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Clerk, **Record Nos. 7511, 7512**
Richmond, Va.

In the
Supreme Court of Appeals of Virginia
at Richmond

OLVIN TAMLIN FERGUSON
v. Record No. 7511
OLVIN LEWIS FERGUSON

OLVIN TAMLIN FERGUSON
v. Record No. 7512
RONALD A. FERGUSON,
an infant, etc.

FROM THE CIRCUIT COURT OF THE CITY OF HAMPTON

RULE 5:12—BRIEFS

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

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

HOWARD G. TURNER, Clerk.

IN THE
Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7512

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 16th day of June, 1970.

OLVIN TAMLIN FERGUSON, Plaintiff in error,
against

RONALD A. FERGUSON, an infant, who
sues by his mother and next friend,
MYRTLE FERGUSON, Defendant in error.

From the Circuit Court of the City of Hampton
Nelson T. Overton, Judge

Upon the petition of Olvin Tamlin Ferguson a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of the City of Hampton on the 23rd day of December, 1969, in a certain motion for judgment then therein depending, wherein Ronald A. Ferguson, an infant, etc., was plaintiff and Sandra Sue Smock Worley and the petitioner were defendants; 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 \$17,500, with condition as the law directs.

Record No. 7511

* * * * *

page 19 } Circuit Court of the City of Hampton, Virginia,
on Tuesday, the twenty-third day of December, in
the year of our Lord one thousand nine hundred and sixty-
nine.

* * * * *

Law No. 8014

This day again came the parties, by counsel, on a motion made on the 11th day of December, 1969, by the plaintiff to set aside the verdict of the jury as to the defendant, Worley, and on a motion made by the defendant, Olvin Tamlin Ferguson, by counsel, to set aside the verdict of the jury rendered in favor of the plaintiff, and the same having been duly argued by counsel before the Court, the Court doth deny prosecution in this behalf expended; and it is further con- gued by counsel before the Court, the court doth deny the motions, to which ruling of the Court counsel excepts.

It is therefore considered by the Court that the plaintiff, Olvin Lewis Ferguson, recover from the defendant, Olvin Tamlin Ferguson, the sum of Fifteen hundred eighty-five dollars and seventy-five cents (\$1,585.75), the damages by the jury in its verdict fixed, with interest thereon computed at the rate of Six per cent (6%) per annum from the 23rd day of December, 1969, until paid and his costs by him about his prosecution in this behalf expended, and it is further con- sidered by the Court that the plaintiff take nothing for his bill against the defendant, Sandra Sue Smock Worley, and for his false clamor be in mercy etc. and the said defendant go without a day and recover of the said plaintiff her costs by her about her defense in this behalf expended.

* * * * *

Record No. 7512

* * * * *

page 67 } Circuit Court of the City of Hampton, Virginia,
on Tuesday, the twenty-third day of December,
in the year of our Lord one thousand nine hundred and sixty-
nine.

* * * * *

Law No. 8015

This day again came the parties, by counsel, on a motion made on the 11th day of December, 1969, by the plaintiff to set aside the verdict of the jury as to the defendant, Worley, and on a motion made by the defendant, Olvin Tamlin Ferguson, by counsel, to set aside the verdict of the jury rendered in favor of the plaintiff, and the same having been duly argued by counsel before the Court, the court doth deny the motions, to which ruling of the Court counsel edcepts.

It is therefore considered by the court that the plaintiff, Ronald A. Ferguson, recover from the defendant, Olvin Tamlin Ferguson, the sum of Fifteen thousand dollars (\$15,000.00), the damages by the jury in its verdict fixed, with interest thereon computed at the rate of Six per cent (6%) per annum from the 23rd day of December, 1969, until paid and his costs by him about his prosecution in this behalf expended; and it is further considered by the Court that the plaintiff take nothing for his bill against the defendant, Sandra Sue Smock Worley, and for his false clamor be in mercy etc. and the said defendant go without a day and recover of the said plaintiff her costs by her about her defense in this behalf expended.

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Records Nos. 7511-7512

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INSTRUCTION NO. 2

The Court instructs the jury that in order for the plaintiff to recover against the defendant, Olvin Tamlin Ferguson, there must be gross negligence in the manner in which Olvin Tamlin Ferguson operated his automobile.

Gross negligence is that degree of such negligence which shows an utter disregard of prudence amounting to complete neglect of the safety of another.

If you believe from the evidence that the defendant, Olvin Tamlin Ferguson, entered onto Mercury Boulevard, at its intersection with Tallwood Drive, without properly observ-

ing the traffic conditions on Mercury Boulevard with respect to oncoming traffic, and if you further believe that the defendant at this time operated his automobile in utter disregard of prudence amounting to complete neglect of the safety of the plaintiff, and you believe that such negligence was the proximate cause of the accident and of the injuries sustained by the plaintiff and, if you further believe from the evidence that the plaintiff was free of any negligence which proximately caused or contributed to its own injuries then you shall find your verdict in favor of the plaintiff against the defendant Ferguson and set the damages according to the other instructions of the Court.

NTO

page 22 } INSTRUCTION NO. 3

The Court instructs the jury that the defendant, Olvin Tamlin Ferguson, while driving and operating his automobile with the plaintiff as a guest passenger was under the duty to exercise reasonable care for the safety of the plaintiff, and if you further believe that the defendant, Olvin Tamlin Ferguson, failed to exercise reasonable care and was grossly negligent in failing to do so and that such failure proximately caused or contributed to the injuries of the plaintiff, and if you further believe that the plaintiff was free of any negligence which proximately caused or contributed to his own injuries, then your verdict shall be for the plaintiff and against the defendant, Olvin Tamlin Ferguson.

NTO

* * * * *

page 24 } INSTRUCTION NO. 6

The Court instructs the jury that if you believe from all of the evidence that both of the defendants violated their respective duties to the plaintiff as defined in other instructions of this Court and that such violations if any, proximately caused or contributed to the injuries to the plaintiff, and that you further believe that the plaintiff was free of any negligence proximately causing or contributing to his injuries. then you shall find your verdict in favor of the plaintiff and against both of the defendants and assess his damages against both defendants in accordance with another instruction of this Court.

NTO

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page 27 }

INSTRUCTION NO. 7

If from the evidence and the other instructions of the Court you find your verdict in favor of 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 and probable duration;
3. Any effect of any such injuries upon the health of the plaintiff which are now permanent.
4. Any physical pain and mental anguish suffered by him in the past, and any which may be reasonably expected to be suffered by him in the future;
5. Any and all loss of earnings which may have

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occurred in the past. 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.

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NTO

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page 36 }

INSTRUCTION NO. 8-B

The Court instructs the jury that it is the duty of the operator of a motor vehicle to exercise ordinary care :

1. To keep a proper lookout;
2. To keep his vehicle under proper control;
3. To operate his vehicle at a reasonable speed under the circumstances and traffic conditions then and there existing.

If you believe from a preponderance of the evidence that the defendant, Ferguson, failed to exercise ordinary care in the performance of any one or more of the foregoing duties; then he was negligent; and if your further believe from such evidence that any such negligence was a proximate cause of the collision and that the defendant, Mrs. Worley, was free

Italics

from negligence, then you shall find your verdict in favor of the defendant, Sandra Worley.

NTO

page 37 } INSTRUCTION NO. 10-B

The Court instructs the jury that the duty of the operator of a motor vehicle to exercise ordinary care to keep a proper lookout, is not limited to looking forward, but requires the operator to exercise ordinary care to look in any direction for vehicles, persons or conditions which should affect his driving.

And if you believe from a preponderance of the evidence that the defendant, O. T. Ferguson, under all the existing circumstances at the time, failed to exercise ordinary care to keep a proper lookout for the conditions existing to his left, then he was negligent; and if you further believe from such evidence that any such negligence was the sole proximate cause of the collision, then you shall find your verdict in favor of the defendant, Mrs. Worley.

NTO

page 38 } INSTRUCTION NO. 12-B

The Court instructs the jury that it is the duty of the driver of a vehicle faced with a stop sign to stop at a point from which, in the exercise of ordinary care, he can see traffic moving on the street he proposes to enter. The duty to look requires not only the physical act of looking, but also reasonably prudent action to avoid any dangers which an effective lookout would disclose.

And if you believe from the evidence that the defendant, Ferguson, failed to exercise ordinary care in the performance of the foregoing duty, then he was negligent; and if you further believe from such evidence that any such negligence was the proximate cause of any such collision, and that the defendant, Mrs. Worley, was free from negligence, then you shall find your verdict in favor of the defendant, Mrs. Worley.

NTO

page 39 } INSTRUCTION NO. 13-B

The Court instructs the jury that where a "Yield Right

of Way" sign is posted upon any highway which intersects with another, the driver of the vehicle approaching or entering such intersection on the highway, road or street on which such sign is posted shall yield the right of way to the driver of a vehicle approaching or entering such intersection from either direction. The driver of any vehicle traveling at an unlawful speed shall forfeit any right of way which he might otherwise have.

And if you believe from a preponderance of the evidence that the defendant, Ferguson, violated the foregoing duty, then he was negligent; and if you further believe from such evidence that any such negligence was the proximate cause of the collision and that Mrs. Worley was free of negligence which caused or proximately contributed to cause the collision, then you shall find your verdict in favor of the defendant, Mrs. Worley.

NTO

page 40 } INSTRUCTION NO. 14-B

The Court instructs the jury that if you believe from the evidence and the other instructions of the Court that the defendant, Mrs. Worley, had the right of way, then under such circumstances she had the right to assume that the defendant, Ferguson, would yield such right of way to her; unless and until the contrary appeared, or in the exercise of ordinary care, should have appeared to her.

NTO

page 41 } INSTRUCTION NO. 16-B

The Court instructs the jury that if the jury believe from the evidence that the defendant, Mrs. Worley, without negligence on her part, was confronted with a sudden emergency, then she was not required to exercise the same good judgment in such sudden emergency which would have been required of her in the absence of such sudden emergency; and in such a situation the said defendant cannot be held liable for any error in judgment on her part in any such sudden emergency if you believe from the evidence that she exercised such judgment as an ordinarily prudent person would have exercised in the same or similar circumstances.

NTO

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page 48 }

INSTRUCTION NO. 6-A

In the present case the plaintiff was a guest passenger in the automobile driven by the defendant, and in such a case in order for the plaintiff to recover against the defendant the burden is upon the plaintiff to prove by a preponderance of the evidence that the defendant was guilty of gross negligence and that any such gross negligence was a proximate cause of the accident.

Ordinary or simple negligence is a failure to exercise that care which a reasonably prudent person would have exercised under the same or similar circumstances; and a mere failure to skillfully operate an automobile under all conditions, or to be alert and observant, and to act intelligently and operate an automobile at a low rate of speed may, or may not, be a failure to do what an ordinarily prudent person would have done under the circumstances and thus amount to ordinary negligence; but such lack of attention and diligence, or mere inadvertence, does not alone amount to gross negligence.

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

Refused NTO

page 49 }

INSTRUCTION NO. 3-A

The Court instructs the jury that: gross negligence is conduct showing such indifference to others as constitutes an utter disregard of prudence amounting to complete neglect of the safety of the plaintiff guest, that is, such a degree of negligence as should shock fair minded men, although something less than wilful negligence.

If you believe from the evidence that the defendant, Ferguson, with respect to the plaintiff acted in a manner free of purposeful recklessness, free of deliberate inattention to known dangers, free of conscious and intentional violation or rash disregard of traffic laws, free of purposeful misconduct, and you further believe his actions were not an utter disregard of prudence amounting to the complete neglect of the safety of his passenger, then you shall return your verdict for the defendant, Ferguson.

Refused NTO

The Court instructs the jury that:

If you believe the defendant, Ferguson, was negligent or grossly negligent in driving his vehicle into the intersection, but you also believe the defendant, Worley, saw, or in the exercise of due care, should have seen the defendant, Ferguson's, vehicle in time to avoid a collision with it, and did not either see the Ferguson vehicle or so operate her car as to avoid such collision, then the sole proximate cause of the accident is the negligence of the defendant, Worley, and not that of the defendant, Ferguson, and accordingly you must find your verdict for the defendant, Ferguson.

Refused NTO

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Docket No. 8014

Docket No. 8015

NOTICE OF APPEAL AND
ASSIGNMENTS OF ERROR

To: The Honorable Murgler Gibson, Clerk of the Circuit Court of the City of Hampton, Virginia

Now Comes the Defendant, Olvin Tamlin Ferguson, by his attorney, and gives notice of his intention to apply to the Supreme Court of Appeals of Virginia for a Writ of Error and *Supersedeas* (Bond for the same having been posted in this Honorable Court, and Order by this Honorable Court granting the same having been heretofore entered) to the final judgment of the Circuit Court of the City of Hampton, the Honorable Nelson T. Overton sitting, which was entered the 23 day of December 1969, affirming a jury verdict for the Plaintiff, Ronald A. Ferguson against the defendant Olvin Tamlin Ferguson, in the amount of \$15,000.00, and for the Plaintiff, Olvin Lewis Ferguson, against the Defendant, Olvin Tamlin Ferguson, in the amount of \$1,500.00; and,

The Defendant, Olvin Tamlin Ferguson, by his attorney, assigns the following errors:

1. The Court erred in refusing to grant the Motion of the Defendant, Olvin Tamlin Ferguson, made at the page 69 } conclusion of the Plaintiff's evidence, to strike the Plaintiff's evidence, and enter final judgment for the Defendant, Olvin Tamlin Ferguson;

2. The Court erred in refusing to grant the Motion of the Defendant, Olvin Tamlin Ferguson, made after both defendants had rested, to strike the Plaintiff's evidence, and enter final judgment for the Defendant, Olvin Tamlin Ferguson.

3. The Court erred in refusing to grant the Motion of the Defendant, Olvin Tamlin Ferguson, made on the 11th day of December 1969, and argued on the 23rd day of December 1969, to set aside the verdict of the jury, and enter final judgment for the Defendant, Olvin Tamlin Ferguson, or in the alternative to grant a new trial as to the Defendant, Olvin Tamlin Ferguson.

4. The Court erred in instructing the jury to disregard the testimony of the Plaintiff, Ronald A. Ferguson, in response to a question of Mr. Gustin, which testimony would have further shown the care and consideration paid the Plaintiff by the Defendant, Ferguson, in times of need of the Plaintiff, which need was created by the failure of the Plaintiff, Olvin Lewis Ferguson, to abide by his own respective duty and care to the Plaintiff.

5. The Court erred in granting Instruction number 2.

6. The Court erred in granting Instruction number 3.

7. The Court erred in granting Instruction number 6.

8. The Court erred in granting Instruction number 7.

9. The Court erred in denying Instruction number 2-A.

10. The Court erred in denying Instruction number 3-A.

11. The Court erred in denying Instruction number 6-A.

12. The Court erred in granting Instruction number 8-B.

13. The Court erred in granting Instruction number 10-B.

14. The Court erred in granting Instruction number 12-B.

15. The Court erred in granting Instruction number 13-B.

16. The Court erred in granting Instruction number 14-B.

17. The Court erred in granting Instruction number 16-B.

page 70 } Olvin Tamlin Ferguson

By: Aldine J. Coffman, Jr.

Of Counsel for the Defendant

* * * * *

C. M. Gibson, Clerk
1970 Feb 20
City of Hampton, Va.

G. E. Jordan

page 2 }

* * * * *

Following is the stenographic transcript of the testimony introduced and proceedings had upon the trial of the above-entitled case on the 9th, 10th, and 11th days of December, 1969, in the Circuit Court for the City of Hampton, before the Honorable Nelson Overton, and a jury.

page 2A } APPEARANCES:

R. Gordon Scott, Esq.
Lee Ford, Esq.
Counsel for the Plaintiffs

Harry Gustin, Esq.
Counsel for Defendant,
Sandra Sue Smock

A. J. Coffman, Esq.
Counsel for Defendant,
Olvin Tamlin Ferguson

Lloyd Hansen, Esq.
Counsel for the Defendant,
Olvin Tamlin Ferguson

G. E. JORDAN, Witness, having been first duly sworn, was examined and testified as follows:

* * * * *

By Mr. Scott:

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page 9 }

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Q. Where was the accident located?

A. It happened on West Mercury Boulevard at its intersection with Tallwood Drive.

Q. What city?

Sandra Smock Worley

A. City of Hampton, sir.

Q. Will you tell us what type of cars were involved?

A. At the time I arrived, I found a 1962 Olds, four-door sedan, and a 1967 Opel, two-door, sports coupe.

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page 10 }

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Q. Tell us the weather conditions that morning.

A. The road was wet. It was a rain or mist-type morning.

Q. What time did you arrive at the scene of the accident?

A. I arrived at approximately 7:38 a.m.

Q. What did you find when you arrived, sir?

A. When I arrived, I found the Olds sitting in the Median Strip facing more or less, in an easterly direction. The Opel was sitting out on Mercury. It was more or less in the outside east-bound lane of Mercury facing west.

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SANDRA SMOCK WORLEY, Defendant, called as an adverse witness, having been first duly sworn, was page 44 } examined and testified as follows:

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page 45 }

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Q. What lane were you driving in going east on Mercury Boulevard?

A. In the left lane.

Q. On the inside lane?

A. Yes.

Q. What were the traffic conditions at that time?

A. It was drizzling rain, and the road was wet.

Q. What were the traffic conditions.

A. There was traffic going eastbound and traffic coming westbound.

Q. Well, was it light, medium, heavy?

Sandra Smock Worley

page 46 } A. It was light.

Q. Light for Mercury Boulevard? Say, was it light for Mercury Boulevard?

A. Yes, sir.

Q. As you were driving along in the inside lane, what automobile or automobiles were in front of you, if any, in near proximity?

A. As I was proceeding east on Mercury Boulevard, there was a black car that had just passed me on the right, and a 1969 fire engine red Torino behind the black car.

Q. Were both of them in front of you?

A. Yes, sir.

Q. They were in front of you?

A. Uh-huh.

Q. To what extent was the black car in front of you, approximately how far?

A. I would say, oh, six or seven car lengths.

Q. The Torino?

A. Three or four.

Q. So they were pretty close together?

* * * * *

page 47 } Q. Could you see traffic coming out of the intersection of, what is the name of the street?

Mr. Scott: Tallwood.

Q. Tallwood onto Mercury?

A. Yes, sir.

Q. You could see that?

A. Yes, sir.

Q. Were there any obstructions, whatever, in the way of buildings?

A. No, sir, no buildings.

Q. The two *automobiles* in front of you did not obstruct your vision of cars coming out of Tallwood onto Mercury Boulevard?

A. No, sir.

Q. What was your speed?

A. Just a little over forty miles per hour.

Q. What is the maximum speed limit at that place?

A. Forty-five.

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Sandra Smock Worley

page 50 } Q. When did you see the Opel automobile?

A. As it was coming onto the road.

Q. Coming onto the road from where, Mrs. Worley?

A. From Tallwood Drive.

Q. Tell the jury whether you knew if it was travelling on Tallwood Drive, or on the service lane parallel to Mercury Boulevard.

A. I couldn't tell whether it came from the service road or from Tallwood, because when I first saw the vehicle it was out onto the road in such a manner I could not tell from where it was coming.

Q. Out into the road? Out into what road?

A. Mercury Boulevard.

Q. Was it on Mercury Boulevard when you first saw it?

A. Most of it. The whole car was not sitting onto the road.

Q. Was it sitting or running?

A. It was running.

Q. It was running, and you did not see it until part of that automobile was on Mercury Boulevard proper?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. What prevented you from seeing it prior to that time?

A. Nothing, I just didn't see it.

page 51 } Q. You just didn't see it, so that it was coming out—it was already partly on the Mercury Boulevard, itself, when you first saw it?

A. Yes.

Q. And it was moving?

A. Yes, sir.

Q. You heard the police officer testify this morning?

A. Yes.

Q. You were here. You heard him?

A. Yes.

Q. He testified that you told him right after the accident that when you first saw this Opel car that you were just back of the Lions Club sign, is that correct?

A. Approximately.

Q. So you had not passed the Lions Club sign when you first saw this car on Mercury Boulevard?

A. I don't really recall, because that is the only point that I could estimate as to the proximity at which I saw the Opel.

Q. Can you deny what the police officer said?

Mr. Gustin: I don't believe we are doing anything, but be-

Sandra Smock Worley

coming argumentive. She is being asked to deny the officer, and she has not contradicted what she told him.

The Court: Overruled.

page 52 } Q. You cannot deny it?
 } A. No, sir.
 } Q. Why then, did you not stop your automobile
 to avoid hitting the Opel crossing Mercury Boulevard?
 } A. I could not stop.

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page 54 }

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The Court:

A. I would say so.

Q. Did you hear the officer testify as to the distance from that Lions Sign to the pole, which you ultimately struck.

A. Yes, sir I did.

Q. Do you agree with him that it was 180 feet approximately?

A. I did not know the estimate between the medians, but I would estimate from the Lions Club sign to the median was approximately 100 feet.

Q. Then about 78 feet across the median strip to the pole. Did you hear him testify?

A. I heard him say that.

Q. You could not deny that?

A. No.

* * * * *

page 58 } By Mr. Gustin:

* * * * *

page 59 }

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Q. Let me ask you this, you mention *there* was a black car that passed you on your right, and was leading you. There

Sandra Smock Worley

was a red Ford Torino that followed that car, and passed you on the right before you got to the Lions Club sign?

A. Yes, sir.

Q. Where were those cars with reference to your seeing the Opel?

A. Those two cars had just cleared the intersection when I saw the car come out.

page 60 } Q. In time sequence, or in the matter *or* time, how soon after the red Torino cleared the intersection did you see the Opel driven by O. T. Ferguson in the position you have described?

A. Almost immediately afterward.

Q. Just prior to the black car and the red Torino clearing that intersection, where were they with reference to your occupation of the left lane and they in the right lane east-bound, and Tallwood Drive?

A. Repeat that.

Q. You were proceeding east in the left lane. They were proceeding east in the right lane, but forward of you, how far apart were they from each other?

A. I would say maybe two or two and a half car lengths.

Q. Were they travelling at about the same speed, one not gaining on the other?

A. I think the Torino was gaining on the Black car.

Q. As they were in that attitude, when you reached the Lions Club sign just before reaching the Lions Club sign, had those two cars drawn within two to three car lengths of each other?

A. Yes, sir.

Q. You mention the red Torino was two or three car lengths ahead of your position?

A. Yes, sir.

Q. Was that the angle you went together to where they cleared the intersection, and the Opel appeared?

page 61 } A. Yes, sir.

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page 62 }

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Q. When you saw the Torino after the black car, and the Opel cleared the intersection far to your right, did it appear

Sandra Smock Worley

to be going at right angles to your approach to the intersection, or was it angled left or right as to its movement?

A. It appeared to me it was going across the eastbound lane of Mercury and onto the westbound.

Q. A left turn?

A. Yes, sir.

Q. What part of your car, and what part of the Opel were initially in collision?

A. The right front of my car and the left front of the Opel.

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page 63 }

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Q. So that I can distinguish and the Court and Jury, the collision between your car, and Ferguson's car did not happen in the right lane eastbound?

A. No, sir.

Q. Did it happen in the Median strip?

A. No, sir it did not.

Q. Did it happen in the left, eastbound lane, the one you were using?

A. Yes, sir it did.

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page 64 }

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Q. As you approached this intersection, had the black car and the red Ford Torino, was there any other moving traffic of note in your line of vision prior to those cars clearing the intersection?

A. There was a car in the intersection coming from the west bound lane on Mercury, as if going to make either a left turn onto Tallwood, or a u-turn, I'm not sure which.

Q. Did that car move, or remain standing during the approach of your vehicle to the collision point with Ferguson?

Mr. Ford: There hasn't been evidence as to whether it was running, or standing still in the first place.

Sandra Smock Worley

The Court: He asked was it moving.

Mr. Ford: Or was it still standing still. He
page 65 } said—

Mr. Gustin: Was it moving or standing?

Mr. Ford: That is right.

Mr. Gustin: Thank you very much.

A. This is the car coming from the westbound lane.

Q. Yes.

A. It was standing still.

Q. Did that car move either prior to your seeing the Opel
as you saw it, or immediately after?

A. No.

Q. You don't know what happened to it in the accident?

A. No, after the accident there was a woman in a black 64
Ford that spoke to me, but she went across the street, and I
haven't seen her, she went on her way.

Q. You don't know if she was in that car, or some other?

A. No, I don't.

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Q. The entire time from the passage of the black car to the
Torino passed, and your immediately seeing the Opel, was the
Opel at any time stopped?

A. Not that I saw.

Q. While you saw it?

A. While I saw it, it was not stopped.

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* * * * *

Q. When you saw the Opel, did it appear to be coming out
of Tallwood, or out of the service road?

page 68 } A. Really I don't know. It was situated such
from. that I couldn't tell which direction it was coming

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Olvin Tamlin Ferguson

By Mr. Coffman

Q. Mrs. Worley, you testified you were *familiar* with Mercury Boulevard, and had driven it back and forth to work?

A. Yes, sir.

Q. What time are you expected to be at work?

A. 8:45.

Q. You stated you were in the vicinity of the Lions Club sign. Are you *familiar* with other signs in that page 69 } vicinity?

A. Just the stop sign and the yield sign at Tallwood and the service road.

Q. This sign facing your lane of traffic, just opposite the Lions sign, can you read it?

A. It says slow, merging traffic.

Q. Did you see that sign?

A. I don't recall seeing it.

Q. In the direction that you are travelling, can you read the Lions Club sign?

A. No, sir.

Q. It is only visible to traffic coming in the other direction?

A. Uh-huh.

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OLVIN TAMLIN FERGUSON, Defendant, called as an adverse witness, having been first duly sworn, was examined and testified as follows:

By Mr. Ford:

page 109 } Q. You were driving the Opel automobile on the day that your brother was injured?

A. Correct, sir.

Q. Whose automobile was it?

A. It was mine.

Q. You drive it all the time?

A. Correct.

Q. What is your age now?

A. Twenty-three.

Q. So your age at the time was—

A. Twenty-two.

Olvin Tamlin Ferguson

Q. You are married?

A. Yes, sir.

Q. You have a family?

A. Yes, sir.

Q. Did you go down the service road running along the south side of Mercury Boulevard toward Tallwood Drive.

A. Right.

Q. When you got to the intersection of Tallwood and Mercury Boulevard in what direction were you looking?

A. I was looking in the eastbound lane.

Q. You were looking toward Newport News?

A. Right.

Q. Did you see automobiles on Mercury Boulevard going east?

page 110 } A. Yes, sir.

* * * * *

page 111 }

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Q. Did you see the automobile which turned out to be the one driven by Mrs. Worley, this lady?

A. No, sir.

Q. Why didn't you see it.

A. She was not in my vision. I can't explain why I didn't see her.

Q. Was it foggy?

A. It was misting rain. It was hazy. I wouldn't say it was fog.

Q. You could see a good distance down the road, could you not?

A. I thought I could see a good distance down the road.

Q. So that had you seen her you could have taken some other action other than what you did?

A. If I had seen her.

Q. But you didn't see her?

A. No, sir.

Q. You cannot tell us why you didn't see her?

A. No, sir.

Q. There are no buildings there that obstruct you, are there?

A. No, sir.

Olwin Tamlin Ferguson

page 112 }

* * * * *

Q. When did you first, did you make any turn to cross Mercury Boulevard?

A. Did I make any turn to cross?

Q. Yes, you turned off the service road, turned to the right, didn't you?

A. I proceed past the yield sign. I would say maybe five yards, and I did make a slight right turn, but I did not enter Mercury Boulevard at that point.

Q. When did you look toward your left, toward Newport News?

A. Shortly after stopping at the intersection.

Q. So you did stop at the intersection?

A. Yes, sir.

Q. Did you look to your left first, toward Newport News first?

A. I looked to the left first, correct.

Q. Then did you look to the right?

A. Yes, sir.

Q. That is toward Hampton.

page 113 } A. Yes, sir.

Q. You continued to look toward the right did you not?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Did you start moving while you were looking to your right?

A. No, sir.

Q. You did not?

A. No, sir.

Q. When did you look again to the left, if you ever did?

A. As soon as the car passed me that was coming down Mercury, as soon as it went by I looked to the left.

Q. How many cars passed you?

A. All I know is a total of two cars went by when I was approaching the intersection, and when I reached it. One passed before I quite got to the intersection, and after I came to a complete stop, one other passed.

Q. Where did you stop, down by the yield sign, or right on the edge of Mercury Boulevard.

Olvin Tamlin Ferguson

A. I would say approximately four feet off Mercury Boulevard.

Q. You had left the first place you had stopped?

A. No, this was still the original place.

Q. Still at the original place?

page 114 } A. Right.

Q. Two cars passed you?

A. Right.

Q. Then you looked again to the left?

A. Right.

Q. And saw nothing?

A. Saw nothing, well I saw one car, this was a dark colored car travelling in the right hand lane which was a considerable distance away.

Q. You could see that?

A. I could see that.

Q. You didn't see the car driven by Mrs. Worley?

A. No, sir.

Q. After looking to the left, and not see Mrs. Worley what did you do?

A. After looking to the left and not seeing Mrs. Worley?

Q. Uh-huh.

A. I looked straight ahead.

Q. What did you do with your car?

A. I proceed to cross Mercury Boulevard.

Q. When did you get hit?

A. Well, I proceed across Mercury Boulevard, and my front end reached the median, I then looked to the right to the traffic heading westward to see if I could proceed out this way onto Mercury to head toward Newport News,

page 115 } and I had turned my head and

Q. You turned your head which way?

A. Right.

Q. To your right?

A. My right, and this is when the collision happened.

Q. So as a matter of fact, you were looking toward your right when the accident happened?

A. At the impact, I was looking to the right.

Q. And just before the impact?

A. Not even a split second, maybe a split second, I had just turned my head when the impact happened.

Q. You looked to the right twice?

A. Once.

Q. Only one time the whole time you were there?

Olvin Tamlin Ferguson

A. Yes, I mean as far as proceeding—now I looked to the right only once.

Q. You looked to the right before you proceeded out?

A. I looked to the right at a black comet that was sitting in the right of the median, but as far as looking to the right down the westbound lane, I did not look to the right down those lanes until I got into the median, or got to the median.

Q. So you were not looking to your left, you were looking at the black car somewhere in the median?

A. At what time, wasn't I looking to the left?

Q. As you were crossing the road.

A. I was looking straight ahead.

page 116 } Q. Straight ahead?

A. When I was first crossing the road.

Q. That is all, sir.

By Mr. Gustin:

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page 120 }

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Q. In answer to Mr. Ford's question, you indicated there was no building or other obstruction as you got to or near the yield sign on the service road at Tallwood that would preclude or prevent you looking toward what was coming on the two east bound lanes of Mercury.

A. No.

Q. You said you stopped at the yield sign before going across?

A. Right.

Q. Two cars passed you?

A. Correct.

Q. How much time elapsed while you were actually stopped?

A. Probably ten seconds, ten or fifteen seconds.

Q. The automobile you were driving was gear shift as opposed to automatic?

A. Right.

Q. When you were stopped that ten or fifteen seconds, Mr. Ferguson, how far were the two cars that passed you east bound?

Olvin Tamlin Ferguson

A. I would say probably seven or eight car
page 121 } lengths between the first and second cars.

Q. Did they appear to be travelling within the
speed limit?

A. Reasonably so.

Q. The speed limit there was forty-five.

A. Yes, sir.

Q. You knew that?

A. Yes, sir.

Q. The streets were wet?

A. Yes, sir.

Q. Were your windshield wipers going, or not?

A. Yes, sir.

Q. You had it going?

A. Yes, sir.

Q. When you were stopped that ten to fifteen seconds, was
your car slightly at an angle to the service road and West
Mercury Boulevard?

A. Yes, it was slightly at an angle.

Q. Tell us how much time passed from the time the second
of the cars went by to when you moved out, did you go im-
mediately?

A. No, when the second of the two cars passed, I glanced
back to my left, and this is when I seen the dark car travell-
ing in the right lane headed eastward, and then I looked
straight ahead and proceeded out.

Q. It was a matter of a second of two before
page 122 } you pulled out?

A. Right.

Q. The car you were driving was a gear shift car, was it
in what—low?

A. First gear.

Q. Was it still in first gear when you had the collision?

A. Yes.

Q. I believed you reached on the console to move the gear
shift?

A. Yes.

Q. The width of these two lanes you intended to cross to
get to the median and ultimately to the left lane are about
eleven feet?

A. I would say so.

Q. I believe you said you crossed before the collision, the
first lane?

A. Yes.

Q. That is eleven feet you moved, and you were in the pro-

Olwin Tamlin Ferguson

cess of being in and starting to leave the second one, or another eleven feet when the collision happened?

A. No, I said my front end reached the median.

Q. Most of your car was still in the left east bound lane, wasn't it?

Q. When the collision happened?

page 123 } A. No, I can't say when the collision occurred.

It was, I can say, when I looked to the right, more of my car was in the left bound lane, but time elapsed and I looked to the right.

Q. From the time the second car passed, you looked left, and moved out, from the time you moved out to the time of the collision, was a matter of two seconds or so, wasn't it?

A. Yes.

Q. Did you see a car that was stopped in the median, or moving slowly in the median, either going into Tallwood from your right or going forward to make a u turn to go east on Mercury Boulevard as you stopped and moved across?

A. Yes.

Q. Did you see that car?

A. Yes.

Q. Your gaze as you moved from s stopped position to where you were hit was fixed on that car to see what it was going to do.

A. Yes.

Q. As you moved out with your attention gazed on that car, was that car to your right, or forward of your position?

A. To the right.

Q. Did it, as you moved out, move on into a u turn and go east on Mercury Boulevard?

A. I can't say for sure it turned into a u turn. It moved out the same time I did.

page 124 } Q. It went to your right as though to go east on Mercury as you were crossing?

A. Yes.

Q. You don't recall anything after the collision?

A. Nothing.

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Ronald Ferguson

page 126 }

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Q. If you had seen a car, other than the black one you said you saw some distance down, other than that one, between it and you, would you have moved out?

A. That depends on the distance, I mean if it was very much ahead of the black car, no.

Q. If it was half way between that car and your car, you wouldn't have moved out?

A. No.

Q. With reference to a Lions Club sign, are you acquainted with the Lions Club sign?

A. I have seen the Lions Club sign.

Q. You knew where it was when the accident happened?

A. No, I never really noticed it before the accident.

Q. Your attention has been brought to it since.

A. Yes.

Q. You know it was there when the accident happened?

A. No, I don't know it was there when the accident happened.

Q. Assuming it was, where in reference to that sign's location was the black car you saw in the right lane coming toward you?

page 127 } A. I would say probably eight or nine car lengths behind, or even further.

Q. By car lengths, you are talking about fifteen feet per car length.

A. Uh-huh.

Q. Did it appear to be travelling as the other two cars that passed at about forty or forty-five miles an hour?

A. It was too far to judge.

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page 142 }

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RONALD FERGUSON, Plaintiff, having been first duly sworn, was examined and testified as follows:

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Ronald Ferguson

page 143 }

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By Mr. Coffman :

Q. Mr. Ferguson, I asked were you in the accident that morning, and Mr. Scott objected. Were you?

A. Yes.

Q. You were riding with your brother?

A. Yes, sir.

* * * * *

Q. We were saying your brother came to a full stop.

A. Yes.

page 144 } Q. You heard him testify he looked at oncoming traffic and waited for several cars to pass?

A. (Nodded yes)

Q. Did you see those cars?

A. I won't paying attention to it.

Q. Did you see any traffic in the oncoming lane, the east bound lane?

A. Yes.

Q. What precisely did you see?

A. Like I said I wasn't paying attention to them. I wasn't expecting anything.

Q. Did you look east?

A. Yes, sir both directions.

Q. Did you see the car in the outside lane far down?

A. Not until we got in the middle of the road.

Q. Speaking of getting to the middle of the road, were you not in fact looking to your right?

A. I was looking to my right at that time, yes.

Q. The testimony was, you yelled before the impact. Had you caught the other car in your peripheral vision?

A. I turned my head, and I caught the car, and I said, "Tammy, watch out".

Q. Prior to pulling out, did you look toward the bridge?

A. Yes, sir.

page 145 } Q. As the car your brother drove came out, did you see any cars coming toward you from that direction?

A. I seen cars coming, but I didn't pay attention to them. They weren't that close.

Ronald Ferguson

Mr. Scott: The answer was he didn't pay attention to them.
The Court: The jury heard the answer.

Q. You do not recall seeing Mrs. Worely's car?

A. Not until we got in the middle of the road.

Q. And you caught it in your peripheral vision?

A. Yes.

Q. After you looked east, and turned right, and were looking back, you caught it?

A. Yes.

Q. The first time you looked east you didn't see it?

A. (Witness Nodded Negatively)

Q. Let the record reflect he nodded.

Mr. Gustin: I can't hear.

Q. I asked him prior to his glancing back, he said the first time he looked to the east, did he see it. He said no. He nodded his head he did not see it the first time.

Q. Do you have a habit of watching traffic when you are riding with someone?

A. Yes.

Q. You do? You remember the morning very well, the weather?

A. Yes, it was raining and the road was wet,
page 146 } sort of misty.

Q. You say hazy or foggy?

A. Not really foggy.

Q. Not really foggy?

A. (Witness Nodded Negatively)

Q. Most of the cars have head lights or parking lights on?

A. Yes, sir.

Q. Did your brother?

A. Yes, I saw him turn them on. His dash lights came on.
I don't know if he had his riley lights on.

Q. Riley?

A. His car had lights on it called riley.

Q. You don't know which?

A. I don't know.

Q. Were the windshield wipers on?

A. Yes, sir.

Q. You said you saw the car of Miss Smock, now Mrs. Worley, just an instant before impact?

A. Yes.

Q. Did you see any lights?

Ronald Ferguson

A. When I looked at it, I didn't see any lights.

Q. Do you remember the cars passing on Mercury Boulevard before your brother pulled out?

A. I only remember one car, it was a black car.
page 147 } I don't know what kind.

Q. You remember one car passing?

A. Yes, sir.

Q. He was stopped when it passed?

A. I don't remember if he came to a stop. I don't remember if he came to a complete stop.

Q. How long have you been driving?

A. Oh, about a year and a half, just about.

Q. You picked up this habit of looking at other cars, left and right as part of driver training and so on?

A. Yes.

Q. As your brother was getting ready to turn across Mercury, you were looking left and right?

A. Yes, sir.

Q. You saw no danger?

A. No.

Q. Do you recall the black comet in the intersection?

A. I just remember seeing a black car going by. I don't know what the type it was.

Q. The one in the intersection?

A. I don't remember seeing nothing, no sir.

Q. You were looking west and east, you never followed.

A. I wasn't paying attention. I wasn't expecting anything.

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By Mr. Gustin:

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page 149 }

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Q. How was it you were not going to school, if school was open?

A. My mother and father had a disagreement,
page 150 } and I was staying with my brother.

The Court: I instruct the jury to disregard the question and the answer.

Sergeant William H. Wade

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page 166 }

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Mr. Coffman: In moving the Court to strike the plaintiff's evidence with respect to the defendant, Ferguson, I would reflect the comments of Mr. Gustin in saying the motion is not lightly made, or made routinely, but in an earnest effort after a study of the evidence.

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page 184 }

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*I request the Court to strike the evidence as to the defendant Ferguson on the part of the plaintiff Ferguson.

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page 198 }

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*I think in consideration of the evidence which has thus far been produced, I won't say it is completely clear, but I feel there is an issue which remains a factual issue and I think that the Motions of both the Defendant Worley and the Defendant Ferguson must be denied.

Mr. Gustin:
Mr. Coffman: Exceptions of both Counsel noted.

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page 200 }

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SERGEANT WILLIAM H. WADE, Witness, having been first duly sworn, was examined and testified as follows:

Sergeant William H. Wade

By Mr. Gustin:

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page 201 }

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Q. On that day did you witness a two car collision at West Mercury Boulevard as it intersects Tallwood Drive in Hampton?

A. Yes, sir.

Q. At that time were you in a car?

A. Yes, sir.

Q. You were proceeding in what direction on what street?

A. East on Mercury Boulevard or toward Langley Field.

Q. Speak so the last gentleman can hear you and he won't have trouble.

A. Can you hear me *alright*?

Q. You were going east on Mercury Boulevard and at that point how many eastbound lanes are there?

A. Two, sir.

Q. Of those two lanes, in which lane were you operating before you saw this collision?

A. The outside lane.

Q. By the outside lane as you go eastbound, does that mean left or right?

A. Right lane.

Q. Before you reached the intersection of Tallwood Drive and West Mercury Boulevard did you see the accident occur?

A. Yes, sir.

Q. Before you reached that?

A. Yes, sir.

Q. Prior to the happening of the accident what, if any, other traffic did you see in either of the eastbound lanes forward of your position, between you and Tallwood?

A. Two cars.

Q. Two cars ahead of you?

A. Yes, sir.

Q. Is that in either lane, both lanes?

A. One in one lane. One in the left lane and one in the right lane.

Q. How did they situate themselves to each other were they even or one ahead of the other?

Sergeant William H. Wade

A. Honestly, sir, I wasn't paying that close attention, right at that particular time.

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page 203 {

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Q. What is the posted speed limit at that time on Mercury Boulevard?

A. Forty five miles an hour.

Q. What was your rate of movement as you moved along before seeing the accident?

page 204 { A. Somewhere between forty and forty five.

Q. The car ahead of you, do you know what color it was?

A. No, sir, I hadn't paid any particular attention to the colors of the cars.

* * * * *

Q. Thank you, Mr. Lee. Where was the car that you just described as being two or three of these pole lengths in front of you with reference to Tallwood Drive when the collision you saw took place?

A. I am not positive on that. The car in the same lane I was in honestly, because it is really difficult to say whether the car made it through the intersection, in my own mind, or whether it turned off to the right to avoid the accident.

Q. It either cleared or turned to the right?

page 205 { A. Yes, sir I can't figure where the car disappeared to I guess it was the shock of seeing two cars almost explode in front of me.

Q. Of the two cars you had seen in front of you before the accident you described the one in the right lane and the distance it was forward of you. Was that car traveling faster or slower than your car?

A. They were about the same rate of speed because I had been coming along behind them for some distance.

Q. Tell us approximately what position the car in the left lane forward of you was to your car before the accident.

A. It was about the same distance. From where I was to that particular intersection. It had been about the same distance for some distance up the street.

Sergeant William H. Wade

- Q. I have reference to the car in the left lane.
 A. Yes, sir.
 Q. Was that two or three light poles in front of you?
 A. Yes, sir.
 Q. Had you been at the same attitude to that car any appreciable distance?
 A. I would say at least shortly before the previous light. There isn't a light at Tallwood.
 Q. Tallwood is where the collision happened?
 A. Right.

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page 207 }

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A. I hadn't paid any particular attention to any of the cars other than in detail, until the actual collision.
 page 208 }

- Q. It turned out to be what color?
 A. It was a cream colored Mercury.
 Q. In the left lane—a Mercury or an Oldsmobile?
 A. A Mercury or an Oldsmobile, I am not sure. I know it was a cream color.
 Q. For your clarification—

Mr. Ford: We will agree it was a cream colored Oldsmobile if the Court please.

- Q. Does this picture depict—
 A. I never seen the front of the car. I seen about here.
 Q. You won't say that it's not the car.
 A. No, sir.
 Q. Referring to stipulation number one, Sergeant, go ahead and in your own words tell us as you were approaching in the right lane traveling approximately—what did you say?
 A. Between forty and forty five miles an hour.
 Q. With the light colored car in the left lane forward of you, with another car approximately how far forward of this one in the right lane?
 A. I'm positive where the car was in relationship.
 Q. It wasn't behind this car?
 page 209 } A. I'm not sure whether it was behind, beside

Sergeant William H. Wade

or in front of it. I'm aware there was two cars in front of me and one of them was in one lane and one in the other.

Q. Go ahead from that point and tell the movement of these cars forward of you and what you saw and the sequence in which they moved and came together.

A. The small foreign car was approaching from the right, and it crossed the service road and I thought to myself gee is he going to come into the main highway and I think I was slightly distracted by something and the next instant I seen one car flying through the air or twirling around in a circle, which was the smaller of the two cars and there had been an impact right there and I guess my eyes actually focused on what was happening between those two cars and I really—

Q. The collision you witnessed as you have just described: where did it happen with reference to the two eastbound lanes of West Mercury Boulevard?

A. Almost on the, just almost on the middle of the intersection I would say. One of the car bounced on up the road a little, the smaller car bounced and the other car swerved over to the crossover to the other angle.

Q. So it happened on West Mercury Boulevard as opposed to Tallwood or the median strip?

A. Yes, sir it happened almost squarely in the middle of the intersection I would say.

Q. Did you ever see the smaller car stop before it came from Tallwood or the service road onto the intersection?

A. I didn't actually see it stop I couldn't swear it did stop or did not stop, to be honest. I don't think it did but I couldn't swear it did or didn't.

Q. What time interval, if any, was there between your seeing the little car and the happening of the collision?

A. I would say, let's go back a little bit, traffic was moderate. In fact I used Mercury Boulevard as a madhouse in traffic between seven thirty and eight o'clock. Usually from where I live at that particular time if I left at seven twenty or seven twenty five I would usually get ahead of the main rush of traffic: five minutes later it begins to pick up then.

Q. Were you that morning ahead of the rush?

A. Yes, sir.

Q. You described the traffic conditions as being moderate?

A. At that particular second it was fairly moderate: five minutes later it began to be like one big madhouse.

Sergeant William H. Wade

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page 212 }

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Q. If you projected Tallwood into the intersection, where page 213 } in the center of that projected street as it intersects with the two lanes, would the impact be?

A. At the time I seen the small blue car, it was turning around almost like a little top out there. It turned around at least once all the way around, and finally came to a standstill.

Q. Where with reference to the intersection did the little car come to rest?

A. It was kind of catty-corner across the white line here. This white line on this side here.

Q. What does that white line serve to do?

A. It divides the two lanes of traffic.

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page 253 }

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The Court: Without prolonging the matter any more than necessary, I think that in view of the evidence presented it leads the Court to the view that to sustain either Motion would be to invade the proper area of responsibility of the Jury. I deny the Motions in both cases. I assume you wish to note your exceptions to both.

Mr. Gustin: Yes, sir.

Mr. Coffman: Yes, sir.

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page 259 } The Court: Your objection continues throughout the instruction.

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page 262 }

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The Court: *** Plaintiff's instruction number two.

Mr. Ford: That is a definition in the opinion by Judge Ianson.

The Court: Mr. Coffman, I guess this is your department.

Mr. Coffman: Several objections your Honor. I am not satisfied with the definition of gross negligence in paragraph two. It is generally considered gross negligence page 263 } is not that degree of negligence. It omits slight care as a standard. Gross negligence is such negligence as shows an utter disregard for the safety of another. I think the phrase better used is safety of the passenger guest. Or guest Plaintiff. So they will know exactly about whom we are speaking. In the next paragraph, if you further believe the Defendant operated his vehicle in utter disregard of prudence. It is repetitious in some respects. The language is "knowing it to be a heavily traveled road" when the evidence clearly shows it was very lightly traveled. Light to medium at the time the accident took place.

The Court: He said it was light for Mercury Boulevard.

Mr. Coffman: He said later it was fairly light in the oncoming lanes. To support the fact he knew it to be heavily traveled at that time. The language "without properly observing the traffic conditions on Mercury Boulevard with respect to oncoming traffic" it should be entered onto Mercury Boulevard with utter disregard. Everything between should be omitted. In the last paragraph about page 264 } the seventh line from the bottom. It should be entered onto Mercury Boulevard, operated his automobile in utter disregard of prudence amounting to complete neglect of the safety of the Plaintiff. I would ask in the second paragraph the words "that degree of" be omitted. Just say "gross negligence is such negligence".

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page 265 }

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Mr. Coffman: In 208 VA., a later case, the language of gross negligence is conduct showing such indifference to others amounting to complete neglect. That is the language I'm opposing. It is a little different.

The Court: I suppose every definition written is a little different than the one before.

Mr. Coffman: The most recent one is the one we are going to be using.

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page 267 }

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Mr. Coffman: You have no duty chargeable here. It says duty to observe. The duties that apply to Mrs. Worley may apply but are not instructed. Start putting in page 268 } limitations of action. You are suggesting actions that may be taken by the Jury as the Court's interpretation of what may be gross negligence. The Jury must decide whether it was gross negligence.

The Court: It says if you believe.

Mr. Coffman: By the time you get to it you have forgotten if you believe.

Mr. Ford: Everyone is that the Jury must believe it.

The Court: You want to take that out? I don't know its going to reach the objection. You want to take it out? Entered onto Mercury Boulevard at its intersection with Tallwood Drive.

Mr. Ford: I don't object to it. I'm moving it be done but I don't object to it.

The Court: I have delted that Mr. Coffman. Do you have more objections? You said you wanted the business about observing traffic conditions out.

Mr. Coffman: The gross negligence definition. I would rather use the one in 208 Va.

The Court: Anything else?

Mr. Coffman: No, sir.

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page 270 }

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The Court: Yes. The next to the last line after the word Plaintiff and the long insertion was also after the word Plaintiff in the third from the bottom line. Num- page 271 } ber two is granted as amended with the excep- tion of the Defendant Ferguson as to the two re-

maining items you are talking about. Let's go out and send the Jury out and get a little farther before we stop tonight.

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page 273 }

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Mr. Coffman: It is repetitious of two. Adds nothing that two does not include and does quote the case *Wallomer v. Martin* 206 Va. with respect to the duty of re-
page 274 } sonable care, but the liability there only if gross negligence is shown. I don't think it necessary to make the educational statement to the Jury. It opens the door to confusion by saying there is a duty of reasonable care. That is academic. The Court has said not all language in opinions should be made in instructions. It doesn't add to instruction two. It is argumentative, repetitious, invites a decision based on the violation of reasonable care, if it may be the law in an academic statement, it is not proper for instructions.

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page 275 }

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The Court: There is an element of repetition between three and two that we have taken up. I am going to grant three. Do you wish to except?

Mr. Coffman: Yes, sir.

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page 278 }

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The Court: * * * Instruction number six.

Mr. Ford: This is as to both parties.

page 279 } Mr. Gustin: I will go first. The Defendant, Worley objects to the granting of instruction six for reasons stated with regard to the granting of instruction five, and states that to Defendant Worley the Plaintiff has been granted instructions as to exactly what duties are owed

by the Defendant Worley to the Plaintiff and the matter has been thoroughly covered without it being again reiterated having been over the objection of the Defendant Worley reiterated in five.

Mr. Coffman: The same objection applies from the Defendant Ferguson's point of view. I add to Mr. Gustin's words, in its present language despite objections of Counsel as to general content there should be inserted in line four in that both such violations, rather than such violations. When you are speaking of two people violating you must make it clear to the Jury.

The Court: You are talking about violation of their duties by the Defendants.

Mr. Coffman: Both of the Defendants and their respective duties but it should be clear both have a different duty, according to *Wallomer v. Martin*. The Court found page 280 } the instructions too confusing to the Jury with respect to the duties of each Defendant and it reversed as to the Plaintiff guest and allowed the Judgment against the other driver. Because of the confusion in instructions. I would like to make specific the duties to each. And the finding instruction where they are going to be held jointly responsible.

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The Court: They are a bit repetitious. I'm going to change the ruling on six now.

Mr. Gustin: You are going to give him six.

The Court: I am going to make certain changes in the wording, though. I am going to make violation in line four plural. Was there anything else that needed to be fixed?

Mr. Gustin: The word another should be other.

Mr. Ford: This is the amount of damage in another instruction that is singular.

The Court: *Alright*.

Mr. Coffman: Note the exception of Counsel.

The Court: Exceptions of both Defendant Worley and Ferguson are noted. *Alright* number seven.

Mr. Gustin: Your Honor, in seven he enumerates as to such damage instructions, the elements of damage claimed under which the Jury can consider. I address my objection for the Defendant Worley in instruction page 285 }

number seven, to case laws in number five and number six and number seven.

Mr. Coffman: I add to that my objections to instruction four. Future pain and suffering.

Mr. Gustin: I join.

Mr. Coffman: And other mental anguish. There is no testimony to mental anguish or pain and suffering. The doctor testified he had a tube in the stomach and he could have been given sedatives to fight that particular circumstance. From the doctor's standpoint they were successful. He went off narcotics, he went on intermittent pain pills, aspirin or something.

The Court: Are you confusing mental anguish with pain?

Mr. Coffman: There is no evidence to mental anguish, and I question whether there is evidence of physical pain before the Court.

Mr. Gustin: My point with respect to instruction seven is that in now four, five, six and seven there is no physical pain and mental anguish, inconvenience and discomfort, doctors, hospital, nurses and medical expenses, or loss of earnings as far as the future.

page 286 } Mr. Coffman: I have the same objection with respect to the future, and add that the evidence is not there to support mental anguish.

Mr. Gustin: The doctor said he will live a normal life.

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page 294 }

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Mr. Gustin: We object to any verbiage after the word past.

The Court: *Alright*. And Mr. Coffman objects to mental anguish included in the first phrase of that.

page 295 } Mr. Coffman: I object to paragraph five as it stands presently. The evidence has been insufficient to establish anything more than speculation about the hours that may have been worked. It invites speculation on the subject.

Mr. Gustin: Is the Court leaving four in its entirety?

The Court: Yes.

Mr. Gustin: We definitely object.

Mr. Coffman: Note my objection to that.

The Court: Exceptions of both Defendants for the reasons stated are noted. ***

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The Court: I refuse 2a and the exception of the Defendant Ferguson is noted. It is not a proper statement of law in this case. Let's go to 3a.

Mr. Ford: The first paragraph of instruction 3a.

Mr. Coffman: It is my instruction. I believe I can quote the exact case law for it.

The Court: Let's hear the objection.

Mr. Ford: The first paragraph in there adds to a definition that has already been given. Without that, and I don't know that that is the law, that there should be such negligence as would shock fair-minded men. I think when we say utter disregard of prudence amounting to complete neglect of safety we have said it all. Whether it shocks somebody or not.

The Court: I wish it were that simple. Every-
page 300 } time you pick up a case you get another defini-
tion.

Mr. Ford: That says it all. To talk about shocking fair-minded men you are getting into a willful act, and the words here that follow are absolutely meaningless "although something less than willful negligence."

The Court: What is purposeful negligence? What is purposeful recklessness?

Mr. Coffman: Driving intentionally in a manner characterized as reckless.

The Court: *Alright*, I don't know, go ahead.

Mr. Coffman: The case from which it is abstracted is *Goodwin v. Gilman* 208 Va. 422. It is the Court's definition of gross negligence in that case, and I am quoting verbatim. "Gross negligence is conduct showing such indifference to others as constitutes complete neglect and that is such a degree of negligence as should shock fair-minded men, although something less than willful negligence." This is the way the Court said it is.

The Court: I don't have any particular difficulty with it so far.

Mr. Gustin: It is the second paragraph.

Mr. Coffman: The Court said in *Finey v.*
page 301 } *Finey* 203 Va. 570 the usual indicia of gross
negligence such as purposeful recklessness, de-
liberate inattention to known dangers, conscious and inten-

tional violation or rash disregard of traffic laws, or purposeful misconduct—these are the usual indicia of gross negligence. I have stated if you believe from the evidence that the Defendant in respect to the Plaintiff acted in a manner and further if you believe his actions were not in utter disregard of prudence amounting to the complete neglect of the safety of his passenger then you shall return your verdict for the Defendant. I believe it is a clear statement of the law and one of the best guidelines the Jury will have to determine gross negligence.

Mr. Ford: It is most confusing and has no law because he is confusing gross negligence with consciousness and I think I discussed that today. The Jury is not concerned with the consciousness or intent. You are getting into this. He doesn't have to. The Defendant Ferguson doesn't have to have a purposeful recklessness.

The Court: He has to be free of purposeful
page 302 } recklessness.

Mr. Ford: What difference does it make? He doesn't have to be free of it and doesn't even have to be guilty of it. He doesn't have to purpose anything.

The Court: I can't say it either.

Mr. Ford: If he does a rash thing, then he could be found guilty of gross negligence. And purposeful misconduct doesn't enter this. Conscious intention of violation doesn't enter into it and you will have the Jury believing under this instruction they could. They could say this man had to intend to do it. He wasn't conscious of knowing what he was doing at the time he was doing wrong, therefore, we don't find he did that and therefore, we're going to let him off the hook. That is not a statement of the law. The statement of law was given here in this case that gross negligence is in utter disregard, whether he purposed to do it or not is immaterial. To say he is free of it means he would have to be proven to have acted with purposeful recklessness. He would have to be guilty of deliberate inattention, to known
page 303 } dangers. He would have to be conscious of an intentional violation. That is not the law. The

law is that is all he has to do. His actions must be such that they amounted to an utter disregard of his prudence—whether he intended to be prudent or imprudent has nothing to do with it. It is what he did that counts. Not what he was conscious or unconscious of.

The Court: I think Mr. Coffman may be taking on an additional burden he didn't come in the case with. He says he has to be proven free of all these things in addition to

utter disregard. You didn't have that burden when you came in the room. Do you want to go out with it?

Mr. Coffman: I am saying if you believe.

Mr. Ford: The Jury can get it in their head he cannot be found guilty in the case.

The Court: This says they have got to find him free of all these things. I don't think Mr. Coffman wants the instruction.

Mr. Coffman: Perhaps I would suggest changing it. If you believe the evidence fails to show.

Mr. Ford: It gives him a chance to go in there and argue. You see the converse of that free of. The converse of free of is that he was guilty of and they would get the page 304 } guilty. He must have been guilty of being conscientiously wrong. That is what I worry about. Whether it helps Mr. Coffman or not. That thing would damage me considerably and not properly, sir.

The Court: I think it is confusing to a degree and I don't think it states the law in its present form and I refuse it.

Mr. Coffman: Note my exception.

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Mr. Coffman: The instruction sets forth the standard of care of ordinary negligence and gross negligence or indicates both. It sets forth the Defendant could be guilty of ordinary negligence and still not be liable. The instruction has been given practically since the statute was passed. It is an instruction of long use. Long standing practice. I am surprised Mr. Ford has not come across it. I have used it before.

Mr. Ford: Who said I haven't come across it? I don't remember seeing the instruction in a case of this kind.

Mr. Coffman: This being from my point a question of guest passenger—

Mr. Ford: Instructions deal with this case.

Mr. Coffman: In the case if I had the automobile driven by Ferguson and a few particulars dealing with my Defendant as opposed to Mr. Gustin's Defendant—other than that I consider the instruction proper and an accurate statement of law and one of long use and one upon which I have the right to distinguish before the Jury the ordinary negligence test or inadvertent negligence

page 309 }

test and the gross negligence requirement. It tells the Jury if they believe he was negligent but don't know whether or not he was grossly negligent they should return the verdict for him.

The Court: Nobody is complaining about the last paragraph as far as I know and I don't think anybody said much about the first or last. It's the middle one. Act intelligently and operate an automobile at a low rate of speed, does not alone amount to gross negligence.

Mr. Gustin: That is the rub.

Mr. Ford: It may or may not amount to it. I never heard of a Court instructing a Jury like that.

Mr. Coffman: The court has said cumulative acts do not of themselves amount to gross negligence. There must be more than mere inattention to this, an act of utter disregard or complete neglect.

Mr. Ford: The Court has instructed them.

The Court: That is the trouble with this instruction. It doesn't tell them what you just said.

Mr. Coffman: I think it does.

Mr. Ford: It does not.

Mr. Coffman: I think it does. The last sentence, page 310 } such lack of attention and diligence, or mere inadvertence, does not alone amount to gross negligence. I have told them there must be complete lack.

Mr. Ford. That kind of lack may in the case be gross negligence. It is up to the Jury under the definition of gross negligence. It is not up to the Court, as a matter of law, to tell the Jury what they may or may not do.

The Court: The approach taken by Counsel for Ferguson in the case, I understand what he is doing and I am sure you do too. I am not sure he is not entitled to an instruction along the theory, but I don't think he is entitled to this one.

Mr. Ford: I have no objection to the first paragraph nor the last except "you shall return your verdict in favor of the Defendant Ferguson."

The Court: Refuse 6a. Exception noted.

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page 342 }

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Mr. Coffman: I object to 8b. I did originally when the Plaintiff provided instructions 1, 3, 5 and 6 as a collection of

finding instructions. I think 5b and 8b are repetitive, although they have different prefixes on their finding clauses.

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Mr. Coffman: This instruction I think would suffice, if it said that the Court instructs the Jury it is the duty of the operator of the motor vehicle and so on. If Mrs. Worley was free of ieglignce you should find your verdict in favor of her. Allegations as to negligence or lack of negligence are immaterial, toward Ferguson. They are not necessary in the instruction to justify the finding. They are superfluous opinions cast on the Defendant Ferguson and are unnecessary. It should read if she is free from negligence find for her. If she is free from negligence, whether or not we are at fault find for her.

page 345 } The Court: That is what it says.

Mr. Coffman: But it says if you believe we were negligent and she was free of negligence find for her. What difference does it make if we are or not. You should find for her and the allegations as to our negligence should be omitted. It should also have if the Plaintiff is free of contributory negligence. I object to the form. I think it is prejudicial to the Defendant to set out his potential misconduct in citing her freedom from negligence.

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Mr. Coffman: In no place is the Plaintiff's recovery against my Defendant based upon the violation of the standards of ordinary care. Any instruction which indicates my client's activity entitling someone to a position or finding is going to be prejudicial. My client may have the duty of general care but his liability is in the violation of it in a grossly negligent manner. This says nothing to
 page 347 } that effect. It states if he fails to exercise the duties he is negligent. That is not significant to the case which is a suit between the guest passenger and my driver. This is why I object to the entire paragraph up to

Mrs. Worley being free of negligence. It is significant to any finding and any further instructions. There is a degree of risk in these cases where you have two standards of negligence.

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page 348 } Mr. Coffman: It should say if you find in favor of the Defendant, Sandra Worley and Ferguson. Within the language of which being found negligent, the verdict must be for him to leave it in the Jury's mind that if they find him ordinarily negligent that is what the prefix is and we have no finding of what they should do with the determination. You are violating 208 Va. *Goodman v. Gilman*. In that case the Court ordered a new trial but not to the one charged with ordinary negligence.

The Court: I think different standards of care have been pointed out. 8b is granted and the objection of the Plaintiff and the Defendant Ferguson are noted.

Mr. Gustin: I withdraw 9b.

The Court: Mr. Gustin wishes to withdraw 9b. That brings us to 10b.

page 349 } Mr. Ford: Before Mr. Coffman says anything, to grant this instruction as it is to get my client in terrible trouble if he gets a verdict. I don't want a reversal on account of an instruction.

The Court: I don't either.

Mr. Coffman: I object on the same grounds as the preceding one and for the same reasons.

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Mr. Coffman: 9, 10, 11, 12 and 13 all predicate the freedom from negligence of Mrs. Worley on the negligence of Ferguson. They are not proper. There are five of them that predicate her verdict on our negligence.

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page 352 } Mr. Coffman: The matter is covered in if you believe she is not free from negligence.

The Court: I grant 10b as submitted and exception of both

Plaintiff and Defendant Ferguson noted. 11b. That the view of the Defendant Ferguson was obstructed?

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page 353 }

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The Court: 12b.

Mr. Coffman: I object to that. Predicated on the stop sign there is no evidence whatsoever to contradict the statement of the Plaintiff and Defendant Ferguson page 354 } that they were coming down the yield road. The testimony of Sergeant Wade that he saw a grey car coming off Tallwood, he could not say positively the car that entered was that car and could not say he was positive it was the car on Tallwood.

Mr. Ford: He described the car as being a little blue car.

The Court: Didn't he say he was 99% sure?

The car is grey and black.

Mr. Coffman: So I don't know what happened to the little blue car but the grey and black car came from the service road. I think the instruction serves only the Plaintiff. It doesn't take in consideration the whole of the evidence. It doesn't discuss the duties when you are at a yield sign.

Mr. Gustin: Judge, I offered this out of the Sergeant who said he saw the car coming from Tallwood and by the officer's testimony that there is a stop sign for traffic north-bound on Tallwood, which the Sergeant says Ferguson was on. His car, whether he called it blue or whatever he called it, it was the same car.

The Court: He said he thought it was the same.

Mr. Gustin: He said he was 99 or 100% sure.

page 355 } The Court: He said 99 to 100.

Mr. Hansen: He didn't get all the Ivory in there.

Mr. Gustin: I offer it with regard to the duties on stop signs.

The Court: I grant it and show the Plaintiff and Defendant Ferguson's exceptions.

Mr. Ford: I do not except to it.

The Court: Only by Ferguson.

Mr. Coffman: Any of the instructions which have a predication of the negligence of the Defendant Ferguson being the basis of the Defendant Worley, I object to.

The Court: Which one does?

Mr. Coffman: This one does.

The Court: She is to be relieved of the liability if she was free of negligence.

Mr. Coffman: We were ordinarily negligent.

The Court: 13b.

Mr. Coffman: I object to 13b. I do so on one ground that it again suggests that the Defendant Ferguson violated a duty and that Mrs. Worley was free of some duty, no verdict shall be found against her. It is an instruction which would be pertinent in a case only between the two drivers and not to this case. If she is free of negligence, regardless page 356 } of the negligence on the part of Ferguson, that has no place in the instruction. The first paragraph alone is an accurate statement of the law. The second paragraph has in it the additional error that the speed of forty five miles an hour being presumed to be the limit at that point. It is the posted limit but not necessarily the safe speed which should be the definition. I think in the first paragraph we would withdraw any objection but if the second and third remain, I see no way to cure it.

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The Court: I think the instruction is technically accurate.

Mr. Coffman: May I note my exception and objection to the instruction.

The Court: Some of it bothers me too.

Mr. Ford: Are you going to grant this instruction?

The Court: In what particular is it inaccurate?

Mr. Ford: In this way sir. There are certain duties that every car driver owes to a person who is a guest. This may or may not be one of them depending on the circumstances in the case. But there are many others.

The Court: This is limited to this particular page 362 } one.

Mr. Ford: That is exactly the trouble I complain of. If they wanted to say what would free her if they start listing, they have got to start listing every duty she had according to the evidence developed in the case, but they picked out one and say to the Jury no matter whatever else she did, if she had the right of way she is home free, and I object to it.

Mr. Coffman: My objection to the instruction is again that

it is an instruction that sets forth the negligence of Ferguson in conjunction with finding in favor of Worely. I think it is another instruction which is confusing the duties owed each Defendant to the Plaintiff, and for that reason I object.

The Court: Same as the last one basically.

Mr. Coffman: Yes, sir. And in addition I urge the consideration of the release of the second paragraph.

Mr. Ford: Any part of the instruction could put her completely out of Court and give the opportunity to the Jury to ignore the other phases. If he starts listing, I can list and list. We have been here three days now.

The Court: I don't think you're going to let page 363 } the Jury go out without pointing all of this to them and saying she is going to have to be free of all negligence.

Mr. Ford: That is not the question.

The Court: All the instructions have to be considered together.

Mr. Ford: That is what I'm afraid of.

The Court: 13b is granted. Exception of the Plaintiff and Ferguson are noted.

Mr. Ford: Are you taking out the middle paragraph?

The Court: Nobody thought it improved it and I don't see anything technically wrong with it. I asked if anybody thought it helped it and nobody said it did.

Mr. Coffman: Yes, you had one vote.

The Court: If Mr. Gustin wants me to delete that section I will.

Mr. Gustin: Take it out, Judge.

Mr. Coffman: My objection still stands.

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The Court: Indications are if 14b is granted Mr. Gustin plans to withdraw 15b. They seem to be substantially the same.

page 364 } Mr. Ford: I make the same objection to 14b as I made to 13b, because this is not a suit between two car owners and whatever her rights may have been concerning that right of way it leaves out any consideration of all other duties that she may owe to this Plaintiff. It emphasizes the fact, well she had the right of way therefore she didn't do anything to the guest.

Mr. Coffman: I object on the ground it is repetitive of the principle set forth in the first paragraph of 13b and is unnecessary. It is undue emphasis as to the acts of the Defendant Ferguson. To that extent it is repetitious. It is an argu-

ment that can be made on the basis of 13b, but I don't think the argument should be made on instructions.

The Court: 14b is granted. Exception of Plaintiff and Defendant Ferguson noted. I understand 15b is withdrawn. 16b.

Mr. Coffman: I have an objection to that your Honor. I think in most of our emergency situations we are referring to other than traffic conditions, other than things which would be revealed by lookout or something of this page 365 } nature. The doctrine of sudden emergency presupposes the lack of negligence on the part of Worley which is in there, but it would not apply to traffic conditions. It would apply to known traffic obstructions and things of that nature, I would suggest.

The Court: Do you have authority that eliminates sudden emergency from motor vehicle litigation?

Mr. Ford: It doesn't conform to the evidence and particularly the admissions of Mrs. Worley that she saw this car and applied her power brakes immediately one hundred twenty five or one hundred thirty feet from where she struck the automobile. She can't rise higher than what she said. If the Jury gets into a conjecture as to whether she was in a sudden emergency—

Mr. Gustin: What does "I didn't have time" mean, in answer to your question? Doesn't it mean a sudden emergency?

The Court: I grant 16b. Do you wish to except?

Mr. Ford: Yes.

Mr. Coffman: Yes.

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The Clerk: Gentlemen of the Jury have you agreed on the following verdicts in these matters? We the Jury find for the Plaintiff Ronald Ferguson on the issues joined against the Defendant Ferguson and fix his damages at fifteen thousand dollars. We the Jury find for the Defendant Worley. We the Jury find for the Plaintiff Olvin Lewis Ferguson page 383 } on the issues joined against the Defendant Ferguson and fix his damages at fifteen hundred and eighty five dollars. We find for the Defendant Worley.

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page 384 }

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Mr. Coffman: May it please the Court, the Defendant Ferguson moves the Court to set aside the verdict of the Jury as contrary to the law and evidence and cites in addition the Court's instruction granted and in this Motion requests leave of the Court to file a written brief within a reasonable time. I'm suggesting thirty days.

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The Court: The Motion of the Defendant Ferguson for the hearing has been set for Tuesday, December twenty third at nine o'clock a.m., it being understood that Mr. Coffman, if he wishes to file a written brief, he will arrange for that to be in Mr. Ford's hands on or before the twenty second of December. ***

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A Copy—Teste:

Howard G. Turner, Clerk.

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