Q. When you left Suffolk, where were you go-
page 61 } ing?

A. I was going to see my aunt in Smithfield, down towards Bailey's Beach.

Q. It would be past Smithfield. In other words, you would have to go through Suffolk on the Surry Road?

A. I don't know the name of the road.

Q. You keep going and don't come to Newport News?

A. That's right.

Willie Bagley

Q. I asked you incidentally a while ago, how fast were you driving?

I found it now.

"How fast were you driving?"

A. I give that officer on that. I think I got on bail—I don't remember. I think I talked to the chief. He said, "Approximately forty or fifty-five", something like that. I think I said fifty-five. I know I wasn't speeding.

Q. On the 18th of January, you already had been tried and you had already pled guilty to reckless driving?

A. Yes.

Q. On January 18th in my office, you weren't under any pressure?

page 62 } A. That's where I got some of my answers, from in the courtoom. Some of the answers I give you, like how fast I was driving, I got them out of the courtroom.

Q. Didn't you say about fifty-five?

A. That's what I said. I wasn't speeding. I know that.

Q. You could have been going faster than that, couldn't you?

A. No.

Q. You know that on the 8th of November in the police station, in the presence of Mr. Cochran, after you had already been found guilty, you said you were doing fifty-five miles an hour?

A. I said I didn't know how fast I was driving. I said the same thing.

Q. Do you know what you told Mr. Cochran over there why this accident occurred?

A. Yes.

Q. What did you tell him then?

A. I hit a hump going on the bridge.

Q. Do you remember telling him you went to sleep?

A. I don't remember telling him I went to sleep.

page 63 } Q. Do you deny that?

A. Yes.

Q. I warn you, I am going to impeach you by bringing Mr. Cochran here and have him testify that you told him that the reason you hit the bridge is you think you went to sleep. I give you a chance to change your answer if you want to change it.

A. I can't change it because I don't believe I went to sleep.

Q. You deny telling Mr. Cochran that?

A. I don't believe I told him.

Willie Bagley

Q. You deny it, right?
A. Yes, sir.
Q. Now, did you know this road?
A. I had been down that road quite a few times. It's been quite a few years since I went over it, about ten years.
Q. What was the condition on this night of July 12th or 13, 1968. What was the condition of the road as you approached the bridge?
A. I am going to be honest with you. All them roads over there is pretty bad.
Q. Do you know how many lanes there were to it?
A. I am pretty sure it's two lanes.
page 64 } Q. Are they marked with lines, or do you remember?
A. I think there is one white line in the center.
Q. Are there any on the side?
A. I didn't pay attention to that.
Q. Can you tell me what the speed limit was?
A. I still don't know, but they say forty miles an hour.
Q. When did it become forty miles an hour?
A. I don't know that either.
Q. What is the speed limit in the town of Smithfield?
A. I think it is twenty-five. I am not sure.
Q. Do you remember seeing the sign?
A. I seen the sign, but I didn't pay no attention. Any human being knows in the city you drive slowly.
Q. Do you remember when it became fifty-five?
A. No.
Q. Where is this hump?
A. Not too far from the bridge—ten or fifteen feet.
Q. Before you come on the bridge?
page 65 } A. Before I come on the bridge. Like, when I hit that hump, the whole car come up. When it landed, it landed on this side of the bridge.
Q. Is that hump—I think you mean something that comes up instead of something that goes down?
A. I don't know if the road has been repaired or what, but I know I hit something and came up off the bridge.
Q. As you came out of Smithfield, this is more than a few hundred feet out of the edge of Smithfield?
A. I think so.
Q. What speed were you coming out of the town of Smithfield?
A. I don't know.
Q. Richard was asleep, wasn't he?

Willie Bagley

A. He was laying in the corner. If he wasn't asleep, he was playing 'possum.

Q. His eyes were closed?

A. Yes, sir.

Q. Did you fall asleep?

A. No.

Q. Do you remember—back in my office again on this little deposition of January 18th, page 16, line 3—"Do

page 66 } you remember hitting the hump?"

Answer: "Yes. I remember hitting the hump."

Q. "Were you awake or asleep?"

Answer: "The only thing, I don't think I was asleep, but I was tired, you know."

A. I said I was tired.

Q. You don't deny it then?

A. I told you how it was. I was tired. I know I wasn't asleep. I had worked sixteen hours.

Q. You had worked sixteen hours the day before and had been asleep all that afternoon at your grandmother's?

A. I went over there Friday, and this happened on Saturday night.

Q. Did you apply your brakes as you came out of Smithfield?

A. No, sir.

Q. You did not?

A. No.

Q. Did you decrease your speed or increase it?

A. I know I didn't leave Smithfiled driving fast. I don't know how fast I was driving. I was driving fifty-five or possibly fifty. I know I wasn't driving over that

page 67 } because I don't think I was running that fast.

Q. Incidentally, did you make a statement to the police officer by the name of Lieutenant Tolbert in the Newport News Police Department, and sign it?

A. Say what?

Q. I asked you: did you make a statement to a Lieutenant Tolbert of the Newport News Police Department in reference to this accident?

A. I made one but I don't think this here would take a part of this accident because this was supposed to have something to do with a stolen car.

Q. Do you remember signing the statement?

A. Yes, I signed one for him.

Q. You did sign one?

A. For him, yes.

Willie Bagley

The Court: He said he gave a statement.

Mr. Hoyle:

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Q. I believe you stated with reference to your plea, that you pled guilty because you were on parole and you were afraid of what was going to happen to you?

A. I didn't want to go back to the penitentiary because I was already involved with the parole man.

Q. Do you remember in my office, in your depositions again in January, referring to this trial which I believe was November 8th, "Who told you to plead guilty to reckless driving?"

Answer: "Didn't nobody tell me."

A. I still had my reason.

Q. Do you remember your answer was: "I did it because I never come to think about lying."

A. I'm sorry. I couldn't hear you.

Q. The answer: "I never come to think about lying about something. Why should I tell a lie?"

That was your answer in January?

A. Yes, sir.

page 77 } Q. So you weren't going to lie about what you said in January?

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page 79 } Mr. Hoyle:

Q. What kind of night was it on the 13th of July, clear or rainy, dark, foggy, or what?

A. I'm pretty sure—I think it was fair.

Q. It was fair. Was visibility good?

A. I think so.

Q. Were both of your headlights working on that car?

A. I guess so.

Q. Don't you know?

A. No.

Q. Could you see?

A. I could see but I was—maybe you have one on and blink

your lights and one goes. I don't know for sure. If you could blink one at high beam, one of them might be on and one of them might be out.

I know the light were on. I am pretty sure it was on.

Q. There were no cars coming, were there?

A. No, sir.

Q. No cars behind you? Nothing behind you between you and the bridge?

A. Nothing but the hump?

Q. And Richard was asleep?

page 80 } A. He was playing 'possum if he wasn't.

Q. His eyes were closed and he was laying back?

A. Yes.

Q. You were doing fifty-five miles an hour to the best of your recollection?

A. That's what I said.

Q. Is it true?

A. Yes, sir. I guess so. I am not for sure what I was doing.

Mr. Hoyle: If Your Honor, please, I have no other questions of this witness, but I would like to have the opportunity and right to call him back, if necessary.

The Court: All right. Do you want to cross examine now?

Mr. Coffman: I will ask him some questions now and call him as the defense witness.

CROSS EXAMINATION

Examined By Mr. Coffman:

Q. Mr. Bagley, you were in a deposition taken on January 18th. You were asked questions leading up to the accident. Directing your attention back to that afternoon, those conversations, those questions, I want to ask you how did the accident occur? What did you say then?

page 81 }

A. During the time the officials picked me up, I don't remember that I give them a statement, don't remember them talking to me.

Q. This is after the accident and you don't remember giving them a statement?

A. I don't remember nothing. The only thing I remember, I woke up in Riverside Hospital three days later.

Willie Bagley

All I know, I was walking around. I don't remember giving no statement.

Q. Before the accident, right before the accident, tell the jury what caused the accident.

A. Well, the hump was in the highway. I know it was a hump in there, and I came across it and came down, flipped over on the side of the bridge.

Q. Did you make that same statement on January 18th?

A. Yes, sir.

Q. Did you make the same statement to Detective Tolbert on the 19th of July?

A. The same guy that took me to the court. He said I had give a statement before that.

page 82 } Q. They were referring to another statement?

A. A statement of the accident that night.

Q. Then you made a statement that Mr. Hoyle was showing?

A. Well, the one he showed on the piece of paper by itself, no, not that. The one that was typed.

Q. That was in the matter in Newport News—not this case.

Q. Before the accident; twenty-four hours—10:30 on Saturday night—

Mr. Hoyle: Is he taking him as his own witness?

Mr. Coffman: You have covered the area on your own examination.

The Court: He has the right to examine him now.

Mr. Coffman:

Q. On the 18th of January, were you working?

A. That was my regular job. My regular job was Peninsula on 48th Street. I worked there that day, and I was working—came down on the second shift.

Q. You worked eight hours and took the second

page 83 } shift?

A. Yes.

Q. When did you get off the second job?

A. About 1:00 o'clock.

Q. Saturday morning?

A. Yes.

Q. Did you sleep at all Saturday morning before you left for Whaleyville?

A. No, sir.

Q. You did sleep at Whaleyville that afternoon?

M. A. Cochran

A. At my uncle's house, yes.
Q. What was your uncle's name?
A. Robert Bagley.
Q. You left Whaleyville at what time that evening?
A. I would say 8:00 or 8:30. I don't know exactly.
Q. Was it dark?
A. Yes, sir.
Q. And you drove to Smithfield?
A. I drove to Suffolk, from Suffolk to Smithfield, and from there—from Suffolk to Smithfield, through Smithfield, going towards Bailey's Beach.

Q. To the best of your knowledge, your head-
page 84 } lights were working?

A. I think it was working. I don't think they was off.
Q. The brakes were working all right?
A. I stopped out of Smithfield and the lights was working. The brakes was working.
Q. When you left Smithfield before you reached the bridge, what was the highest speed you reached? Do you remember?
A. I know I wasn't driving at the top speed. I estimate forty to fifty-five miles an hour. I don't believe I was a mile over that. I might not have been driving that. I don't know for sure, but I know it wouldn't be over fifty-five.
Q. How many times have you driven that road?
A. Quite a few times.
Q. In the last few years?
A. In the last ten years—
Q. Had you driven it much before the last couple of months before the accident?
A. No. It had been ten years since I been over it.

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M. A. COCHRAN, witness called by Attorney for the Plaintiff, having been first duly sworn, was examined and testified as follows:

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M. A. Cochran

page 105 }

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CROSS EXAMINATION

Examined By Mr. Scott:

Q. Chief, I believe you testified that the vehicle struck an abutment on the bridge, is that correct?

A. Yes, sir, on the right hand side.

Q. What was the size of this abutment?

A. Well, my measurements show it to be nine by twelve, and thirty-two inches high.

Q. And you say some concrete was missing from that abutment?

A. Yes, sir, down towards the bottom of it.

Q. About how far up or down?

A. I didn't measure that, but I would say about a foot of it was gone, just knocked right out where the car hit it.

page 106 } Q. You say a foot of it?

A. Long, yes. Long, not deep.

Q. How deep was the gash?

A. That I don't know.

Q. Can you estimate?

A. I couldn't say because I didn't measure it.

Q. Didn't you think this was pertinent?

A. I tried everything I could to get the man off the bridge, but I made the measurements the next morning. I measured where the car landed that night before it was moved.

Q. The question was, Chief, didn't you think the gash in the concrete was pertinent?

A. I probably could have been.

Q. You say again, it was thirty-two inches high, is that correct?

A. Well, the abutment is thirty-two inches high, and it's about nine by twelve inches, and it's some railings goes through each one of them.

Q. Was it reinforced concrete?

A. That I couldn't say because I'm not a concrete man.

Q. Thirty-two inches tall? About that tall?

(Mr. Scott indicates measurement.)

M. A. Cochran

page 107 } A. Thirty-two inches tall is what I measured.

Q. You say about a foot off the ground was a gash?

A. Wasn't quite a foot off the ground, up on the column a ways and about a foot long, where it was chipped out, it was about a foot long.

Q. The bottom of the gash, sir, how far off the ground was it?

A. I couldn't say.

Q. Was it more towards the ground?

A. More towards the ground.

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page 111 }

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Q. How are you so sure he hit the abutment?

A. By the debris and the part of the car at the abutment.

Q. What was there?

A. The chrome and stuff.

Q. How did you determine it was from this particular car?

A. Well, it wasn't any other on the bridge, and they picked it up.

page 112 } Q. Did you try to match the chrome to the car?

A. No.

Q. Explain to me, if you will, if this car bounced some ten to fourteen times over and over again, how is it this damage is so slight?

A. I can't tell you that. I don't know.

Q. What you are telling us, that the car bounced over and over like that was mere conjecture?

A. That's the only way I could figure it got up there, because there was no scratch marks up to twenty-five or thirty feet and it was laying on its top when I got there.

Q. Chief, the fact of the matter is, you merely made a conjecture that this particular automobile hit that particular abutment?

A. No, it's no guess. I was there in five minutes after it happened. I know what happened. I know where the car hit, and I know where the car stopped at.

Q. Would you please tell me why, if this car is still headed

north, the car is on its back—top—and why is it that—that is, the right hand side of the car hit the right abutment of the bridge—it was traveling north—you don't
page 113 } know how far down the gash mark is?

A. No.

Q. You didn't take a picture of the back of this car?

A. No.

Q. As a matter of fact, this car which kept turning over and over and over still had one headlight on?

The glass in the headlight wasn't even broken?

A. Sir?

Q. Is that what you are telling this Court? You are telling me what you thought might have happened?

A. No. I am telling you what I know, Captain.

Q. My name is Scott. I would appreciate your referring to me that way.

You say you know that is the way it happened. Yet you took this picture yourself?

A. No, I didn't take the picture myself.

Q. It is an accurate representation of the car after you saw it?

The picture was taken while you were there?
page 114 } A. Yes.

Q. The car had not been moved?

A. No. The car had not been moved.

Q. This is the same car involved in the automobile accident?

A. Yes, sir.

Q. A while back, I believe you testified that this was the only accident which occurred that evening, is that correct?

A. That was the first.

Mr. Hoyle: I object to that. That is not material, whether it did or didn't. It doesn't make any difference.

Mr. Scott: I will be glad to make an offer of proof in this particular matter.

(Jury is excluded from courtroom.)

Mr. Scott: May it please the Court, the Chief has testified that he came back in the next morning and saw this concrete abutment nine by twelve feet high.

I have a witness who will testify that they were involved in an accident on that bridge that night and hit the same abutmet.

page 115 } Mr. Hoyle: Did he say that he saw them the next morning or that night?

A. The accident happened that he is referring to at 2:00 o'clock in the morning, and this accident happened at 10:40.

Mr. Scott:

Q. You saw the gouge marks when?

A. I saw them that night. I said I didn't take any measurements until the next morning of the bridge, other than the car landed at.

The Court: We can read his testimony back if you want to, but I don't recall that he has testified that he has seen the gouged out place in the abutment on the night the accident took place.

Mr. Hoyle: That's not my recollection, Your Honor, that he saw it at the very beginning.

The Court: The question, as I understand it, if he saw the gash in the abutment—if he saw it before he investigated the accident is one thing, but if he didn't measure it until the next morning, he doesn't know whether

page 116 } it was from this accident or another one.

Mr. Scott: It seems to me his testimony was very clear, that he made the measurements the next morning, that he noted where it came to rest that night.

The Court: The question confronting the Court is whether you have the right to go into the other accident. We don't know when it took place but it certainly took place before 2:00 o'clock in the morning.

If his evidence—whether it is outside the presence of the jury or not—we know now that he noticed the abutment had been struck at the time he investigated the first accident; therefore, Mr. Hoyle is objecting to your question of him as to whether or not he investigaged another accident at 2:00 o'clock in the morning, which could have caused the damage to the abutment.

Mr. Scott: That's correct. I think I have the right to ask him about this other accident.

Mr. Hoyle: If they want to go into that, I will

page 117 } go into that.

There is no authority they could bring in if they wanted to—a subsequent accident or prior accident could be brought in, but in the absence of that—the truth of the situation is he saw it that night and went back and measured it the next day.

How in the world could that have anything to do with the second accident?

The Court: What is your authority? We might as well cover this at this point, while the jury is out.

What is your authority as to your right to question a witness who investigated an accident at 2:00 o'clock in the morning, and this accident?

Mr. Scott: First of all, Your Honor, this witness has testified that although he made the measurements that evening and reduced it to writing the next day, I think the evidence will show that he also investigated the other accident.

page 118 } I think I have the right to cross examine him as to whether he is confused about the two accidents.

The defendant did testify on the stand that before the accident the car went over a hump.

I think we have the right to show there was another accident along the same stretch of road that evening.

Now, Your Honor has asked me for the law. I do not have it. I can get it by tomorrow morning.

It seems elementary to me that you have the right to introduce evidence. We are not talking about a suit against the State Department of Highways, the Town of Smithfield, or anything like that.

We are talking about a material defect to the road, which the defendant has testified caused him to have this accident.

The fact that there is another accident within a four-hour period is also germane to this particular accident.

page 119 } I think I have the right to examine the witness about how much damage was done that evening by the second accident, because he's told the story about the car flipping over and over as a result of this.

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page 121 }

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Mr. Coffman: It is a rule of evidence that evidence not permissible for one purpose may be permissible for another purpose.

I have had one experience where an officer testifying was shown that, in investigating one accident that same night, possibly had in his mind confusion as to which accident,

trying to collect from the several accidents. This explanation is permissible to show the officer may have had some confusion in his mind.

We have some turbulence that is not quite clear
page 122 } at this point. I think the right to explore the possibility of another accident, the officer having in his mind some confusion about which accident he is speaking about, and I think Mr. Scott has the right to explore further for thought this line of evidence.

We are not arguing about the question of negligence. We are arguing about whether this witness has not confused these facts with another set of facts.

If the accident happened on the other side of town, it makes no difference.

Let's not confuse these facts—possibly confuse this event with some other event occurring within the same period of time.

Mr. Hoyle: If Your Honor, please, what Mr. Cochran says, he says that he did notice these gouge marks that night, and there is nothing contradictory.

The Court: We don't know what this reference is going to be to. You are talking about his being confused about the two accidents.

page 123 } I can see how on one side that the fact that there had been another accident and that there is a possibility—certainly in counsel's minds, and possibly to the jury—that he may be mistaken, but I don't think it is proper evidence to go before the jury, that there had been another accident.

I don't know how we are going to do this without showing there was another accident.

As far as this lady who is going to testify, I don't think it is proper for her to testify that she was in an accident at approximately 2:00 o'clock.

I think possibly her evidence could be solicited as to her recollection of the road at the time and then to assume that there had been no deterioration of the road from the time the first accident happened and the time of the second.

I don't know what she knows. The defendant has testified there was a hump. This witness says there was no hump.

If the lady can testify at 2:00 o'clock that
page 124 } there was a hump, I don't think you are in a position to say, "As a result, did you have an accident?"

Mr. Scott: Is it possible to approach it from this standpoint?

M. A. Cochran

Is it possible for me to question this witness as to any other accident he may have investigated that evening, not necessarily in that same area, and then reduce them to writing?

The Court: I will let you do that.

Mr. Scott:

Q. How many accidents did you investigate that night?

A. Two.

Q. Mrs. Hearn hit the abutment, didn't she?

A. Right.

Q. Did she do any additional damage to it?

A. Very little—didn't do too much damage to it. Her car hit and ended up over ninety-seven feet, and it ended up on its top, kind of crossways of the road.

Q. You made the investigation of her accident the same evening?

A. At 2:00 o'clock in the morning.

page 125 } Q. Four hours later?

A. Sometime later, yes.

Q. Were the people that had to go to the hospital in that particular accident?

A. In her accident? No. One of them was dead, and I sent the other two—one of them ran away from the accident.

This woman that you have got out here—she was going to jump overboard, so I had to get them in the police car and send them to the police station, and I had to stay there until the hearse came and picked up the dead one.

Q. What time did you get away that evening?

A. I guess 3:00 or 3:30 in the morning before we got the oil and grease washed off.

Q. How long did it take you to investigate the Bagley accident?

A. I would say we was there waiting on the wrecking truck and ambulance—I would say we was there an hour.

Q. Then at 2:00 o'clock, you had the other accident?

A. Yes, sir.

Q. There is no question in your mind that you reduced all your findings to writing the next morning?

page 126 } A. I reduced them to writing the next morning. I made notes in a field note book.

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M. A. Cochran

page 129 }

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The Court: What does counsel think of the Court telling the jury that they are not to consider another accident but there was another accident, and it is only in reference to Mr. Cochran's possible confusion, if any, when investigating the two accidents, but they are not to consider this—a damaged condition in the road.

Let her testify that there was another accident. I don't know how far they are going to go with their testimony.

Mr. Hoyle: If they do, I will have to ask him to stay for rebuttal, but I would cite it as an error. I don't think it is proper for them to show another accident. There is certainly no similarity of circumstances.

page 130 } Mr. Cochran doesn't say he was under the influence. He says he was not under the influence. There is nothing that can be similar in these two cases, Your Honor. He is straddling the fence.

He says here—and there is nothing for the jury to be mistaken about—he says, "I saw them that night."

The Court: Is there any possibility that the fact these two accidents took place on the same bridge on the same abutment, and you didn't make your diagrams and reduce this to writing until the next day, is there any question in your mind that there may be some confusion between the two?

A. No, sir. The picture shows that car went 362 feet and landed on the top.

The Court: I am talking about the abutment.

A. No, sir. When I first drove up on the bridge, the abutment—about a foot of it was gone, and when I got back to the second one, there was a little bit more of it gone.

You could see it on the ground.

page 131 } Mr. Coffman: If you will instruct the jury there was a second accident, or at least let us inquire whether there was a second accident, but instruct the jury that they are not to regard the second accident as evidence of being the cause of the first one.

Mr. Hoyle: I would object to it, if Your Honor, please, and cite it as error because I don't think the accident had anything to do with it whatsoever. The evidence is clear and unequivocal. They are just trying to cite red herrings in here because they don't have any other evidence in here, and they know it. They are trying to cloud up the water.

I would do the same thing. They are doing a good job.

Mr. Scott: You are missing the entire point. All we want to do is show this jury, and show Chief Cochran, there is possible confusion.

Mr. Hoyle: He's said there was none.

Mr. Scott: He hasn't said that to the jury.

page 132 } Mr. Coffman: The officer investigated a second accident that night, and there is possibility of confusion.

Mr. Hoyle: They can go that far: "Could you be confused?" but I want it to be certain that Mrs. Hearn is not going to come back here and I have let Chief Cochran go.

The Court: Are you saying you are agreeable for them to ask him if there was another accident and if he investigated it, was there any possibility that he was confused?

Mr. Hoyle: But not as to where the other accident occurred and who was driving or anything.

Mr. Scott: I think we have the right to question him about his field notes.

The Court: I don't think you can get into another question now.

Mr. Scott, if you want to examine the Chief in reference to his testimony which he says is recollection about his field notes concerning this action, I don't think there is anything wrong there.

page 133 } Mr. Scott: I can belabor the point but it seems to me the Chief has testified he made these field notes and probably he made the same field notes on the other case. I think we have the right not to go into the details of the accident at all.

All I want to get out is that he did make the field notes on this case and on the other case, and then cross examine him on that yellow piece of paper.

Mr. Hoyle: I don't think he can mention the second accident.

The Court: You have already agreed that if they asked him if there was another accident he investigated—

Mr. Hoyle: I don't think I have to agree. I withdraw any agreement I made.

I take the position I will not agree to any reference to any other accident on that bridge that night.

I don't think it is proper. If they do, then I think they are opening Pandora's box, and Mr. Cochran has stated he is not confused, and I intend to ask him were those marks there that night?

M. A. Cochran

page 134 } The Court: All right. I am going to rule that it is improper for this man or any other witness to say that there was any other accident that took place at 2:00 o'clock, and I will permit you to cross examine him as to his field notes and when this was written up and so on and so forth, and cross examine him as to the diagram concerning this accident, not concerning that there was another accident at 2:00 o'clock in the morning.

Mr. Scott: Then the Judge is shutting the door on the other accident?

The Court: Yes.

Mr. Scott: Then I please note my exception to the Judge's ruling for the reasons previously stated.

You may as well get Mrs. Hearn in here and send her home.

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page 135 }

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RECROSS EXAMINATION

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page 154 }

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Mr. Scott:

Q. Chief, is this in your own handwriting?

A. Yes, that is correct.

Q. Will you read it to the jury?

page 155 } A. Do you want me to read the whole thing?

Q. Just read from the top—wait a minute—right there.

A. All the way down?

"Richard Bagley stated at first he was the driver of the car. He was hurt badly and in my later investigation, I found out Willie Bagley was the driver and I got papers for him and arrested him on October 25, 1968."

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page 159 } LIEUTENANT A. B. TOLBERT, witness called by Attorney for the Plaintiff, having been first duly sworn, was examined and testified as follows:

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page 161 }

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CROSS EXAMINATION

Examined by Mr. Coffman:

Q. Mr. Tolbert, in the same statement, I would like to read one sentence to the jury, if you would. The next to the last paragraph, the second sentence. It begins: "We decided—" I believe next to the last paragraph, second sentence.

page 162 } A. Yes, sir. That's a misspelled word—

"Around 10:30 p.m. that night, last Saturday, we started back towards Newport News. We decoded—" but it's supposed to be "decided"—

Q. Keep reading.

A. "—to go to Smithfield. On the way back we went through Smithfield and I remember hitting something, and the car wrecked."

Is that satisfactory?

Q. Nothing else in particular. What date was this statement taken?

A. On July 19, 1968, at 6:45 p.m.

Q. This was six days after the accident.

I have no further questions.

REDIRECT EXAMINATION

Examined By Mr. Hoyle:

Q. Did he volunteer any reason to you why he hit the bridge?

A. At that time I wasn't concerned about the accident because he was charged with unlawful driver's license.

Mr. Coffman: I am going to object to that.

The Court: The jury will not pay any attention to the statement.

Lilly Rawls

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page 178 }

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LILLY RAWLS, witness called by Attorney for the Plaintiff, having been first duly sworn, was examined and testified as follows:

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page 179 }

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Q. When was that, Lilly? If you don't remember the date, with reference to the time?
A. I don't remember the date exactly.
Q. How long had he been there when you went there?
A. A couple of days.
Q. What was his condition?
A. He was in terrible condition.
Q. What do you mean?
A. A lot of pain and his legs and all.

page 180 } Mr. Scott: I am going to object to that.

Mr. Hoyle: I submit she can tell whether a man is evidencing pain. As a layman, she cannot give a medical opinion, but she can state what she saw.

The Court: She can state what she saw, but unless she's going to state a facial expression or something as to pain, she can't tell.

Mr. Hoyle:
Q. Can you tell what you saw?
A. He had a lot of pressure on his face. I thought he was in a lot of pain.

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Lilly Rawls

page 183 }

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Mr. Hoyle:
Q. Did he have anything on his leg?
A. He had a cast on.
Q. Was he able to sleep at night?
A. Not much.
Q. How do you know that?
A. Because he cried with his leg.
Q. You heard him and saw him cry?
A. That's right.
Q. And he was a grown man?
A. That's right.
Q. How old was he?
A. About forty-six.
Q. And how long did he continue to cry about that leg?
A. Quite a while.
Q. Do you remember his having cut the cast off one time?
A. Yes.
Q. Do you know why he cut it off?
A. His leg was hurting him.
Q. Did he go back to the doctor after he cut
page 184 } it off?
A. Yes.
Q. Did they reapply another cast?
A. That's right.
Q. Did he continue to wear that cast?
A. Yes.
Q. Do you remember when he died, Lilly?
A. January 18th, I think.
Q. Of this year?
A. That's right.
Q. When he died, what was his condition with reference to being able to walk? Did he have a crutch?
A. Still on crutches.
Q. Did he have a cast then?
A. Yes.
Q. Still with the cast on his leg?
A. (Witness nods head in the affirmative.)
Q. Was he able to sleep at night then, in January after July?
A. No, not much.
Q. How do you know that?

Willie Bagley

A. Because I could hear him moaning and groaning. His leg was bothering him.

Q. In January?

page 185 } A. That's right.

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page 188 }

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WILLIE BAGLEY, Defendant having been previously sworn, was recalled by Attorney for the Plaintiff, and was examined and testified as follows:

DIRECT EXAMINATION

Examined By Mr. Hoyle:

Q. When you were sued you filed an answer and in it you said that Richard Bagley was guilty of contributory negligence, that he was in some way at fault. I want you to tell me how he was at fault.

Mr. Scott: I would object to that. It is well known in these particular type proceedings that counsel filed answer for the defendant and what may or may not have been filed in the answer is not germane at this particular time.

We all know counsel file these answers and it is a standard procedure under the laws. Mr. Hoyle knows it very well.

I don't think it is material in this particular

page 189 } proceeding at this particular time.

Mr. Hoyle: With respect, this is a suit of Richard Bagley against Willie Bagley. The motion of judgment and answer and grounds of defense filed on behalf of Willie Bagley, it is true it was signed by counsel, but it is his answer.

In it he has said that Richard Bagley was in some way at fault, and I think I have the right to ask how he was at fault.

The Court: I will permit the question to be answered.

Mr. Scott: Note our exception.

Mr. Hoyle:

Q. As a matter of fact, he's already said he didn't do anything wrong?

Willie Bagley

A. What you just did—you said that I said he was in fault. I would like you to explain that to me.

The Court: This is his question:

Your attorneys for you, have filed papers in the suit, and among some of the things that have been said, your answer on one of the papers alleges that Richard was page 190 } contributorily negligent, and he is asking you what you meant by that, if you know?

A. I wish you would break this down a little bit more.

The Court: There was an accident and you are saying in effect that it was something that he did that helped to cause the accident, and he is asking you what this was.

Mr. Coffman: Your Honor, you stated that contributory negligence is something the man may have omitted to do. If this be the case, the witness would not be qualified to give an answer.

The Court: I don't know. I will let him say whether he knows. Counsel has pointed out that it might be something that Richard Bagley did or did not do which helped to cause the accident. Do you understand that?

A. The only thing I can say: if he had never said, "Let's go home", we would never have had the accident.

Mr. Hoyle:

page 191 } Q. If you stayed in Whaleyville the rest of your life, you wouldn't have been in the car.

A. We didn't stay in Whaleyville.

Q. What did Richard do wrong that night?

A. I don't know.

Q. Back to page 21, line 9: "What did Richard do wrong that night?"

Is this your answer: "I don't think anything as far as I can see."?

A. As far as I can see.

Q. You don't know anything wrong Richard did that night?

A. Like I said, I only seen him from about 5:30 that morning.

Q. I don't know what you said.

The Court: He said he saw him at his aunt's house but he doesn't know what he did after that time until he saw him that night.

Talk a little louder and slower.

Willie Bagley

Mr. Hoyle:

Q. You don't think he did anything wrong, do you?

A. Like I said, I could tell when he was drink-
page 192 } ing.

Q. You said he was drinking?

A. Yes. I am pretty sure he was.

Q. Even though we went into that yesterday already, but he didn't drive or help you drive, did he?

A. No.

Q. Let me ask you one more thing. You said you had been over this road many times?

A. No, sir. When I was a kid coming up, I used to go over it, but during the last ten years, I haven't been over it.

Q. Then there was a hump ten years ago?

A. No, sir.

The Court: He said the last time he went over it was about ten years ago.

Mr. Hoyle:

Q. Didn't you tell us that you knew that road upside down?

A. They probably built a new road from Smithfield to Bailey's Beach in ten years.

Q. Going back to page 15 of these depositions: "As you left Smithfield, will you tell us," line 10, "what you remember about the accident then?"

"I remember it. I knowed the road upside
page 193 } down because I been over there quite a few
times."

Is this your answer on January 18th?

A. Yes. Ten years ago I did know the road.

Q. Upside down means you know it very well?

A. The answer was right.

Q. That is true?

A. That was ten years ago.

Q. You didn't tell me that in January? What you are saying, you don't even know there was a hump there?

A. I know now. I didn't know it was there then but I know it was one there when I had the accident.

Q. Did you apply your brakes in any way as you approached?

A. No more than stopped in Smithfield for a red light.

Q. Did you see the 40-mile per hour speed limit sign about fifteen feet from the place of the accident as you approached the bridge?

A. No.
Q. You did not?
A. No.

Mr. Hoyle: That's all I have.

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page 194 }

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DR. DONALD S. MAXWELL, witness called by Attorney for the Plaintiff, having been first duly sworn, was examined and testified as follows:

page 195 } DIRECT EXAMINATION

Examined By Mr. Hoyle:

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page 202 }

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Q. Did you give him medication for his pain?
A. Yes.
Q. What type of medication specifically?
A. Well, he required morphine at the outset occasionally.
Q. This was in the Veterans Hospital?
A. That's right.
Q. All right, sir.
A. This was only for the first few days. He was switched over after that to non-narcotic substitutes.
Q. That means what?
A. Well, morphine is a narcotic. We have medi-
page 203 } cations which are not addicting which we turn to as rapidly as we can because of the obvious possibility of causing the patient to become addicted—specifically darvon.
Q. Darvon is what you gave him?
A. Darvon.
Q. Do you know how much darvon you gave him and how often you gave it to him?

Dr. Donald S. Maxwell

A. His darvon was ordered every four hours as needed, and as I recall, he did require it.

Actually, talwin was used in addition to that. Talwin is a synthetic drug which, I think, is a little stronger than darvon. It is given by injection. Its purpose is for relief of pain.

Q. How often did he have the darvon?

A. Talwin was ordered by injection every four hours as needed for pain.

Q. In addition to darvon?

A. Talwin was continued for at least two weeks following his admission. We gave him indocin at one point.

Q. What is the purpose for indocin?

A. The same—relief of pain.

Q. Why did you give him talwin and darvon with indocin?

page 204 } A. We were searching for a drug that would relieve his symptoms, and at this particular time it seemed darvon was used.

Q. What do you mean by "symptoms"?

A. Pain.

Q. How long did he continue his darvon, Doctor?

A. This was used up until the time of his discharge on October 2 of 1968.

Q. Which was approximately two months—every four hours—until October 2, 1968?

A. Every four hours as needed.

Q. When he was discharged on October 2nd, was he given prescriptions and medicines to continue at home?

A. Yes.

Q. And instructed to use them as needed?

A. Yes.

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page 219 }

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Mr. Hoyle: I offer this in evidence, if Your Honor, please, and I would call to the Court's attention Stipulation Number 5: "That the charge of the Veterans Administration is a fair and reasonable charge for services rendered during his actual period of hospitalization."

The Court: Is there any objection to the introduction of that from the Veterans Administration?

Mr. Coffman: No, sir.

Dr. Donald S. Maxwell

The Court: Let it be properly marked as Plaintiff's Exhibit Number "3" and admitted into evidence.

page 220 } (To Jury) The last exhibit introduced now is a long letter. It is folded so that you cannot see the contents of the letter. It will be taped, so I will instruct you not to untape it and look at that portion of the letter only that is shown.

Mr. Hoyle: Answer these gentlemen.

CROSS EXAMINATION

Examined By Mr. Coffman:

Q. Dr. Maxwell, with respect to the last piece of paper presented to you, Richard Bagley was never charged this figure for his hospitalization was he?

Mr. Hoyle: I object to that, Your Honor, and I ask that the jury be withdrawn and we will argue this.

The Court: All right. Take the jury out.

(Jury excluded from courtroom.)

Mr. Coffman: Whether or not Richard Bagley was actually charged this figure for his hospitalization—I believe I understand the nature of the objection, Your Honor, and I believe the proper place is to be an instruction for the page 221 } Court that this figure is being recovered to the estate under the Federal law, but it should be made clear it was never paid during the lifetime. This is a debt of the estate.

Mr. Hoyle: If Your Honor, please, I agree wholeheartedly. This wasn't a *a* debt. We have argued this at length at the pretrial conference, and I presented a—and will be glad to give it to you again—Public Law Title 42, U. S. Code, Section 20651, which states that there is a right of the United States Government to recover. Then an executive order 11060, signed by John F. Kennedy, President of the United States on November 7, 1962, establishing rates, which they have already agreed to, together with the power of attorney and assignment dated July 30, 1968, signed by Richard Bagley, witnessed. The stipulation is in the record to where it is his signature, and there is no question about that.

For the record, I would like to read:

page 222 } "For a valuable consideration, I hereby assign to the United States of America . . . all claims,

demands," and so forth. "I hereby irrevocably appoint the Attorney General . . . to collect and disburse such funds in my behalf. . ."

I submit, if Your Honor, please, that by law, if there is a recovery, we are required to pay the United States Government, and the United States Government has a lien on any sum of money that may be recovered in this action, whether it is less or more than the bill for the United States Government.

It is admittedly a conditional obligation subject to a recovery, but it is an obligation which is in full force and effect in every way in the event that there is a recovery.

The Court: Do you have anything further you want to say now?

Mr. Coffman: Mr. Hoyle is correct when he states that it is an obligation if there is a recovery, and I did
page 223 } read the law properly. However, what we have in this assignment is not an assignment to Mr. Bagley to the VA to collect this bill, but an assignment by Mr. Bagley to the VA of any rights that he might have to recover the medical costs involved in this action.

I believe the jury is entitled to know the true state of affairs with respect to this bill.

It is imperative that they know that Richard Bagley does not owe the money. If there is recovery, this amount of money would be voided by the trustee to the VA. This is true in the pleadings.

It says so in the motion for judgment. It is not a debt of Richard Bagley or of his estate. It is not alleged as such in the proceedings.

We have a right to show it to the jury and discuss it with the jury, and at the proper time the Court can instruct the jury as to how—

The Court: I can't see any objection to this witness testifying, if he knows, to the effect that in the event
page 224 } that this plaintiff had not died, this would not be a bill that he would owe, but the law is such that in the event there is any recovery in this suit, the Federal Government is entitled to recover the amount of the bill, or whatever amount the jury may give.

Mr. Coffman: I withdraw my objection.

Mr. Hoyle: Judge, can you orally instruct the jury now? I think you did a real good job and we can't improve on it.

(Jury returns to courtroom.)

Joseph Arthur Price

The Court: Do you waive polling?
Mr. Hoyle: Waive polling.
Mr. Coffman: Waive polling.
The Court: Gentlemen, you are aware of the question asked in reference to this bill for the Veterans Administration. I will get the court reporter to read the decision.
Court Reporter: "I can't see any objection to this witness testifying, if he knows, to the effect that in the event that this plaintiff had not died, this would not be a page 225 } bill that he would owe, but the law is such that in the event there is any recovery in this suit, the Federal Government is entitled to recover the amount of the bill, or whatever amount the jury may give."

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page 246 } Mr. Coffman: At this time I move to strike the evidence of the complainant and enter summary judgment for the defendant in this matter, and cite as the reasons therefor. I will give you the citation in the beginning: 194 Va. 615, 199 Va. 903, 202 Va. 548, and the case of 206 Va. 723.

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page 264 }

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The Court: I am going to overrule your motion to strike.
Mr. Scott: Note our exception for reasons previously stated.

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JOSEPH ARTHUR PRICE, witness called by Attorney for the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * * *

Joseph Arthur Price

page 268 } Mr. Hoyle: If he is an engineer with the Department of Highways, I will be glad to stipulate it. I am sure the State hires very competent people.

Mr. Coffman:

Q. I want to direct your attention to a section of Route 10 from the town of Smithfield north to the south of Pagan Creek Bridge and the bridge itself.

Is that within the jurisdiction of your Resident Engineer?

A. Yes, sir.

Q. Are your familiar with the area of the bridge?

A. Yes.

Q. How long have you been familiar with the structure?

A. About twenty-some odd years.

Q. Does this bridge have any problems with respect to construction or underlying soil?

A. I am sorry. I didn't understand the question.

Q. With respect to this particular bridge, does it periodically have problems or problems periodically occur there because of the soil, terrain and construction of the bridge?

page 269 }

A. There's been settlement of the structure and the approach.

Q. Over the entire period of time you have been familiar with the bridge?

A. Yes, sir.

Q. Mr. Price, does this of necessity cause you to have the bridge repaired on a periodic basis?

A. I don't know how to answer your question. The bridge has been repaired, and so has the approach, when it gets to the point it is needed.

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Mr. Coffman: Your Honor, I have a motion.

Mr. Hoyle: What is yours? To renew your motion to strike?

Mr. Coffman: The same argument, the same reason I said before. In view of the additional evidence that there was a gas main put in this road subsequent to the accident will indicate there was a hump in the road.

We have other evidence that the road has sunk over the years, and common sense tells us that one or the other sinking causes a bump.

This corroborates the testimony of the defendant that the Court can properly rely on the fact he did strike a bump. As such, it provides an alternative to the accident, of causing the accident.

We have only the possibility of negligence.
page 274 } Even if we should allow it to go to the jury, the jury cannot make the assumption that the negligence was gross.

We renew this motion with corroboration and the same law.

Mr. Hoyle: Apparently we didn't hear the same witness.

I understood that man to say on July 13, 1968 there was a good road, no hump. The evidence hasn't changed one iota as far as I am concerned. The rule still stands.

The Court: I overrule your motion to strike.

Mr. Coffman: Note our exception.

Mr. Hoyle: My motion is, if Your Honor, please, that the Court instruct the jury that the plaintiff—

The Court: Are you arguing your first instruction?

Mr. Hoyle: We do it by motion or instruction, or both. I don't have their instructions.

The Court: I don't either.
page 275 } Let's take up the plaintiff's instructions first.

Mr. Scott: May it please the Court, I find no real objection to this instruction. However, I feel the question of contributory negligence was never raised.

The Court: Are you asking for it?

Mr. Hoyle: Yes, sir. I certainly am asking for it.

The Court: If there is no objection, I will grant it.

Mr. Coffman: I am caught in a bind, using contributory negligence to assumed risk. I would like to leave the door open to assumed risk.

Mr. Hoyle: The man was asleep and he had every reason to be asleep. The evidence was the defendant was sober, he had been driving properly. The man went to sleep. He said himself he went to sleep, and my man knew he had gone to sleep.

The Court: I am going to grant instruction
page 276 } number 1. If you want to take an exception, you may.

Mr. Coffman: Yes, sir.

The Court: Note the exception.

Mr. Hoyle: I don't feel the reasonable men can differ. I—

The Court: What is your position to 1-A?

Mr. Scott: I don't think I like the instruction, and I object very strenuously. I think there is a considerable amount on which reasonable men can differ. Max Cochran would differ and I would strenously object to it.

The Court: I will deny instruction 1-A.

Mr. Hoyle: Note our exception.

The Court: Note his exception to the Court's denial of 1-A.

Mr. Scott: In other cases it might state what the law is in an automobile accident case, but it certainly doesn't apply to this particular case here today.

Nowhere does it instruct the jury that we are dealing with a matter of gross negligence. It says
page 277 } "reasonable care".

We know that in Virginia reasonable care is not a particular standard by which you judge gross negligence, and therefore, we object to it.

Mr. Hoyle: I think he has the duty—every motorist has the duty—to exercise reasonable care. It is a stock instruction.

The Court: Do you have an instruction on gross negligence?

Mr. Scott: Yes, we do, Your Honor.

The Court: This instruction 2 is your instruction as to gross negligence?

Mr. Hoyle: No. It is just one as to the duty. This is what I call the finding instruction.

Instruction 7 and 8 have to do with gross negligence, also number 12.

The Court: Why are you asking the Court to grant three or four instructions on gross negligence?

Mr. Hoyle: They are different instructions, if Your Honor, please.

The first one we are talking about is number 2, and I don't consider that an instruction on gross negligence.
page 278 } That is a finding instruction and it falls on the duties of the driver, and specifically, this driver, and it doesn't define gross negligence. It merely says, "If he fails to keep one of the foregoing duties, that was gross negligence, and that such gross negligence contributed to the accident. . ."

Number 7 and 8 define gross negligence. Number 7 says that gross negligence is a conduct of utter indifference.

Another one is given and tells them gross negligence may be a single act or it may be in the course of those three cases I gave you.

Number 12 tells them that while it's got to be more than simple negligence, it still doesn't have to be that he willfully

or wantonly did this act. There is a distinction in each one of these.

The Court: Isn't instruction number 2 the same as instruction 8?

page 279 } Mr. Hoyle: Yes, sir, but number 8 doesn't say what negligence is. In other words, number two defines negligence in effect.

The Court: I think there is such a thing as confusing the jury if you have too many instructions.

I want to alleviate the repetition as best we can.

I am talking about instruction number 8. I will have to ask you if you withdraw it. If not, I am going to deny it, and I am asking them if they object to instruction number 2?

Mr. Scott: Yes, sir. The first sentence, "In the exercise of reasonable care". We don't have the duty of reasonable care in this case. We only have the duty which is something less than that. That is what gross negligence is about—that's what the case is all about.

Mr. Hoyle: Will you agree to say: "The Court instructs the jury that the defendant had the following duties:"?

page 280 } Mr. Scott: No, sir. The defendant had reasonable care to operate the automobile in a reasonable manner. The law is well stated that his duty is something less than reasonable care.

The Court says in 199 Va. 55: "You have got to prove that one of the admissions or acts that the defendant did amounted to gross negligence." The Court is very clear in that case.

Mr. Hoyle: I understand the Court has denied 8, so I am certainly asking for 2, Your Honor.

The Court: Is that your only objection?

Mr. Scott: I would object every time the word "reasonable" is used in this particular instruction.

This instruction is highly prejudicial to the defendant's case, and we object to it.

The Court: In the first sentence of instruction number 2, I am going to change it to read, "The Court instructs the jury, in the operation of a motor vehicle, the following duties devolve upon a motorist:"

page 281 } All right. What about instruction number 3?

Mr. Scott: May it please the Court, you are going to leave the exact language in there?

The Court: Yes, sir.

Mr. Scott: I note an exception.

I don't know of any duty that you have got to put your lights on high beam at night.

Mr. Hoyle: That is to better avail yourself of lighting.

The Court: Isn't the statute that at night you drive with high beam unless you approach an oncoming car?

Mr. Scott: Note our exception to instruction 2.

The Court: What about instruction 3?

Mr. Scott: It violates the rule of 199 Va. 55. You can't pile negligence up to make gross negligence.

The Court: I am going to grant number 3 as written. You note your exception.

page 282 } Mr. Scott: Note our exception.

I have no objection to the repetition in number 4.

Mr. Hoyle: I will go along with that. I will withdraw 4.

The Court: What about 5?

Mr. Hoyle: I think I am going to ask for 4, frankly. He doesn't object to it. We just don't know what we are going to do. I will ask for 4. I think he said he didn't object to it.

Five is stock.

The Court: I will have to go back and consider 4.

Mr. Hoyle: He said he didn't object to it.

Mr. Scott: It is repetitious, Judge.

The Court: I am going to deny instruction number 4 because I think it's been covered.

Mr. Hoyle: All right.

The Court: Do you want to take an exception to the Court's ruling on the denying of this instruction?

Mr. Hoyle: Yes, sir.

page 283 } The Court: How about instruction number 5?

Mr. Scott: This isn't a gross negligence instruction.

Mr. Hoyle: I will withdraw instruction 5.

Mr. Scott: Judge, instruction number 6—if you strike out the words "negligence" and "or", I think it is an acceptable instruction.

Mr. Hoyle: They are both correct.

The Court: All right. Let's strike out "negligence" in the first line and the word "or" in the second sentence.

How about instruction 7?

Mr. Hoyle: Cited in 208 Va. 245.

Mr. Scott: No objection.

The Court: Now, instruction 8?

Mr. Scott: I thought we decided we weren't going to use 8.

The Court: I will either deny it or you can withdraw it.

Mr. Hoyle: I will let you deny it and I will except automatically.

page 284 } The Court: I will deny it. Note his exception.

How about 9?

Mr. Scott: Okay.

The Court: How about 10?

Mr. Scott: This is merely cumulative with instruction 2.

The Court: There is nothing in instruction 2 as far as the speed is concerned—yes, item 5.

Mr. Scott: May it please the Court, there is a question in my mind if exceeding the speed limit is in fact gross negligence.

The Court: I am going to amend it to read, after the word "speed", the third line from the last, and add, "together with other acts of negligence."

Do you want to note your exceptions?

Mr. Scott: Yes, Your Honor.

The Court: How about instruction 11?

Mr. Scott: This is a damage instruction, Your Honor. I don't think the "probable duration" should be in there at all.

page 285 } Mr. Hoyle: Strike the word "probable duration".

The Court: Strike out "and probable duration."

I am going to grant that. Any exception?

Mr. Scott: Well, I have got some more on item 4. I don't think there is any evidence at all of any disfigurement or deformity.

Mr. Hoyle: I disagree completely. He had scar tissue as deformity. He said he had a medically good union but as far as anatomically, the word I believe he used was "horrible."

The Court: I don't see any objection to item number 4.

Mr. Scott: There is not one scintilla of evidence as to loss of earnings.

Mr. Hoyle: It is uncontradicted that he was employed as a longshoreman and worked reasonably and regularly. He was not able to work from the time of the accident to the time he died.

page 286 } Mr. Scott: You have got to say he was employed such and such a place and he wasn't able to work for so many weeks.

That is clearly speculation and clearly erroneous.

The Court: Except as to the testimony that he worked fairly regularly, there's been no indication what his salary was in the past and what he was unable to earn as a result of the accident, and I think any evidence on this would be purely speculative.

I am going to delete item 6.

Mr. Scott: Note our exception.

The Court: I am going to grant it. Note the exception.

How about number 12?

Mr. Scott: No objection.

The Court: Grant instruction number 12.

What about 13?

Mr. Scott: I have got no objection to that.

The Court: Grant instruction 13.

page 287 } What about 14?

Mr. Scott: In instruction 14, when you are dealing in the area of excessive speed, I think we also ought to instruct the jury that the lack of excessive speed can also be obtained from information surrounding the accident, and I think you ought to put in there than an inference of excessive speed or lack of excessive speed—

The Court: Is there any evidence of lack of excessive speed?

Mr. Scott: The front of that car isn't that badly damaged.

Mr. Hoyle: I saw the car, and it is not as high as that table. It is flat.

The Court: You are suggesting that the Court amend it to read that "inference of excessive speed or lack of it on the part of the defendant may be drawn"?

Mr. Scott: Yes, Your Honor.

The Court: Do you have anything further to say about the instruction?

Mr. Scott: I object to it, Your Honor.

page 288 } The Court: I am going to grant it. Note his exception. That's instruction 14. Now, instruction 15.

Mr. Scott: Standard stock instruction, no objection.

The Court: I will grant instruction 15.

Mr. Hoyle: If Your Honor, please, with reference to instruction number A, there is no evidence whatsoever that there was any damage claimed that was not caused by this collision. It couldn't come from any other thing.

I think you can stop at maybe the first paragraph if you want to, but the second paragraph should be stricken.

The Court: Delete the item in reference to wages.

Mr. Coffman: I am willing to—since the loss of wages has been withdrawn—to withdraw this one, Your Honor.

The Court: You want to withdraw the whole instruction?

Mr. Coffman: The whole instruction. I believe

page 289 } there may be a miscellaneous instruction following. Withdraw A and B.

The Court: Withdraw A and B.

Mr. Hoyle: C I object to because it says "excessive speed does not show gross negligence." I don't know that case

but I certainly don't think it is a proper statement of law which says the speed or violation of the statute is made *per se.*

The Court: What is your position in that?

Mr. Coffman: Mr. Hoyle apparently wants to delete the phrase "negligence at all".

Mr. Hoyle: I don't think that is the law.

The Court: I am going to let it read this way, beginning "alone does not of necessity but may under some instances, show gross negligence or negligence at all."

Mr. Coffman: I object to it, Your Honor.

The Court: All right. Note his objection and
page 290 } exception.

Mr. Hoyle: Does that make grammatical sense to leave it in here?

It isn't a sentence.

The Court: Strike the last two words "at all".

Mr. Hoyle: Yes, sir. Then I think it makes sense.

I except to it, but it is a sentence.

The Court: How about D?

Mr. Hoyle: If Your Honor, please, it is a question of contributory negligence. It should be refused.

This has to do with contributory negligence and the Court has already ruled that it is not applicable in this case.

Mr. Coffman: Contributory negligence is not applicable. I think this would change it. Plaintiff would have assumed the risk of such incident or event and subsequent injuries, and therefore, cannot recover.

The Court: It isn't any evidence here except the fact that this man was asleep.

page 291 } Mr. Coffman: It is stated that the driver had no sleep the night before.

Mr. Hoyle: He slept at his grandmother's, and this man told Mr. Tolbert that he had slept twice. There is no evidence to support the fact he had no sleep.

Mr. Coffman: I beg to differ.

The Court: I am going to deny instruction D. Note your exception.

Mr. Coffman: I note an objection and exception.

The Court: How about E?

Mr. Hoyle: I think that is a proper instruction.

The Court: Grant number E.

Mr. Hoyle: F is not applicable because there is no evidence—there is no question about the 4-wheel brakes. In other words, it hasn't met the proof necessary.

Mr. Coffman: The evidence does give the jury some facts which infer the possibility the car was travel-

page 292 } ing at an excessive rate of speed. I think the jury ought to know he applied the brakes.

The Court: I am going to deny instruction F.

Mr. Coffman: Exception.

The Court: What about G?

Mr. Hoyle: This slight care document has been overruled in 206 Va. Virginia National Bank, which is a stock instruction.

The Court: What case?

Mr. Hoyle: *Barham* v. *Virginia National Bank,* 206 Va.

The Court: I am going to delete the second paragraph of instruction G as to the slight care.

Mr. Coffman: Is that the only thing—just to slight care? Can we leave in "gross negligence shows that degree of disregard."?

Mr. Hoyle: Instruction A has the same paragraph as instruction G.

The Court: Instruction A has been withdrawn.

Mr. Coffman: This informs the jury what
page 293 } simple negligence is and what gross negligence is.

The Court: I don't see any objection to letting it read that "gross negligence is that degree of negligence which shows utter disregard" and so forth.

Any other objections, Mr. Hoyle?

Mr. Hoyle: I did not object to E and he gave it to me again. You look at E, the last paragraph—preponderance of the evidence.

The Court: Let's stike out the last paragraph in instruction G. I think it is accumulation.

Mr. Coffman: Are you going to strike it out of G instead of E?

The Court: Striking it out of G.

How about H?

Mr. Coffman: I am going to object for the record.

Mr. Hoyle: It is cumulative. He has said the same thing a dozen times.

The Court: I will grant H.

Mr. Hoyle: All right. I don't think any great
page 294 } harm has been done.

If Your Honor, please, there is no evidence to support this thing. In other words, they are trying to excuse the defendant.

The Court: What instruction are you on?

Mr. Hoyle: I. "In the light of evidence he has received serious injuries." Where is that evidence? I don't remember any. His failure to relate more circumstances—he's explained it about ten different ways.

If Your Honor, please, fully and completely, the question is: which version did they believe? There is no evidence here that he had any serious injury.

Mr. Coffman: He was hospitalized a period of time.

Mr. Hoyle: Who said that?

Mr. Scott: He did. He said he woke up in the hospital three days later.

The Court: I am going to deny instruction I.

page 295 } Mr. Coffman: Note our objection and exception, Your Honor.

The Court: How about J?

Mr. Hoyle: No objection. I think you ought to stop at "not evidence in this case."

Mr. Coffman: That is a stock instruction.

Mr. Hoyle: It is not evidence in this case, I agree.

The Court: All right. What about amending this to read: "The mention by counsel of amount sued for is not evidence in this case and should not be considered by you except as a limitation, if any, of arriving at the amount of your award."

Do you have any objections to that?

Mr. Coffman: No, sir.

The Court: I will grant instruction J.

How about K?

Mr. Hoyle: There is no evidence whatsoever about sudden emergency or sudden peril. If there was, it would have to be brought on by his own action.

page 296 } He was going fifteen miles an hour above the speed limit, so that could not possibly apply. There is no evidence of sudden peril.

Mr. Coffman: There was a bump in the road and at that time he had no—

The Court: My recollection was that he never saw the bump in the road but he felt a bump, and the next thing he knew he had the wreck.

Mr. Hoyle: It was there for him to see if it was there.

The Court: I am going to deny instruction K.

Mr. Coffman: Exception.

Mr. Hoyle: I have one that is merely cumulative.

Mr. Coffman: I will withdraw L.

The Court: The next one is M, which begins with, "If the jury believes from the evidence that the person was guilty of reckless driving . . ."

Mr. Hoyle: No objection.

The Court: Grant instruction M.

page 297 } Mr. Hoyle: N is sudden peril, and you have already turned it down, and I think you should turn it down again.

The Court: All right. I will deny it.

Mr. Coffman: I will object and except.

The next one also says "emergency".

Mr. Hoyle: I object to O.

The Court: I will deny instruction O.

Mr. Coffman: Exception.

The Court: P says, "If the jury believes from the evidence, contributory negligence . . ."

Mr. Hoyle: You have already ruled on that, so that is not proper.

The Court: I am going to deny instruction P.

Mr. Coffman: Respectfully except.

The Court: How about Q?

Mr. Hoyle: You have already ruled that he is guilty of contributory negligence so I would object to Q.

Mr. Coffman: This is in line with the other instructions; for the same reason, I would urge they all be admitted.

Mr. Hoyle: You are asking that he find him page 298 } guilty of contributory negligence and—

The Court: I will deny instruction Q.

Mr. Coffman: Note an exception.

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(Jury returns to courtroom.)

The Court: Does counsel waive polling?

Mr. Hoyle: Waive polling.

Mr. Coffman: Waive polling.

(The Court reads instructions to the jury.)

(4:15 p.m. Mr. Hoyle presents closing statement to the jury on behalf of the Plaintiff.)

(4:45 p.m. Mr. Coffman presents closing statement to the jury on behalf of the Defendant.)

(5:05 p.m. Mr. Hoyle presents rebuttal closing statement to the jury on behalf of the Plaintiff.)

(5:20 p.m. Jury retires to jury room for deliberation.)

page 299 } (6:15 p.m. Jury returns to courtroom.)

The Court: Gentlemen, there are seven jurors in the box. Do you waive the poll?

Mr. Hoyle: We waive the poll.

Mr. Coffman: Waive the poll.

Clerk of Court: Gentlemen of the jury, have you reached a verdict?

Foreman: Yes, we have, sir.

Clerk of Court: May I have it, please?

"We, the jury, find the defendant, Willie Bagley, guilty of gross negligence and do award William Beverly Weaver Administrator of the Estate of Richard Bagley, deceased the sum of $15,000. Signed Henry E. Smola, Foreman, dated June 3, 1969."

The Court: Gentlemen of the jury, is this your verdict?

Jurors: Yes, sir.

The Court: So say you all?

Jurors: Yes, sir.

The Court: Do you have any questions you want to poll the jury?

Mr. Coffman: No, sir.

page 300 } Mr. Hoyle: No questions, but we want to thank them.

(Jury leaves courtroom.)

Mr. Scott: May it please the Court, at this time, we would like to move to set aside the jury's verdict for reasons previously stated. We would also make a motion to strike the evidence as being contrary to the law and the evidence.

The Court: What else did you say?

Mr. Scott: And also renew my motion to stike the evidence.

The Court: You are making a motion at this time to strike the evidence?

Mr. Scott: Yes, Your Honor.

The Court: All right, Mr. Hoyle.

Mr. Hoyle: If Your Honor, please, I would object as to—it's been a jury question. We have gone through instructions and two days of trial.

I don't think there is any question it was a jury question, and they have come in with their verdict, and the Court's already denied twice their motion to strike.

page 301 } It may be that the Court would like to change the wording, but I don't believe possibly, out of the presence of the jury, you could do that, but I certainly have no objection to this verdict, and I ask the Court to leave it as it is.

The Court: If there are no further reasons for your motions, other than those previously stated, I will overrule your motion.

Mr. Scott: Note our exception for the record, Your Honor.
Mr. Hoyle: Thank you, Your Honor.

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A Copy—Teste:

Howard G. Turner, Clerk.

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