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IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 8100

TOY E. HUGHES,

Appellant,

v.

SUE ETTA MOORE,

Appellee.

APPENDIX

FRANCIS W. FLANNAGAN
115 Johnson Street
Bristol, Virginia
Counsel for Appellant

TABLE OF CONTENTS

App. Page

Motion for Judgment 1

Demurrer and Grounds of Defense 2

Opinion of Judge 2

Final Order 9

Assignments of Error 10

Excerpts From Reporter's Transcript of Proceedings:

- Motion to Exclude Evidence of Alcohol 11
- Testimony of Louis Vannoy 12
- Testimony of Dr. Pearce Nelson 22
- Testimony of Robert Moore 33
- Testimony of Arthur Burchette 48
- Testimony of Dr. Daniel P. Gabriel 49
- Motions re Testimony of Arthur Burchette 54
- Testimony of Trooper Mosier 55
- Testimony of Sue Etta Moore 61
- Motion to Strike Plaintiff's Evidence 72
- Testimony of Toy E. Hughes 74
- Testimony of Michael Hughes 78
- Rebuttal Testimony of Robert Moore 83
- Rebuttal Testimony of Sue Etta Moore 86
- Motion to Strike Plaintiff's Evidence 87
- Instructions 87
- Motion to Limit Argument 91
- Motions for Mistrial 17, 18, 54, 55, 85, 86, 87

MOTION FOR JUDGMENT

Filed November 18, 1970

The undersigned hereby moves the Circuit Court of Lee County, Virginia for a judgment against you in the sum of $30,000.00 for the wrongs and injuries sustained by the undersigned as follows:

I

That on the 2nd day of May, 1970 the undersigned Plaintiff was in her home in St. Charles, Virginia (Turners Siding Community), at which time you did drive an automobile into the house occupied by the Plaintiff.

II

That the sole proximate cause of the accident, as aforesaid, was your negligence, in that you did fail to drive your motor vehicle in the highway; that you were operating your motor vehicle at an improper speed and failed to keep your motor vehicle under proper control; that you failed to keep a proper lookout; and you did operate your motor vehicle while under the influence of intoxicants, and in all of the aforesaid matters you were negligent.

III

As a result of said negligence on your part, the Plaintiff was injured in that she had just previously given birth to a child and said accident caused the Plaintiff to become extremely nervous, causing difficulty to her nervous system which affected her breasts, female organs and injury to her entire nervous system and causing her to seek and obtain medical attention, and causing permanent injury to the Plaintiff's nerves.

Wherefore, Plaintiff moves the Court for a judgment against you in the sum of $30,000.00, with interest from the 2nd day of May, 1970 and the costs of this proceeding.

Sue Etta Moore
By Counsel

DEMURRER

Filed February 5, 1971

Comes now the defendant and says that the Motion for Judgment filed herein is not sufficient in law in that it fails to state a cause of action against this defendant.

GROUNDS OF DEFENSE

(Filed February 5, 1971)

The defendant, for his Grounds of Defense to the Motion for Judgment filed against him in this action, says:

I.

The allegations of paragraph I of said motion for judgment are admitted.

II.

The allegations of paragraph II of said motion for judgment are denied.

III.

Defendant denies that he was guilty of any negligence proximately causing the accident or alleged injuries to the plaintiff and states further that he is without sufficient knowledge or information to either admit or deny the allegations relative to plaintiff's injuries and strict proof of the same is called for.

IV.

Defendant denies he is liable to the plaintiff for the amount sued for, or any amount.

Toy E. Hughes
By Counsel

OPINION OF JUDGE

Filed March 27, 1972

Plaintiff, Sue Etta Moore, brought this action to recover damages for personal injuries sustained when an automobile driven by defend-

ant, Toy E. Hughes, ran off the highway and into the dwelling house where she, her husband and three infant children resided. A jury trial resulted in a verdict for the plaintiff in the sum of $12,000.

The defendant seeks to have the verdict set aside upon the following grounds:

1. The verdict is contrary to the law and the evidence and without evidence to support it.
2. Plaintiff cannot recover for emotional upset in the absence of physical injuries.
3. The court erred in failing to strike the evidence of the plaintiff for the reasons assigned in the transcript.
4. The court erred in refusing to sustain the motion of defendant made before trial to exclude any evidence of drinking.
5. The court erred in refusing to declare a mistrial for the reasons assigned in the transcript, and in particular for:
   (A) The repeated introduction of improper and prejudicial evidence by the witness Vannoy after frequent admonitions by the court.
   (B) The statements and questions of counsel for plaintiff regarding the warrant for the arrest of defendant.
   (C) In permitting on two separate occasions questions and answers as to someone throwing something from the defendant's car, and in permitting testimony as to whiskey being thrown from the defendant's car. The later directions by the court to disregard this testimony did not cure the error.
6. The court erred in failing to sustain motion of defendant to strike plaintiff's evidence regarding the smallness of her breasts and change in menstrual cycle for there was no proper evidence to connect this to any action of the defendant.
7. The verdict is excessive.
8. The court erred in permitting testimony as to the smell of alcohol on defendant's breath, for there was no evidence of in-

toxication and plaintiff's own evidence showed that defendant was not intoxicated.

On the 2nd of May, 1970, defendant, operating an 1968 Chevrolet automobile, with two passengers, at about 11:30 P.M. was proceeding along the highway near St. Charles, Lee County, Virginia, when he ran his vehicle off the road and into a house occupied by plaintiff, her husband, and three small children, located about 35 feet off the highway. Before hitting the house, defendant's vehicle hit a vehicle parked off the highway near the house and severely damaged it.

Defendant explanation of why he ran off the road was that a woman ran across the road from his left to the right and he swerved to the left to miss the woman and lost control of his vehicle.

The State Trooper who investigated the accident testified that he found pressure or skid marks just off the right edge of the pavement as the Hughes vehicle came around a curve to the right for a distance of 17 paces, hence 33 paces across the roadway to the left edge of the pavement and then 45 paces off the highway, through the yard of plaintiff and into the house. If we consider a pace 3 feet, the distance of the pressure or skid marks made by the defendant's vehicle was approximately 285 feet. During the skidding and before hitting the house defendant's vehicle had hit and severely damaged a vehicle sitting a few feet from the house. Defendant told the investigation officer that he was traveling about 25 miles per hour. The road was wet. Plaintiff testified that she only saw the vehicle about ten feet before it hit the house and that it was coming very fast. Plaintiff and her husband both testified that the end of the Moore home was "smashed" in and the post holding up the end of the porch was pushed in against the wall of the house and that after the initial collision defendant moved his car forward and backward striking the house several times.

Plaintiff at the time of the collision was standing in her living room looking out the window as the defendant vehicle hit the porch. She says she "froze in her tracks" and screamed. Immediately thereafter she became weak and felt as if her legs were going to fall under her. She couldn't sleep that night and had pain in her chest and arms.

Prior to this occurrence plaintiff was normal and healthy. She had no nervous or emotional problems. On May 5, 1970, plaintiff went to her family physician at which time the physician described her con-

dition as very nervous and upset. He gave her a sedative and referred her to Dr. Pearce Nelson, a psychiatrist. Dr. Nelson made the diagnosis of "anxiety reaction with phobias and hysteria." Dr. Nelson gave her medication and therapy for this condition. She returned to see Dr. Nelson approximately 5 times. The doctor's prognosis was that plaintiff would have trouble if she was in the future emotionally upset. Dr. Nelson states that is his opinion there was a causal connection between the automobile striking the house and plaintiff's difficulty, and that Mrs. Moore was in a serious condition for several weeks after he first saw her. Her menstrual periods were irregular for which he also treated her. Dr. Gabriel, the family physician stated that plaintiff's menstrual periods were irregular and that she no longer was able to feed her 3 months baby on the breast.

The plaintiff testified that immediately after the accident she could not sleep at night, she was unable to do her housework, she stayed very nervous and her menstrual periods were irregular. This condition was still present at the time of the trial. She was still taking medication prescribed by Dr. Nelson. Plaintiff in describing her condition after the accident stated: "I stayed very nervous all the time and my periods were irregular. I did not know when to expect them. They were worse than they had been: I became very nervous at that time. Any kind of speeding car, anything at all like that, if a boy were sliding his wheels, it would upset me and I would become very nervous and it brought it all back to me again. And I could see it all happening again and hear that noise the rumbling noise. Even now I still I am a lot better, but I am still nervous. I still have trouble with my periods. And it doesn't take anything at all just to trigger it off. Just a little of nothing and I can't take it."

Plaintiff testified that 3 days after the accident her breasts had almost dried up. She didn't have enough milk to feed her baby and that the baby was crying all the time and starving.

Defendant complains of the admission of evidence pertaining to his intoxication. The Court is of the opinion that evidence admitted was admissible and defendant's condition with reference to being intoxicated was a jury question.

Defendant contends that he had only two cans of beer in the afternoon. The investigation officer arrived approximately 50 minutes after the accident and in answer to a question of defendant's counsel said that there was evidence of drinking but not the extent that the de-

fendant was charged with driving under the influence. Robert Moore testified that defendant was adnormal. He could smell intoxicants on the breath of defendant and he was glassy eyed. He did not walk as he normally did. He walked around the car holding on to it and that he did a lot of talking. Moore gave him a breath freshener so that the officer would not smell intoxicants. Plaintiff testified that the defendant was "glassy eyed."

Assignments of error with reference to the court failing to call a mistrial because of prejudicial evidence, even though the evidence was stricken and the jury admonished to disregard the same, are not well taken.

Defendant contends that the verdict is excessive. The jury awarded a verdict for $12,000. If we are to believe the testimony of plaintiff and her physician, she had serious nervous and emotional problems which were continuing to the day of the trial. The court cannot substitute its judgment for that of the jury in this respect. See Brown v. Wallace, 184 Va. 570, 35 S.E. (2d) 783; Rimic v. Whited, 180 Va. 1, 21 S.E. (2d) 543; 5 Mich., Jur., Damages, (8), P. 579.

The Defendant contends that the nature of plaintiff's injury is such as not to be compensable.

Plaintiff had no contact with the vehicle. She was not hit or knocked down. She received no wounds to her body. Her injury was to her nervous system.

Defendant cites Bowles v. May, 159 Va. 419; Moore v. Jefferson Hospital, Inc. et al., 208 Va. 438 and Soldinger v. United States, 247 F. Supp. 559 (1965) (Eastern District of Virginia), as authority for his contention that plaintiff's condition is not compensable.

Plaintiff relies on Penick v. Mirro, 189 F. Supp. 947 (1960) (Eastern District of Virginia).

In the Bowles case the court does hold that the Virginia rule is that there can be recovery for mental anguish resulting from negligence unaccompanied by physical injuries. In this case plaintiff contended that she suffered a stroke after having been the object of insulting language by the defendant. The court in discussing the facts found that the proof did not show that the defendant did commit a tort nor was a causal connection shown between the alleged insulting words and the stroke suffered by the plaintiff. The court goes on to say that the determination of each case is governed by its own particular facts. The opinion further concludes:

"While the possible success of unrighteous or groundless actions should not bar recovery in a meritorious case, nevertheless, because of the fact that fright or mental shock may be easily feigned without detection, the court should allow no recovery in a doubtful case."

"The plaintiff should be required to prove by clear and convincing evidence (1) the commission of the wrongful act (2) a chain of unbroken causal connection between the alleged act and the physical injury."

In *Penich* v. Mirro, supra, the defendant lost control of her car, which struck plaintiff's dwelling house and demolished a thick wall, Plaintiff was not hit by the vehicle or any other object, but dropped to the floor in a faint. It was held that plaintiff could recover for a psychoneurosis suffered from seeing the accident.

Judge Bryan, in his opinion, analyzed the Bowles case and had this to say:

" 'Physical damage' in this context, as the cited cases will confirm, has never been equated by the Virginia courts with physical taction. The term here connotes merely an injury upon or within the person of the claimant. Furthermore, the injury may be direct or indirect, mediate or immediate. But there must be a suffering or greater substance than a pure, isolated mental anguish, such as fright, anxiety or apprehensiveness. The closest case to the defendant's contention, Bowles v. May, supra, 159 Va. 419, 166 S.E. 550. Does not oppose these conclusions. Actually, that decision went off on the utter insufficiency of the evidence to establish any wrongdoing whatsoever.

Reason and principle both counsel against the exaction insisted upon by the defendant. Common knowledge embraces myriad instances of perils negligently created by one person without physical contact of other persons, but so disturbing to their emotions as to cause them to act to their bodily hurt. Escape, for a classic example, to avoid a danger brought about by the neglectful, but unimpinging, conduct of another frequently will end in personal harm to the latter. Furthermore, it is unreal to attempt to distingush between mental or the physical sensibilities is an effront to the personal being. The only question in Virginia is whether the

'damage' is of substance and sufficiently identifiable in the person of the claimant.

Hence we need not stop to ponder here whether injury to the body followed injury to the emotions or the reverse was true. As we find the defendant guilty of an actionable tort, the inquiry is simply whether there was a personal injury, either mental or physical, which was a natural and probable consequence of the tort. Clearly the plaintiff sustained both types of injury, without fault on her part, as the proximate result of the gross negligence of the defendant."

In the case at bar, the court is of the opinion that the defendant was guilty of negligence. The jury, not only from the evidence of intoxication but from the evidence of the manner in which the accident occurred could well have come to that conclusion. The evidence shows that defendant was off the hard surface on the right of the road, which he denies, and was in a skid for 285 feet, severely damaging a vehicle and then into the house off the left side of the road where plaintiff resided. This was substantial evidence to show excessive speed on a wet pavement.

The plaintiff suffered not alone mental anguish but physical damage. There was a disruption of her menstrual periods and a decrease in the lactation of her breasts. The doctor stated that plaintiff is having a serious medical problem. A part of the examination of Dr. Nelson is as follows:

Q. Another question or two, Doctor. Based on the history given you by Mrs. Moore, state whether or not in your opinion there was any causal connection between the automobile striking the house and Mrs. Moore's difficulty? A. Certainly there was.

* * *

Q. In regards to Mrs. Moore then I will ask you whether or not the emotional problem is a serious medical problem? A. It is one of the most serious we have. If one only has to say all the feelings, whether it is directly hit with a hammer on your thumb, you still feel it. Whether it is a headache, it is still a feeling you see. And all of these things are real feelings. They are not imaginary.

Q. In other words this is a real rather than an imaginary feeling? A. There is no such things as imaginary feelings. They are real feelings.

Q. And this emotional problem then with Mrs. Moore you would relate it as being medically a serious problem? A. Certainly.

The court is of the opinion that if the defendant is guilty of an actionable tort, then any personal injury is a normal or probable consequence of the tort is compensable whether mental or physical. A mental disorder caused by tortious conduct is a serious malady for which the injured person can recover.

After reviewing other assignments of error, the court is of the opinion that they are without merit.

The motion to set aside the verdict is overruled and judgment will be entered in accordance with the verdict of the jury.

Counsel will draft an order carrying out the opinion of the court and submit for entry.

This the 27th day of March, 1972.

ORDER

Entered April 22, 1972

This day came the parties by counsel, upon the written motion of the defendant to set aside the verdict of the jury heretofore rendered on the 29th day of April, 1971, and to enter final judgment for the defendant, or in the alternative, to award a new trial, and upon the transcript of the proceedings in this case, and upon the written memoranda and argument, of counsel.

And after considering said motion, the court is of the opinion and does Adjudge and Order that the said motion to set aside the verdict of the jury, be and the same hereby is, overruled, and the court does Adjudge and Order that the plaintiff, Sue Etta Moore, have and recover of the defendant, Toy E. Hughes, the sum of Twelve Thousand and no/100 ($12,000.00) Dollars, with interest from the 29th day of April, 1971, until paid, and the costs of this action; to all of which rulings and judgment of the court, the defendant, by counsel, duly and legally excepts.

The defendant, by counsel, indicating his intention to petition the Supreme Court of Appeals of Virginia for a Writ of Error and Supersedeas in this case, it is Ordered that execution of the above rendered judgment be suspended for a period of four (4) months from this date, and thereafter until said Writ of Error, if applied for, is acted upon by the Supreme Court of Appeals, provided the defendant, Toy E. Hughes, or someone for him, shall execute bond in the penalty of $500.00 conditioned as provided by law within fifteen (15) days from this date with surety to be approved by the Clerk, and takes such steps as required by law to present such petition for Writ of Error.

The transcript of the trial of this case shall become a part of the record when filed in the office of the Clerk of this court.

Enter this 22nd day of April, 1972.

ASSIGNMENTS OF ERROR

Filed May 20, 1972

Toy E. Hughes assigns as error the following:

1. The verdict is contrary to the law and the evidence and without evidence to support it.

2. The court erred in permitting plaintiff to recover for personal injuries, for there was no evidence of trauma or physical injuries.

3. The court erred in failing to strike the evidence of the plaintiff for the reasons assigned in the transcript.

4. The court erred in refusing to sustain the motion of defendant made before trial to exclude any evidence of drinking.

5. The court erred in refusing to declare a mistrial for the reasons assigned in the transcript, and in particular for:

(A) The repeated introduction of improper and prejudicial evidence by the witness Vannoy after frequent admonitions by the court.

(B) The statements and questions of counsel for plaintiff regarding the warrant for the arrest of defendant.

(C) In permitting on two separate occasions questions and answers as to someone throwing something from the defendant's car, and in permitting testimony as to whiskey being thrown from the de-

fendant's car. The later directions by the court to disregard this testimony did not cure the error.

6. The court erred in failing to sustain motion of defendant to strike plaintiff's evidence regarding the smallness of her breasts and change in menstrual cycle for there was no proper evidence to connect this to any action of the defendant.

7. The verdict is excessive.

8. The court erred in permitting testimony as to the smell of alcohol on defendant's breath, for there was no evidence of intoxication and plaintiff's own evidence showed that defendant was not intoxicated. The court erred in permitting any testimony relative to drinking or alcohol for the reasons assigned in the transcript.

9. The court erred in granting instructions 1 and 3 for the reasons assigned in the transcript.

Toy E. Hughes
By Counsel

[4] * * *

EXCERPTS FROM REPORTER'S TRANSCRIPT OF PROCEEDINGS

Motion to Exclude Evidence of Alcohol

Mr. Flannagan: If the Court please, in this case we anticipate there is going to be some testimony concerning drinking. We do not know of any evidence as to actual intoxication, and we would like for the Court to make some ruling at this time as to the admissibility of any evidence where drinking is concerned. It is our position that it would be inadmissible evidence and we felt like it would be highly prejudicial if we had to raise this point as the [5] trial progressed.

Mr. Williams: If the Court please, I think it is up to the jury to determine whether a person is intoxicated and we will show his condition.

The Court: I think there are cases on the subject. I don't recall them specifically. If he has had a drink and doesn't show intoxication, I think the Court held in that case that was not a jury question of intoxication and the Court should have stricken the evidence with reference to intoxication.

Mr. Flannagan: Your Honor, in this case there was no charge by the officer of intoxication and he was there and investigated all the parties.

Mr. Williams: If the Court please, the plaintiff's husband testified in Discovery Depositions that the boy was drinking and he gave him some Sen Sen for his breath before the officer came which may account for the fact the officer did not smell anything on his breath.

The Court: If they smelled something on his breath, that would not prove intoxication.

Mr. Williams: I think we are entitled to attempt to prove it.

Mr. Flannagan: We think that the Court should rule at this time, if Your Honor please, that evidence is not [6] admissible. The jury doesn't erase it from their minds at all.

The Court: They are supposed to. The point is I cannot decide the case before it is tried.

Mr. Williams: I think my evidence is sufficient on the point.

Mr. Flannagan: Your Honor, it was our motion at this time that unless Mr. Williams can tell Your Honor there was evidence of intoxication, Your Honor could rule at this time there could be no evidence introduced which doesn't show intoxication and which would be stricken by the Court. We have taken discovery evidence and we know it is not there. In our opinion the plaintiff cannot show evidence of intoxication.

The Court: Well, I will overrule your motion.

Mr. Flannagan: Exception.

[7] * * *

Louis Vannoy

a witness called in behalf of plaintiff, after having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Williams:

[8] Q. Is your name Louis Vannoy? A. Yes, sir.

Q. How old are you, Mr. Vannoy? A. Sixty.

Q. Where do you live? A. Well, I live at, we call it Turner's Siding, right across from Sue Etta.

Q. You live across from her? You mean the opposite side of the road or along side of her? A. I live across the railroad from her.

Q. On the State Highway, are you on the same side of the road? A. No, sir, there is a railroad and a little road between me and the State Highway.

Q. Well, I mean are you on the same side of the road the Moores live, or do you all live on opposite sides of the road? A. We live on the same side of the highway but there is a railroad between us.

Q. All right. Then approximately how close would you say then that you live to the Moores? In yards or feet? A. I would guess 200 feet.

Q. Now what kind of road is that that passes by your house and what road is it? The highway? A. I don't know whether that would be called a [9] county highway or a state highway. No, it ain't a state highway. It is a highway though.

Q. Where is it exactly? Just describe where you live? Where is the road? A. Oh, it lays in front, like I live here. . . .

Q. No, in what part of Lee County? What part of the County is it in? A. It is called St. Charles.

Q. In the Town of St. Charles? A. No, we call it Turner's Siding, between St. Charles and Benedict.

Q. Is it the same main road that goes through St. Charles that you live on, or is it a different road? A. No, I live so far, I don't know, it must be about 150 feet from the highway that goes to Benedict from St. Charles.

Q. Are you still in the town or do you live outside of the town? At Turner's Siding? A. At Turner's Siding, yes.

Q. All right. Is this the main road that leads from St. Charles to Benedict then that you live on? A. That's right.

Q. All right. And is that a paved road? A. Yes, sir.

[10] Q. And is it wide enough for two cars to pass? A. Yes, sir.

Q. Now are you acquainted with the defendant over here, Toy Hughes? A. No, I don't believe I know him. I am acquainted with his father but not him.

Q. Do you remember the night in May of last year when an accident happened there at Moore's home? A. Yes, sir, I do. I forgot what date it was but I remembered when it happened.

Q. Where were you and what first called your attention to it, and what did you see and hear? A. Well, what called my attention to it the first thing I had gone to bed and it sounded to me like a car coming up the road a little unusual. And I had two old cars setting there by the side of the road and some kind of collision was over there, and I thought "Well, they have tore up both of them old cars." That is the way it sounded. I put my pants on and my shoes on and run over there and the old cars was still setting there. There wasn't nothing wrong with them. So I thought "Well, it was bound to have went in the creek then." There is a wall and then a creek.

Mr. Flannagan: Your Honor, I believe he should limit his testimony instead of what he thought but what he saw.

[11] The Court: That is true. In this respect just tell what you actually did and what you actually saw, not what you thought might have happened, not what you were thinking about.

(Witness continues) Well, that was what I was thinking when it started. I looked in that creek and the car wasn't in the creek and so I looked up the road then toward Moore's house and there the car was setting right in Moore's yard. And it had hit the house and hit the car.

Mr. Flannagan: Your Honor, now again this is a conclusion of this witness. I don't mind his testifying to what he saw but he didn't see this.

The Court: Well, I take it you didn't see the actual car hitting anything. Tell what the situation was when you got there, the positions of the cars and so forth when you got there.

(Witness continues) Well, when I got there, Robert's car, I could tell he had parked his car as usual. His car was setting way over from that car, and that car was setting in his place and the porch was tore up. That's the way it was.

Q. Is there any trees, or big stakes or anything in front of the Moore House? [12] A. There was a tree there and I don't know how he got around that tree and hit all that stuff.

Mr. Flannagan: Your Honor, again I object to this. This witness can tell what he saw but he is testifying to conclusions and to opinions.

The Court: I sustain the objection. Tell what you saw and what was there when you got there.

Q. With regard to this tree, where was the Hughes vehicle and where was the damage done? A. Well, I would almost have to draw you a map for that.

Q. All right. Can you draw up a map? A. Right here comes the highway, this way. The house was setting over here. The tree was right there. And right there is where Robert pulls his car in. The porch, well, I guess it was a little bit wider than that, was right along there. The porch was tore up. The car had been moved and that car setting in its place. . . .

Mr. Flannagan: Your Honor, again, I hate to keep objecting, but he says the car was moved. He doesn't know that. I have no objections at all to his testifying as to what he saw.

[13] The Court: You draw a map of the situation when you got there.

Mr. Williams: Well, he knows where the car was and it had been moved.

Mr. Flannagan: I have no objection to his showing where it was setting, Your Honor.

Mr. Williams: That is what he said. He said the car wasn't where it had been setting and that it had been moved and the other car was setting in its place.

Mr. Flannagan: Your Honor, I object to him testifying the car had been moved. He can't testify as to where the car was before.

The Court: I am going to permit him to draw a plat there, or whatever he wants to draw, as to the situation as it was when he got there, not where something was some other time.

Q. Can you state whether or not the car had been moved nor not?

Mr. Flannagan: Now, Your Honor . . . .

The Court: If he knew where it was at a particular time and saw it moved. Go ahead and ask the question.

[14] Q. Mr. Vannoy, were there marks there showing where the car had been moved?

Mr. Flannagan: Your Honor, that question is improper. I have no objection to him testifying what he saw, but his conclusions I object to.

The Court: I sustain the objection to that. He can show if there were any marks on the ground, skid marks, and things of that kind and he can testify to that, but what made them he can't testify to that.

Q. All right. Describe what marks were there with regard to the Moore vehicle, Mr. Vannoy?

Mr. Flannagan: Your Honor, I object to that question. I have no objection to his describing marks, but what made those marks, I object to.

The Court: I sustain the objection. He can draw his plat and show any marks that he saw when he got there, not what made them.

(Witness continues) Well, the marks showed that the car had been. . . .

Mr. Flannagan: Now, Your Honor, I object. . . .

[15] The Court: I sustain the objection to that. Now, listen, you people who are going to stay in here will have to be quiet. I am going to give you an opportunity to stay in here if you will be quiet, otherwise you can leave right now.

I am going to tell you, the witness, that you cannot testify as to what made those marks. You can testify that there were marks on the ground, if there were, and where they were. As to what made them that is a conclusion the jury can draw from the evidence. Now go ahead with the evidence along the lines that I have set out here.

(Witness continues) Well, after I saw just what I got through telling you why . . .

Q. Describe what the marks were? What marks did you see? A. Well, he just give me orders not to tell it.

Q. No, you misunderstood him, Mr. Vannoy. He says you could state what you saw? A. Well, I saw marks on the ground coming from the wheels. It looked like. . . .

Q. Let me ask you this: Did the marks lead [16] up to anything and, if so, what did they lead up to? A. They led the distance, the width of that car.

Q. To which car? Led to whose car? A. Well, Robert's car.

Q. Robert Moore's car? A. It had moved over and the other one was setting in its place.

Mr. Flannagan: Now, Your Honor, again I object to this.

The Court: I sustain the objection. I have already ruled on it a half dozen times.

Mr. Flannagan: And at this time I move for a mistrial.

The Court: I am not going to grant a mistrial. I am going to strike this witness' evidence if I can't explain to him, and apparently I can't, that he cannot testify as to what made those marks. He can testify only as to where the marks were if he saw marks.

Mr. Flannagan: That is the basis for motion for mistrial, Your Honor, that Your Honor has explained to him on several [17] occasions and he still insists in testifying as to what made the marks.

The Court: I will overrule your motion at this time.

Mr. Flannagan: Save an exception.

Q. Well, Mr. Vannoy, you described these marks on the road. Did they lead up to a car you say and, if so, to whose car did they lead up to? A. Well, now I didn't know the boys and I couldn't say whose car it was.

Q. Well, where were the marks with relation to the Moore vehicle? A. Well, if I tell you, he will tell me not to tell you.

Q. I am asking you whether or not the marks led up to the Moore vehicle? Did they or not? A. Well, as I said, the Moore vehicle had been slid over, had been pushed over. . . .

Mr. Flannagan: Again, Your Honor, we object. That answer is not even responsive to the question, and again we move for a mistrial.

Q. Did the marks lead up to the Moore vehicle, "Yes" or "No?"

[18] Mr. Flannagan: Excuse me, Mr. Williams. I again move for a mistrial.

The Court: I overrule your motion.

The Flannagan: Save exceptions.

Q. Your answer was "yes" to that question? A. Yes.

Q. All right. Now where these marks were in the road, was there another vehicle setting there that you didn't know who it belonged to? A. Yes, sir.

Q. Now will you continue with your diagram. You have made a diagram showing the house, the tree, the porch, and the vehicle you don't know who was the owner. Now will you also draw there where the Moore vehicle was when you saw it? A. It was setting right beside. They was setting right together.

Q. Well, on which side? A. The house was setting from the road over here. Both cars was setting toward the house.

Q. Will you place the Moore vehicle there in relation to where it was with the other car?

Mr. Flannagan: Mr. Williams, may I inquire which vehicle this represents?

Mr. Williams: It was the vehicle owned by persons unknown.

[19] A. Well, the Moore vehicle, because the other one was setting right smack dab again it, and the porch was torn up.

Q. All right. Now let's come up here and show this to the jury so they can see what you have drawn. A. (Witness and Counsel approach jury box.)

Q. I believe you have drawn here what we will say is the house with a porch on it facing in this direction? Is that correct? A. No, the porch faces in that direction.

Q. Facing the road? A. Yes.

Q. And you state this would have been the Moore vehicle and this the other vehicle? A. Yes.

Q. And there was a tree at this point? A. Yes.

Q. Now which side were you on? Over this way or over the other way? A. I was here because there is a little road behind here and that is the railroad down here.

Q. Now from what direction was the sound of this vehicle traveling? A. Coming from St. Charles toward Benedict.

[20] Q. Then St. Charles is down here, I am marking it here, St. Charles is down in this direction? A. Yes.

Q. And this direction is Benedict? A. Yes.

Q. I will put "R. R." meaning railroad and this is a small road? Is that correct? A. That's right.

Q. Make me an arrow, you say the car was headed in this direction? A. I was going by sound.

Q. You were going by sound?

Mr. Flannagan: Now Your Honor, I object to this. Again this is a conclusion. He heard a noise. He doesn't know whether it was a car, he doesn't know what it was. He was in bed some 200 feet from this house. He doesn't know even what made the noise.

Mr. Williams: Well, Your Honor, I think that is proper evidence.

The Court: What was his answer to it?

Mr. Williams: His statement was that he judged the manner in which this car that wrecked was coming from the sound.

[21] The Court: I overrule the objection. Go ahead.

Mr. Flannagan: Save exceptions.

Mr. Williams: Now, Your Honor, we would like to mark this diagram as Plaintiff's Exhibit No. 1.

The Court: Plaintiff's Exhibit No. 1.

(Diagram was marked Plaintiff's Exhibit No. 1 for identification, and received in evidence.)

Mr. Flannagan: We have an additional objection, Your Honor. There was no foundation laid for this because there was no showing what if any car made such a noise. He has only testified as to a noise and he was in bed at that time when he heard it. He hasn't testified as to this accident, how it happened, when it happened, at all. There is no foundation for this whatsoever, and it permits this witness to state to the jury a conclusion.

The Court: You will have to relate the noise sometime to the time of this collision.

Mr. Flannagan: Your Honor, that is one of the basis of our objection.

[22] Mr. Williams: Your Honor, I think it will be connected up by Mr. and Mrs. Moores' testimony from the relationship of the time and so forth, when Mr. Vannoy got to the house. I will have to show that by them.

The Court: Well, unless you can relate it to the time of this accident, I would sustain the objection. It would have to have some relationship as to time. Until that is shown, I will sustain the objection to it and the jury will disregard it.

Mr. Flannagan: Excuse me. Did Your Honor say he was now sustaining the objection?

The Court: On the grounds you have stated I am sustaining the objection because of the time element. There is no relationship between the time he heard these noises and the time of the accident. So I will sustain the objection and the jury will disregard it.

Q. Mr. Vannoy, now this car that was there, you say you don't know who was driving it. I will ask you whether or not you saw this boy seated over here there with the car that night? A. I saw about 2 or 3 boys there but I don't [23] know them. I didn't look at them enough to know them.

Q. You didn't look enough to know them? A. No.

Q. Are you able to identify him today as being the one? A. No, sir.

Q. Now after you had heard this noise, I will ask you how quickly

you got to the Moore Home? A. Well, I couldn't say for a minute because I had just got out of the bed as quick as I could and put my pants on and my shoes on, I didn't put any socks on, and went straight over to the cars where I told you I thought it had hit, and went on up that way.

Q. In other words, you say you didn't even put your shoes on? A. I didn't put my socks on. I just slipped my shoes on and slipped my pants on, and got out of the bed and went straight.

Q. Went straight to the place? A. That's right.

Mr. Flannagan: Excuse me, Your Honor. That is not what he said. That is what Mr. Williams said. He didn't say he went straight to the place. He said he went to his cars and then went to the creek.

[24] (Witness continues) That's right. That is exactly right. I went to look at the two cars, and looked in the creek. I didn't kill no time at all. I looked up at Moores and there the car was up at Moores. That's right.

Q. All right. Did you see Mr. and Mrs. Moore? A. Yes.

Q. I will ask you to state to the jury from your observation what Mrs. Moore's appearance was at that time? A. Well, first Mrs. Moore asked me if she could go to the house and call the State Police and I told her "Yes," and I went over there with her. She was scared real bad. My wife and I, I am pretty sure I offered to take her to the hospital because I thought she was going to go into shock.

Q. Did Mrs. Moore leave your presence for awhile then and go over to your house? A. I went with her.

Q. You went with her? A. That's right.

Q. And over what period of time were you observing Mrs. Moore there on that occasion? A. Well, I couldn't state that. She rung, she used the phone. She was shaking.

Mr. Flannagan: I am sorry but there [25] was one thing he said before he said "she used the phone," that I did not hear. She sunk?

(Witness continues) She was shaking, trembling.

Q. Trembling? A. That's right.

Q. Now other than the shaking and trembling and you say you thought she was going into shock, what other things did you observe about her, Mr. Vannoy? A. Well, that's the worst thing cause I was afraid now she might go into shock. I offered, I am pretty sure I offered to take her to the hospital.

Mr. Williams: You may cross examine.

Cross Examination

By Mr. Charles Flannagan:

Q. Mr. Vannoy, as I understand it, when you saw Mrs. Moore what you observed was that she was scared and shaking? Is that correct? A. That's what I thought she was. I thought she was scared because she was shaking and she was acting scared.

Q. All right, sir. And you offered to take her to the hospital? A. Yes, and my wife tried to get her to go to [26] bed I am pretty sure.

Q. And she refused to? A. I think she did. She didn't go to bed.

Mr. Flannagan: That's all.

Dr. Pearce Nelson

a witness called in behalf plaintiff, after being duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Williams:

Q. Is your name Dr. Pearce Nelson? A. Yes, sir.

Q. Dr. Nelson, will you relate to the jury what your profession is and what training you have had that qualifies you for your profession? A. I am Dr. Nelson, Director of the Mental Health Clinic in Wise. I had a regular medical education and graduated from Marquette University in 1946. I had special training in psychiatry in Norwich, Connecticut for one year. Then when I went into service I finished up my residency training at Bethesda, Maryland, Before coming down to Wise in 1959, I was Chief Psychiatrist at Marine Corp Base at Quantico for a year and a half, and also Chief [27] of Psychiatry at Philadelphia Naval Hospital for a year and a half, and also Assistant in Neu-

rology at Philadelphia Naval Hospital. I also have a Master's Degree from the University of Michigan.

Q. And then what is your specialty, Doctor? A. My specialty is in nerve psychiatry.

Q. What in layman's language does that consist of? A. Nerve psychiatry is the study of the brain and peripheral nervous system, and nerves in the body. Also psychiatry is a study of feelings and emotions.

Q. You are dealing then with feelings, emotions and nerves? A. Yes, sir.

Q. And the brain? A. Yes, sir.

Q. And you say that you are in charge of the Mental Health Clinic in Wise, Virginia? A. Yes.

Q. At the present time? A. Yes.

Q. Now, Dr. Nelson, did you have as a patient Sue Etta Moore? A. Yes, I did.

[28] Q. Would you state the date you first saw Mrs. Moore? A. Dr. Gabriel referred Mrs. Moore to me in June of 1970 for emotional problems that resulted from an accident. She became quite upset. We diagnosed her case as having severe anxiety with some phobia or fear and hysteria.

Q. First of all, did you take a history from Mrs. Moore? A. Yes, I did.

Q. Will you state what history she gave you, Dr. Nelson? A. She gave us a history of a traumatic episode where a car run into the house. There was an accident there involving a car and the house. She became quite upset at that time and continued on. About a month later Dr. Gabriel sent her over to me.

Q. What kind of complaints did she have, Dr. Nelson? A. She was having difficulty sleeping, bad dreams, was extremely nervous, shaky, so that she could do the ordinary things of housework. She could not do ordinary dish washing without shaking, dropping cups, and things of that sort. Also she was having bad dreams to the [29] point where she would wake up all through the night. Dreams usually repetitious of the accident which generally supported the diagno-

sis of hysteria. Also it had upset her menstrual periods so that she was coming early. She had fears that these things were going to keep repeating, the accident, so that cars driving by the house and things like that would bring on sudden episodes of anxiety and fear.

Q. Describe, Doctor, how your examination of a person of that type takes place? Do you have a staff that helps you in diagnosing? What kind of staff does that consist of in diagnosing matters of this kind? A. We have a well trained psychiatric social worker that works in the clinic. We have a clinical psychologist. At that time we had a full time clinical psychologist.

Q. For example did the clinical psychologist assist in Mrs. Moore's case or did you handle this entirely yourself? A. No, the psychiatric social worker spent time with her when she came in initially at the same time that I did. We didn't think it would be necessary to go through the psychological testing. We thought our diagnosis was correct.

Q. In other words you felt definite enough about this case yourself that it was not necessary to have psychological testing? [30] A. That's right.

Q. I am not sure you completed there, probably you did give it, your findings then of what was wrong with Mrs. Moore, Doctor? If you didn't complete it, would you give it again? A. I indicated that her diagnosis. . . .

Mr. Flannagan: Your Honor, this is repetitious. He has gone over it once.

The Court: I don't know to what extent he has gone over it. Go ahead and we will see what you had started to say.

(Witness continues) I made a diagnosis with anxiety reaction, with phobias, and hysteria. We recommended that she follow along in regular therapy, meaning we spent time with her and also prescribed medication, anti-anxiety medication. The medicine was Librum which is used in anxiety and we prescribed that for her. She returned to see us periodically, two weeks later, another two weeks later, and then another week later. Then she got to feeling improved and better so that the next visit was in October. Following October we did not see the patient again. She called up in February indicating she was getting

along much better but we thought she should continue on medication. We also continued medication for another month after February, giving her the [31] option of renewing the medication as she needed it some three times.

Q. Is she still under your care? A. We assumed she was getting along well enough so that she had not returned for treatment. So we feel she is getting along well now.

Q. Now you spoke in addition to the medicine, Librum, that you gave her that you also gave her this therapy, all of these visits that she would come for approximately an hour at a time, what would that therapy consist of?

Mr. Flannagan: Excuse me, Your Honor, I don't think there is any evidence that she came for an hour at a time. Again that is Mr. Williams' testimony.

The Court: The doctor can explain how long she stayed there and what he did while she was in the clinic.

Q. Go ahead and describe what therapy consists of, Doctor? A. Other than the medication we gave, I indicated that we spent time with her. Initially we spent about 2 hours on the first visit, and subsequently we spent about an hour each visit with her on five different visits. The purpose of therapy is to help her so that when she has [32] the feelings coming on she can understand some of the problems and some of the ways she can help herself.

Q. What prognosis do you have for the future then regarding Mrs. Moore's physical condition, Dr. Nelson, the possibility of recurrence or any continued treatment? A. Initially the situation was serious. She got along I would say very well with the kind of difficulty she had. At the present time I think her prognosis for continued activity and doing the things she should be doing is good unless of course she has some other thing that will stir her up again. I would say her prognosis without any unusual thing happening to her is relatively good.

Q. What would you mean by something that would cause its recurrence? A. Stress like, oh, automobile accident or close calls with an accident. Some other problems with her family. Anything of a

physical thing that would upset her or anything emotionally that could upset her or scare her. In ordinary terms "scare her real bad," and then she would have trouble.

Mr. Williams: You may cross examine.

Cross Examination

By Mr. Francis Flannagan:

Q. Dr. Nelson, is this your file on Mrs. Moore? [33] A. This is my personal record.

Q. Well, you were testifying from those?

Mr. Flannagan: I want to see them, Your Honor. He has been testifying from them.

The Court: Do you have any objections to your personal records being seen by the attorney?

Witness: I do object because certain things I want to see my record when I answer it. I want to have it in my hand when I answer it.

Mr. Flannagan: Yes, sir. If you need your record, you just let me know and I will get it right back to you, Dr. Nelson. There won't be any problem there.

Q. Now you are a psychiatrist? Is that correct? A. Yes, sir.

Q. And a psychiatrist is a medical doctor who deals with the emotional problems of individuals? A. He is one who specializes in emotional problems and as I indicated I have had training in neurology too.

Q. Well, you didn't do any neurological work [34] on Mrs. Moore other than the examination? A. If I might clarify it, usually we observe our patients pretty carefully when they are in there. Most of the time you can investigate most of the cranial nerves by watching the patient pretty well to see how they perform.

Q. All right, Sir. Now you have been practicing in the mental health clinic in Wise for a number of years I believe? You have been Director of this? A. I have been over there for twelve years, yes, sir.

Q. And I say you are the Director of it? Are you having difficulty hearing me? Would it be better if I were on the other side of you? A. Just talk louder.

Q. All right. Now what was the first day, and if you need your record just take it, that you saw Mrs. Moore? You said it was in June but you didn't give us a date? A. June 3rd, 1970.

Q. And she gave you a history of having been involved in an automobile accident, an automobile striking her house and car? Is that correct? A. Essentially, yes.

Q. And what date did she tell you that this occurred? [35] A. Approximately the 2nd of May, 1970.

Q. So you saw her one month following the accident? A. One month after the accident, yes.

Q. And you spent two hours with her, and by the two hours that would be your time plus other workers at the mental health institution? A. That was the total time spent with her.

Q. Total time. And her sypmptoms at that time she was nervous, upset, emotionally upset? Is that correct? A. Yes.

Q. And your diagnosis was that she. . . . A. Anxiety reaction.

Q. Was having an anxiety reaction? A. Yes.

Q. Now I take it these two hours that were spent then were spent in testing, examining and testing Mrs. Moore? A. Essentially yes. We also spent time with her initially of course trying to interpret what we can and what was going on. Essentially it is the initial examination for preparing the report to Dr. Gabriel.

Q. Then did you send her back to Dr. Gabriel? A. We sent a report to Dr. Gabriel so that when she goes to Dr. Gabriel, and Dr. Gabriel can be seen [36] more easily than me, he will have an idea what we prescribed for her and what our ideas about her diagnosis was.

Q. Have you been in touch with Dr. Gabriel since you have seen Mrs. Moore? A. Not on this case, no.

Q. That is what I am talking about, on Mrs. Moore's case? Then you saw Mrs. Moore some two weeks after her original visit? A. Yes, I saw her on the 17th.

Q. The 17th of May? A. June.

Q. Excuse me, the 17th of June. Then you saw her again when? A. On July 8th.

Q. And then the last time you saw her was when? A. We saw her again on July 15th, and then the last time I saw her was on October 23rd.

Q. October 23rd. So you have seen her five times? A. Yes.

Q. And the medication you gave her was Librum? A. Yes, sir.

Q. And this is a tranquilizer? A. Yes, sir.

[37] Q. And you gave her some form of treatment in addition to the librum? A. We spent time with her in psychitherapy, yes.

Q. In psychitherapy. And this was just talking to her? A. Talking with her, yes.

Q. Talking with her. And that is the extent of the treatment that you have given her? A. Yes.

Q. And you haven't seen her since October? A. No.

Q. And she called you in February on the telephone and said that she was much improved? A. She called me on February 8th and indicated that she still needed medication which we had prescribed for her.

Q. Well, that is the Librum? A. Yes.

Q. And you continued that for a month? A. yes.

Q. And so far as you know she had not been taking any Librum or any other medication after March, approximately March 8th, of 1970? Excuse me, that would be March 1971? A. In case I didn't make myself clear, when I [38] give her the prescription I gave her three re-fills and so essentially she can continue on with the medication if she needs it for a period of three re-fills which brings it up to four months. Since she didn't return to see me, I assumed she was getting along well.

Q. And this medication again was just Librum, a tranquilizer? A. Yes. We did find it necessary to increase the Librum and so we essentially doubled the medication.

Q. All right. How many millograms of Librum did you prescribe for her? A. She was originally for example just getting Librum, 10 mgs., twice a day. We increased it two weeks later 10 mgs. five times a day. Then in order to simplify the medication we gave her 25 mgs. in October three times a day which was essentially the level she got relief.

Q. All right, sir. Now people have emotional problems such as Mrs. Moore was having without being in a car wreck and without being in a house which was struck by a car, do they not? A. They can.

Q. How many do you know that have had emotional problems that you have seen resulted from being in a house which was struck by a car?

[39] Mr. Williams: Your Honor, I object. We are not trying these people that have emotional problems that are not caused by a car wreck.

The Court: I will overrule the objection. A. I have only had one.

Q. All right. The majority of your cases then and all of your cases save one were caused by problems other than their house being struck by an automobile? A. That's right.

Q. People have emotional problems, do they not, without any automobile being involved at all? The majority of them are not connected with automobiles, are they? A. I would say so.

Q. The majority of them are problems related back to some earlier childhood experience, are they not? A. We find this part of the country a little bit different. I think your statements are correct for the country as a whole, but we find problems in this part of the country, for example, mining accidents, and things like this which are serious problems which are stemmed from accidents. So when we consider the accidents that we have mining and other areas, in this particular area we have more problems, say for example, from trauma, than they would say in New York or some of the more rural areas.

[40] Well, that is because we have more trauma in this area, isn't it? A. Certainly.

Q. Now outside of what Mrs. Moore has told you, you cannot say that any of her problems are related to the car striking her house,

can you? A. Without her talking I wouldn't know anything about her.

Q. That wasn't exactly what I asked you? A. Excuse me. I am sorry.

Q. I asked you outside of what she told you, you wouldn't know she was having an emotional problem? A. Right.

Q. And outside of what she told you, you wouldn't know what caused that emotional problem? A. That's right.

Q. And an emotional problem like she had have many, many causes, do they not? A. They can have many causes.

Q. Well, not only they but they do, don't they, Dr. Nelson? A. Many people do have emotional problems, yes, sir.

Q. Your clinic stays pretty busy, doesn't it? A. Very busy I would say.

[41] Q. You have how many full time employees? A. Six or seven.

Q. Six or seven, and in the twelve years you have been there only one of your emotional problems was related to a car striking a house? A. That's right.

Q. You didn't find any physical injury as such? If you would refer to your letter of June 3rd, second paragraph, fourth line?

Mr. Williams: I suggest you hand him his letter.

Mr. Flannagan: He has got his letter. It is in this letter I am referring to.

A. Yes. That is right.

Mr. Flannagan: Thank you, Dr. Nelson.

Redirect Examination

By Mr. Williams:

Q. Another question or two, Doctor. Based on the history given to you by Mrs. Moore, state whether or not in your opinion there was a causal connection between the automobile striking the house and Mrs. Moore's difficulty? A. Certainly there was.

Q. Dr. Nelson, is an emotional problem from a medical standpoint a serious problem?

[42] Mr. Flannagan: Now Your Honor, I object to it. Only as it relates to this person. We have all stages of problems, serious or non-serious. He is just asking a blank question. I have an emotional problem every time I try a lawsuit, but it is not a serious problem.

Mr. Williams: I object to that statement. I didn't know that Mr. Flannagan had an emotional problem.

Mr. Flannagan: I think Your Honor ought to sustain both objections.

The Court: I sustain the objection as to your physical condition. As far as the question asked, I sustain the objection so far as it does not relate to this particular subject.

Q. In regard to Mrs. Moore then I will ask you whether or not the emotional problem is a serious medical problem? A. It is one of the most serious we have. If one only has to say all the feelings, whether it is directly hit with a hammer on your thumb, you still feel it. Whether it is a headache, it is still a feeling you see. And all of these things are real feelings. They are not imaginary.

[43] Q. In other words this is a real rather than an imaginary feeling? A. There are no such things as imaginary feelings. They are real feelings.

Q. And this emotional problem then with Mrs. Moore you would relate it as being medically a serious problem? A. Certainly.

Mr. Williams: All right.

Recross Examination

By Mr. Flannagan:

Q. You say it is a serious problem A. It is a serious problem.

Q. You saw her on June 2nd, did you consider it serious at that time? A. I would say so.

Q. Did you put her in the hospital? A. No, sir.

Q. Did she go home? A. Yes, sir.

Q. How did she get to your place? By ambulance or by car? A. I don't know.

Q. You mean a woman with a serious medical problem and you sent her home and didn't know whether she was going [44] to drive a car or not? A. Patients who come to our office very often do very crazy things.

Q. That wasn't what I asked you, was it, Dr. Nelson? A. No, of course not.

Q. Would you have considered it a crazy thing for her to drive home? A. We would have probably locked her up, yes, sir.

Q. And yet you didn't even inquire us to how she got there? As far as you knew she was driving her own car this woman was in serious condition, and you didn't even inquire about that? Is that correct? A. I can't honestly answer that question directly.

Q. All right, sir, let's see if you can answer it on another date then. Did you consider it serious on the 17th of June when you saw her? A. You mean did I ask her that question?

Q. No, you said she had a serious problem. I am asking you if you considered it serious on the 17th day of June? A. Yes, sir.

Q. Did you put her in the hospital? A. We increased the medication, yes, sir.

Q. When did you increase the medication? [45] A. On June 17th. We increased it from twice a day to five times a day.

Q. Five times a day. So she was worse I take it? A. I would say so, yes, sir.

Q. All right. Did you put her in the hospital? A. No, sir.

Q. Did you send her home? A. We let her go home, yes, sir.

Q. How did she get to the clinic? A. By automobile I presume.

Q. Do you know whether or not she drove it? A. Personally I did not see her drive it.

Q. Did you check to see if she was planning on driving home? A. I didn't watch her.

Q. So it wasn't serious enough that you were concerned as to whether or not she was going to drive a car, was it? A. I didn't feel that she could drive a car.

Q. Did you tell her not to? A. I don't have a record of that, no, sir.

Q. Now was she still in serious condition on July 8th when you saw her? A. Yes.

[46] Q. All right. Was she worse or better? A. She had had an early menstrual period. I would say she was doing pretty well at that time. Somewhat improved, yes, sir.

Q. All right. Did you give her anything for her early menstrual period? A. I was giving her Librum, yes, sir.

Q. But this was the drug that you were giving her before? A. Certainly.

Q. Did you put her in the hospital? A. No, sir.

Q. And I guess your answer would be the same as to in October when you last say her? A. I would saw the same thing, yes, sir.

Q. But now you consider that she is getting along well to use your language? A. I think she is, yes, sir.

Mr. Flannagan: All right.

Robert Moore

after having first been duly sworn, was examined and testified as follows:

[47] Direct Examination

By Mr. Williams:

Q. Is your name Robert Moore? A. Yes, sir.

Q. Are you the husband of Sue Etta Moore? A. Yes, sir.

Q. Mr. Moore, are you a resident of Lee County, and if you are, will you state exactly where you live here? A. Yes, sir, I am a resident of Lee County and I live in the St. Charles Community. I live about a half mile Northeast of St. Charles, on the Monarch Road.

Q. Would you describe what kind of a road that is that goes by your place? A. It is a state highway. It is approximately 40 to 45 foot wide. Right in front of the place where I live it is straight.

Q. Straight road? A. The road is straight.

Q. How far off of the road is your house? A. Approximately 30 feet, or 35 feet.

Q. Is there a fence around it? A. No, sir.

Q. Is there any trees or vegetation around it? A. There was.

[48] Q. What kind? A. There were some small Pine trees, and then there is an Apple tree setting right in front of my house about 3 feet from my porch.

Q. About 3 feet from your porch is an Apple tree? A. Right.

Q. Would you describe what type of house it is that you have and whether there was a porch on it, and how the porch is, and so on? A. Yes, sir. The house is a wood frame house. The porch runs parallel with the highway, and it is on the Eastern part of the house, a long porch.

Q. A long porch. Does it wrap around any way? A. No, sir. It just runs 20, I have a living room that is 20 foot long and so is the porch, it runs the length of the living room.

Q. Now you are the husband of Sue Etta Moore here? A. Yes, sir.

Q. And how old are you? A. I am 39.

Q. Do you all have children? A. Yes, sir. We have 3 children.

Q. Now were you at home when there was an accident involved there regarding your house? A. Yes, sir.

[49] Q. And that occurred on this 2nd day of May, 1970, is that correct as far as your recollection? A. Yes, sir, at approximately 11:00 o'clock at night, or 11:30, somewhere along there.

Q. Had you gone to bed? A. No, sir, I was sitting on the sofa in the living room.

Q. And where was the living room with regard to what part of the house with regard to the road? A. As the road goes by my house the living room is on the far end of the house, Northeastern part of the house facing the road.

Q. As you were on the couch were you facing the road as you were seated there, or was your back to the road? A. No, sir. My side was to the road. We have a large picture window in the side of the living room and the television set was in the Eastern part of the living room, and I was preparing myself for the late show.

Q. Where was your wife and children at that time? A. The children were in bed and my wife had just taken the little boy, our youngest child, to bed.

Q. How old was this youngest child at that time? A. Approximately 3 months old.

Q. You say your wife had just taken him to bed? A. She had taken him to bed and was doubling some [50] clothes or something of this nature. At the time of the accident she had approached the living room to come back in where I was. I know when she left the living room this was what she was doing, taken the child to bed and doubling up some clothes that she had washed.

Q. I will ask you to state this 3 months old child, how was it being fed at that time? A. On its mother's breast.

Q. Now you just state what was the first thing you saw or heard, and describe it, and describe what you saw from then on on this accident? A. Well, as I said I was preparing to watch the late show when all at once I heard a loud noise. I couldn't make out what the noise was because I had never heard one of this nature before. I didn't know whether it was an airplane, thunder, wind, or what it was, but I heard as the noise came closer to where I was it was much louder. In fact a neighbor heard the noise. As this noise came closer to the house I heard a few bumps. It got a little louder as it came closer, and then I heard a tremendous crash and as I looked to my side out the picture window I seen headlights shining where headlights had never been before. Naturally this startled me and as I arose to see what it was, my wife was standing between an opening of our kitchen and our [51] living room and she was as white as a shirt, scared to

death, and just trembling. I had taken my shoes off and I had put my shoes on or had started to go outside and she was just screaming and hysterical. I had to get her down from there. I thought she was going to faint and I did get her down into the living room and sat her down in a chair and told her to sit there and I would investigate and see what it was. At the same time I was doing this I heard one or two or three maybe bangs on the house, and I thought that the car was coming into the living room. I didn't know whether to go out. . . .

Q. You mean the car while it was out there banged into the house two or three more times? A. Yes, after the first impact.

Q. All right? A. After I set my wife down and I thought I had got her calm enough to set there while I investigated, we started toward, or I started toward the door and she was right behind me. At this time we did see that there was a car that had came into my yard sideways and taken the place and position where my car usually is parked. It had knocked my car a car's width over into the grass. When I seen these boys in there, one of them was still under the wheel.

Q. Can you identify the one that was under the wheel? Is he here today? [52] A. Yes, sir.

Q. Who? A. Mr. Eugene Hughes here.

Q. Is that the same as Toy E. Hughes? A. Toy, yes.

Q. Had you known him before? A. Just by seeing him is all.

Q. You had seen him on occasions? A. Yes.

Q. Did you know his family? A. Yes, I know his family.

Q. Now do they live in the St. Charles area? A. Yes, they live in the corporation limits.

Q. About how far away from you? A. Approximately one-half mile.

Q. And did you know these other boys? A. Yes, I knew these other boys also. They were brothers, and actually I know one better than I know this one because he is in town quite often as I come through. This young fellow here I understand works away and quite often comes home.

Q. I want to ask you one thing here, when you first heard this noise I want to ask you if you heard any other noises from any other vehicles or anything else other than this one noise from this one vehicle? [53] A. You mean like a passing car or something?

Q. Yes? Any other cars out on the road or anything else? A. No, sir, there wasn't anything.

Q. All right. Go ahead and state did you have a conversation with this driver and did you observe him. If so, will you describe him and state what your conversation was? A. Yes. I did come out onto the porch. The upper end of the porch had been smashed in and the post that was holding up that end had been pushed in against the wall of the house and there was debris laying upon the porch also. I crawled through the porch, under the bannisters that are on the porch, and the driver of the car was rocking the car back and forth.

Q. You mean you saw him rocking the car back and forth? A. Right.

Q. All right? A. As I went out to the driver . . . .

Q. Describe in a little bit more detail what you mean by rocking the car back and forth? A. He was putting it in low gear I suppose. . . .

Mr. Flannagan: Your Honor, we object to what he supposes.

[54] Q. Just describe what he was doing? A. The car was going forwards and then backwards. Forwards and then backwards.

Q. All right. A. And it was hitting my porch and my car at the same time. When it was going in the reverse, it hit my car. When it was going forward, it was bumping my porch.

Q. All right. Did you speak to him then? A. Yes. I told the boy I said "Son, you may as well get out of the car, you are not going any place, you have destroyed my car, my house, and my wife is tore up over this thing." It scared her to death. And the boy did cut the key off and got outside of the car.

Q. First of all I want to ask you after he got out whether you smelled the odor of anything on his breath?

Mr. Flannagan: Your Honor, we object for reasons previously stated.

The Court: Go ahead. Overruled.

Mr. Flannagan: Save exceptions.

Q. Did you smell the odor of anything on his breath? A. Yes, sir.

Q. What was it? A. It was the odor of intoxication of some kind. At this time I had no idea what it was.

[55] Q. You mean alcoholic beverage? A. Right.

Q. Now describe, you state he had been rocking this car back and forth and got out, now describe his appearance to you when he got out of the car? A. When he got out of his car, I noticed then who he was. I recognized the boy. The other two occupants of the car had came out on the other side of the automobile and I knew that they were Mr. Hughes' sons. And the first thing they began to tell me was. . .

Q. I asked you before you state what was said, I will ask you to describe this boy's appearance, the one that was driving, Toy E. Hughes' appearance and behavior? How did he act and how did he look?

Mr. Flannagan: Your Honor, we have the same objection and this is a continuing objection for reasons assigned before the trial and that Your Honor has overruled.

The Court: Yes, I overrule the objection at this time.

Mr. Flannagan: Save exceptions, and we will not object any further.

Q. You state you have known this boy before, and I will ask you whether or not his behavior and appearance were normal or not, and if it was or wasn't, state how it [56] differed, if it did? A. No, sir, he was not normal. When he came out of the car, his shirt tail was out of his pants. They looked like juvenile delinquents to me and I could smell intoxicants.

Mr. Flannagan: Your Honor, I object to this. It is not even responsive.

The Court: Sustained.

Q. Don't interject stuff like that. I just want you to describe his appearance? A. He leaned up against the car facing me. I could tell the boy had been drinking. I could tell it by looking at him, in his eyes. . . .

Mr. Flannagan. We object to this. This is totally unresponsive to what Mr. Williams asked.

The Court. Sustained.

Q. All right. You say his eyes were not normal. What was different about his eyes? A. Glassy. His eyes were kind of glassy and looked watery and he kept batting his eyes.

Q. Would you describe how he was about his movements, and standing, of that nature? A. He was just walking around the car, touching the car, holding onto the car, and his other occupants were there with him talking and they were. . . .

[57] Q. I am asking you in regard to any abnormal movements as compared with the way he usually walked? A. At this time I couldn't tell you. He didn't walk like he was walking down the street like I had seen him before.

Q. In what manner did he walk? A. Well, all of us were walking around the car and he was looking around the car, holding onto it, and looking to see the damage that was done.

Q. Now anything else about his appearance? A. As I said a moment ago I smelled the intoxicants. I knew the boy, and they kept saying "Don't call my Dad, I am afraid he will die of a heart attack."

Q. Which one was saying "Don't call my Dad?" A. All three boys. All of them was begging us not to call their father. They was afraid he might have a heart attack. I told the boys that I didn't want to cause them any more trouble than what they were already in. I gave them a breath freshener so that when the State Police did come it might help them.

Q. Did you have any other conversation with Toy E. Hughes? A. Nothing more so than I told him he had tore my house up, and my car up.

Q. Did he make any statements to you? [58] A. Of what nature?

Q. Well, did he make any statements about the accident? A. Nothing more than they were just sorry that it happened.

Q. All right. Where did your wife go in the meantime? A. Her being in the condition that she was. . . .

Q. Well, where did, what happened to her then? A. This is what I am trying to get to.

Q. All right? A. I thought it would be best if she would leave the accident, the scene of the accident, and so I asked Mr. Vannoy if it would be all right if she went and called the police.

Q. I want to ask you if Mr. Vannoy was there? When did he arrive A. He arrived approximately 5 to 10 minutes, maybe not that long. I don't think it was that long actually. There was so much excitement around there I couldn't tell but I did notice that we needed a state man to be there and he was present. He came as quickly as possible. He was present and I asked him if my wife could use his phone to call the police.

[59] Mr. Williams: Now, Your Honor, at this time I would like for you to rule on the motion that was made regarding Mr. Vannoy's testimony. I think it has been connected up by this witness. It was a previous motion that the Court said he would hold up on.

The Court: The only thing I ruled at that time was his statement as to the noise. This witness is not certain as to the time elapsed but thinks it was 5 or 10 minutes. I still sustain the objection to Mr. Vannoy's testimony on the noise.

Mr. Williams: All right.

Q. Do you know at exactly what stage Mr. Vannoy arrived in regard to whether or not it was when you first went out or how quickly after you had gone out? A. He was there in just a matter of minutes. When the boys were all out of the car, I would say he was there at this time because there was some of his family over there.

Q. Was Mrs. Vannoy there, his wife? A. No, now I think she didn't come over. If she did, I don't recall it, I don't recall her being there.

Q. Were there other people that came up at that time? [60] A. Yes, my sister and brother-in-law came up, and Mr. Otis Steward, a neighbor, was there. The yard was full of people I would say within 10 or 15 minutes.

Q. Now getting back to your wife, what did she do then? Where did she go? A. Mr. Vannoy, when I asked him if she could use the phone, he went over to his house with her, and she did use the phone there. I understand that they did try to get her to. . . .

Q. You can't tell what somebody else said A. Well, I was referring to what my wife said.

Q. She can testify herself? A. All right.

Q. She left then and went over to Mr. Vannoy's house? Is that correct? A. That's right.

Q. Go ahead now and describe when you next saw your wife and what her condition was at that time and on throughout the night there? A. She came back over to the house 10 or 15 minutes after this. She was standing around there talking with my sister and some of the people that were around there. I tried to get her to go into the house and set down but she couldn't. She did go in and check on the children to [61] see if there was anything wrong with them. She came back outside and we all stood there and talked and waited on the State Police to come. When they came I think she either went back in the house or got a chair and set down on the porch or something. I didn't pay close attention to her.

Q. Was there any particular problem with her that night and, if so, what? A. After the police had made their investigation and everyone left and gone we set around and talked for awhile and I tried to calm her down in every way. She was still nervous, awfully nervous, and she went in and tried to sleep and she didn't I understand all night long.

Q. Now while these boys were there, I will ask you whether or not you saw anything taken or thrown from the car? A. Yes.

Mr. Flannagan: We object, Your Honor, on the basis no foundation has been laid and it could only be charged to this boy.

The Court: I don't know what the answer is going to be as to something that was thrown from the car. Who do you have in mind, the defendant or somebody else?

Mr. Flannagan: Your Honor, we know from discovery what the answer will be and it won't be this defendant.

[62] The Court: Well, as long as it was somebody else, I sustain the objection.

Mr. Williams: Your Honor, I would like to be heard on it. Along with the other evidence here that if something was thrown from the car that it would relate to all of them.

The Court: I sustain the objection. Go ahead.

Q. Mr. Moore, following this accident I would like for you to state what your wife's condition has been since that time? First, let me ask you this: Prior to this accident what was the condition and the health of your wife, whether it was good or bad? A. It was good. She was a normal, healthy female.

Q. Were there any changes that occurred that you observed and, if so, state what they were? A. Yes, sir. In days following the accident I noticed she was very irritable with the children especially, and she cut me short a few times. It seems that things that were small to me just began to bother her in ways and I thought maybe she should have a checkup to see what her problem was. She seemed highly nervous. She [63] couldn't sleep. She would have nightmares. I noticed a lot of times she was up at night and it would wake me up because I could hear her. She just couldn't sleep because she was so nervous and I recommended that she see Dr. Gabriel.

Mr. Williams: You may cross examine.

Cross Examination

By Mr. Francis Flannagan:

Q. Mr. Moore, what do you do for a living? A. I am an insurance agent, and I just shortly went into the remodeling of homes.

Q. You were getting ready to watch the late show I take it? A. Right.

Q. And does your wife also watch that movie? A. There are times when we watch it together.

Q. And you heard this noise and went outside and saw this car approximately at the place your car normally sets? A. That's right.

Q. Is your car normally parked out in the yard? A. Yes, sir.

Q. Is your car parked beside or in front of your house? A. It is parked you would call it in front of the house.

[64] Q. Is this a picture of your house? A. Yes, sir.

Q. And is that your car? A. That is my car that I have now.

Q. And is that parked where you normally park? A. Yes.

Q. I take it from your answer that this is not the car that was involved in this accident? A. I am color blind and I can't tell. The features of this car look like the one I own now. My other car was a Pontiac.

Q. What car do you own now? A. I own a '67 Chrysler.

Q. And is this the Apple tree? A. Yes, sir.

Mr. Flannagan: We would like to file this photograph as Defendant's Exhibit A, Your Honor.

The Court: Let it be so identified.

(Photograph was marked Defendant's Exhibit A for identification, and received in evidence.)

Q. I hand you another picture. Is that a picture of your house? A. Yes, sir.

Q. And does that show the post that you referred [65] to that was knocked out on the porch? A. Yes, sir.

Mr. Flannagan: We would like to offer this as Defendant's Exhibit B, Your Honor.

The Court: It will so be identified.

(Photograph was marked Defendant's Exhibit B for identification, and received in evidence.)

Q. The road in front of the house, and I am referring now to

Defendant's Exhibit A, that would be looking toward Benedict? A. Up this road, yes.

Q. As you go up the road toward Benedict your house is on the left? A. Right.

Q. Now would you step up here just a moment, Mr. Moore? A. (Witness and counsel move to jury box.)

Q. Now this is the front porch that you said was 20 feet long and this is the picture window? A. Right.

Q. And you were sitting in this living room? A. Yes, back in this part back here.

Q. And this is the support to the roof of the porch that was knocked out? A. Yes, sir.

[66] Q. Now your car was parked over here in the foreground? A. Yes, parked along there.

Q. You could drive your car without striking your house on down from your house, could you not? A. Which way are you referring to?

Q. Beside your house? A. Yes, you could. There is a driveway in here and I have put gravel and everything trying to make it hard enough to park on.

Q. Now if you descended that driveway, you would not run into your house but by the side of your house? Is that correct? A. Descended it in what direction?

Q. In the same direction the driveway is going, just straight? A. It would go into the back of the house.

Q. Go into the back of the house and not into the front? A. It would go right straight by the side of the house.

Q. Now does this picture, Defendant's Exhibit B, also show the damage that was done to your house on the night of this accident? A. It shows what you can see in a picture, yes.

[67] Q. Now following the accident as I understand it you went outside and this car was moving back and forwards against your car? A. Yes, sir.

Q. And also striking your house did I understand you to say? A. Right.

Q. How far would it have been moved? A. Approximately 3 feet back and forth.

Q. Well, moving back and forth and striking both your house and your car, it was not parallel with your car then, was it? A. My car, if I can draw a picture with my hands my car was parked lengthwise with the end of my house. This car came in sideways.

Q. You didn't see it come in? A. No, sir.

Q. All right, sir. You don't know how it came in then, do you? A. Yes, sir.

Q. If you didn't see it, there is no possible way for you to know how it came in other than what you saw on the ground, is there? A. There were four tire marks indicating the car came in sideways.

[68] Mr. Flannagan: Your Honor, we object to this. It is not responsive to the question.

The Court: Sustained.

(Witness continues) The car came in and slapped the side of my car. The front end of my car was setting over at an angle a little further than the back end. My porch was up here and the car that was zig zagging in here was bumping the back of my car and the end of my porch at the same time.

Q. And how far did you say it was moving? A. Approximately 3 feet, something like that, each way.

Q. And you asked the boys to get out and they got out? A. Right.

Q. They followed your suggestion and got out? A. Right.

Q. I will ask you if at that time were you upset? A. Well, I wasn't upset in such a way that I didn't know what I was doing.

Q. You were not normal I take it? A. Oh, yes. I hope to be normal.

Q. You were normal? You mean this accident didn't upset you? A. My thinking. This doesn't bother my thinking.

Q. Oh, I understand that. What I am asking you [69] were you upset? A. Sure, anyone would be upset.

Q. Anyone would be upset. And your wife was upset? A. Right.

Q. She was not normal? A. Right.

Q. And you said these boys were not normal? A. I didn't say they weren't normal.

Q. Oh, you didn't? You had never seen them following an automobile accident before, had you? A. These boys?

Q. Yes, sir? A. No, sir.

Q. You don't know how they would appear following an automobile accident, do you? A. No.

Q. You said you smelled the odor of intoxicants? A. Yes, sir.

Q. What was it? A. I have no idea.

Q. Well, how do you know it was intoxicants? A. Because I can tell by smelling it. Anyone can.

Q. What did it smell like? A. It smelled like alcohol.

[70] Q. Could it have been shaving lotion? A. It is doubtful.

Q. That isn't what I asked you. If it smelled like alcohol, then shaving lotion has alcohol in it, doesn't it? A. Why did he take the breath freshener?

Q. That isn't what I asked you. A. I realize it isn't.

Q. Well, why don't you answer my questions? A. I don't know what is in shaving lotion. I have no idea.

Q. Well, does shaving lotion smell like alcohol to you? A. Not to me.

Q. It doesn't to you? A. No, sir.

Q. Whatever you smelled then didn't smell like shaving lotion? A. It smelled like alcohol.

Q. It smelled like alcohol. Now where have you smelled alcohol? A. I used to indulge.

Q. Well, you knew what you were drinking? A. Yes, sir.

[71] Different drinks have different odors about them, do they not? A. Alcohol is alcohol. That is the only thing I can tell when I smell it.

Q. Have you only indulged in one type of drink? A. No, sir.

Q. And they all smell the same? A. They all smell the same, and do the same job.

Q. And then the other thing you said he was looking at his car to see if it was damaged? A. To see how much damage.

Q. To see how much damage was done to it? He knew what he was doing then I take it? A. You will have to ask him.

Q. Well, you saw him and said he was looking to see how much damage was done to his car? A. I have no idea. I can't speak for the man.

Q. And you said that you asked him something about it and that he said he was sorry that the accident had happened? A. All of the boys said this.

Q. And this is a perfectly logical answer to you, is it not? A. Sure.

[72] Q. Now it was night time? A. Sure.

Q. Any lights on out there? A. Yes, sir.

Q. What lights were on? A. Porch light.

Q. And you gave them a breath freshener? A. Yes, sir.

Q. Did he use it? A. Yes, sir.

Q. Did all of them use it? A. No ,sir.

Q. Just he? A. No, sir.

Q. One of the others did? A. Yes, sir.

Q And you had called the police? A. My wife had called the police.

Q. And they waited there until the police arrived? A. Right.

Q. And they talked with the police? A. Right.

Q. And following that their father came? A. The next day.

[73] Q. Well, the night they left there? A. Yes, sir.

Q. And they didn't leave with the policeman? A. No, sir.

Q. Following this accident as I understand it you sent your wife over to use the telephone to call the police? A. Right.

Q. How long was it after the accident until the police arrived? A. Approximately 30 to 35 minutes.

Q. And your wife came back and engaged in conversation with you and your sister and the other people out in the yard? A. Yes, sir.

Q. And you suggested later that she see Dr. Gabriel? A. Yes, sir.

Q. And when did she see Dr. Gabriel? A. Approximately 2 weeks, somewhere along there.

Q. And she saw him only on one occasion? A. He referred her to Dr. Nelson.

Q. Well, I say she saw him only on the one occasion? A. That was the first occasion. She has been back since this time.

Q. When did she go back the last time? A. She has been down there for different reasons.

[74] Q. I am talking about for reason of this automobile accident A. Oh, I think this was the only time she went for that purpose.

Q. Just one time.

Q. Did anyone do anything to the Hughes car that night relative to the battery cables? A. Not as I know of.

Mr. Flannagan: That's all. Thank you, Mr. Moore.

[75] * * *

Arthur Burchette

a competent witness, after having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Williams:

Q. Your name is Arthur T. Burchette and you are the Clerk of the Circuit Court of Lee County? A. Yes, sir.

Q. Mr. Burchette, after a warrant has been disposed of in the County Court of Lee County, is the official record brought into your office and into your custody? A. Yes, sir, usually within ten days after the expiration of the preceding month.

Q. I hand you here Docket No. 561, County Court of Lee County, Warrant for Arrest of Toy Eugene Hughes, and ask you if this is the official record that is in your custody? A. Yes, sir.

Mr. Flannagan: Your Honor, we would like to take this up in the absence of the jury.

[76] The Court: Very well.

Mr. Williams: Your Honor, I wonder in order to save, well, I promised Dr. Gabriel that I would put him on at 1:00 o'clock and he is here, and I was wondering if we could come back to this after we hear Dr. Gabriel's testimony so that he could go.

Mr. Flannagan: I have no objections.

The Court: All right. Proceed.

Dr. Daniel P. Gabriel

a competent witness, after having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Williams:

Q. You are Dr. Daniel Gabriel? A. Yes, sir.

Q. Dr. Gabriel, state briefly what your profession is and what your training is for your profession? A. I am a general practitioner. I have been in Lee County for 22 years. Prior to that I was 4 years in West Virginia, and am licensed in the State of Virginia, and State of Massachusetts. I went to the University of Kansas and took my pre-med at New York University, and I have done general practice work in this area for 22 years.

[77] Q. Dr. Gabriel, have you had Sue Etta Moore as a patient

of yours in your practice of medicine for a number of years and, if so, would you state approximately how long you have had her as a patient? A. Yes, she has been a patient of mine for a good number of years. I don't recall how old she was when I first started treating her. I treated her for a good number of years prior to her marriage. Then I have been her doctor since her marriage and delivered three of her children, I think she only has three, and I delivered all three of them.

Q. You are the doctor that has delivered all three of her children? A. Yes, sir.

Q. Doctor, I will ask you first of all whether nor not prior to May 2, 1970, she had ever had any complaint to you as her doctor or whether or not you had ever treated her for a nervous or emotional problem of any kind? A. No, sir. She had never been treated by me for any such condition.

Q. I will ask you what her general health was prior to May 2, 1970? A. She was a normal, healthy girl. She had three babies, no complications, no problems. Usual colds and sore throats, and come through all of that.

[78] Q. Now did she come to you regarding complaints following an incident where an automobile ran into her home in May, 1970? A. Yes, sir.

Q. Can you state from recollection exactly the date she came to you, Doctor? A. She came to see me I believe it was May 5th, 1970, with a history that three days earlier, May 2d, a car had crashed into her home. And she was very nervous and upset at that time. She had a baby on the breast and she started menstruating. She asked me the the significance of that and should she take the baby off the breast. I told her at that point just a few days after the incident that I couldn't say whether the baby should be off the breast and on a bottle, but I thought it would be best she put it on a bottle and she did. She came several times later complaining she had menstruated a whole week at that time and very excessively, more than the usual amount. She had not menstruated at all prior to this. The baby was born three months earlier and it is normal for a lactating mother, a mother that has a baby on the breast, not to menstruate. It was within a few days after that she did menstruate and menstruated quite a bit. I gave her medication for that and she put her baby on the bottle.

[79] Q. Do you recall whether or not at that time there had been anything occurred in regard to her breasts? A. Well, not at that time, but later, a few weeks later she complained her breasts were getting smaller. And as time went on she kept complaining her breast had diminished from normal size for a woman her age and expectations. She asked for medication for that, and I told her the only thing I knew of would be give her some hormones which we did. She asked for a cream to massage her breasts and I did not recommend that, but I think she might have used it, I don't know but I expect she may have because she indicated that she thought it would help her. My last consultation in this reference was some months back and at that time she still had complaints her breasts were diminishing and that it was somewhat embarrassing.

Q. Now during this time did you find that she had a problem and you referred her to another doctor? A. Yes, I did.

Q. What were your findings and state what you did in that regard? A. Well, when she first came on June 5th she gave a history of a car crashing into her home.

Q. Doctor, you said awhile ago May 5th? A. Yes, May 5th.

Q. Did you refresh your memory with your records, Doctor? [80] A. Yes, sir. May 5th. June 5th was when she saw Dr. Nelson. When I first saw her on May 5th she gave a history of a car crashing into her home three days earlier, which would have been May 2nd, and she became hysterical and started screaming and she was very upset and nervous when I did see her. I didn't think too much at the time. We all have little incidents that upset us and I gave her some phenobarbital for her nerves. However, about a week later she still seemed very much upset and I recommended for her to see a psychiatrist, Dr. Nelson. I made the appointment and it is my impression he first saw her on June 5th. That would be about a month after I saw her.

Q. Have you seen her since then in the months that have followed to know what her condition is at the present time, Doctor? A. After I referred her to Dr. Nelson I no longer felt qualified to treat her for a nervous reaction, but she has been in the office numerous times for other complaints, brought the children over, and I inquired how she was feeling and she said that she was still very nervous and that she was

taking medication from Dr. Nelson. She told me that she was taking Librum. At one time he prescribed 10 millograms and that wasn't strong enough, and then he prescribed 25 millograms of Librum two times a day and at bed time. Later [81] on told her to take it three times a day and at bedtime.

Mr. Williams: You may cross examine.

Cross Examination

By Mr. Francis Flannagan:

Q. Dr. Gabriel, as I understand it you are a general practitioner in Lee County? A. Yes, sir.

Q. And Mrs. Moore has been a patient of yours for a number of years? A. Yes, sir.

Q. And when she came to see you she was nervous and upset and having some problems with her menstrual cycle? A. When I first saw her on May 5th I don't recall whether the cycle had started then, but it did very shortly if it wasn't that day.

Q. Of course the menstrual cycle stops during pregnancy and for a period following the birth of a child until the mother stops nursing the child, does it not? A. That is the usual customary cycle.

Q. And it does start back again? A. Often times it starts after several months, I might say normally it is not expected to start but they do start many times during lactation.

Q. So this is not an abnormal situation, you [82] found it frequently starts during lactation which is the period the mother is feeding the child from the breast? A. That is true but it is usually at a later date than three months.

Q. All right. And you suggested she stop feeding the child from the breast and go to a bottle? A. Yes, sir.

Q. And when this happens the milk drys up, does it not? A. Yes, sir. I gave her medication to help dry it up.

Q. All right, sir. In fact you prescribed something to dry up the milk, did you not? A. Yes, sir, because she was not completely depleted. She had some lactation, some milk, but not enough to sustain the baby and so we gave her something to help dry her breasts.

Q. And at this time of course the breast does reduce in size? A. Yes, it does without the milk but still we have the normal size for a woman.

Q. I take it that her complaints outside of being nervous and upset was the size of her breast, that she felt they were too small and she asked you for some hormones to see if this would increase the size of them? [83] A. Did you say "beside the nervousness?"

Q. Beside the nervousness, yes? A. Yes, sir.

Q. And her concern with her breast was the size of them, that they had reduced in size? A. Yes, sir.

Q. And you prescribed some estrogen, or one of the hormones? A. That's right, sir.

Q. And she suggested to you that you give her a cream to massage to increase the size of them? A. She made that suggestion but I don't know whether she used the cream or not.

Q. All right, sir? A. That cream is available over the counter.

Q. And this is something that is sold over the counter and not medical practice? A. Well, let's just say it is sold over the counter. I have a feeling as of this date it may have been stopped. I am not sure but I saw in the Medical Journal where they were trying to stop that.

Q. It is not recommended by the doctors? A. Not at this time.

Q. And you also gave her some phenobarbital? A. Yes, sir.

[84] Q. And this is a sedative to quieten her nerves? A. Yes, sir.

Q. And you referred her to a psychiatrist? A. That's right.

Q. And this was because of her emotional problems? A. That's right.

Q. And you haven't seen her as a patient since then? A. Other than when she would come to the office I would ask once in awhile how she was. She was vague, she was still somewhat nervous and still upset about her breast.

Q. You were not seeing her as a patient? A. Not for psychiatric treatment, no, sir.

Q. Well, I understood you to say she would bring the children in to see you? A. Yes, and she herself would come occasionally for other causes.

Q. For other causes? A. Yes, sir.

Q. All right, sir? A. Such as the breast, but not for psychiatric treatment.

Q. Did Mrs. Moore seem to be concerned over the size of her breast at this time? A. At what time are you referring to?

[85] Q. When she came to see you and asked you whether or not she could get some stuff to rub on them? A. By that time I had already referred her to Dr. Nelson and my main concern there was to try to treat her breast.

Q. I say did she seem to be concerned about them? A. Yes, sir.

Mr. Flannagan. That is all. Thank you, Doctor.

Motions Re Testimony of Arthur Burchette

Mr. Williams: Now, Your Honor, we re-introduce Mr. Burchette. I don't know if he needs to come down here at this time since there is an objection to be made.

The Court: Very well.

(The following proceedings were had in chambers, all counsel being present.)

The Court: What is your objection?

Mr. Flannagan: Now if Your Honor please, we would move to strike all reference to a warrant for arrest of Toy Eugene Hughes on the grounds that the paper handed him shows it was never served. It does not show any plea of guilty. And in addition to that motion we would move for a mistrial [86] on the grounds this has been brought out before the jury and was in possession of the Clerk after being disposed of in the County Court. The defendant left for Ohio the next day or so, and his father was told that the easiest thing to do would be pay it off. If there is any evidence, we will put the defendant on the stand.

The Court: I don't think whether it was served has anything to do with it.

Mr. Flannagan: It doesn't show that, Your Honor.

The Court: It says "On plea," and "Guilty as charged." The plea might have been "Not guilty," I don't know.

Mr. Williams: Your Honor, I was thinking I had a similar warrant the last term of court and even had Judge Fugate here to testify in regard to these matters, and the Court ruled it was a verity.

The Court: On plea of guilty I would. I think you are right to allow a plea of guilty to a civil case and it would be a verity as to what transpired before. I am afraid this doesn't show he pled guilty and I don't think you can interpret it otherwise.

Mr. Williams: We except to the ruling of the Court.

Mr. Flannagan: Your Honor, we also moved for a mistrial because this is before the jury, and with the [87] additional statement that the warrant comes to Mr. Burchette only after it is disposed of in the Trial Justice Court.

The Court: I will overrule your motion and tell the jury to disregard the matter.

Mr. Flannagan: We save exceptions.

(The following proceedings took place in open court, the jury, and all counsel present.)

The Court: Gentlemen of the jury, the questions asked with reference to the warrant will be stricken from the evidence and disregarded by you.

Proceed.

Trooper D. R. Mosier

a competent witness, after having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Williams:

Q. State your full name? A. D. R. Mosier.

Q. And what is your occupation? A. Trooper with the Virginia State Police.

Q. Were you a State Trooper and so serving in Lee County, Virginia, on May 2, 1970? A. Yes, I was.

[88] Q. Did you investigate an accident in which Toy E. Hughes was involved at which time the motor vehicle run into the home of Robert Moore? A. Yes, I did.

Q. How long after the accident was it when you arrived if you know approximately? A. I received the call at 11:40 P.M. and arrived at 11:50 P.M. according to the notes I have here. As far as I could determine the accident happened about 11:30.

Q. Do you know where that call came from, from the jail, or from St. Charles, or where? A. No, I don't.

Q. Did you get it over your car radio? A. Yes, sir.

Q. Well, what would your car radio have been hooked up with? A. We talk directly to the dispatcher in Wytheville. I don't know where they received the information.

Q. In other words, your orders came from Wytheville then? A. Yes, sir.

Q. To investigate this accident? A. Yes.

Q. So you don't know how long after the accident it was? [89] A. No, sir.

Q. You arrived about 11:50? A. Yes, sir.

Q. All right. I will ask you was Toy Hughes still present at the scene? A. Yes, he was.

Q. Did he state to you whether or not he was the driver of the vehicle that ran into the house? A. Yes, he did.

Q. Did he state that he was? A. He was driving.

Q. Will you state what your investigation of the road showed in regard to the marks that were on the road, or off the pavement either one? A. Yes, sir. The roadway at this location was a curve just below the house and it is fairly level through there. The road surface was wet. I believe it was raining a very light drizzle. The

highway is not lighted at this location. At the scene I found a 1968 Chevrolet 2-door, which investigation revealed was operated by Mr. Hughes. This vehicle had damage to the entire right side and rear bumper. There was also a 1966 Model Pontiac which was parked in the yard, unoccupied at the time as far as I could determine, owned by Mr. Robert Moore. This vehicle had damage to the [90] left side. There was also damage to the front porch of the home. At the scene of the accident I found marks, well, I first determined the mark made by the Hughes vehicle was on the right. . . .

Mr. Flannagan: Your Honor, we have no objection to him testifying as to what he found.

The Court: Testify as to where the marks were, but as to what caused them is a conclusion which will be left to the jury to determine.

(Witness continues) I found marks, the mark which began just off the right edge of the pavement. This was in the right edge of Mr. Hughes, the direction the Hughes vehicle, it came 17 paces back onto the paved portion, 33 paces across the roadway to the left to the left edge of the pavement, and continued 45 paces through the yard and so forth up to the scene of the accident.

Q. Now these marks that you say began off the right portion of the highway, and continued off the right portion of the highway, and then came across the highway and on into the yard, did they lead up to any vehicle in the yard? A. Yes, they did.

Q. To which vehicle? A. The '68 Chevrolet operated by Mr. Hughes.

[91] Q. Did Mr. Hughes make any statement in regard to explaining the accident? A. Yes, he made a statement.

Q. State what he said? A. I was coming up through there about 25 miles per hour and something ran out in the road. I swerved to miss it and lost control.

Mr. Williams: You may cross examine.

Cross Examination

By Mr. Francis Flannagan:

Q. Mr. Hughes was present when you arrived? A. Yes, sir.

I talked with him there at the scene. I took the necessary information at the scene.

Q. Did he leave before you left? A. I don't know that, sir. I can't recall.

Q. You all didn't leave together? A. Mr. Hughes and I?

Q. Yes, sir? I am not talking about the same time, I am talking about did you actually leave together? A. I believe I issued him a summons and left him there at the scene. I have no note to that effect. It is just what I can recall. I don't believe I brought him in if that is what you are asking.

Q. No, sir. That is not what I asked you at all. [92] I only asked you if you all left there together? A. No, sir.

Q. And he was not intoxicated?

Mr. Williams: I object to that. He can state what he found out about him.

The Court: Well, you are asking the witness to draw a conclusion. I sustain the objection to the question as asked.

Mr. Flannagan: Your Honor, here is one man who is experienced in this, the only man.

The Court: In the first place it is not responsive to any question asked by the plaintiff's attorney.

Mr. Flannagan: I will make him my witness for the purpose, Your Honor.

The Court: You haven't made him your witness. If he is your witness, you might proceed but you will have to proceed on a different basis from asking for a conclusion.

Mr. Flannagan: We will just except to the ruling of the Court.

The Court: You can use him as your witness now or later. If you do, you will be under the rules.

Mr. Flannagan: As to that question, [93] Your Honor, I said I would make him my witness.

The Court: The question would still be objectionable because it is asking for a conclusion.

Mr. Flannagan: We except to the ruling of the Court.

Q. He was cooperative with you? A. Yes, he was.

Q. And he answered your questions? A. Yes, sir, he did.

Q. You either left him there at the scene of the accident or he either left before you did? A. Yes, sir, as far as I can recall. The only reason he would have left with me is if I had brought him and had him make bond and I don't believe I did.

Q. You didn't do that, did you? A. I don't recall, sir. I am not sure.

Q. You are not saying that you did? A. No, sir.

Q. And you have no recollection of doing that? A. No, sir. As best I can recall I let him sign a summons, but I would have to go back and check my records before I could say definitely I did.

Mr. Flannagan: Now, Your Honor, his answer is not responsive and we object to [94] his answer. He just said he would have to check his records and if he wants to check his records, well and good and testify from those, but I asked him from his recollection and he says he doesn't know.

The Court: Well, I think he was probably responsive to your question. What was your question?

Mr. Flannagan: I asked him if he didn't leave him there, Your Honor.

The Court: All right. Do you know whether you left him there or not?

Trooper: The best I can say, Judge, is that I don't recall bonding the man.

The Court: All right. He doesn't recall it.

Mr. Flannagan: That is what I am objecting to, Your Honor, all the balance of this and ask that it be stricken because it is not responsive to the question.

The Court: His answer was he didn't recall and that was in answer to your question.

Mr. Flannagan: Yes, sir, but he gave a lot more than that.

[95] The Court: Any answer other than that will be stricken.

Q. Now did you see Mrs. Moore there? A. I don't recall seeing her, no, sir.

Q. No personal injuries were reported to you as a result of this accident? A. No, sir.

Q. May I see your notes just a moment, please? Is it a part of your job in the investigation of highway accidents to make a determination as to whether or not a person supposed to have been driving the vehicle is impaired? A. Yes, sir, in an accident you are concerned with that form.

Q. And did you make such a determination in this case?

Mr. Williams: I object, Your Honor. I think that he can state anything he wants to but I think that is an improper question. It was 50 minutes after the accident.

The Court: The question was whether he made a determination. He can answer that "yes" or "no."

Q. Did you make that determination in this case? You may look at your notes if you want to. A. There was evidence of drinking but not to the [96] extent the person was charged with driving under the influence.

Q. So your observation then was that his driving ability was not impaired? A. That is correct. As far as alcohol is concerned.

Mr. Flannagan: All right. That's all.

Redirect Examination

By Mr. Williams:

Q. You observed the man at 11:50, or sometime after that? I believe that is your testimony? A. Yes, sir. My notes indicate that I arrived at 11:50 P.M.

Q. Now, may I see your notes?

Mr. Williams: Your Honor, I am just making notes of what he has testified to that I didn't have down so that I wouldn't forget it

without him repeating it. He has already told the jury but I can't keep it in my head and I am just making notes.

The Court: You are not indicating your memory is bad?

Mr. Williams: No, I am not admitting it, or didn't mean to.

Q. One other question. These marks you have [97] indicated and testified about, and given the number of paces each of them was, will you state what type of marks they were, Trooper? If you want to refer to your notes, here they are. A. Where they began they were pressure marks, and after going over in the yard the vehicle was coming around sideways and they could have been skid marks. In other words, rather than a pressure mark when a wheel is turning a curve the wheels were sliding.

Mr. Williams: All right.

Sue Etta Moore

a competent witness, after having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Williams:

Q. Your name is Sue Etta Moore? A. Yes, sir.

Q. How old are you, Mrs. Moore? A. Twenty-eight (28).

Q. It has been previously testified that you have three children. Is that correct? A. Yes, sir.

Q. Mrs. Moore, prior to May 2nd, 1970, I will [98] ask you whether or not your general health, what it was, whether it was good or bad? A. It was good. I have always had good health up until this time.

Q. It has also been testified and I will ask you whether or not it is true that your youngest child was approximately three months old and was being breast fed at the time of this accident? Is that correct? A. Yes, sir.

Q. Now Mrs. Moore, state where you were and what your first knowledge was that there was an accident either about to happen or having happened, and what called your attenion to it? Where you were

and what you heard and saw? A. I had put my baby to bed and got a basket of clothes and put them away, and had started back into the living room. And I heard the rumbling noise, which was real loud, it drowned out the sounds of the T.V. and everything. All at the same time I was standing facing the picture window out from my kitchen, standing right in the doorway from the kitchen to the living room, and I could see lights of a car getting closer all of the time. I couldn't tell by the sound whether it was a car or truck. I got so frightened that I began to scream, and I could see the car then you know when it got up in the vision of the window. I could see the car and it hit and it weaved and the front [99] of it came up on the edge of the porch and I thought it was going to come into the house. And it just scared me until I froze in my tracks and screamed my head off. Robert got up to calm me down and got me to set down for a few minutes. And I didn't know whether to go out and check on them or go and check about the children, I didn't know if it had wakened them or not, but I jumped up and went out anyway and flipped the light on, and a couple of the boys were getting out of the car when we opened the door. The driver was see-sawing the car back and forth. I stood there for just a few minutes and all of them were begging us not to call their Daddy, they were afraid he might have a heart attack, and they were saying "Please don't call Daddy."

Mr. Flannagan: Your Honor, we want to object to what anybody said other than the defendant here.

Mr. Williams: I believe, Your Honor, it would be part of what happened there at the time and would be admissible.

The Court: Was the defendant there at that time?

Witness: He was right out in the yard in front of the bannisters.

The Court: Confine your statements to what he may have said or what was said in his presence.

[100] (Witness continues) He too was telling me not to call his Daddy. I told them to please hush and not say anything to me for just a minute and let me get hold of myself because I couldn't talk to them. I stood there for a few minutes and held onto the bannister. And so I got just enough strength to stand there and became as weak as water and felt like my legs were going to fall under me. I stood there for a few

minutes then and Robert had been talking to them. So he told me to go over and call the state police, and he asked Mr. Vannoy if we could use his phone, and he said "Yes" and he went over there with me. I was so weak I didn't know if I could make it across the path to get over there and back and I did. And while I was there they tried to get me to go to the doctor or hospital. He said that he would be glad to drive me, or either to lay down over there and rest for awhile. The children were still in bed and I didn't want to stay over there away from them. I was afraid they would wake up and be scared and so I went back and I went out then and looked where the car had been. I walked out in the yard to see where the tracks were and I got real chilled because I was trembling anyway and I became chilled and I went back inside then and stayed in there, and Mr. Vannoy's wife came in there with me and stayed in there.

[101] Q. Mrs. Moore, you say you could see these lights coming toward you. This car that was coming toward the house, could you tell anything about the speed of the vehicle? A. It was coming very fast.

Mr. Flannagan: Your Honor, I am going to object and ask the answer be stricken. She didn't even see the vehicle.

Q. Were you judging from the lights, Mrs. Moore? A. No, I could see the lights and I could see the car too, when it got in the vision of my window I could see the car.

The Court: I overrule the objection.

Mr. Flannagan: Save exceptions.

Q. Now do you know what the vehicle that struck, what it struck first. Could you see what it struck first? A. No, at that point when I saw that it was coming in toward the house I just began screaming and so I can't tell you which one that it struck first, but I heard three or four bumps and I became hysterical.

Q. Now you say after you went out, do I understand you that Hughes was still trying to move the vehicle back and forth and you saw that? A. Yes, sir. He was zig zagging, see sawing the car back and forth like that. It was going that a way, back and forth.

[102] Q. Were you in any condition yourself or were you able to observe anything about Hughes? Had you known him before in

order to make any determination about him? A. No, sir. I had not known the boy before.

Q. Were you in any condition to observe anything about his condition there at that time?

Mr. Flannagan: Your Honor, I object to a question such as that. That is leading and suggesting. I have no objection to this witness testifying as to what she knows and what she saw.

The Court: Go ahead.

Mr. Flannagan: Save exceptions.

A. I was close to him and I did smell some kind of an alcoholic drink on him. I couldn't say what it was because I don't know that much about it, but I do know that it was a drink.

Mr. Flannagan: Now Your Honor we have the same objection to this as we have had all along, and let it be understood this objection is continuing.

The Court: Overruled.

Mr. Flannagan: We except.

Q. Did you observe anything about his appearance, [103] Mrs. Moore, or the manner in which he was moving, or standing, or walking? A. He was very figidity, and he was talking pretty much, but I couldn't tell you anything that he said, and he did most of the talking to my husband and I didn't talk much to any of them.

Q. Did you notice the movements of his hands or feet or anything at that time, or the manner in which he got around? A. No, I didn't.

Q. I will ask you whether or not the speech that you heard from him at that time appeared to you to a normal speech of a man?

Mr. Flannagan: Now Your Honor, I object to this question, the last five or six have been leading.

The Court: That is a leading question.

Mr. Flannagan: In addition she has just stated that she had never seen the man before and didn't know what his speech was.

The Court: I sustain your objection as to leading.

Q. State whether or not you observed anything about his appearance? A. He was glassy eyed. And like I said awhile [104] ago he seemed to be very nervous and figidity. He was walking around very quick like and observing the accident. Other than that, I couldn't tell you.

Q. Now, Mrs. Moore, that night following the accident after you state Mrs. Vannoy came back over to your house to help you, what was your condition throughout the night following that? A. I didn't get any sleep at all. I had pains in my chest and arms, and I tossed and turned, and I took two or three little old dozes and during the dozes I had pure nightmares. I just couldn't rest at all.

Q. Now during the following day did that continue? A. Yes, sir. It did up until I went to Dr. Nelson and he gave me the medication of Librum.

Q. Now I believe Dr. Gabriel has stated some three days or something after this accident you came to him. Is that correct? A. Yes, sir.

Q. What was wrong with you that you went to Dr. Gabriel? At that time? A. My breasts had almost dried up. I didn't have enough milk to feed the baby and he had got to where he was crying all the time and starving, and that made it worse than ever on the other children because I was already torn up. [105] And I had started my menstruation periods.

Just exactly when did you start this menstrual cycle following this accident? A. I would say within a weeks time, just on the exact day I couldn't tell you, but it was within a weeks time.

Q. Was it before you went to Dr. Gabriel? A. Yes, sir. The day that I went to Dr. Gabriel I did not mention that to him because just a few days after that, I don't even know what day it was on, I went back to him because of the overflow that I was having.

Q. You went back to him a second time? A. Yes, sir.

Q. And because of an overflow at that time? A. Yes, sir.

Q. Did he give you some medication then? A. Yes, he gave me some little capsules then and referred me on to Dr. Nelson.

Q. Now during the weeks then that followed, Mrs. Moore, just

state to the jury what your condition was? A. Well, I could not sleep at night. I became very irritable with the family. I wasn't able to keep my work up the way that I had been. My mother came in and helped me. I did not hire anyone. She came in and helped me. [106] I stayed real nervous all the time and my periods were irregular. I did not know when to expect them. They were worse than they had been. I became more nervous at that time. Any kind of a speeding car, anything at all like that, if a boy were sliding his wheels, it would upset me and I would become very nervous and it brought it all back to me again. And I could see it all happening again and hear that noise, the rumbling noise. Even now I still, I am a lot better, but I am still nervous. I still have troube with my periods. And it doesn't take anything at all just to trigger it off. Just a little of nothing and I can't take it.

Q. At the time of this accident, were you doing anything other than housework, of course your baby had just been born? A. No, sir.

Q. Now when was it you began, if you did, to show some improvement from this condition? A. The last time I went to Dr. Nelson which I believe was October. I was getting some better than. That is when he changed my medicine, three capsules of Librum a day, 25 millograms apiece, and they have helped me considerably. And he then told me to take them, right now I have got. . . .

[107] Mr. Flannagan: If Your Honor please, we object to hearsay.

The Court: What is your objection?

Mr. Flannagan: We object to her testifying to hearsay, testifying as to what somebody told her.

The Court: I sustain the objection to that.

Q. Go ahead with what you were doing there? A. Dr. Nelson then told me. . . .

Q. No. No, not what he told you, what you did? A. Well, I then just began taking them as I needed them. Some days I can get along without them and some days I have to have them.

Q. Are you still taking them? A. Yes, sir.

Q. I take it then you take them when you feel like you need them? A. Yes.

Q. About how frequently do you take medication, say on an average now? A. Well, most of the time through the week days it doesn't bother me too much, but weekends I have to have them. We have a lot of traffic on the weekends and that is when I become more nervous than at any other time.

Q. I believe you have started work recently? [108] A. Yes, I started March 1st because I thought it might help me just to get out of the house and get away for awhile and get my mind occupied with something else.

Mr. Williams: You may cross examine.

Cross Examination

By Mr. Charles Flannagan:

Q. Mrs. Moore, when the accident and collision took place, you were standing up. Is this correct? A. Yes, sir.

Q. And exactly where were you standing? A. In the doorway that comes down into my living room. We have a step there that comes from the kitchen down into the living room and I had just started to step down the step when the noise began and I just stood right there. I did not move.

Q. And were you knocked down? A. No, sir.

Q. Were you struck by anything? A. No, sir.

Q. I take it from that then you did not have any cuts about your body, no bruises about your body? A. No, sir.

Q. No actual physical injuries as a result of the collision? A. No, sir.

[109] Q. From the way you describe it there must have been quite some noise prior to the collision? A. Yes, sir.

Q. And all of your children were in bed? A. Yes, sir.

Q. What are their ages? A. I have a little girl 6, a little boy 5, and the baby is now sixteen months old.

Q. During all of this did any of the children wake up? A. They were not completely awakened. My little girl was aroused but she was not awakened enough to get up out of the bed and come in there. We got her settled back down, one of the neighbors did.

Q. When you went to Mr. Vannoy's, did you leave the child there? A. Yes, sir. I left a boy there with them, one of Mr. Vannoy's boys stayed with them.

Q. Did you see this child between the time of the collision occurred and the time you went to Mr. Vannoy's? A. Yes, sir, I went in and checked on them first before I went over there.

Q. I understood that you went out on the porch first? A. I did. I went out on the porch and saw what [110] had happened, and then Robert told me to go and call the State Police, he asked Mr. Vannoy, and I went back in the house and checked on the children and asked Mr. Vannoy's son if he would stay there until I went and made the call.

Q. Were they awake at that time? A. No, sir.

Q. Now did I understand you to say that Dr. Gabriel gave you some medicine? When you went to see him? A. Yes, sir.

Q. On which occasion was this that he prescribed medicine for you? A. I believe it was the second time. I can't remember, but I believe it was the second time, because he wanted me to wait a day or two and see if I felt better.

Q. Do you recall giving a deposition on March 15th here in the court house in which I asked you some questions? A. Yes, sir.

Q. Do you recall at that time that I asked you this question: "Did he," referring to Dr. Gabriel, "give you any medication or treatment on the two occasions that he saw you?" And do you recall your answer being "No, sir?" A. I don't remember. If I did, I was very nervous that day and I might have said that all right, but if I did, I didn't mean to.

[111] Q. It was incorrect? A. Yes, sir.

Q. Now you have stated that the problem you had with your menstrual cycle was that it was irregular? A. Yes, sir.

Q. Was it early? Late? A. It was late.

Q. You were present here when Dr. Nelson testified earlier today? A. Yes, sir.

Q. And did you hear him testify that you were having problems with early periods? A. I have early and late periods, but most of the time it was late. Now two or three times when I was up there I had began early, and the last two times I went I was late. The last time I was up there I talked to this little girl and I can't remember her name, she was a young girl, and I was two weeks over due then, and she told me that. . . .

Mr. Flannagan: We object to what somebody told her. It would be hearsay.

The Court: Sustained.

Q. How far from the house was the automobile when you first actually saw the automobile? A. Well, when it first came into view, I would [112] say it was around 6 to 8 feet out from the porch.

Q. Six or 8 feet? A. Yes.

Q. So you saw the automobile travel a distance of approximately 6 or 8 feet? A. Well, I am talking about from the porch out this way, not the way it came this way, it would be around, let's see, about 10 foot that way, the way you are talking about.

Q. In any way you look at it you actually saw the automobile travel a distance of approximately 10 feet? Is that right? A. Yes, sir.

Q. And from observing this automobile travel a distance of 10 feet, you determined that it was traveling at a very fast rate of speed? A. Yes, sir, it was.

Q. You didn't see it other than this 10 feet, did you? A. No, the way the house is made you cannot see down the road from the window unless you go to the window and look out.

Q. Now when did you last see Dr. Nelson? A. October I think was my last visit, and since then I have only telephoned him and gotten prescriptions [113] that I have.

Q. Now again I will ask you if you recall testifying in Discovery Depositions on March 15th when I asked "When was the last time you

saw Dr. Nelson?" And your answer was "It has been two or three months?" "But I called him by phone." So actually from March 15th it would have been more like five months? A. Well, I was just guessing. Like I say I was a nervous wreck and so I couldn't give everything exact. I would not tell you a story about it, not intentionally.

Q. All right. And you began working on March 1? A. Yes, sir.

Q. And are you working at this time? A. Yes, I am.

Q. Mrs. Moore, on your first visit to Dr. Nelson's office, did he or some of his associates take a history from you, a personal history? A. Yes, sir. A lady helper of his which I can't recall her name, it has been some time back, she talked to me first and then I went into Dr. Nelson and I spent I guess two hours with him, or longer.

Q. And in taking this first history I assume they asked you questions about your recent history and your reason for being in their office? A. Yes, sir.

[114] Q. And did you tell them on your first occasion there that you were coming there because you expected to bring a lawsuit and recover a substantial sum of money? A. No, sir.

Q. You are denying that was told to anyone there? A. Yes, sir. I did not make a statement like that.

Mr. Flannagan: That's all.

Redirect Examination

By Mr. Williams:

Q. Mrs. Moore, I hand you some bills for some prescriptions here and ask you if these bills have been part of the medical bills that you have had since this accident? A. Yes.

Q. Are they all here? Is there any bill there for Dr. Nelson? A. Here is one that I got at the drug store.

Q. I mean his own bill, Dr. Nelson I assume charged you? A. Yes, I have some of them. I don't have them with me but I do have them.

Q. Do you know how much his bill is? A. I believe the last one

was $50.00. I am pretty sure it was $50.00, and then I got one about two weeks ago.

[115] Q. Is there also a drug bill in addition to those? A. Yes, sir. I have one I got this week.

Q. How much is it? A. It is $10.00 for my Librum.

Q. Is this Dr. Gabriel's bill and certain pharmaceutical bills, is that what this consists of? A. Yes.

Q. You say in addition to these you have Dr. Nelson's bill for $50.00 and certain drug bills? A. Yes, sir.

Mr. Williams: We would like to introduce those, Your Honor, as Exhibit 2.

Mr. Flannagan: We have no objections to it, Your Honor.

The Court: Let the bills be introduced.

(Medical bills were marked Plaintiff's Collective Exhibits No. 2 for identification, and received in evidence.)

Mr. Williams: Your Honor, I had Dr. Nelson's bill and it has been misplaced out of my file.

Recross Examination

By Mr. Flannagan:

Q. Mrs. Moore, I want to show you one of the bills that has been introduced. What is this? Who signed this bill? A. The druggist signed it.

[116] The Court: Speak a little louder, Mrs. Moore.

A. The druggist of McConnell Drug in Wise. That is one that we got filled up there and I think it might have been the first one. Then after that I got them filled in Pennington.

Q. Do you know why it is signed? A. I guess it is because I went back up there later and got it, and he signed it on account of that. That is the only reason I would know, because he was the one that gave it to me.

Q. Do you know what name it is? A. No, I don't recall it. He

told me that day what it was but I don't recall how to pronounce that.

Mr. Flannagan: All right.

Mr. Williams: We rest.

Motion to Strike Plaintiff's Evidence

Mr. Flannagan: Your Honor, at the conclusion of [117] the evidence for the plaintiff, we move the Court to strike the evidence of the plaintiff because she has not proved cause of action against the defendant in this case.

It is admitted by plaintiff herself there was no physical injuries received and her testimony was in response to questions. She did not feel any actual physical injury, there was no impact of her body with the automobile or any object. Her injuries complained of are emotional in nature. The law in Virginia is settled that there can be no recovery for emotional upsets resulting from negligence unaccompanied by contemporaneous physical injuries. In the case of *Bowles* v. *May,* 159 Va. 419, the defendant made threatening motions and gestures toward the plaintiff and the plaintiff became upset and suffered stroke and paralysis as a result thereof.

Since that time there have been cases which explained the Virginia doctrine further. The 1967 case, *Moore* v. *Jefferson Hospital,* 208 Va. 438, in which case the plaintiff was hospitalized for surgery and he and his doctor were preparing to go into the operating room. The head nurse refused the plaintiff and surgeon admission to the room. As a consequence the plaintiff became extremely nervous and upset and the plaintiff said that the shock caused him to become aggravated of the condition he was [118] hospitalized for. In that case the Court stated that it was necessary in such a case that it be alleged the actions of the defendant were willful, wanton, malicious, vindictive and grossly negligent. In that case the Court cited *Bowles* v. *May* case which I cited earlier. Here there is no allegation that this is anything other than a simple case of negligence. There is no evidence and it is not contended there was any physical injury to the plaintiff.

In the case of *Soldinger* v. *United States,* 247 F. Supp. 559, the plaintiffs lived next to the Naval Air Station in Norfolk and sued for damages for injury to their health, fright, and mental anguish caused by noise of low flying aircraft. Again the Court cited the old case of

Bowles v. *May* and entered judgment for the defendant as to the mental suffering, and the trial was allowed to proceed upon the basis of unlawful taking of property.

We move that the evidence of the plaintiff be stricken.

The Court. What do you have to say, Mr. Williams?

Mr. Williams: Your Honor, in the first place there is bodily harm here. It is physical. The woman's menstrual cycle is such that it is impaired and irregular, and her breasts dried up. That is physical and going to the body. Both doctors testified and she has testified in regard to it. So there is accompanying physical as well as [119] mental disability. There is no requirement in any of these cases that there be a touching. There may not be any physical wound but here you have the physical wrong to the person.

Mr. Flannagan: In response we were very careful to note that neither of the doctors testifying actually stated the problems of the menstrual cycle or with her breasts were result of this condition.

The Court: I don't have time to make an exhaustive research in the middle of a trial. This could have been brought up on summary judgment. Here in the middle of a trial I am confronted with a problem that you have researched for sometime. I don't know whether the plaintiff has a case under these conditions or not. I am going to overrule your motion and I can take the matter up at a later time if the circumstances require.

Mr. Flannagan: If the Court please, this would be a medical question in our opinion and the doctors have refused to relate it.

I will inquire what your Honor intends to submit to the jury?

The Court: I am going to submit to them the question of negligence of the defendant, casual relationship between the negligence, if any shown, to the plaintiff's condition as shown.

[120] Mr. Flannagan: What I was specifically referring to, Your Honor, was on damages?

The Court: I am going to submit to the jury the question of damages sustained by reason of an automobile running into this house.

Mr. Flannagan: And leave it to the jury to determine what caused those damages?

The Court: Yes.

Mr. Flannagan: We respectfully except to the ruling of the Court.

[121] * * *

Toy E. Hughes

the defendant, after having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Flannagan:

Q. What is your name? A. Toy Eugene Hughes.

Q. And I believe you are a little hard of hearing. Is that right, Mr. Hughes? A. That's right.

Q. Now if you will just talk up to Judge Cridlin here, we all ought to hear you. How old are you, Toy? A. Twenty-seven (27).

Q. And you were born and raised in Lee County? A. Yes, sir.

Q. Where do you live at the present time? A. Morristown, Tennessee.

Q. And are you working down there? A. Yes, sir.

[122] Q. Are you married? A. Yes, sir.

Q. How long have you been married? A. About two weeks.

Q. Now prior to your job down in Morristown, where were you working? A. In Ohio.

Q. What is your occupation? What do you do? A. I am a truck driver and a highlift operator.

Q. Now at the time of this accident up at Mrs. Moore's where were you working? A. Tripp City.

Q. What state is that in? A. Ohio.

Q. What was the occasion for your being in Lee County? A. I come on vacation.

Q. And when were you going to return to Ohio? A. The following Sunday after the accident.

Q. What day of the week did the accident happen on? How long before Sunday when you left? A. The night before.

Q. The night before. How long had you been down there in Lee County in 1970 on your vacation before this accident? [123] A. About four days.

Q. Whose car were you driving? A. My Dad's.

Q. And who was with you? A. My two brothers.

Q. What are their names? A. Michael Hughes and Earl Hughes.

Q. And where is Michael? A. Setting in the room there.

Q. And where is Earl? A. He is up in Ohio.

Q. Does he work up there? A. Yes, sir.

Q. Where were you going just before this accident happened? A. I was going up to my Aunt's house.

A. And where does she live? A. On up above where Mr. Moore lives.

Q. What was your purpose in going up there? A. I hadn't seen her in a long time and I was going to see her before I returned to Ohio.

Q. Were you driving? A. Yes, sir.

Q. Now just before this accident happened, tell us what occurred? [124] A. Well, I was going up through there and just around the curve somebody ran out in front of me. I applied my brakes and cut to my left and slid on up through the yard into Mr. Moore's car.

Q. Now you said someone ran in front of you. Was it a man or a woman? A. It was a woman.

Q. Do you know who it was? A. No, sir, I don't.

Q. Did you see this person any more after she darted in front of you? A. No, I didn't.

Q. Did you strike this person? A. No, sir.

Q. Had this person not run in front of you, would you have had any difficulty in negotiating the curve? A. No, sir.

Q. Would you have run into the house or the car? A. No, sir.

Q. Which did you strike first, the car or the house? A. I never did hit the house.

Q. What did hit the house? A. I hit a stump and carried it into the post on the porch.

[125] Q. Carried what into the post? A. The stump.

Q. And the stump hit what? A. The post leading from the porch.

Q. Does that post show in Defendant's Exhibit B? A. Yes, sir, that is it right there.

Q. The corner post? And you say your car didn't strike the house? A. No, sir.

Q. What part of your car struck what part of Mr. Moore's car? A. The right side of mine struck the left side of his.

Q. Now did you juggle the car, going back and forth there, striking the house and the car? A. No, sir.

Q. What did you do after you struck the house? A. Sir?

Q. What did you do after you struck the car? What did you do? A. I got out of the car. I tried to cut it off and it wouldn't cut off. I got out and took the battery cables loose.

Q. Do you know why it wouldn't shut off? A. No, sir.

[126] Q. By this you mean and are talking about the motor wouldn't shut off? A. Yes, sir.

Q. Did you see Mr. Moore there that night? A. Yes, sir.

Q. What was the first thing he said to you? A. When he come out of his house he said "It looks like I will get me a new home and a new car."

Q. "Looks like I will get me a new home and a new car?" A. Yes, sir.

Q. Did you stay there then until the police officer arrived? A. Yes, sir.

Q. Then when did you leave there? A. After the State Trooper told me it would be all right for me to leave.

Q. And where did you go? A. I went home to my father's house.

Q. And how long did you stay in Lee County? A. Until the next morning about 8:00 o'clock.

Q. Then where did you go? A. I went back to Ohio.

Q. After you left the next morning at 8:00 o'clock [127] were you ever in Lee County again for several months? A. Not for about two months.

Q. Now were you intoxicated? A. No, sir.

Q. Had you had anything to drink? A. I had that evening about 5:00 o'clock.

Q. And what was that? A. I drunk two beers.

Q. Did it have any influence upon your driving that night at 11:30? A. No, sir.

Q. Did Mr. Moore give you a breath freshener or something along that line? A. He offered it to me.

Q. Did you use it? A. No, sir, I told him I didn't need it.

Q. Did you see Mrs. Moore there that night? A. Yes, sir.

Q. Did you talk with her? A. No, I didn't.

Q. How long after the accident occurred would you say it was before you went home? A. About an hour.

Mr. Flannagan: You may ask him, Mr. Williams.

[128] Cross Examination

By Mr. Williams:

Q. Were your lights broken out in this accident? A. You will have to speak up so that I can hear you.

Q. Were your lights broken out in this accident? A. Not that I know of.

Q. Do you deny that your park lights were broken out and lying on the porch? A. I didn't look at the park lights. I don't know.

Q. You don't know. Now you say that someone came across in front of you? A. Yes, sir.

Q. Did they come from your right or from your left? A. From my left.

Q. They came from your left? A. Yes, sir.

Q. I take it if they came from your left they would have had to come all the way across the road? A. That's right.

Q. Were they running or walking? A. They were running.

[129] Q. And did they run all the way across in front of you? A. Yes, sir.

Q. And you say that you cut to your left to miss them? A. Yes, sir.

Q. In other words as soon as you saw them, you cut to your left? A. I applied my brakes and cut to the left.

Q. Applied your brakes and cut to the left, and they went on across in front of you whoever it was? A. Yes, sir.

Q. Did you all have some stuff to drink in the car? A. No, sir.

Q. You didn't throw some stuff out out there at Mr. Moore's? A. No, sir.

Mr. Flannagan: Your Honor, we object.

The Court: Overruled.

Mr. Flannagan: Save exceptions.

Q. None of you did? A. No, sir.

Mr. Williams: That's all.

[130] * * *

Michael Hughes

another competent witness, after having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Flannagan:

Q. What is your name? A. Michael Hughes.

Q. How old are you, Mike? A. Seventeen (17).

Q. Are you akin to Toy Hughes? A. Yes, he is my brother.

Q. Were you with him the night of the accident with Mr. Moore's car? A. Yes, sir.

Q. Tell us what happened? A. We was going up the road going to my Aunt's house. We was going up there and something run across the road. He cut his wheels to the left.

Q. And what happened when he cut to the left? A. He started sliding because the grass was wet. We hit Mr. Moore's car.

Q. What about the house? A. He hit a stump that was laying there in the yard and it throwed it against the porch.

Q. What did it do to the house? [131] A. It knocked a 2 by 4 down.

Q. And the car didn't hit the house? A. No, sir.

Q. Does the 2 by 4 that the stump hit show in this picture, Defendant's Exhibit B? A. Yes, sir. Right there.

Q. You are pointing to the corner post? A. Yes, sir.

Q. Did Toy then attempt to juggle the car back and forth? A. No, sir.

Q. What did he do about stopping the car? A. It wouldn't stop and so he opened the hood and took the battery cables off.

Q. Now when you say it wouldn't stop, are you referring to the motor? A. The motor wouldn't stop.

Q. And did he disconnect the battery cable? A. Yes, sir.

Q. And did it stop then? A. Yes, sir.

Q. Now was your car driven away from there or was it towed away by a wrecker? A. It was towed away by a wrecker.

Q. Did you see the car? Did you see the car [132] before it was towed away? A. Yes, sir.

Q. Where was it damaged? A. On the right side.

Q. Where was Mr. Moore's car damaged? A. On the left side.

Q. Did you hear Mr. Moore say anything there that night? A. Yes, he come out of his house and he said "That will mean a new home and a new Cadillac."

Q. "That's me a new home and a new Cadillac?" A. Yes, sir.

Mr. Flannagan: You may ask him.

Cross Examination

By Mr. Williams:

Q. Well, was his car totaled? A. I don't know.

Q. You don't know. It was pretty well demolished, wasn't it? A. I guess it did.

Q. Pretty well demolished it. And it knocked his house plumb out of line, didn't it? A. All I seen was a 2 by 4 knocked down.

Q. All you saw was just a 2 by 4? A. Yes, sir.

[133] Q. Now had you been drinking? A. No, sir.

Q. Hadn't had anything to drink? A. No, sir.

Q. Was there anybody in the car drinking? A. No, sir.

Q. Nobody in the car had had anything to drink? A. No, sir.

Q. And you had nothing in the car and didn't throw anything out after the wreck? A. No, sir.

Q. Now this person, you say it was a person that came across the road? A. Yes, sir.

Q. Did it walk across? A. No, it was running.

Q. Did they come from your right or from your left? A. From the left.

Q. From the left. All the way from the left side of the road? A. Yes, sir.

Q. Now if they were coming from your left, do you know why he didn't cut to his right? A. No, sir.

[134] Q. He cut to his left. As soon as he saw this person coming he cut to the left? A. Yes, sir.

Q. And the person went off on the right?

Mr. Flannagan: Excuse me. Instead of just nodding your head, answer.

A. Yes.

Q. Which way did you skid then? A. He was kindly sliding on the shoulder.

Q. If he was cutting to his left, did the rear end slip and slide around? Did the rear end of it hit the car? A. The whole side of it hit the car.

Q. The whole side of it. Well, did the back end or the front end come up against the porch? A. No end hit the porch.

Q. Neither end? A. No, sir. The stump hit the porch.

Q. When it wound up, which way was it headed? A. The car?

Q. Yes? A. It was headed toward his house.

Q. You mean it had turned completely around? A. It just turned around like that and went in sideways.

[135] Q. Cut to the left, turned around that way, and went in sideways. You never were off on the right side of the road then? A. No, sir.

Q. Did you hear Mr. Moore offer to give your brother something for his mouth, or give him something for his mouth? A. I seen him with something in his hand that looked like a breath spray.

Q. You don't know why he was giving him that? A. No, sir, I don't.

Q. Your other brother had not been drinking anything? A. No, sir.

Q. And you are sure that no one threw anything out into the creek? A. No one didn't throw nothing out.

Q. Neither one of you boys threw anything into the creek? A. No, sir.

Q. You were all there together? A. Yes, sir.

Q. Did any of you boys come back down there the next day with either your father or your uncle? A. I did.

[136] Q. What did you come down there for? A. Looking at the car.

Q. Did he go over to the creek and. . . .

Mr. Flannagan: Your Honor, I object to this. We have a continuing objection as I understand it. But this is getting too far. The next day involving something that the father did.

The Court: I understand the question was asked whether he went over to the creek or not.

Mr. Williams: Yes, Your Honor.

The Court: Go ahead.

Mr. Flannagan: That wasn't all of the question, Your Honor.

Q. Did you go over there to recover. . . .

The Court: Well, the question was whether he went down there with anybody the next day or who it was which I suppose is preliminary to the question he is going to ask. I overrule your objection.

Mr. Flannagan: Save exceptions.

Q. Did you go down there and recover a bottle from the creek? A. I didn't.

[137] Mr. Flannagan: Your Honor, that is what we are objecting to.

The Court: On what grounds?

Mr. Flannagan: On the grounds that he has already testified that nothing was thrown over there. On the further grounds it is not related to this defendant, it is the father of the defendant, it is the following day. I don't see that it has any connection with this case. In addition there is no foundation laid for it, Your Honor.

The Court: I will overrule the objection.

Mr. Flannagan: Save an exception. Your Honor, by implication they are trying to show that something was done wrong and it is only being done by implication. There is absolutely no foundation for this line of questioning.

The Court: I don't care to go into it any further. I have overruled your objection.

Mr. Flannagan: All right. Save exceptions.

Q. You say that didn't happen? A. What?

Mr. Flannagan: Your Honor, he has asked the question and it has been answered once. I don't think he ought to go into it, and [138] and into it, and into it.

Mr. Williams: If he answered it, I am sorry. I didn't hear it and I was just making sure that he said "No."

Mr. Flannagan: Well, he said that five or six times.

Mr. Williams: If he did, I didn't hear it, Mr. Flannagan, and I am sorry.

Redirect Examination

By Mr. Flannagan:

Q. When did you first get together with your brother, Toy, that evening? A. At the house about 6:30.

Mr. Flannagan: All right.

* * *

Whereupon, the following evidence was introduced in rebuttal on behalf of the plaintiff:

Robert Moore

recalled in rebuttal behalf of plaintiff, was examined and testified as follows:

[139] Direct Examination

By Mr. Williams:

Q. Mr. Moore, I want to ask you if on the night of this accident when the car came into your house as you have testified if you came out there and made the statement to these boys in the presence of the three of them to the effect that you would get yourself a new house and a new Cadillac? A. No, sir.

Q. I want to ask you if in your presence and in the presence of all three of these boys, some whiskey or beer bottles or cans were thrown from the car over into the creek?

Mr. Flannagan: Now Your Honor we object to this. It was excluded this morning and he knows it was excluded.

The Court: This is rebuttal at this point and it doesn't go only to the credibility of the witness. I will admit it on that ground. It was not admissible this morning as I ruled but it is admissible now as rebuttal testimony on the basis it only goes to the credibility of the witness.

Mr. Flannagan: To what witness?

Mr. Williams: Both of them.

[140] The Court: The defendant and the defendant's witness who said that there was nothing thrown.

Mr. Flannagan: I understand that, Your Honor, but our objection is that you cannot set up a straw man and then knock him down, and that is what they are attempting to do.

The Court: Go ahead. I overrule your objection.

Mr. Flannagan: We save an exception.

Q. Did you see something thrown from the car? A. Yes, sir.

Q. State what it was? A. It was definitely beer. I didn't know at the time what it was.

Q. I want to ask you if the next day did you see this younger boy that is here today at the trial? A. Yes, sir.

Q. Did he come back down there the next day? A. No, sir.

Q. He was not back down there the next day? A. No. Only Eugene came.

Q. And Eugene came back down. A. Right.

Q. Was that recovered in your presence over [141] there by some of his family? A. Yes, sir. I explained that night that I would not say anything about the boys drinking if I wasn't asked anything that I wouldn't say anything, but if I was that I would definitely would. . . .

Mr. Flannagan: Now Your Honor this is not responsive to the question.

Q. All right. Was there a recovery of this beer made in your presence . . . .

Mr. Flannagan: And I move for a mistrial, Your Honor.

The Court: As to the last remark I will exclude it and the jury will disregard it.

Q. Just answer my questions, Mr. Moore? A. Yes, sir, it was.

Q. The object that was thrown from the car, this beer was recover the next day? A. Yes, sir.

Mr. Williams: That's all.

Cross Examination

By Mr. Flannagan:

Q. Mr. Moore, if I understand your testimony, you saw someone thrown something from the car that night? A. Yes, sir.

[142] Q. You don't know who threw it? A. No, sir, I couldn't tell which one but it was thrown.

Q. And your wife was extremely upset? A. She definitely was.

Q. Your house was damaged? A. Yes, sir.

Q. Your car was totally demolished? A. Yes, sir.

Q. And under those circumstances are you testifying that you offered this boy something to overcome the odor of alcohol on his breath and didn't even so much as go over and pick up a bottle that was thrown out of that car? A. No, sir. I did not that night.

The Court: Let me understand the testimony. You say you don't know who threw this?

Witness: The two men got out on the right side.

The Court: Who were they?

Witness: They were his brothers. They threw the bottle.

The Court: You don't know which one of his brothers?

[143] Witness: No, sir.

The Court: I am going to strike this evidence and the jury will disregard it. I understood it was one of the witnesses that testified.

Mr. Flannagan: Excuse me, Your Honor. Are you striking everything in regard to it, what occurred the next day and so forth?

The Court: I am striking everything with reference to a bottle being thrown out of a car by somebody whom he does not know and the subsequent recovery of it. I am striking all evidence and the jury will disregard it.

Mr. Flannagan: Then I have no further questions.

* * *

Mr. Flannagan: Now Your Honor, we renew our motion on the basis of Your Honor's ruling.

The Court: Renew what motion?

Mr. Flannagan: For a mistrial, Your Honor, on the basis it was improper evidence. The jury can't disregard all of that.

The Court' The jury will disregard what I have told them to disregard. They will [144] disregard that particular testimony. Your motion is overruled.

Mr. Flannagan: Save exceptions.

Sue Etta Moore

the plaintiff, recalled in rebuttal, was examined and testified as follows:

Direct Examination

By Mr. Williams:

Q. Mrs. Moore, I would like to ask you whether or not the headlights of this boy's car were over there on your porch the next day? A. His park lights.

Q. Park lights? A. Yes, sir.

Mr. Flannagan: Your Honor, this is not rebuttal.

Mr. Williams: I asked him if it wasn't over there.

Mr. Flannagan: And he said that he didn't know.

Mr. Williams: He said that he had hit a stump.

Mr. Flannagan: You didn't ask him about the head light. You asked about the park lights.

[145] Mr. Williams. All right. She said it was park light.

Q. Was the park light over there the next day? A. Yes, sir.

Mr. Flannagan: That is not proper rebuttal evidence, Your Honor, and we object to it.

The Court: I sustain the objection.

Mr. Williams: All right.

* * *

Motion to Strike Plaintiff's Evidence

Mr. Flannagan: If the Court please, we want to renew our motion to strike, and also want to renew our motion for mistrial on the grounds heretofore assigned.

The Court: I will overrule the motions.

Mr. Flannagan: Save exceptions.

Instructions

The Court: Any objections to Instructions offered by plaintiff?

[146] Mr. Flannagan: Defendant objects, Your Honor, to the granting of any instructions because the plaintiff has not proved any action.

The Court: Any specific objections to these instructions?

Instruction No. 1
(Granted)

The Court instructs the jury that negligence is the failure to use ordinary care that a reasonably prudent person would exercise under the same or similar circumstances. If you find from the evidence that the Defendant was negligent and that his negligence was the proximate cause of the accident and the injuries sustained by the Plaintiff, then your verdict should be for the plaintiff in such amount as will reasonably compensate her for her injuries not to exceed the amount sued for.

Mr. Flannagan: Specifically on Instruction No. 1 we object because there is no evidence of any damages the plaintiff has suffered in this accident which are compensable at law.

The Court: I still give Instruction No. 1.

Mr. Flannagan: Save exceptions.

[147] Instruction No. 2
(Granted)

The Court instructs the jury that the burden on the Plaintiff to prove her damages by a preponderance of the evidence or with reasonable certainty does not require that she prove with mathematical precision the exact sum of her damage, but only that she furnish evidence of sufficient facts and circumstances to permit an intelligent and probably estimate thereof.

The Court: Any objections.

Mr. Flannagan: I have no objections to the form of No. 2.

The Court: I will give No. 2.

Instruction No. 3
(Granted as Amended)

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

[148] 1. Any injuries sustained and the extent and duration thereof;

2. Any effect of any such injuries upon her health according to its degree and probable duration;

3. Any physical pain and mental anguish suffered by her in the past, and any which may be reasonably expected to be suffered by her in the future;

4. Any inconvenience and discomfort caused in the past and any which will probably be caused in the future;

5. Any doctors and medical expenses incurred 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, Sue Etta Moore, for the damages sustained by her as a result of the wreck, not to exceed the sum sued for in the Motion for Judgment.

The Court: Any objections?

Mr. Flannagan: We have the same objection, Your Honor. There is no injuries proved in this case which are compensable at law. In Paragraph 3 there was no physical pain proven. Paragraph 5, no hospital or nursing expenses.

[149] The Court: The doctor says there is mental pain and suffering.

Mr. Williams: Not only that but there is the bleeding and the irregularity of the menstrual cycle.

The Court: I remember he said there was pain to it.

Mr. Flannagan: But Your Honor, he did not say it was physical pain. He has in there "physical pain and mental anguish."

The Court: In Paragraph 5 I am going to strike out "hospital and nursing expenses" and I will give No. 3 as amended.

Mr. Flannagan: Exception.

The Court: Let's take up the Instructions offered by the defendant.

Instruction No. A
(Granted)

The Court instructs the jury that a verdict must not be based upon surmise, conjecture or sympathy for either of the parties, but must be based solely upon the evidence and the instructions of the Court.

The Court further instructs the jury that the [150] term "preponderance of the evidence" does not necessarily mean the greater number of witnesses, but means the greater weight of the evidence or that degree of proof which you find more convincing and worthy of belief. The testimony of one witness in whom the jury has confidence may constitute a preponderance.

The jury are the sole judges of the weight to be given to the evidence and of the credibility of the witnesses. And in ascertaining the preponderance of the evidence and the credibility of witnesses, you may take into consideration the demeanor of the witness on the witness

stand; his apparent candor or fairness; his bias, if any; his intelligence; his interest, or lack of it in the outcome of the case; his opportunity, or lack of it, for knowing the truth and for having observed the facts to which he has testified; any prior inconsistent statements by the witness if proven by the evidence; and from all these and taking into consideration all the facts and circumstances of the case, you are to determine the credibility of witnesses and the preponderance of the evidence.

Mr. Williams: I have no objections, Your Honor.

The Court: I will give Instruction A.

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[151] Instruction No. B
(Granted)

The Court instructs the jury that the mere fact that there has been an accident and that as a result thereof the plaintiff has been injured, does not of itself entitle the plaintiff to recover. In order 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 negligence and that any such negligence was a proximate cause of the collision.

And if the jury are uncertain as to whether any such negligence has been thus proven by the evidence, or if you believe that it is just as possible that the defendant was not guilty of any such negligence as it is that he was, then your verdict shall be for the defendant.

The Court: Any objections?

Mr. Williams: No objections, Your Honor.

The Court: I will give Instruction B.

Instruction No. C
(Granted)

The Court instructs the jury that damages are not presumed nor may they be based upon speculation, but [152] must be proven; and the burden is on the plaintiff to prove by a preponderance of the evi-

dence each item and element of damage claimed, and unless such item or element thus claimed is proven by a preponderance of the evidence, the plaintiff cannot recover therefor.

And if the jury are uncertain as to whether any particular element of damage claimed was caused by the collision, or if it appears just as probable that any injury or element of damage complained of resulted from a cause other than the collision as that it did, then the plaintiff cannot recover therefor.

Mr. Williams: I have no objections.

The Court: I will give Instruction C.

The Court: I am giving Instructions Nos. 1, 2, and 3 as amended, for the plaintiff. I am giving Instructions Nos. A, B, and C as offered by defendant.

Motion to Limit Argument

Mr. Flannagan: We would move the Court to exclude any reference in argument that the woman is entitled to any compensation for the disruption of her menstrual cycle and the loss of the size of her breast because there is no medical evidence as the doctor said these things [153] happen following pregnancy and delivery of a child. That was the doctors own testimony. We would ask the Court to exclude it, and I think we would offer an Instruction that the jury should not consider that as an item of damages.

Mr. Williams: I am not going to try to say that the doctor did not give casual connection but I thought he did. I thought my question to Dr. Nelson embraced those things. I do not think an Instruction would be proper and I think it should all be taken into consideration in arriving at this woman's problems.

The Court: Only those conditions which are shown to have some connection with the accident. I will let it go as it is.

Mr. Flannagan: Save an exception.

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