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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

RECORD NO. 740419

JAMES BOYD,

Appellant,

vs.

JOSEPH E. DIGGS,

Appellee.

JOINT APPENDIX

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Richman and Lipka
217 - 28th Street
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[R1-2] MOTION FOR JUDGMENT

The plaintiff, James Boyd, moves the honorable Judge of the Circuit Court for the City of Newport News, Virginia, for a judgment and award of execution against the defendant, Joseph E. Diggs, for the sum of TWENTY THOUSAND DOLLARS ($20,000.00) together with the costs of this action, which sum of money is due from the said defendant to the said plaintiff, for this, to-wit:

1. That heretofore, to-wit: On the 4th day of September, 1971, the defendant, Joseph E. Diggs, operated and controlled a motor vehicle along the roads in the City of Newport News, Virginia.

2. That on said date, the plaintiff was lawfully and properly driving his motor vehicle along the roads in the City of Newport News, Virginia.

3. That as a result of the negligence of the said defendant, Joseph E. Diggs, in the operation and control of his motor vehicle, his motor vehicle was caused to come into violent contact with the motor vehicle driven by the plaintiff, causing the plaintiff to receive serious and permanent injuries.

4. That the plaintiff was caused to suffer and he will in the future be caused to suffer great physical pain and mental anguish.

5. That the plaintiff was caused to expend and he will in the future be caused to expend a large sum of money in an endeavor to be healed and cured of said injuries.

6. That the plaintiff was caused to be unable and he will in the future be unable to perform his necessary and lawful affairs.

(filed 2/28/73) JAMES BOYD

[R5-6] ANSWER AND GROUNDS OF DEFENSE

This defendant denies that he is indebted to the plaintiff for any amount as claimed in the Motion for Judgment and, for further answer, says:

1. This defendant denies that he was guilty of negligence as charged in the Motion and specifically denies such allegations in paragraphs 3.

2. This defendant states that the plaintiff was guilty of negligence which was either the sole proximate cause or an efficiently contributing cause of the accident and the injuries complained of and, therefore, this defen-

dant denies the allegations in paragraph 2 of the motion.

3. This defendant states that if he was guilty of negligence, which is expressly denied, then such negligence was a remote cause and not a proximate cause of the accident and the injuries complained of.

4. Protesting negligence on his part this defendant will nevertheless rely on the contributory negligence of the plaintiff as a bar to his right to recover.

5. This defendant states that the plaintiff was not injured in the manner and to the extent claimed in the Motion and therefore denies the allegations in paragraphs 3, 4, 5 and 6.

6. This defendant will rely on such other and further defenses as may be available at bar.

(filed 3/20/73) JOSEPH DIGGS

[R15] COURT ORDER

This day came the parties in person and by counsel, and thereupon came a jury, to-wit: Raymond L. Dennis, Frank O. Gingles, John R. Parker, Jr., Melvin A. Johnson, Clara S. Radcliff, John D. Hammond and L. E. Thompson, who were sworn to try the issue joined, 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 to strike the Court doth sustain and therefore doth strike the evidence of the plaintiff and doth find in favor of the defendant against the plaintiff, and the jury is accordingly discharged.

The Plaintiff by his Attorney excepts to the ruling of the Court and moved the Court to set aside the verdict of the Court and grant the plaintiff a new trial, which motion to set aside the Court doth overrule, to which ruling of the Court the Plaintiff by his Attorney excepts.

Therefore, it is considered by the Court that the plaintiff recover nothing from the defendant and further that the defendant recover from the plaintiff his costs in this behalf expended.

(entered 1/8/74)

Henry D. Garnett, Judge
Circuit Court for the City
of Newport News

[R16017] ASSIGNMENTS OF ERROR

1. The Court erred in striking plaintiff's evidence.

2. The Court erred in refusing to submit to the

jury the negligence of the defendant, and the contributory negligence, if any, of the plaintiff, for their determination.

3. The Court erred in entering summary judgment for the defendant.

4. The Court erred in overruling plaintiff's motion for a new trial.

5. The Court erred in refusing to set the judgment aside and award plaintiff a new trial.

(filed 1/28/74) JAMES BOYD

TRANSCRIPT OF TESTIMONY AND INCIDENTS AT TRIAL

Following is the stenographic transcript of the testimony introduced and proceedings had upon the trial of the above entitled case on the 8th day of January, 1974, in the Circuit Court for the City of Newport News, before the Honorable Henry D. Garnett.

* * * * *

(TR7) PATROLMAN THOMAS A. ZEITLER, called as a witness by the Plaintiff, being duly sworn, testified as follows:

(TR8) DIRECT EXAMINATION

BY MR. RICHMAN:

Q. State your name, please.

A. Patrolman Thomas A. Zeitler, Newport News Police Department.

Q. Were you so employed on September the 4th, 1971?

A. Yes, I was, sir.

Q. Did you have occasion to investigate an accident on 44th Street in the seven hundred block, on September the 4th, '71, about 11:30 a.m., between a vehicle driven by James Boyd and one driven by Joseph Edward Diggs?

A. Yes sir, I did.

Q. What type of vehicles were they, Officer Zeitler?

A. Vehicle Number One, driven by James Boyd, was a '68 Oldsmobile, four-door sedan.

* * * * *

(TR9) A. Vehicle Number Two, driven by Mr. Diggs, was a 1965 Dodge truck.

* * * * *

(TR9) Q. Okay. What is the speed limit at this location?

A. Speed limit in a residential district is a 25 mile per hour speed zone.

Q. Okay. What is the character of the roadway at this level; at this area?

A. The character?

Q. The character of the roadway.

A. Yes sir. Unmarked intersection and an unmarked roadway. Surface is blacktop and the surface was in very good condition; no defects.

(TR10) Q. Is it level or straight --

A. Yes sir, it's level roadway.

Q. What were the drivers doing before the accident? What direction were they going?

A. Both drivers were going in an eastbound direction towards Marshall Avenue on 44th Street.

Q. Did the --

A. Mr. --

Q. Did you determine the point of impact?

A. Yes sir.

MR. STEIN: Well, if your Honor please, we object to that. Let him testify to what he found will be all right.

COURT: All he's done so far is said he determined it.

BY MR. RICHMAN:

Q. What were you able to determine it by? Were you able to determine it by anything in particular?

A. Determined the point of impact by skid marks, debris and I talked to the two people involved in the accident. Determined the point of impact as close as I could.

(TR11) Q. Where was the point of impact?

A. Point of impact was approximately ten paces west of the west curb line of Baughman Court and approxi-

mately seven paces south of the north curb line of 44th Street, in the City of Newport News.

Q. Did either of the drivers make any statements to you?

A. Yes sir; both drivers did make statements to me in the presence of each other.

Q. What were the statements?

A. Statement of driver of Vehicle Number One, Mr. Boyd, he stated, "I was going east on 44th Street in the left-hand lane. He made a left turn on me and I was not ready. He did not turn his signal light on."

Q. Did the other driver, Mr. Diggs, make a statement to you?

A. Yes sir. Mr. Diggs, the driver of Vehicle Number Two, "I was going on 44th Street at approximately 25 miles per hour and thought I put on my signal light on to make a left turn. I did not see the car behind me."

Q. Could you please draw a diagram on the board there of what you found at the accident?

A. Yes sir.

* * * * *

(TR12) Q. Okay, Officer Zeitler, would you explain your diagram; where is the point of impact, please?

A. Yes sir, this is 44th Street and this is Baughman Court (indicating). The intersections are not marked or the traffic road is not marked; it's an unmarked roadway. Point of impact is approximately right here (indicating); be ten paces west of the west curb line of Baughman Court. The other measurement --

(TR13) Q. Go ahead, excuse me.

COURT: May I ask you a question, first, please. What is Baughman Court; is that a City street?

A. I believe it is, sir. The other would be seven paces south of the north curb line of 44th Street, would be the other measurement of the point of impact. This measurement here is the amount of skid marks left by Vehicle Number One, which was driven by Mr. Boyd.

BY MR. RICHMAN:

Q. Now, this isn't to scale, of course, Officer, because you have the ten paces a small distance and the nine paces of skid marks a big distance.

A. Yes sir.

Q. Approximately how long is a pace?

A. Approximately three feet; in that area.

Q. So the point of impact was approximately 30 feet, then, from the intersection of Baughman Court?

A. Yes sir, in that area.

Q. And there were nine paces of skid marks from the Boyd vehicle as determined by you?

A. Yes sir.

(TR14) Q. Did you see any skid marks at all from Vehicle Two?

A. Not that I can determine, sir.

Q. And this is the way the cars were when you came to the scene?

A. Yes sir. This vehicle was moved up into Baughman Court, sir (indicating).

Q. This is quite a -- 44th Street is quite a wide roadway, is it not?

A. Yes, it is, sir.

Q. Do you know how many -- if you didn't have parking, do you know how many lanes you could put on 44th Street?

MR. STEIN: Well, I object to that.

COURT: Well, I imagine if the street is marked off into lanes and the officer can tell us how many there are --

MR. RICHMAN: It's not marked off.

COURT: All right, sir. Then he couldn't testify as to the lanes. Do you know how wide the street is?

(TR15) A. I believe it's approximately 16 paces.

BY MR. RICHMAN:

Q. That's over 40 feet, is that right?

A. Yes sir, it's 40 feet or better, sir.

Q. Okay, sir. Now, Mr. Diggs you said told you he was going to make a left-hand turn and Mr. Boyd was -- what was he doing -- why was he in the left lane, did you determine that?

A. Upon his statement and other questioning, he was going around the first vehicle, sir.

MR. RICHMAN: I have no further questions of this witness.

CROSS EXAMINATION

BY MR. STEIN:

Q. Officer, while you're standing up there I'll ask you a couple of questions. This is -- in here or back over on this side, I guess, would be the north side of the newer Newsome Park Apartments (indicating)?

A. Yes sir.

Q. Over here, so that everybody might understand, is that big Shipyard building that you can see

from 39th Street (indicating)?

A. Yes sir.

(TR16) Q. Now, what runs along -- all the way along the right side of the road as you're going east on 44th Street?

A. There's a fence that surrounds the Shipyard building on that side of 44th Street.

Q. Okay. And that runs all the way from -- what is it, Madison to Marshall?

A. Yes sir.

Q. There are no other intersecting City streets at this point.

A. No sir, no City streets.

Q. Now, traffic can move in an easterly and westerly direction on 44th Street.

A. Yes sir.

Q. I think you testified that there's no dividing lines between the eastbound lane and the westbound lane.

A. No sir.

Q. Now, parking is allowed, is it not, on the north side of 44th Street; that would be parking, facing toward Jefferson Avenue, which is down here (indicating)?

A. Yes sir.

Q. And there is no parking over here on the southside of the street, that is along the -- as you're coming up toward -- in an easterly direction, no parking on the right-hand side for this entire block?

(TR17) A. Yes sir.

Q. And I believe you testified there was a 25 mile an hour posted speed limit on 44th Street.

A. Yes sir; also, it is a residential zone.

Q. Now Baughman Court is a hard surface road, blacktop road, as well as 44th Street?

A. Yes sir.

Q. And that, of course, is a City street?

A. Yes sir, it's a City street.

Q. Now, you have indicated these little squiggley marks that you indicated that were skid marks. Now, I see that they're angled over in a -- I guess we'd call it a northeasterly direction. Would that be from the eastbound lane into the westbound lane or slightly, anyway?

A. It is slightly. It's hard to determine, since the roadway is not marked; approximately half and half.

Q. Now, so that we can sort of better understand it, you've got what you found some debris, I understand, at this point where you marked with this little star

(indicating)?

A. Yes sir.

Q. Now, what were the -- did you determine were the points of collision between the two vehicles? Where did you find the damage to the vehicles? What parts of the cars were damaged?

(TR18) A. Vehicle Number One, which was a '68 Oldsmovile, four-door sedan driven by Mr. Boyd, was damaged on the right front fender, hood and bumper. The 1965 Dodge truck, driven by Mr. Diggs, did not have no apparent damage to it at that time.

Q. Did you determine from talking to the parties that the Plaintiff had collided with the rear left tire of the truck?

A. Left rear?

Q. Left rear tire of the truck?

A. Yes sir, the collision was in the left rear portion of the truck.

Q. Apparently the debris that you found -- do you recall what type of debris it was?

A. Not right off. But I believe it was glass from the other vehicle; from the Oldsmobile from the front. I'm not sure, positively.

Q. You want to go back to the stand.

A. Yes sir.

(At this time the witness resumed his seat in the witness box.)

BY MR. STEIN:

(TR19) Q. There's only one lane eastbound and one lane westbound on 44th?

A. Yes sir.

Q. Now, I believe you said that the Plaintiff told you that at the time of the accident he was travelling -- in his statement to you, he had pulled into the left lane. How did that -- what was his statement there with regard to what lane he was in?

A. Left-hand lane is what he got in the statement, sir.

Q. That would necessarily mean that he was, of course, pulling from the eastbound lane of travel, travelling in an easterly direction over in the westbound lane.

A. Yes sir.

Q. Now, Mr. Richman, I believe, asked you what the speed limit was and you testified about -- that it was 25, but Mr. Richman didn't ask you, did you ask Mr. -- the Plaintiff what speed he was travelling at the time of the accident?

A. Yes sir.

Q. What did he tell you?

A. I asked both drivers the speed and Mr. Boyd stated his speed was 30 miles per hour.

Q. What did the Defendant tell you his speed was before the accident?

(TR20) A. Mr. Diggs stated his speed was 25 miles per hour.

* * * * *

(TR20) Q. Do you have any information -- what was the description of the truck that the Defendant was driving?

A. I can't recall at this time.

Q. Well, it was a truck, was it not?

A. Yes sir.

Q. I believe you said a --

A. A Dodge truck.

Q. Dodge truck. Do you have any idea as to the length of that truck?

(TR21) A. No sir.

Q. Larger than an ordinary automobile?

A. Yes sir, larger than a passenger car.

* * * * *

(TR30) JAMES BOYD, called as a witness in his own behalf, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RICHMAN:

(TR31) Q. Where did you go when you left -- where were you going when you left this friend's house?

A. I was going home, sir. And I went to Madison Avenue and I made a left turn. Before I got to 44th Street, I saw the truck.

Q. How far was he away from you at that time?

A. About 50 feet; 50 yards. And he got to the intersection before I did. And I let him went on by and I made a right turn. I followed him --

Q. Which way did he go?

A. He was going towards Hampton; going towards --

(TR32) Q. Did he make a turn?

A. Yes sir.

Q. What kind of turn?

A. He made a left turn and I made a right turn.

Q. Behind him?

A. Yes sir. And I followed him, I say about 50 yards. I been about 50 feet behind him and it looked like he was slowing up and his speed was breaking --

Q. When you were going this 50 yards behind him and you were travelling 50 feet behind him, what speed was he going, about?

A. He looked like he was going about 15 or 20 miles, I guess, because I was doing about 20; and I put my signal light on and I went to pass him.

Q. Now, how far were you away from Baughman Court at this point?

A. About 65 or 70 yards from the intersection.

Q. Okay.

A. And he keep pulling over after I got evened up with him and I keep pulling to the left. And after I see he was still coming over to the left, I put on brakes and blowed my horn. And then the truck just ran over the front end of my car. And he pulled over to the other side and he got out.

(TR33) And I got out the car and I felt all right then; I didn't feel no pain or nothing. And he got out; he told me, "I'm very sorry." He said, "It was my fault." He said, "I will have the car and everything fixed." I told him, "Okay." He said, "Don't call the law." And I said, "Why?" He said, "I don't want to bother with the law."

He said, "I'll have the car moved and have it fixed and everything."

And he was going to get a truck to pull my car off. I went and called the police. When he got back, the police were there. And the police walk it off and everything. And he told the police hisself that --

Q. Okay. Now, how many -- how wide is 44th Street, approximately?

A. Forth-fourth Street is about 40 feet wide, sir. There enough room that four cars can pass.

Q. About wide -- room for four cars to pass?

A. Yes sir, and also parking on the side too, sir.

MR. STEIN: What was the last answer?

MR. RICHMAN: And also park on the side.

* * * * *

(TR35) BY MR RICHMAN:

Q. When you -- when the accident occurred, you say you put on your brakes?

A. Yes sir.

Q. And what was the fastest you'd gone before you put on your brakes?

A. Well, I say approximately about -- when I

look at my speed limit before I pass, I was doing about 20 miles. When I went to pass, I was doing about 25.

* * * * *

(TR39) CROSS EXAMINATION

BY MR. SMITH:

Q. Mr. Boyd, if I understand you correctly, you say you had been visiting a friend?

A. Yes sir.

Q. On 42nd Street?

A. In the six hundred block of 42nd Street, that's right.

Q. And you were in the process of going home to Orcutt Avenue.

A. That's right, sir.

Q. Are you familiar with the layout of 44th Street?

(TR40) A. Yes sir.

Q. You're familiar with that; you've travelled 44th Street?

A. That's right.

Q. You're familiar with the intersections and so forth of 44th Street?

A. That's right.

Q. And you're aware that Baughman Court intersected there at 44th Street.

A. Yes sir.

Q. All right. You indicated that you followed the Defendant at a distance of around 50 feet after you got on 44th Street?

A. I followed him -- no, around -- how far down, about 50 yards.

Q. Fifty yards?

A. About 50 yards. And then after I got about-- I guess about middle ways the block, I guess, then that's when I got up about 50 feet behind him to -- after his truck keep slowing up like, you know, and my speed keep falling and I speeded up to about 50 feet behind him. And I put on my signal light and my way was open and nothing was in the way, and wide as the street was, I went to pass him.

(TR41) Q. All right. Mr. Boyd, you say he was breaking down his speed --

A. That's right.

Q. About halfway in the block?

A. That's right.

Q. You noticed that he was cutting down on his speed--

A. He was.

Q. The defendant.

A. That's right.

Q. And you stated -- how fast was he going then?

A. He was possibly going about, I say, about 20 miles because that's what I was doing, about 20 miles, and I was trailing behind him about 50 feet.

Q. He had broken his speed and you were overtaking him, is that correct?

A. Yes.

Q. Now, you say you're familiar with the layout of 44th Street and the intersection of Baughman Court?

A. That's right.

Q. You were familiar, of course, that this was a fence all along the right side, is that right?

A. Right.

(TR42) Q. And you were familiar with this "T" intersection at this point.

A. That's right.

Q. And, of course, you knew that there was no place that anyone could turn off to the right, between the block here -- between Madison and Marshall?

A. That's right.

Q. There were no other turns in between those two streets?

A. That's right.

Q. And as far as the parking situation, you were aware there was no parking posted along the right side of the road, is that correct, as you were going easterly?

A. That's right.

Q. But there was parking on the left side as you were going easterly?

A. In some spots.

Q. In some spots. But there was definitely no parking over here (indicating); no place to park was posted?

A. No parking --

Q. And no place to turn off to the right, is that correct?

A. There is a road to turn off and go inside the building, you know; there's a gate there.

(TR43) Q. There's a gate there.

A. But nobody goes in there unless they working.

Q. Yes, just authorized people.

A. Uh huh.

Q. What did you think when he was slowing down;

what did you think that the Defendant was going to do at that point?

A. Well, a lot of people do that sometime. He didn't have no signal light on or nothing like that. I checked the signal light before I passed -- before I made an attempt to pass and he didn't have no signal light on. I just thought probably he was going -- he just slowed down, probably looking for something under his seat or something like that.

Q. He was approaching Baughman Court, the intersection there, and he was slowing down, is that correct?

A. That's right; he was going towards Marshall Avenue, that's right.

Q. Marshall Avenue. But he was approaching the intersection -- "T" intersection referred to here as Baughman Court to 44th Street.

A. That's right.

Q. You were behind him and you noticed his car slowing down?

(TR44) A. That's right.

Q. Now, what was your -- what did you think he might do? Why was he slowing down?

MR. RICHMAN: I object to opinion of what he thought, your Honor. I don't think that's relevant.

COURT: Well, I think that he can explain what was running through his mind to explain his actions.

MR. RICHMAN: I think he already has, your Honor.

A. Well, I could not read his mind, because I have drive behind a lot of people do that and keep on going. But he didn't have no signal light on. If he had had a signal light on, I'd know then he was going to make a left turn.

BY MR. SMITH:

Q. Okay. Mr. Boyd, you stated that your speed at one point was 20 miles per hour on 44th Street?

MR. RICHMAN: I object, your Honor; "at one point," I don't know --

BY MR. SMITH:

Q. Well, in your testimony, Mr. Richman asked you how fast you were proceeding on 44th Street, you said your speed was -- what was your speed on 44th Street?

A. My speed was about 20 or 25 miles an hour.

Q. Twenty or 25 miles per hour?

A. That's right, sir.

Q. Now, if you remember, Officer Zeitler testified that you told him that your speed prior to the accident was 30 miles per hour.

A. Well, at the time I probably may have tell him that, but you know, when things like that happen sometimes, a lot of times, sometimes, you get just a little excited, sometimes, things like that. But I wasn't doing -- my memory, I wasn't doing 30 miles; because if I was doing 20 miles behind him at 50 feet and you don't -- actually you can't do 30 miles in that distance. And when I looked at my speed limit, I was doing 20 miles before I passed him and on up to 25 miles.

Q. So you're telling us now that the -- that you weren't going 30 miles per hour, but you were rather going 20 miles per hour?

A. I was going 25 miles an hour. I could have told the police it was 30 miles, but I disremember.

(TR46) Q. Now, you also stated in your examination by Mr. Richman, that you started your pass 65 to 70 yards prior to the intersection, before the intersection of Baughman Court, is that right?

A. That's right.

Q. You're familiar with the diagram here that the officer has drawn.

A. That's right.

Q. But you're saying that actually you started your passing 65 or 70 yards before you reached the intersection?

A. That's right.

Q. That you got over into the left lane --

A. I cut over to the left, that's right.

Q. To pass. Now, from this diagram, if you had completed your pass, if the collision had not occurred, is it not a fact that you would have been passing at this intersection of Baughman Court?

A. I would have passed before I got there. At the speed he was going --

Q. You're saying that you could have completed your pass --

A. I would have completed my pass if he -- he didn't make a proper turn; he made a short turn.

Q. All right, let's go back. Mr. Diggs was proceeding, you testified around 15, 20 miles per hour, prior to the accident, just prior to the accident, is that correct?

(TR47) A. He was probably going about 15 to 20 miles, something like that, yes.

Q. And he's heading easterly, of course; he's still moving easterly?

A. That's right.

Q. And you're going to pass him here at the point of collision; the officer says approximately ten paces this side of the intersection; and you're moving, of course, You say you could have completed your pass and gotten back into your proper lane prior to the intersection?

A. Sir, my way was open and I didn't see anything and he was breaking his speed and I don't see --

Q. Well, that's not the question. Isn't it a fact, though, that if you had -- if you had continued on in your path that you were going, that you would have been passing in the intersection?

A. No, I would have passed before I got into the intersection.

Q. With both of you moving at ten paces here before the point of impact and your car pulling out there, you would have completed your pass and gotten back inside (indicating)?

(TR48) MR. RICHMAN: He's answered the question, your Honor, three times.

BY MR. SMITH:

Q. Mr. Boyd, what part of the truck did your car strike?

A. Well, my car strike the back end -- the rim of his wheel and his wheel -- I would say in the front of his back wheel, because his back wheel ran over on the top of my bumper.

Q. It was around the front of the back wheel?

A. That's right. In front of the back wheel.

Q. And your right front of your car?

A. That's right.

Q. Now, when you started your pass, was the truck -- the front of the truck, was that not at the intersection when you started your --

A. No sir.

Q. The front of the truck, now. I'm talking about the front.

A. No sir.

Q. Had not?

(TR49) A. No sir.

Q. When you called the police officer, had a wrecker already come; had the wrecker come before the police officer arrived?

A. Yes sir, he got the wrecker; he called the wrecker.

Q. Was the wrecker in the process of moving your car?

A. Yes sir, and I rejected him moving it.

Q. Excuse me, sir?

A. And I rejected them moving it until the police come.

Q. You rejected it and they didn't move it -- they didn't move it at all? Your car was never moved from the point of impact, at all?

A. No, they didn't move it until the police came.

Q. Did you and Mr. Diggs ever move the car at all?

A. No, we didn't move the car.

Q. Didn't move it an inch, or foot?

A. No, they didn't even hook up --

Q. Did you and Mr. Diggs try to remove the crow-bar --

A. Yes, we tried to move the car.

(TR50) Q. But you didn't accomplish moving the car at all?

A. No, we didn't move the car.

Q. Going back to my question about the 65 or 70 yards that you started your pass prior to the intersection. You stated you started your pass 65 to 70 yards prior to the intersection of Baughman Court and 44th Street, that's what you testified?

A. What you mean? You mean from Madison Avenue or what? I don't understand that.

Q. In other words, you started your pass, to pass the Defendant, Mr. Diggs, 65 to 70 yards before the intersection of Baughman Court, that's what you've testified to, is that not correct?

A. I said -- well, something like that.

Q. Okay, Are you telling the Court, then, that you were in the left-hand lane for a distance of say 200 feet, prior to the intersection?

A. I wasn't in the left-hand -- I was behind the truck. I was behind the truck; I followed the truck about 75 -- I'd say about a hundred feet; about a hundred yards. And then I pulled over to the left to pass, after I seen my way was open.

Q. But you say you pulled to the left 65 or 70 yards prior to Baughman Court --

(TR51) A. I had been trailing him from Madison Avenue that distance. And after his truck keep slowing up, you know, I didn't know what was the trouble.

COURT: Well, wait a minute. What he wants to know is, how far were you from Baughman Court when you started to pass this other vehicle?

A. Well, I was about 75 yards.

COURT: About 75 yards.

BY MR. SMITH:

Q. Seventy-five yards when you started your pass?

A. That's right.

Q. Okay. Now, Officer Zeitler testified that the accident happened approximately -- the point of collision was about 30 feet or ten paces west of the intersection, approximately. Now is it not a fact, based on where you started to pass, that you would have to travel in the left-hand lane, the westbound lane, for a distance of maybe 200 feet?

A. I don't know how fast -- how many feet I was travelling on that. I know it take a length of time to make up your mind to pass. You just can't pass at the rate

of your eyes, you know, I pulled to the side and -- I pulled on the side and followed him a little piece before I did pass and we got to the intersection before we have the collision -- before we had the wreck.

(TR52) COURT: Did you say you got to the intersection before you had the wreck?

A. Yes sir, and then he -- then he turned about 30 feet from the intersection when we had the collision.

COURT: I see.

BY MR. SMITH:

Q. Of course, you say that the collision -- the point of impact would be say ten paces behind or below the intersection here. Of course, he was driving a truck. You hit the rear of his -- the rear of his truck; it was a truck. I mean, it was longer than a passenger car, I think the officer testified.

A. I didn't hit the rear of his car. I hit the side of it.

Q. You hit the rear wheel, did you not?

A. On the side.

Q. But if you hit his rear wheel, of course, there was more part -- the truck was extended out closer to the intersection, is that not a fact?

A. I really don't know what happened; I didn't pay much attention to that.

(TR53) MR. SMITH: That's all I have, your Honor.

REDIRECT EXAMINATION

BY MR. RICHMAN:

Q. Mr. Boyd, when you started to pass, do you know approximately how many paces from Baughman Court you were?

A. Oh, about -- I say about 75 or 80 yards, I guess, or feet.

Q. How many paces?

A. About 75 feet.

Q. About 75 feet?

A. Yes sir.

Q. Now, there's a big difference here between 75 feet and 75 yards.

A. Yes sir.

Q. Now, do you know approximately how far you were when you started to pass from the intersection of Baughman Court?

A. Well, I was making a guess at it, see.

Q. Well, what do you figure it to be?

(TR54) A. I figure about--

MR. STEIN: Well, we don't want guesses, your Honor. We don't want guesses here.

A. I don't know the measurement because I didn't measure nothing. I would say 75 feet.

BY MR. RICHMAN:

Q. Seventy-five feet before you started your pass?

A. Yes sir.

MR. RICHMAN: No further questions.

RECROSS EXAMINATION

BY MR. SMITH:

Q. Mr. Boyd, do you know the difference between feet and yards?

A. Yes sir.

Q. And did you not testify on three or four occasions that you started your pass 85 -- 80-- 75 to 80 yards prior to the intersection?

A. That's before I decided to pass him.

Q. That's before you decided to pass him?

(TR55) A. Yes sir.

Q. It was my understanding that you started your pass at a point 80 yards west of the intersection of Baughman Court and 44th Street; that you started to pull out into the westbound lane.

A. I say I followed him about 50 yards before I started to pass him and when I did start to pass him, that's when it was 80 feet; I mean 80 yards.

Q. When you started to pass?

A. That's right sir. I come from Madison Avenue -- actually the whole thing was from Madison Avenue. When I started passing him, it was 80 yards, I would say.

COURT: When you pulled out to pass this car, how far were you from Baughman Court, that's all he wants to know.

A. I was about 75 to 80 feet.

COURT: Seventy-five to 80 feet.

A. Yes sir.

COURT: Up to that time, had you been right behind him?

A. About 50 feet, yes sir.

COURT: But you'd been right behind him about 50 feet?

(TR56) A. Yes sir.

COURT: And 75 to 80 feet from the intersection you pulled out to go past him?

A. That's right.

COURT: All right.

MR. RICHMAN: Come on back, Mr. Boyd. Plaintiff rests, if your Honor please.

COURT: Plaintiff rests.

MR. SMITH: Your Honor, we have a motion.

COURT: All right, Sheriff, retire the jury.

(At this time the jury retired to the jury room).

MR. SMITH: If your Honor please, at this point, on behalf of the Defendant, I would move to strike the Plaintiff's evidence. And I base this motion on the fact that from the testimony of the Plaintiff himself and the testimony presented by the plaintiff, he is guilty of contributory negligence as a matter of law.

(TR57) His testimony is filled with violations. In fact, specifically, I would state that he violated section 46.1-190, of the Virginia Code which deals with passing at an intersection. It states, "A person shall be guilty of reckless driving who shall overtake and pass any other vehicle proceeding in the same direction at any intersection of highways."

Clearly, we've had testimony that this is a City street, Baughman Court, "T" intersection here, and the fact that he was attempting to pass at an intersection. It's impossible that he could have completed his pass prior to getting into the intersection.

And we submit that this statute applies, that he was passing at an intersection. He was fully aware --
(TR58) from his own testimony, he was fully aware of the 44th Street situation; the intersection of Baughman Court, the fence on the right side. He saw the man -- he testified he saw the man breaking down, slowing down his speed. The Defendant breaking down, slowing down as he came to Baughman Court. Yet, he decided at that point to pass.

Of course, he's testified that his passing started 75 to 80 yards and then 75 to 80 feet, and I'm not sure exactly which is the true distance. But the fact is, he was passing at an intersection.

* * * * *

(TR59) MR. SMITH:

If I may, I'd like to quote briefly from these cases. The case of White versus John Doe, 207 Virginia 276. This was a situation where a police officer on a
(TR60) motorcycle was attempting to overtake another car and he pulled beside it near the intersection or at the intersection and the car suddenly turned to the left and the collision occurred. The Court in that case states that, "The occurrence in dispute before us is of the very nature which Code 46.1-190 subsection "E", was purposely designed

to prevent." Cites Holland versus Engleblute. "By his action in overtaking the Defendant's vehicle at the intersection, the Plaintiff contributed directly to his own injuries." Cite Loving versus Mason.

And I again would just read briefly from Loving versus Mason, again an intersection accident, passing at an intersection. And the Court states there in 206 Virginia 613, "That clearly Mason," which was the Plaintiff in that case, "violated the statutes referred to." This was also a statute dealing with the rules of the road violated, "referred to was guilty of negligence. It is equally plain that his negligence was a proximate efficient cause of the accident. Had he kept to his side of the road and not driven his car to his left within the intersection in passing the car in front of him, the collision between him -- between his car and the Defendant's car would not have occurred."

And I submit that this is -- this is right in line that the statute itself is designed to prevent this -- just this type of accident that we have here. And even if we take all the testimony as being true as to what he said and all the confusion as to the testimony, the fact is that he was trying to pass this car, he was aware

(TR62) the car was slowing down and that he should have taken precautions not to pass a car that was breaking down, that was -- obviously couldn't turn to the right. There was no place to turn to the right. He had to be either going into Baughman Court, or was stopped dead in the road. Yet, he continues on and tries to pass.

And I don't think the fact that the accident happened ten paces short, of course, of the intersection. Actually it says at the intersection and this was at the intersection. In fact, he could not have completed his pass without going into the intersection. And I submit that this is contributory negligence as a matter of law and that you should strike the evidence of the Plaintiff.

(TR63) MR. RICHMAN: The cases Mr. Smith has cited aren't applicable to this case, if your Honor please. From the testimony here the accident occurred 30 feet from the intersection. This is a big Oldsmobile 98, which is another 18 or so feet, which is another -- makes it 48 feet. And the man started turning another, at least, nine paces because the testimony is that he applied his brakes when he saw him begin to turn.

He started his turn 30 -- 58 -- really about 77 feet away from the intersection, if your Honor please.

And this turn -- these cases that he cites are where they start right at the intersection to pass and the guy starts to make a left-hand turn.

The Defendant -- this case -- this is at least 77 feet from the intersection when he was already in the
(TR64) left lane and the man was going to -- started making his left-hand turn. So, from the Plaintiff's evidence, your Honor, he wasn't passing at the intersection. He had plenty of time to pass and get through it.

MR. SMITH: If your Honor please, first of all, I don't understand what the length of the car, the Oldsmobile, would have anything to do with it. The fact is the front end of the Oldsmobile struck the rear wheel of the truck. The truck, as the police officer testified, was longer than a normal passenger car and certainly the front end of the truck would be in the vicinity of the -- or into the intersection itself.

And the fact that the Oldsmobile had some length to it has nothing to do with the fact the front end hit at this point to the rear end of this car. Obviously the
(TR65) truck would be extended out toward the intersection and probably into the intersection at that point.

And I think that the cases that I have cited, I

think they do start the passing prior to the intersection. Certainly it would be very restrictive on a statute of this type to say that the passing has to start within the intersection. The statute itself doesn't use the word "in". It says at. And I think the cases that -- will bear this out.

I haven't found any particular case in Virginia that has dealt exactly with this particular situation, but certainly there are cases -- I have an ALR annotation here that refers to cases where they have -- in other jurisdictions where they have dealt with this particular
(TR66) question and they have all decided that this would be a very narrow and restrictive interpretation of a particular statute of this nature to say that the accident has to occur within the intersection and that they have to be passing and complete their passing within the intersection.

I think that this is the very type of accident that the statute was designed to take care of and not the fact of a few feet out or a few feet beyond shouldn't have anything to do with the interpretation of the statute.

COURT: Now, the evidence is, as I understand it, and taking it in the best light of the Plaintiff, which we have to do at this stage of the proceeding, is that the

Plaintiff was proceeding easterly on 44th Street, following
(TR67) 50 feet or more behind the Defendant's truck. And they were both, apparently, to the right of the imaginary center line down 44th Street.

That the truck began to slow down, brake its speed, as the Plaintiff described it. And the Plaintiff, at a distance of some 75 feet from the intersection, undertook to pull out to pass the other vehicle. Now he was doing, at that point, he said, some 20 miles an hour. And as he undertook to pass, he probably speeded his vehicle up to 25 miles an hour, maybe a little more, I believe, was what this man said. Now, if he was 75 feet from that intersection when he undertook to pass, and the other car was doing 15 to 20 miles an hour, there's no mathematical way he could have passed before he got to
(TR68) the intersection; he just couldn't have done that.

Now, the accident occurred we'll say 30 feet, from the imaginary line extended from the west of the curb line of Baughman Court. Now, that would be less than two car lengths of an ordinary car. Now, there's no testimony as to how long the truck was, except it was longer than an ordinary car.

So, we would have to conclude it was less than two car lengths of an ordinary car at the -- from the point of impact, which would have extended it, as Mr. Smith has pointed out, the front end of the Defendant's motor vehicle certainly at or very near that intersection.

Now, the statute is very explicit, Mr. Richman, about this. And it states if you undertake to pass at an intersection, you're guilty of contributory negligence

(TR69) as a matter of law.

MR. RICHMAN: Well, if your Honor please, I'd like to point out to the Court that this man had slowed down and had almost stopped when this accident occurred. Now, he had spent all this time slowing down; if he had gone his normal speed of 25 miles an hour, starting back here, and 75 feet from the intersection, he well could have gotten around that --

COURT: Well, I don't believe we can quite follow that, because this -- of course, I -- at this point don't make any deductions about what could have happened. That's a matter for the jury. I only can say what has happened uncontradicted from the evidence. But on that point, your man said that as he got up, it became apparent to him, not in this language, but it became apparent

to him that this man was going to keep going left. And
(TR70) he didn't undertake to stop, at that point; he kept bearing left in an effort to continue to get by him. And then put on his brakes.

And if that were true and if we went to the jury on that I believe the jury would probably find that this man was guilty of negligence as a result of that particular act. It became apparent that this man wasn't going to let him by. That's when, I think, the jury could consider whether or not reasonable care would dictate that he stop at that point rather than undertake to continue on around him.

But I don't consider that in my decision, because that would be a deduction I would have no right to make. But I think the statute is very explicit. If you pass at an intersection, you're guilty of contributory negligence
(TR71) as a matter of law. I might say for the sake of the record, that from the evidence before me right now, there would be no question about the Defendant's negligence. He didn't see the man behind him. We don't know that he even gave a signal. But certainly he didn't see him and he made an illegal or wrongful turn. Because it is incumbent upon him to know what's behind him before he

undertakes to turn.

But I want to explain to this Plaintiff that where two people are at fault in an accident, neither one of them can recover. And when you undertook, sir, to pass at that intersection, the statutes of Virginia say that you're guilty of reckless driving. And I have no choice in this matter -- I don't necessarily agree with that statute, but I have -- in its entirety, but I have no
(TR72) choice in this matter but to grant the motion to strike the evidence and I so do.

All right, now note Mr. Richman's exception.

MR. RICHMAN: Right. And I move -- object to the Court striking the evidence and move for a new trial.

COURT: Yes sir, well, I have to overrule that, Mr. Richman. I'm really bound by that statute. In this particular case, I would say it's one of the cases that this statute is designed to prevent. But there are cases, I might say, that I think would be mighty hard to invoke this statute where we go home every day up Warwick Boulevard, three abreast, and whatnot, we pass those intersections and you're passing someone; they don't make any
(TR73) exception for that. And I just don't believe that the statute is right. I think it's construed too strictly.

But in this case, I believe it is the type of case that -- type of accident that the statute is designed to prevent. All right, Sheriff, get the jury.

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