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Clerk, Supreme Court of Appeals
Richmond, Va.

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD No. 8113

ARNOLD DAVID SCHUTT,
Plaintiff in error,

v.

JAMES E. BROCKWELL, JR.,
Defendant in error.

APPENDIX

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[1] * * *

MOTION FOR JUDGMENT

Filed August 2, 1971

Plaintiff moves the Court for judgment against the defendants, jointly and severally, in the sum and on the grounds hereinafter set forth.

1. On or about the 26th day of March, 1971, plaintiff was travelling on foot across Jefferson Davis Highway from the west side thereof to the east side thereof, near its intersection with Lancelot Avenue, in the City of Richmond, Virginia.

2. At the same time, a certain Ford pickup truck, which was owned, operated and controlled by the defendant, Unitized Systems Company, Incorporated, was being driven by the defendant, Arnold David Schutt, its agent, servant and employee, acting within the scope of his employment, in a southerly direction on said Jefferson Davis Highway, approaching the place aforesaid.

3. And the said defendants, and each of them, did then and there so carelessly, recklessly and negligently run and operate the said Ford pickup truck that the same was caused to run into and upon the plaintiff.

[2] 4. As a result, plaintiff was caused to sustain permanent injuries; has been prevented for transacting his business; has suffered and will continue to suffer pain of body and mind; has sustained permanent disability, deformity and loss of earning capacity; and has incurred, and will have to incur in the future, medical and other related expenses in an effort to be cured of his injuries.

Wherefore, plaintiff demands judgment against the defendants, jointly and severally, in the sum of One Hundred Fifty Thousand Dollars ($150,000.00) and costs.

Trial by jury is demanded.

[28] * * *

ORDER

Filed February 4, 1972

This day came the plaintiff, in person and by his attorney, and came also the defendant, in person and by his attorney, and thereupon came a jury, to-wit: Robert Brown, Sr., A. B. Cole, G. P. Johnson,

Sr., Paul G. Knecht, H. Randolph Minor, David E. Perkins, Jr., and Kenneth W. Sledd, who were sworn well and truly to try the issue jointly in this case and having fully heard the evidence and argument of counsel were sent out of Court to consult of a verdict and after some time returned into Court with a verdict in the words and figures following, to-wit: "We, the Jury, on the issue joined, find for the Plaintiff, and assesses the damages at $100,000.00.

This is the unanimous finding of the jury."

Thereupon the defendant, by his attorney, moved the Court to set aside the verdict of the jury and enter final judgment in his favor on the grounds previously stated in support of his motions to strike the plaintiff's evidence, or in the alternative, to award him a new trial on all issues on the ground of misdirection of the jury in refusing Instruction K, which motion the Court doth overrule.

Therefore, it is considered by the Court that the plaintiff recover of the defendant the sum of One Hundred Thousand Dollars with interest thereon to be computed after rate of six per centum per annum from the 4th day of February, 1972, until paid, and his costs by him about his suit in this behalf expended.

To which action of the Court the defendant, by his attorney, objected and excepted.

[29] And the defendant having indicated his intention to petition the Supreme Court of Appeals of Virginia for a writ of error from and supersedeas to this judgment, it is ordered that execution thereon be suspended for a period of four months from this date, and thereafter, if such petition be filed within said time, until the Supreme Court of Appeals of Virginia shall have acted on said petition, provided the defendant or someone for him shall within twenty-one days from this date give a bond in the penalty of One Hundred Fifteen Thousand Dollars, with surety to be approved by the Clerk, conditioned according to Sections 8-465 and 8-477 of the Code of Virginia of 1950, as amended.

[30] * * *

MOTION

Filed February 14, 1972

The defendant, Arnold David Schutt, by counsel, respectfully moves the Court to set aside the verdict and judgment in favor of

plaintiff against him on the 4th day of Feburary, 1972, and to grant to him a new trial on the following grounds, in addition to those made on February 4, 1972, at the conclusion of the trial thereof, all of which are spelled out in the judgment order of the Court dated February 4, 1972:

1. The Court erred in granting instruction number one requested by the plaintiff, over objection of the defendant.

2. The Court erred in granting instruction number eight requested by the plaintiff, over objection of the defendant.

3. The Court erred in granting instruction number two requested by the plaintiff, over objection of the defendant.

[32] * * *

ORDER

Filed February 22, 1972

This day came the defendant, by counsel, upon his motion to set aside the verdict and judgment in favor of the plaintiff after legal and timely notice to the plaintiff by counsel; and was argued by counsel for the defendant.

Upon consideration whereof, the said motion is hereby overruled, to which action of the court the defendant, by counsel, objected.

[34] * * *

ASSIGNMENTS OF ERROR

Filed February 29, 1972

Defendant assigns error as follows:

1. The Court erred in denying the Motion of the defendant made at the conclusion of plaintiff's evidence, to strike the evidence of the plaintiff and grant summary judgment for the defendant.

2. The Court erred in denying the Motion of the defendant made at the conclusion of all of the evidence to strike the plaintiff's evidence and enter summary judgment for the defendant.

3. The Court erred in denying the motion of the defendant after verdict in favor of plaintiff to set aside the verdict of the jury and enter judgment for the defendant.

4. The Court erred in refusing to grant instruction number K at the request of the defendant.

5. The Court erred in the granting of instruction number 1, requested by the plaintiff over objection of the defendant.

6. The Court erred in granting instruction number 2 requested by the plaintiff over objection of the defendant.

[35] 7. The Court erred in granting instruction number 8 requested by the plaintiff, over objection of the defendant.

8. The Court erred in denying the motion of the defendant after verdict to set aside the verdict of the jury and award the defendant a new trial on all issues by reason of misdirection of the jury in the refusal to grant instruction number K.

9. The Court erred in denying the motion of the defendant after verdict to set aside the verdict of the jury and award the defendant a new trial on all issues because of error committed by the Court in granting instructions number 1, 2, and 8, over objection of the defendant.

[27]

INSTRUCTION NO. K

The Court instructs the jury that a motorist has a superior right of way over pedestrians between intersections; and further instructs you that in this case the defendant had a right to assume that no pedestrian would attempt to cross Jefferson Davis Highway in front of him between intersections, and the defendant had a right to rely upon that assumption insofar as plaintiff was concerned until he saw, or in the exercise or ordinary care he should have seen, plaintiff crossing Jefferson Davis Highway.

Refused

A. C. C.

[18]

INSTRUCTION NO. KK

A pedestrian may cross a street between intersections if he elects to do so rather than go to the regular crossings, that is, where there is

a marked crosswalk or a street intersection. If the pedestrian chooses to cross the street between intersections he is required to use greater care for his own safety than when he crosses at the place provided for pedestrians. But the court further instructs the jury that the rule by which to determine whether a pedestrian crossing a street between intersections has exercised the greater care required in such case is the rule of ordinary care, that is to say, has he used the care which an ordinarily prudent person would use in the same place and under the same conditions.

It is also the duty of a pedestrian crossing a street to cross the street only at right angles.

And if you believe from a preponderance of the evidence that the plaintiff failed in the performance of either of the foregoing duties, then he was negligent; and if you further believe from the evidence that any such negligence was the sole proximate cause of the collision or that it proximately contributed to cause the collision, then you shall return your verdict in favor of the defendant.

[14]

INSTRUCTION NO. 1

The Court instructs the jury that at the time and place of the accident, it was the duty of the defendant, Arnold David Schutt, to exercise ordinary care for the safety of the plaintiff, or that degree of care which a reasonably prudent person would have exercised under the same, or similar, circumstances. Included within this general duty was the duty to keep a reasonable lookout and to keep his car under reasonable control under the conditions then existing.

If you believe by a preponderance of the evidence that the defendant failed in the performance of the above-mentioned duty, in any particular, then he was guilty of negligence, and if you further believe from the evidence that such negligence, if any, existed and proximately caused the accident, then, unless you also find that the plaintiff was guilty of contributory negligence, you shall find your verdict for the plaintiff and assess his damages in accordance with the instruction on damages.

[15]

INSTRUCTION NO. 2

Every motor vehicle traveling upon a highway of this State shall be equipped with at least two head lamps, at the front of and on opposite sides of the motor vehicle. Such head lamps, if they be multiple-beam,

shall provide an uppermost distribution of light of sufficient intensity to reveal persons and objects at least 350 feet ahead, and at least one lower, non-glaring distribution of light of sufficient intensity to reveal persons and objects at least 100 feet ahead.

And if you find by a preponderance of the evidence that at the time of this accident, the defendant did not have burning head lamps of the intensity as required by this duty then the defendant was negligent, and if you further believe from the evidence that such negligence, if any, existed and proximately caused the accident, then, unless you also find that the plaintiff was guilty of contributory negligence, you shall find your verdict for the plaintiff and assess his damages in accordance with the instruction on damages.

[20]

INSTRUCTION NO. 8

The duty of a pedestrian in crossing a street to exercise ordinary care to keep a lookout for approaching traffic, does not require him to await the passing of all vehicles, but only those vehicles which are approaching so near, or at such a rate of speed, or in such a manner, that a reasonably prudent person exercising ordinary care for his own safety would not attempt to cross.

EXCERPTS FROM REPORTER'S TRANSCRIPT OF PROCEEDINGS

[5] * * *

Testimony of Officer L. G. Simpkins

Direct Examination

By Mr. Branch:

Q Officer Simpkins, will you state your full name. A Officer L. G. Simpkins.

Q And you are a patrolman with the City of Richmond Police Force? A Assigned to the Traffic Division.

Q In the course of your duties did you have occasion to investigate an accident that occurred during the evening of March 26, 1971? A I did, sir.

Q What time did you receive your call or what time did you arrive at the scene? A I received it at 8:07.

Q Do you know approximately how long it took you to go there? A Approximately six minutes.

Q First, Officer, will you tell us what the weather conditions had been earlier that day and what was [6] existing at the time of this occurrence. A There was a snowfall and snow was on the ground. It was snowing and raining when I arrived, a very slushy type snow. The roadway itself was wet and slushy.

Q Had it been steady prior to that or intermittent, or do you know? A I do not recall, sir.

Q Where did the accident we are talking about occur? A In the southbound lanes of Jefferson Davis Highway, approximately what I consider 100 feet north of Lancelot Avenue, which intersects at right angles south of this point.

Q Do you know the name of the intersection north of the scene of the accident? A No, I don't, sir.

Q When you arrived at the scene did you see Mr. Brockwell? A When I arrived there was a gentleman laying on the median and being treated and in the process of being put in an ambulance.

Q The ambulance was already there? A Yes, sir. Which gentleman I later identified as Mr. Brockwell.

[7] Q He was on the median strip? A On the median strip, yes, sir.

Q Would you step up here, please.

Note: Counsel and the witness are now standing before the jury.

Q This has been used as a view facing southwardly. Do you recognize that? This is Plaintiff's Exhibit No. 1. A Yes, sir.

Q Now the median strip you refer to is a grass plot here between the north and southbound lanes? (Indicating) A Yes, sir.

Q Will you point out to the jury approximately where on the median strip you found Mr. Brockwell's body? A I would say approximately here when I arrived. (Indicating) What I consider three-quarters of a block south of this intersection.

Q And Lancelot is the next intersection down here? A Yes.

Q You don't know the name of this one down [8] here? A I don't, no, sir.

Q Were these overhead lights burning all right that night? A They were when I arrived, sir.

Q At that time was it dark or light? A It was dark.

Q What was the light condition over here where the gas stations are? A The gas stations were open and it appeared to be normal.

Q Did they have a lot of lights on then? A Normal operation, yes, sir.

Q Did you in some way determine where Mr. Brockwell had initially been struck, or where was he at the point of impact relative to this curbing line on the grass plot? A I couldn't say, no, sir. I couldn't determine. All I can say it I found him at this point when I arrived, on the grass plot.

Q Did you get any indication that he had been moved from where he came to rest or is that the place where he had landed? A The indication to me is this is where he had landed after impact.

[9] Q Did you locate the vehicle that had struck him? A I did, sir.

Q Where did you find that? A I found this vehicle sitting on Jefferson Davis Highway in the extreme left-hand southbound lane up against the median, south of where the pedestrian was being treated approximately 355 feet.

Q Where was that vehicle relative to Lancelot, the next intersection? A Approximately 255 feet south of Lancelot.

Q Was that vehicle in the intersection or between intersections? A Between intersections.

Q The lane you found it in, was that the normal driving lane? A The normal left-hand southbound travel lane.

Q I show you Plaintiff's Exhibit No. 2, a view of the same area looking northward. Do you recognize that? A (Looking at photograph) Yes, sir.

Q The Gulf Station there? A And Lancelot there.

Q This is Lancelot according to the street [10] sign.

Mr. Branch: The Officer just noted the street sign in Plaintiff's Exhibit No. 2 and identified this intersection as Lancelot.

Q Now, Officer, this picture is not entirely self-evident. Can you tell us whether there is any left turn dogleg or cutout on the southbound lane here at the intersection of Lancelot? A No, sir, not at this intersection.

Q Before we sit down—you told us that you got slush and it was wet on the street. How about the condition existing on the side, the sidewalk and area adjacent? A There was about two inches of snow on the sidewalk.

Q Was there any markings of any sort in the snow on this side of Jefferson Davis Highway? A One set of footprints slightly northward of where I found the pedestrian on the median, slightly.

Q Leading which way? A Leading as if someone walked into the highway.

Q. Slightly north from the body of Mr. Brockwell on the grass plot? A Yes, sir.

[11] Note: At this time the witness resumes the witness chair.

Q When you arrived at the scene did you see there were some men there rendering assistance to Mr. Brockwell? A I would say, sir, several.

Q Do you know who they were? A Some of them were the Rescue Squad.

Q Part of the ambulance? A Yes, sir.

Q Did you see Mrs. Brockwell there? A I spoke to her later. I don't recollect whether I saw her at that particular time or not.

Q At that particular time you don't know where she was? A I couldn't say, no, sir.

Q Did you talk to Mr. Schutt, who was the operator of that vehicle you found? A I did, sir.

Q What did he have to say about why the accident occurred or any statement that he made? A I questioned him as to his direction

of travel and if he was the driver, which he confirmed he was. I asked the question where was the pedestrian when you [12] first saw him. The statement I have recorded is: I didn't see him until I hit him.

Q Officer, were you able to locate any eye-witnesses to this accident? A I spoke with some people who said they didn't actually see it.

Mr. Branch: Thank you, I have no other questions.

Cross Examination

By Mr. Miller:

Q Officer, do you have any idea how wide the southbound lanes of Jefferson Davis Highway are? A The entire width is approximately 34 feet wide for all three lanes.

Q From the edge of the median to the curbing line? A Yes, sir.

Q 34 feet. Now Officer, will you come up here just a moment, please.

Note: Counsel and the witness now stand before the jury.

[13] Q Mr. Branch asked you on Plaintiff's Exhibit No. 1 where you found the pedestrian. Can you point on this picture as to where he was, Plaintiff's Exhibit No. 2, as best you can? A I would say about there. (Indicating)

Q Will you take a red pen here and put an "X." A (So doing)

Mr. Miller: Let the record reflect that the witness put an "X" on Plaintiff's Exhibit No. 2 in red.

Q Did you talk to the plaintiff's wife at the scene? A I spoke to her, yes, sir.

Q Did she make any mention of their car being there at the East Coast Station or anything like that? A She did, sir. Do you want me to give the statement, what she told me?

Q Yes, sir. If you would. You may sit back down.

Note: The witness now resumes the witness chair.

[14] Q You have her statement, sir? A I did not write it

down. I recollect, in essence, that they had experienced trouble and he had gone across the street to try and get some help and was on his way back when she saw him struck.

Q All right, sir. Did you see where her vehicle or the plaintiff's vehicle was parked at the East Coast Station? A Yes, sir, somebody pointed it out to me.

Q Are there two or three pump islands at the East Coast Station? A Yes, sir.

Q Can you see in Plaintiff's Exhibit No. 2 the island where the plaintiff's car was parked? A To the best of my recollection, in the northernmost island.

Q The northernmost island? A To the best of my recollection.

Q Will you draw a circle around the northernmost island for us with my red pen. A (So doing)

Q And on that picture do you see or can you locate approximately where you saw the footprints in the snow. Put two dashes by that so we will know where they are. [15] A (So doing)

Q May I see that, sir. (Looking at photograph) You don't know whose footprints these were? A I do not know, no, sir.

Q You just saw footprints? A Just saw footprints.

Q What is the speed limit at this point? A Posted 40 miles an hour.

Q 40 miles an hour. Thank you, sir.

Mr. Miller: That is all I have.

By Mr. Branch:

Q Just one question. The footprints you saw, could you tell whether they were large or small. Were they left by a large man or a small man? A (Pause) In my opinion, it appeared to be a track of a man. They were larger.

Mr. Branch: Thank you. No further questions. May the Officer be excused?

By the Court:

Q Officer, tell us whether or not you looked for, and if you did,

found any marks in the highway at or near the location where you found Mr. Brockwell upon your arrival. Were there any marks in the highway visible [16] to you or any debris there.? A No, sir.

Q There were none? A I was not able to find any markings.

Q Did you ask Mr. Schutt his speed, that is the driver of the truck? A I did.

Q What did he say his speed was? A He estimated his speed to me at 35 miles an hour.

Q Did you examine the vehicle? A I did, sir.

Q You did? A Yes, sir.

Q Did you find any damage to the vehicle? A I found damage to the left front and left front headlight.

Q What was the nature of that damage? A The metal itself was caved in. The hood portion was caved in. I would say to the extent of—

Q Don't tell us how much you think it would cost to repair it, just describe it. Is that about your description as you observed it? A Yes, sir.

The Court: Any further questions of [17] Officer Simpkins?

Mr. Miller: One or two on recross.

Recross Examination

By Mr. Miller:

Q You say there was damage to the left front headlight? A Yes, sir.

Q The metal rim was caved in, sir? I am trying to understand what you said. A Yes, sir, the portion around it. What I call the hood.

Q The hood of the headlight? A The hood of the vehicle was damaged.

Q The hood of the truck? A Yes, sir.

Q On which side was the hood hit? A The left front.

Q The left front. All right.

Mr. Miller: That is all, thank you.

By Mr. Branch:

Q One question I overlooked. Did Mr. Schutt indicate to you in which lane of travel he was at the time [18] of impact? A He stated that he had been coming down in the left lane.

Q The left lane. All right.

Mr. Branch: May the Officer be excused?

The Court: Officer, you may be excused and you may go.

[51] * * *

Testimony of Mrs. Brenda Brockwell

Direct Examination

By Mr. Branch:

Q Mrs. Brockwell, give us your full name. A Brenda.

Q Brenda Brockwell? A Yes.

Q You are the wife of James Brockwell, Jr., sitting here with me? A Yes, sir.

Q Mrs. Brockwell, taking you back to the evening of March 26, 1971, that night when Mr. Brockwell was hurt— A Yes, sir.

Q —do you remember about what time he got home from work? A It was around six.

Q Mrs. Brockwell, do you feel a little nervous A Yes, sir.

Q Anyway, will you try to turn and speak to [52] the members of the jury loud enough so they can hear you? A Yes, sir.

Q After Mr. Brockwell got home then where did you go? A We went to my mother's to eat supper.

Q About what time did you leave? A About six thirty.

Q Had Mr. Brockwell had anything to drink? A No, sir.

Q When you left to go to your mother's for dinner who went with you? A The two children.

Q How old are they? A Four and five.

Q Well, did you have dinner all right at your mother's house? A Yes, sir.

Q And then you left your mother's. Did you take both children with you when you left your mother's house? A No, sir.

Q Did you take one of them? A Yes, sir.

Q When you left your mother's house where [53] were you heading? A Going to King's.

Q For what purpose? A To get groceries.

Q Did you ever get to King's? A No, sir.

Q Where did you stop? A We went to the East Coast Station.

Q Now to get to the East Coast Station Mr. Brockwell would have to turn left, in the direction he was going? A Yes, sir.

Q He had been heading toward Petersburg, toward King's? A Yes, sir.

Q And the East Coast Station would be on his left side of the street? A Yes, sir.

Q Do you know why he turned and went across the street to the East Coast instead of going to the Gulf Station on the right? A The gas over there is cheaper.

Q Did he get gas at the station? A Yes, sir.

Q And then what happened? [54] A He got back into the car and the car wouldn't start.

Q And so what did he do about that? A He got out of the car and put the hood up.

Q What did he ask you to do? A To get over in the driver seat, turn the key on.

Q Well did you do that? A Yes, sir.

Q Could he start the car? A No, sir.

Q Then where did he go? A He crossed the street.

Q Did he ask somebody or did you see him speak to anybody at East Coast first? A Yes, sir.

Q And did he come back to the car? A Yes, sir.

Q And did he tell you then—

Mr. Miller: Your Honor—

Mr. Branch: All right.

Q When he came back to the car after you saw him speaking to someone at East Coast what did he tell you? [55] A That they didn't have any jumper cable and he was going over to the Gulf Station to see if they had any.

Q Did you watch him and see him as he left the car? A Yes, sir.

Q Where did he go as you saw him? A He went behind the car to go around it.

Q Then what? A Then he crossed the street.

Q How far over did he cross the street? Did he go all the way across the street? A It is between them things they put around trees.

Q Step up here a moment, please.

Note: Counsel and the witness now stand before the jury.

Q I show you Plaintiff's Exhibit No. 1. Do you recognize this area? A Yes, sir.

Q And you had been over here in Gas For Less? A Yes.

Q And you saw him start across the street? [56] A Yes.

Q Take this pencil and show the jury approximately where he crossed the grass plot and then where did he go. A Between these two little things.

Mr. Branch: She is pointing to the little frames guarding small trees.

Q He went between those? A Yes.

Q Then where? A Across to the station.

Q The Gulf Station? A Yes, sir.

Q Then, Mrs. Brockwell, did you again see your husband before the accident? A Yes, I did.

Q Where was he when you next saw him? A He was getting ready to come back across the street.

Q Point out on this picture about where he was as he started to come back across. A About right in here. (Indicating)

Mr. Branch: She is pointing just beyond the first driveway to the Gulf Station shown in Plaintiff's Exhibit No. 1.

[57] Q After you saw him at that place you have just pointed out could you tell us about the traffic, or any traffic coming from the north heading toward Petersburg? A There wasn't any.

Q How do you know A I looked.

Q How far up the street could you see when you looked? A It would be about a block.

Q Did you see any other vehicles in that area? A I saw my husband right here. (Indicating) There was a truck. It looked like he was parked about right in here.

Q All right. You can take your seat.

Note: The witness now resumes the witness chair.

Q That truck that looked like he was parked there in the driveway you pointed out— A Yes, sir.

Q —which part of the truck were you looking at? Which way was it heading? [58] A Headed like it was going to come out.

Q You saw the front end of it? A Yes, sir.

Q How was it heading, straight out or in either direction? A No, sir, on sort of a slant.

Q In what direction? A Headed down the way we were going.

Q Did that truck have any headlights on at that time? A No, sir, it looked like it was parked.

Q After you saw this what did you do? A I saw my husband step off the curbing and I slid back over on my side of the car and put my little girl on my lap.

Q Then did you see your husband again? A Yes, sir.

[59] * * *

Q Mrs. Brockwell, you had told us you had slipped back over to the passenger side and put your little child in your lap. A Yes, sir.

Q And then did you see your husband again? A Yes.

Q Where was he when you saw him this time? A He was up in the air.

Q Will you step over and show us again in this picture.

Note: Counsel and the witness now stand before the jury.

Q This is Plaintiff's Exhibit No. 1. Can you point out approximately where your husband was when you saw him in the air? [60] A Right here. (Indicating)

Mr. Branch: She is pointing at an area between two little frames around little trees. All right. You can have your seat now.

Note: The witness now resumes the witness chair.

Q When you saw your husband then in the air did you see anything else there at him or behind him? A Yes, sir.

Q What did you see? A The truck.

Q What truck? A It was the same truck.

Q The same truck as which truck? A One that was in that lot.

Q What color was the truck as you saw it? A Maroon.

Q How do you know it was the same truck you had seen in the lot? A It looked the same, same color.

Q Was the front end of that truck visible to you? That is, in what position was it in the road? A On sort of a slant, I reckon you would call [61] it.

Q Could you see the front end of the truck? A Yes, sir.

Q Could you tell us whether it then had lights on? A No, sir, it didn't have lights on.

Q Did you see where that truck went after that? A Right at

that point it looked like—my husband was in the air and it looked like he was just there and it went on.

Q Mrs. Brockwell, what did you do then? Did you get out of your car, or stay where you were, or what? A I was still in the car.

Q Why didn't you go right over to your husband, do you remember? A No, sir, I don't.

Q Do you have any clear memory of what happened after that? A No, sir.

Mr. Branch: Thank you, Mrs. Brockwell. That is all I have.

[62] Cross Examination

By Mr. Miller:

Q Mrs. Brockwell, you can sit right where you are. Can you put this pad on your lap. (Handing pad) I was going to try and let you have something on which you could draw. Take that pad and take this picture.

Now take the black pen I have and on Plaintiff's Exhibit No. 1 put a mark in the form of a letter "B" where your husband went across to the Gulf Station. On the median strip, if you will. A (So doing)

Q All right. Now on the same picture will you put an "S" where he was when you saw him start back. You said he went across to the Gulf Station and you saw him start back. Put an "S" on there where he was when you saw him start back over at the Gulf Station. A (So doing)

Q Now will you draw a little box, if you can, which would represent the truck and put the truck in the Gulf Station where it was at the time you saw it and saw your husband starting back. A (So doing)

Q Would you put a "T" beside the little box for truck, so we know "T" is for truck. A (So doing)

[63] Q Now would you then put an "X" where your husband was the next time you saw him. A (So doing)

Mr. Miller: All right. Thank you, ma'am.

Note: The picture is now passed among the jury.

Q Do you know—the East Coast Station had more than one pump, did it not? A Yes, sir.

Q Do you remember how many pump islands they had in front of the station? A In front?

Q Yes, ma'am. A We were on the side toward the street, at those pumps.

Q You were at one of the pumps toward the street? A Yes.

Q I hand you Plaintiff's Exhibit No. 2, and ask if you can see on that picture the pump island where your car was. A What kind of mark do I put?

[64] Q I just asked you if you could see. Can you see the pump island at the East Coast Station where you were? I believe it is on the right-hand side, Mrs. Brockwell, the East Coast Station. Do you see the island, the pump island or pump where your car was when you bought gas? A Yes, sir.

Q You do see that. Will you take a black pen and just put "X" across the whole pump, if you will. A (So doing)

Mr. Miller: Thank you, ma'am.

Note: The picture is now passed among the jury.

Q Now, do you recall whether you were on the street side of the pump or station side of the pump, if you remember? A We were on the street side.

Q You were on the side closest to Jefferson Davis Highway? A Yes, sir.

Q And your husband, when he went around to go across the street, went behind your car? A Yes, sir.

[65] Q To go across the street. Mrs. Brockwell, do you know whether or not that Gulf Station over there rents trucks, U-Haul-It, or anything like that? A Yes, sir.

Q They do? A Yes, sir.

Q On the day of the accident did they rent trucks so far as you know and can remember? A They have trucks over there. I reckon they rent them if anyone comes in.

Q Excuse me? A If anyone comes in to rent one.

Q And they had them on the night your husband got hurt? A Yes, sir.

Q And they parked them around the station? A Yes, sir.

Q You have seen them before and since, I imagine? A Yes, sir.

Q Now you saw a truck at an angle sitting in there where you marked Plaintiff's Exhibit No. 1 with a "T"? A Yes, sir.

[66] And you said you saw your husband where the "S" and the truck where the "T" was, and then you changed seats in the car? A Yes.

Q You looked to your right, and picked up the little girl, put her in your lap, and then turned around? A Yes, sir.

Q And then you saw your husband in the air and then saw the truck? A Yes, sir.

Q Did you see more of the front or more of the side of the truck when you saw it the second time? A It was slanted like.

Q Well was the front facing you? A Not directly to me.

Q But you saw more of the front than the side? A Yes, sir.

Q Now do you have any idea how many people were in that truck? A No, sir.

Q Was it a one color truck? A Sir?

Q Was the truck one color or two-toned? [67] You mentioned maroon, is that the only color you can remember? A Yes, sir, that I can remember.

Q Now did you see that truck again after the second time you saw it when your husband was in the air? A I can't really say for sure.

Q You can't tell the jury here today whether or not you saw that truck again? A I can't really say.

Q Do you remember a deposition of yours which was taken in Mr. Branch's office on October 28 of last year? A Yes.

Q Do you remember being in Mr. Branch's office, the room that had the long table? I believe I was sitting with my back to the curtains and Mr. Branch and Mr. Brockwell and you were on one side of the table, and Mr. Schutt was there? A Yes.

Q Do you remember the question I asked you at that time. Question: After your husband got hit did you look back over there to see if the truck was still there? Answer: The truck was right behind my husband when my husband went up in the air and then the truck took [68] off and came right into the station I was in. Question: Drove into the East Coast Station? Answer: Yes, sir.

Do you remember those questions and answers? A Yes, sir.

Q Do you remember telling me at that time that the pickup truck, after it hit your husband, drove in to the East Coast Station? A I think so.

Q That is what you told me then. Then I asked you another question, we talked about the people at the East Coast Station, and then I said: And the other man said he went over to see your husband, did he go over to the median strip? Answer: The man that worked in the station. Question: How about Mr. Schutt? Answer: He went back around to go back over there but he went in the Gulf Station before he come back and then he come back over to the East Coast Station, and then he come back again. Question: I am confused, but you saw your husband in the air? Answer: That is right. Question: And you saw the truck? Answer: Yes, sir. Question: When is the next time you saw the truck? Did you follow the truck in that time until he stopped? Answer: I seen him going around.

Do you remember those questions and [69] answers? A Yes, sir.

Q Then I asked another question: Did he drive into the East Coast Station? Answer: Yes, sir. Question: Did he stop his truck there? Answer: He stayed in his truck and asked them to call the police. Question: So you heard them—he asked to call the police? Answer: Yes. Question: Then what did he do? Answer: He went back out of that station and went across the street. Question: Did he drive? Answer: Yes, sir. Question: Drove over to the Gulf Station? Answer: Yes, sir.

Do you remember those questions and answers A I think so.

Q In fairness to the gentlemen of the jury, is it fair to say your memory in October was better than it is today? A I really don't know.

Mr. Miller: Thank you, ma'am. That is all I have.

By Mr. Branch:

Q Mrs. Brockwell, you did tell all these things at your deposition? A Yes, sir.

[70] Q And I asked you if you had a clear memory. Do you still think you remember all that? A I can't be sure. It was—

[71] * * *

Testimony of James E. Brockwell, Jr.

Direct Examination

By Mr. Branch:

Q You are Mr. Brockwell, the plaintiff in this case? A Yes, sir.

Q Try to remember to speak to the jury so they can hear you. Before this accident last March, or when the accident happened, where were you working? A For the City of Richmond.

Q Doing what? A Working for Gas and Water Distribution.

Q What kind of work did you do for them? A Street maintenance and pipe repair.

Q How much were you earning? A $80.00 per week.

Q Then on the day of the accident, had you worked that day? A Yes, sir.

Q What time did you get home from work? A Around five-thirty or six.

Q Then where did you and your wife and your [72] children go? A To my mother-in-law's for supper.

Q What time did you leave to go to your mother-in-law's? A Around six-thirty.

Q Had you had anything to drink up to that time? A No, sir.

Q Did you have supper at your mother-in-law's? A Yes, sir, I did.

Q And then you left, we understand, again? A Yes, sir.

Q Up until you left had you had anything to drink at your mother-in-law's? A No, sir, I didn't.

Q About what time did this accident happen? A Between seven-thirty and eight.

Q When you left your mother-in-law's and at the time of the accident what was your destination? A King's Department Store.

Q You left one of your children with your mother-in-law and took one with you, didn't you? A Yes, sir.

Q Mr. Brockwell, at the time of the accident what were the weather conditions? [73] A It had been snowing but it had stopped.

Q Now you didn't get to King's Department Store, did you? A No, sir, I didn't.

Q Where did you stop? A At the East Coast Station.

Q And that required you to turn—you had been heading south and that was on the left-hand side of Jefferson Davis Highway? A Yes, sir.

Q Tell us why you turned to the left and went over there instead of in the Gulf Station to your right? A The gas was cheaper.

Q Did you get your gas? A Yes, sir, I did.

Q And then what happened? A I tried to start the car and it would not start.

Q What was its trouble? A The battery was low.

Q When you got out of the car why did you ask your wife to get under the driver's side? A So I could get out and see if I could choke it with my hand over the carburetor, to see if that would [74] start it.

Q Did you try? A Yes, sir, I did.

Q Apparently it didn't work. You didn't start it? A No, sir.

Q Then what did you do? A I went around the front of the car, around on my wife's side, to the man at the East Coast Station to see if he had a jumper cable where I could get it started.

Q Did he have any? A No, sir, he didn't.

Q What did you decide to do then? A I come back around and told my wife I was going across to the Gulf Station to see if I could get it started by him.

Q And did you? A No, sir, I didn't.

Q What do you mean you didn't? You told your wife you were going across to the Gulf Station. Did you go over there? A Yes, sir.

Q When you got to the Gulf Station—you did get all the way to the Gulf Station? [75] A Yes, sir.

Q Did you talk to the people there? A The man in the station.

Q Was he able to help you? A No, sir, he was not.

Q Then what did you do? A I started to go back across the street.

Q As you walked to the curb, what path did you take or where were you when you arrived at the curb line? (Showing photograph) You see this driveway of the Gulf Station, and one down there? A Yes, sir.

Q Where approximately did you walk to the point where you reached the curb line? A A little to the right side of this driveway here. (Indicating)

The Court: Would you identify that for the record.

Mr. Branch: That was Plaintiff's Exhibit No. 1. The driveway he referred to was the closest one shown in the photograph of the Gulf Station.

Mr. Miller: Which would be the north driveway.

Mr. Branch: Yes.

The Court: You said a little to the right, [76] would that be north or south of the driveway?

Mr. Branch: South of the driveway.

By Mr. Branch: (Continuing)

Q Now as you walked up to the curb were you taking any particular notice of any of the vehicles there in that station? A No, sir.

Q When you got to the curb what did you do? A I looked to my left to see if any traffic was coming before I proceeded to cross.

Q Was there any? A No, sir, there was not.

Q How far to the north could you see when you looked? A About two or three blocks.

Q Then what happened. What did you do? A I proceeded to cross the Pike in a normal manner.

Q You say normal, does that mean the way you were walking, your gait? A Yes, sir.

Q Well just tell us what you remember from that point on. A I remember getting all the way across the [77] Pike and getting ready to step up on the curbing and that is the last thing I remember.

Q You were about to step up on the curbing? A Yes, sir.

Q Do you remember which foot you would have used to step up on the curbing first? A I stepped up on the curbing with the left foot and turned slightly to my right.

Q That is the last thing you remember? A Yes, sir.

Q Did you ever see the car that hit you? A No, sir, I didn't.

Q Did you hear any noise or warning or horn? A No, sir, I didn't.

Q What was the lighting condition. How would you describe the lighting conditions in that area? A Good.

Q The lights on the poles in the center island they were all burning? A Yes, sir.

Q What was the light situation from the gas stations? A Very good.

Q It had been snowing. Was there any snow on [78] the surface of the street? A It was wet slush.

Q Was there any snow beyond the curbing of the street? A A little.

Q What is the next thing you remember, Mr. Brockwell? A when I was in the hospital and they were scraping my head, getting ready to sew it up.

[82] * * *

Cross Examination

By Mr. Miller:

Q Mr. Brockwell, do you remember which pump [83] or island you were at at the East Coast Station? A The one nearest the street.

Q Do you remember on which side of that pump you parked your vehicle? A Closest to the street.

Q Closest to the street? A Yes, sir.

Q I believe your wife testified when you went over to the Gulf Station you went behind your car, is that correct? A Yes, sir.

Q And went straight across the street? A Yes, sir.

Q Now on that block we have heard testimony here today that the Gulf Station is at an intersection. We can see it in the picture here, Plaintiff's Exhibit No. 1. Do you happen to know the name of the street right beside the Gulf Station? A Lancelot Avenue.

Q That is Lancelot? A Yes, sir.

Q Now across from the Gulf Station on the Petersburg Pike at that point is Ewing's Auto Parts, on the west side of the Pike? A Yes, sir.

[84] Q Then on the east side, next to East Coast Station—actually the pump islands for the East Coast Station are in the middle of the block, aren't they? A Yes, sir.

Q Then north of the pump islands of the East Coast Station they have a little car wash? A Yes, sir.

Q Where you can wash two or three cars. Then as you go across the street you run into C & B Auto Parts? A Yes, sir.

Q I just wanted to get the location squared away. The East Coast Station is not at the corner like the Gulf Station, where the pump islands are? A No, sir.

Q It is more in the middle of the block? A Yes, sir.

Q Now referring to Plaintiff's Exhibit No. 1, you pointed to the north driveway and I believe you said you started back across the street south of that, or to the right of it? A Yes, sir.

Q At that time were there any rental vehicles or trucks parked in that Gulf Station? A When I came out of the station and proceeded [85] to cross the Pike I did not pay any particular notice whether there were or were not.

Q You went into the station itself? A Yes, I did.

Q Into the little building. Then you started back across the street? A Yes, sir, I did.

Q You looked, got to the curbing and looked, didn't see anything coming for two or three blocks and then walked across the street? A Yes, sir.

Q And the next thing you knew you got hit, is that correct? A I don't remember getting hit.

Q The next thing you remember you saw the median and thought about getting up on it? A The last thing I saw was the median strip.

Q And you were getting ready to get up on it? A That is right.

Q But you had not gotten up on it? A No, sir.

Q You said you came to the curbing, you looked, and you walked across? [85(a)] A That is right.

Q After you came to the curbing and looked you didn't look again, did you, after you started walking? A No, sir, I didn't.

Q All right, sir. What kind of clothing did you have on this night? A A green work uniform and a black jacket.

Q Green work uniform is a dark green, isn't it? A Yes, sir.

Q About the same or close to the shade the Army uses? A Close.

Q For fatigues? A Yes, sir.

Q How long were you in the Gulf Station? A I do not know exactly how long.

Q Well when you went in and asked the man do you have a jumper cable, did you have to wait for him or was he just in there sitting down? A He was in there sitting down.

Q You asked him then and he said no, and you left? A Yes, sir.

Q At this point how did you intend to get your [86] car started? A I was going back across the Pike and see if anyone in that station had any jumper cables in their car.

Q Did you ask at the East Coast Station before you went to the Gulf Station? A I asked the man in the station.

Q Were you going to ask the customers then? A Yes, sir.

* * *

Stipulation of Counsel

Mr. Branch: Regarding the photographs, it was stipulated they represent that is the way the street was at the time of the accident except for [87] the weather?

Mr. Miller: Except for the weather, and it was daylight instead of night.

Mr. Branch: The stipulation is the photographs accurately show the road surface as it existed at the time of the accident, except for the weather and the fact the accident occurred at night. With that, the plaintiff rests.

[92] * * *

Testimony of Gerald David Schutt

Direct Examination

By Mr. Miller:

Q State your name. A Gerald David Schutt.

Q How old are you? A 19.

Q What do you do? A Sir? As an occupation?

Q Do you go to school? A I go to school and work in Colonial Grocery Store.

Q What grade are you in school? A A senior, the twelfth.

Q Are you the son of Arnold David Schutt in this case? A Yes, sir.

Q Were you riding with him on the night of March 26 last year? A Yes, I was.

Q At the time you were in the truck, where had [93] you left from? A My house.

Q Where is that? A 2940 Spring View Drive.

Q Where were you going? A We were going to King's Department Store.

Q Did your father make any stops between the time you left your house and the time you were involved in an accident? A Yes, sir.

Q Where did he stop? A We stopped at, I think, two red lights.

Q Did he make any other stops? A No, sir.

Q Where is your house with relation to the scene of the accident? A In distance?

Q If you know. A It is about a mile and a half, and it is off to the side.

Q Is it north or south of where the accident happened? A I am not sure. I am not that good with directions.

[94] Q Back toward town or away? A Back toward town, the City.

Q What kind of truck was it? A A pickup truck.

Q What color? A Red and white.

Q Where were you sitting? A On the right-hand side.

Q What lane were you driving in? A We were in the far left.

Q Do you know how fast you were going? A 30, 35, 40.

Q Somewhere in that. All right. Did you see Mr. Brockwell? A I saw him a split second before we hit him.

Q Where was he? A At the left front bumper.

Q What happened then? A Well after that we pulled over to the side, in the left turn, after the intersection. And then we both got out and went back to where the man was. And so I decided to go over to the service station. There was a service station over across the Pike. A Gas For Less, or something like this. Some kind of discount gas station. I [95] went over there and—

Q That is all right. So you went over there. Where did your father go? A He was at the scene where the man was.

Q Did your father have his lights on in the truck? A Yes, sir.

Q How do you know? A Because the dashboard was lit up, and I usually listen to the radio and I think that was lit up too.

Q Did you stop at any gas station between your house and the scene of the accident? A No, sir.

Q Where was the plaintiff when you got there? A He was on the median strip.

Mr. Miller: All right, sir. Answer Mr. Branch.

Cross Examination

By Mr. Branch:

Q You say your Dad pulled into a left turn lane? A Yes, sir, after the accident.

[96] Q Are you sure of that? A Yes, sir.

Q Have you talked to your Dad about this during the recent time? A No, sir.

Q You remember the left turn lane on your own memory? A Yes, sir.

Q It is not what your Dad told you? A Yes, sir.

Q Where was this left turn lane? A The way it is, the median

strip is indented when you go to turn left, and this is right after the intersection.

Q At the next intersection after the accident? A Yes, sir.

Q Were you there when the Officer arrived? A Yes, I was.

Q Was your truck still in the same position where your Dad had stopped it? A Yes, sir.

[98] * * *

Testimony of Arnold David Schutt

Direct Examination

By Mr. Miller:

Q State your name. A Arnold David Schutt.

Q What is your occupation? A Heavy equipment carrier.

Q On March 26, 1971 who was your employer? A USCO, Unitized Systems Company, Incorporated.

Q Whose truck were you driving on March 26, 1971? A Their truck.

Q What kind of truck was it? A A 1969 Ford pickup.

Q What color was it? A Red and white.

Q Who paid for the gas for that truck? A The company did.

Q How was the gas for that truck purchased? A Credit cards.

Q What type of credit cards did you have? A An Esso and Texaco.

[99] Q Did you have a Gulf credit card? A No, sir.

Q What kind of mechanical condition was the truck in on March 26, 1971? A Excellent.

Q Do you live at the address your son testified to? A Yes, sir.

Q Is that north or south of the accident scene? A North.

Q Approximately how far? A From where we hit on Jefferson Davis Highway I would say it is about a mile.

Q A mile north of the accident scene? A A mile north of the accident.

Q How long had you been on Jefferson Davis Highway prior to the accident? A Maybe ten minutes, fifteen minutes.

Q In what lane were you driving? A Inside lane.

Q At what speed? A Around 35 to 40.

Q What was the weather like? A I believe, if I am not mistaken, it had just [100] quit snowing.

Q Did you have your lights on? A Yes, sir.

Q Did you have any other equipment working? A The windshield wipers.

Q All right, sir. You proceeded down the Pike in the left-hand lane. Did you see Mr. Brockwell? A Not until the time I hit him.

Q You did hit him? A I hit him.

Q Where was your truck at that point? A In the inside lane.

Q What part of your truck hit him? A The left-hand front.

Q What did you do after you hit him? A I stopped and ran back by him.

Q Where did you stop? A I would say about half a block from where it happened.

Q Is there any special thing that would identify the place where you stopped? A I stopped on this turnoff, just like my son said.

Q I hand you Plaintiff's Exhibit No. 1 and ask if the place you stopped is visible in there? [101] A (Looking at photograph) Yes, sir.

Q Will you take this pen and put a hole through the picture where you stopped? A (So doing)

Q Then draw a circle around that. A (So doing)

Q Now what did you do after you stopped the truck? A I went back to see where he was.

Q Where was he? A Laying in the median strip.

Q Where was this with relation to Lancelot. Are you familiar with Lancelot? A Yes, sir.

Q Where was he with relation to Lancelot Avenue, if you can remember? A About a quarter south of that block.

Q About a quarter of a block from Lancelot? A No, north of Lancelot.

Q North of Lancelot. I hand you Plaintiff's Exhibit No. 2 and ask if you can find in that picture where the plaintiff was when you arrived. A (Looking at photograph) Yes, sir.

Q Will you take a pen and punch a hole in that picture. [102] A (So doing)

Note: The photographs are now passed among the jury.

Q Was your truck damaged? A It knocked the front headlight out, dented the hood and tore the mirror off from the bottom of the door where it screws out of the door.

Q Screws out of the door of what? A Of the mirror.

Q What time had you gotten home from work that night? A Approximately 7:30.

Q Where had you been? A South Hill, Virginia.

Q Had you had anything to drink? A No, sir.

Q What did you do after you got home? A I asked my wife if the check had come.

Q What check would that be? A My payroll check.

Q Do you normally receive it by mail? A Yes, sir.

Q What were you going to do? [103] A Get the check cashed.

Q Where were you going to get it cashed? A King's Department Store.

Q Where is that in relation to the scene of the accident? A Four or five blocks from there.

Q What was the traffic like at the time going down the Pike? A I would say it was rather heavy.

Mr. Miller: Answer Mr. Branch, please.

Cross Examination

By Mr. Branch:

Q Mr. Schutt, you say you know where Lancelot is? A Yes, sir.

Q Do you understand that to be the street just—or the next street south of where this accident happened? A South.

Q South of where this happened. Where did you stop your car? A About half a block on the other side of that intersection.

[104] Q You went through Lancelot and went about half a block beyond that? A True.

Q You did not stop in a cutoff lane or left turn lane? A A left turn lane.

Q You did? A Yes.

Q In the middle of the block? A It starts about the middle of the block.

Q You pulled into a left turn lane? A Yes, sir.

Q You were present in Court today when the Officer testified, weren't you? A Yes, sir.

Q Do you disagree with him when he said there was no left turn lane there? A There is not a left turn lane on that block but it is on the next one.

Q Do you disagree when he said he found your truck on the inside driving lane? A I am not disagreeing. I know where I parked my truck.

Q You didn't move your truck from where you stopped until after the Officer arrived, did you? [105] A No, sir, I never left him.

Q Now did you tell Mr. Miller, in answer to his question, that you went about half a block before you stopped? A It is about half a block.

Q But you had hit the pedestrian up there within the preceding block, had you not? A Yes, sir.

Q And you finished that block and went an additional half block, did you not? A Yes, sir.

Q And, in fact, you testified on the occasion Mr. Miller asked Mrs. Brockwell about, do you remember Question: How far did you go before you stopped? And you told us then: I would say a good block. A Approximately a block.

Q Why did you reduce it today to half a block? A All together it would be a whole block.

Q Mr. Miller asked you how far did you go before you stopped, and you told us to start with half a block, but really you went about a block, did you not? A About a block, true.

Q How far was this pedestrian away from the median strip when you struck him? [106] A I would say roughly my truck was about two feet off the median strip, the curb.

Q You had driven to South Hill that day? A Yes, sir.

Q You had worked and returned? A And returned.

Q What time had you gotten up that morning? A It could have been 4:00 o'clock, or 3:00 o'clock, in the morning.

Q You got up mighty early and made the trip and did a day's work and back? A All I had done that day was drive.

Q You had driven all day long? A Just about.

Q Let's say you started at 4:00 o'clock. You had been driving for 16 hours before this accident? A Not all together.

Q You said all that you did that day was drive? A I took another fellow to South Hill to pick up an automobile.

Q And then? A I came back to Richmond.

Q That is all you did, drive to South Hill and back? [107] A That is right.

Q What did you do while you were in South Hill, did you work? A No.

Q What did you mean when you said all that you did that day was drive? It didn't take that long to drive to South Hill and back? A I do not know. It was snowing right hard all day.

Q So however you drove, you had been behind the wheel driving

a car in the bad weather most of that time, would you say? A I would say most of the time.

Q Mr. Schutt, weren't you right tired? A Well, no.

Q It's a right hard day. Didn't you feel right tired? A Not really.

Mr. Branch: All right. I have no other questions.

Redirect Examination

By Mr. Miller:

Q Mr. Schutt, during that day did you take [108] time out for meals? A Yes, sir.

Q Where did you eat? A Right out of Petersburg, if I remember right.

Q Did you eat lunch? A Yes, sir.

Q Where did you eat lunch? A South Hill.

Q Where did you eat supper? A I am not sure about that. I do not think I ate supper but at home.

Q Did you spend some time at South Hill? A At the garage.

Q How long at the garage? A An hour and a half or two hours.

The Court: Mr. Schutt, you said there was heavy traffic as you were going down the Pike. Where was the heavy traffic?

The Witness: Mostly on the right of me because it was going by me.

The Court: Any further questions?

Mr. Branch: With that, I have to pursue it, Your Honor.

[109] Recross Examination

By Mr. Branch:

Q Heavy traffic. Was there any traffic in the right lanes in front of you? A I would say there was.

Q You were on the inside lane and there was traffic on both of the lanes to your right, both in front of you and along side of you? A I would say so.

Q How far in front of you was the traffic to your right that was closest to you? A I really can't say right offhand.

Q Are you describing kind of a general line of traffic stretching all the way down the road? A A car here and there.

Q What do you mean here and there. Were they one behind the other in the normal distance? A Like on any road, I would say.

Q Are you saying that for Mr. Brockwell to get to the curbing from your right he would have been ducking and dodging between cars? A There might have been no traffic right at the time he was crossing because there was a stoplight two or three blocks before the accident.

Q That is what I thought the case was. So [110] at the time of this accident you don't really know what the traffic was, do you? A Pardon me?

Q Generally, back some distance, you got a general impression of the traffic, but in this instance you are not telling us there was traffic in the lanes to your right? A There had to be.

Q Why did there have to be? A Because there was traffic on the highway, sir.

Q Are you telling us from your memory, that being a specific fact, or because you think that is what existed? A I seen the traffic pass me.

Q At that time or generally? A At that time, but I do not know if exactly at that instant.

Q That is what I am saying, at that instant, at the time of the accident. You don't really know the traffic at that instant? A No, sir, not at that instant.

[111] * * *

Testimony of James E. Brockwell, Jr.

Direct Examination

By Mr. Miller:

Q Mr. Brockwell, at the point you crossed the Petersburg Pike, just to the north of where you crossed, is there a street that went across? A Yes.

Q Was there any reason you could not cross [112] the Petersburg Pike at that point where the street was? A No, there was not.

Objections and Exceptions to Instructions

[116] * * *

The Court: *Instruction No. A* is given. Now, Mr. Miller, *Instruction No. 1?*

Mr. Miller: Yes, sir, on the grounds that is not a real statement of the law. It says the defendant was under the duty to exercise ordinary care, but still under *Instruction No. K* that I [117] offered—it leaves out he had a right to assume nobody was crossing until in the exercise of ordinary care he saw or should have seen the plaintiff crossing Jefferson Davis Highway.

Mr. Branch: Judge, we might as well hit that one. I am going to object to his request for that purpose most vigorously. I thought we had it well established by the decisions in other cases. We took this up before. No one has any right to assume anything unless he has seen something that leads him to that assumption. I think I pointed out, and the Court pointed out, if you see a car stopped you can assume it will remain stopped. Until you see something that will mislead you, you are under a duty to keep a lookout.

The case he cites is the case of a very young child that was considered on one particular objection and there is no authority for overruling all cases saying the duties of pedestrians and motorists are equal and reciprocal between intersections and nobody has the right of way. There is no right of way at all in that situation. It may be that the plaintiffs' lawyer in that case did not object to it on that ground, and the Court [118] considered only the ground they objected to. But there has never been a case saying anybody has a right of way between intersections.

Mr. Miller: In Spiegelman v. Birch, 204 Va. 96, a pedestrian crossing at an intersection has the right of way, and between intersections the vehicle has the right of way.

The Court: Let me see that, Mr. Miller.

Mr. Miller: Page 100, first paragraph.

The Court: It is your position, Mr. Miller, that the defendant had the right of way here?

Mr. Miller: Yes, sir.

The Court: And you rely on Spiegelman v. Birch, Page 100.

Mr. Miller: Read that first paragraph.

The Court: The defendant argues that the deceased was guilty of contributory negligence because he was not crossing at an intersection. Section 46.1-230 of the Code provides that in crossing highways or streets a pedestrian shall cross wherever possible only at intersections and at right angles. A pedestrian crossing at such point has the right of way and between intersections the vehicle has the right of way.

[119] Mr. Miller: That is subsequent to Brown v. Arthur.

The Court: Brown v. Arthur, 202 Va. 629. A motorist or pedestrian in travelling along a portion of a highway prescribed for the use of each of them, has no right of way over the other except as is provided by statute. In the absence of such a statutory provision, the rights of the motorists and pedestrians are equal and their duties are mutual and reciprocal.

Mr. Miller: In Brown v. Arthur I don't think he was crossing the street. Wasn't he walking along?

Mr. Branch: In every other case on the subject the Court has consistently said right of ways exist when covered by statute.

The Court: That is what Brown v. Arthur says.

Mr. Branch: That statement in Spiegelman, I think at best you can say is appellate language. They favored the plaintiff's verdict in this case.

The Court: The instruction in Brown v. Arthur was—they did affirm the verdict for the plaintiff? No, it was a verdict and judgment

for the [120] defendant in Brown v. Arthur. The plaintiff was granted a writ of error. In that case the plaintiff complained that Instruction No. B-1 is erroneous in that it states that "vehicles have the right of way, except at intersecting streets," over pedestrians.

The defendant replies that this language in the instruction was approved in Green v. Ruffin, 141 Va. 628. But that case involved an instruction interpreting a city ordinance which as the opinion points out, expressly provided that "vehicles shall have the right of way over pedestrians between intersections." There is no such ordinance or statutory provision involved in the present case. As we have several times pointed out, a motorist or pedestrian, in travelling along a portion of a highway prescribed for the use of each of them, has no right of way over the other except as is provided by statute. In the absence of such a statutory provision, the rights of the motorists and pedestrians are equal and their duties are mutual and reciprocal. While each must exercise reasonable care, if a pedestrian is crossing between intersections reasonable care requires that he exercise a greater [121] degree of vigilance than if crossing at the intersection.

Mr. Branch: What they have said there, Judge, they have said throughout all cases on pedestrians, that a pedestrian crossing between intersections has a higher degree of vigilance. But I can't account for why they made that point in Spiegelman. That is the case where the man was on the far side of the street and the motorist veered over, and they affirmed the plaintiff's verdict.

We have an amendment to the Code that I was expecting to rely on. In one of his motions to strike he wanted to complain about the pedestrian not crossing at the intersection and 46.1-230, Sub-Section A, as amended—

The Court: That is he can't be guilty of contributory negligence as a matter of law just because he wasn't crossing at an intersection, is that right?

Mr. Branch: That is right. And then—well, that is what I am talking about.

The Court: Well, now, this statement in Spiegelman is that a pedestrian crossing at such point [122] has the right of way and between intersections the vehicle has the right of way. The citation for that statement is Tolson v. Reeves, 200 Va. 179, specifically Page 182-3.

In that case this instruction was given. The Court instructs the jury that pedestrians shall cross a street at an intersection in that portion thereof which is included in the prolongation of the lateral boundary lines of the adjacent sidewalk. A pedestrian crossing at such point has the right of way, elsewhere a vehicle has the right of way.

Mr. Miller: That is right.

The Court: Well there was no complaint in Tolson v. Reeves. I do not believe that that was an erroneous instruction so that instruction became the law in that case. In that case Instruction No. P-3, which the Court felt—as I read this case hurriedly—that P-3 conflicted. It could have taken P-3 to mean had the right of way whether crossing in the intersection or beyond it, and thereby could have applied to his conduct as well as the defendant's wrong standard of care.

Then the Court quotes Instruction No. X elsewhere. If it plainly appears that the jury could [123] not have been mislead by the defective instruction then these errors not amounting to a positive misstatement of the law can be cured—and so forth.

Then they cite another case where the conflict in the instructions was upon a sufficiently material matter to have influenced the jury. Then they go on to say P-3 incorrectly stated the rights of the plaintiff, was inconsistent with and contradictory of his duties and rights as stated correctly in "X." "X" is the one that says the vehicle has the right of way elsewhere. We are unable to say it plainly appears from this record that the jury could not have been mislead by it. That is P-3. Could that be the explanation for the statement in Spiegelman?

Mr. Miller: Between intersections the vehicle has the right of way.

The Court: That is directly opposite of what was said in Brown v. Arthur, 202 Va., Page 629.

Mr. Branch: The Court has said so many times the only right of ways are those conferred by statute.

Mr. Miller: Judge, the only difference I [124] can point out, in Brown v. Arthur we are talking about that these pedestrians were travelling along a portion of the highway. They don't mean crossing.

The Court: Does it say a pedestrian or vehicle?

Mr. Miller: A motorist or pedestrian.

The Court: A motorist or pedestrian.

Mr. Miller: In travelling along a portion of the highway prescribed for the use of each of them has no right of way over the other except as provided by statute.

Mr. Branch: But here the statute gives him a right to ask for an instruction about pedestrians not maliciously, and so forth, interfering with the orderly passage of cars. That is another way of saying—

The Court: Here is what Judge Doubles says about Shelton v. Mullins in his 1971 pocket to this instruction book. His comment on the instruction about a pedestrian crossing between intersections does not say anything in the form of instruction about the right of way of the vehicle. Then the comment says does the motorist have the right of way, and a number of cases are cited in there, and [125] Brown v. Arthur is cited. There appears to be no statute giving motorists any right of way. He discusses Tolson v. Reeves, which we discussed, and Brown v. Arthur. Then this reference in Spiegelman v. Birch.

Judge Doubles says as to the statement "the motorist has the right of way between intersections," these cases appear irreconcilable. It is submitted that the statement in Tolson v. Reeves whereby the instruction was approved, may be treated as dictum because it was made in connection with a holding that an instruction tendered by the plaintiff, which was held to be erroneous on several scores, was inconsistent with the defendant's approved instruction, and the Court was not specifically dealing with the language concerning motorist's rights between intersections. And also because the statement is unnecessary to the decision; the crux of the decision being that although the plaintiff was negligent for violating 46.1-230, even so, such negligence was not necessarily a proximate contributing cause of the accident. The only apparent way in which these statements can be reconciled is to hold that a violation of the statute [126]—and so forth.

Then in the supplement he talks of Shelton v. Mullins. Although no point was made of the problem, the Court approved an instruction which contained the phrase "a motorist has a superior right of way over pedestrians between intersections."

That is the way I see it.

Mr. Miller: We except. We feel under this case that the Court of Appeals has held that the motorist has the right of way between intersections. I take it the Court is going to refuse *Instruction No. K?*

The Court: Yes, *Instruction No. K* is refused.

Mr. Miller: I note my exception on the grounds that it is supported by the authorities Shelton v. Mullins, 207 Va. 17; Spiegelman v. Birch, 204 Va. 96; and other cases therein. And on the further grounds the plaintiff in this case was crossing between intersections and the defendant had the superior right of way at that point.

The Court: Is there any further objection to *Instruction No. 1?*

Mr. Miller: Let the record show that the [127] defendant objects to the granting of *Instruction No. 1* on the grounds it is an incorrect statement of the law.

The Court: As you mentioned?

Mr. Miller: As I mentioned.

The Court: In support of your objection to the refusal in granting *Instruction No. K?*

Mr. Miller: For the same reasons expressed in the defendant's objection to the refusal of the Court to grant *Instruction No. K* tendered by the defendant.

Mr. Branch: *Instruction No. 1* is given?

The Court: *Instruction No. 1* is given. *Instruction No. 8,* Mr. Miller.

Mr. Miller: The defendant objects to the granting of *Instruction No. 8* for the same reasons expressed in the granting of *Instruction No. 1* by the Court and the refusal of the Court to grant *Instruction No. K.*

The Court: *Instruction No. 8* is given. Looking at *Instruction No. 2,* Mr. Branch—

Mr. Miller: Judge, this is not supported by the evidence.

The Court: I was just going to ask how— [128] if the jury believes the plaintiff's version, that is that he pulled out of the station without any lights, how does that relate? Do you feel that might have given your client warning by having advance notice of the vehicle, number one. And number two, he may be able to easier see your client as he moved out into the highway, if the defendant, in fact, did not have lights on?

Mr. Branch: It is subject to argument whether the truck, which

she says is the same one by shape and color, is the one that she had previously seen. Theoretically, you might say there had been two trucks. But anyway the truck she saw right behind her husband in the air she said had no lights on. So if that truck had been coming down the street and not out of the driveway that could be the reason he didn't see it. I think on the lighting conditions existing at the time otherwise—that area was bright as daylight so I am not sure the negligence would be failure to see with his headlights up, but the headlights would make it easier for the pedestrian to see him than if he was coming without lights.

Mr. Miller: This instruction merely goes to the fact that trucks be equipped with them. There is [129] no evidence the truck was not equipped with them.

Mr. Branch: Read the second paragraph—wasn't displaying lighted headlights.

Mr. Miller: As I read it, if the defendant did not have lighted headlights of the intensity as required. It doesn't say to have them on. It just says to have them.

The Court: The statute requires him to have them, as well as to have them on.

Mr. Miller: As I read the instruction, if the defendant did not have lighted headlights of the intensity required by his duty.

The Court: Would you have objection to—if you find the defendand did not have burning on the vehicle headlights of the intensity required by law. Your complaint is the instruction said he had to have them on the vehicle but there is no evidence he did not have them installed on the vehicle?

Mr. Miller: Yes, sir. And, secondly, it doesn't have anything to do with the case.

The Court: Why not?

Mr. Miller: I don't feel factually there is any credible evidence before the Court upon which the Court can grant this instruction.

[130] The Court: Mrs. Brockwell said the vehicle she saw at the point of the accident did not have its headlights burning.

Mr. Miller: That is true. But my point was there was no credible evidence. At the time I made my motion to strike I made that comment.

The Court: All right. Well, I do not think that point is well taken. Now could your other objection be cured by saying in the second paragraph—leave it exactly like it is, and in that second line, the defendant did not have burning head lamps of the intensity as required by this duty.

Mr. Miller: Yes, sir.

Mr. Branch: Change lighted for burning?

The Court: Yes. Is that all right, Mr. Branch?

Mr. Branch: Yes.

The Court: Does that cure your first objection?

Mr. Miller: Yes. I still object to it for the reasons stated on the evidence of the plaintiff.

The Court: *Instruction No. 2* is given.

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