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IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

Record No. 8142

FARRELL B. CARTER, Appellant,

v.

BARRY C. SHOEMAKER, etc., Appellee.

APPENDIX

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

Record No. 8142

FARRELL B. CARTER, Appellant,

v.

BARRY C. SHOEMAKER, etc., Appellee.

APPENDIX

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MOTION FOR JUDGMENT

* * * *

1. That on or about April 21, 1971, at approximately 7:00 p.m., the Plaintiff was driving a motorcycle in an eastbound direction on Forest Hill Avenue about two-tenths of a mile west of the intersection with Kenmore Avenue in the City of Richmond, Virginia;

2. That at the time and place aforesaid, the Defendant, Barry C. Shoemaker, was operating a Rambler automobile owned by Defendant, Cinderella Cleaners and Launderers, Incorporated, in a westerly direction on Forest Hill Avenue, and was in the process of making a left-hand turn into a high school parking lot area;

3. That the Defendant, Barry C. Shoemaker, negligently and carelessly allowed his automobile to collide with the vehicle being operated by the Plaintiff;

4. That at the time and place aforesaid, the Defendant, Barry C. Shoemaker, was a servant, employee and/or agent of the Defendant, Cinderella Cleaners and Launderers, Incorporated, and was acting within the scope of his employment.

5. As a proximate cause of the aforesaid negligent conduct, the Plaintiff has suffered, and will suffer, severe and permanent bodily injuries, physical pain and mental anguish, embarrassment, inconvenience and discomfort, doctors', hospital and medical expenses, loss of earnings in the past, and future loss of earning capacity, as well as damages to his personal property.

WHEREFORE, Plaintiff moves the Court for judgment against the Defendants, jointly and severally, in the amount of Fifty Thousand Dollars ($50,000.00) and for costs.

* * * *

GROUNDS OF DEFENSE

* * * *

1. These defendants admit that a motor vehicle operated by plaintiff collided with another motor vehicle operated by defendants at the time and place indicated in the Motion for Judgment; and

2. Defendants deny that the collision was caused in the manner claimed in plaintiff's Motion for Judgment; and further deny that the collision was caused by any negligence on the part of these defendants; and

3. The defendants allege that said collision was caused by the negligence of the plaintiff in the operation of his motor vehicle; and

4. These defendants deny that plaintiff was injured or damaged, past, present, or future in the manner or to the extent claimed in the plaintiff's Motion for Judgment; and

5. These defendants deny that they are indebted to the plaintiff or obligated to him in any amount or for any cause; and

6. These defendants further say that plaintiff himself was guilty of negligence which proximately caused or proximately contributed to cause said collision.

BARRY C. SHOEMAKER and
CINDERELLA CLEANERS AND LAUNDERERS,
INCORPORATED

* * * *

JUDGMENT - Final Order (March 2, 1972)

This day came the parties, by their attorneys, and came also the jury sworn in this case, pursuant to their adjournment on yesterday, and having fully heard the 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 following, to-wit: "We the jury on the issue joined find in favor of the defendant."

Thereupon the plaintiff, by his attorney, moved the Court to set aside the verdict of the jury on the grounds the verdict is contrary to the law and the evidence, for misdirection of the jury

by the Court, and for other errors committed by the Court during the course of the trial as noted in the Reporter's Transcript of the evidence, which motion the Court doth overrule.

Therefore, it is considered by the Court that the plaintff recover nothing of the defendants but that they recover of the plaintiff their costs by them about their defense in this behalf expended.

ASSIGNMENT OF ERRORS

* * * *

I. The Court erred by refusing to grant a mistrial after counsel for the defendants wilfully referred in his opening statement to prior motor accidents in which the plaintiff was involved and then stated to the Court, within hearing of the jury, that one such accident was a fatal accident.

* * * *

TRANSCRIPT OF EVIDENCE

FROM MR. WICKER'S OPENING STATEMENT (T-12)

MR. WICKER: * * * * The evidence, of course, will show for a few weeks he missed that work. The evidence will also show you, however, first, there will be no evidence of any permanent injury whatsoever, except to his right knee, which he

himself admits this accident had nothing to do with and was caused by a previous accident.

The evidence will be he had been in several previous accidents while Mr. Shoemaker has never been in any. We think the evidence will then show, as I say, no permanent injury. He missed some of that employment, but the evidence will all show as bearing out---

MR. WOOD: I would like to approach the bench, If I may-

NOTE: The following occurred at the bench, outside the hearing of the jury:

AT THE BENCH (T-12)

MR. WOOD: In his opening statement just a minute ago, Mr. Wicker makes reference to the fact the plaintiff has been involved in previous accidents. Now, as he well knows from his experience, that is clearly inadmissible. I don't see any excuse for it. He could not get it into evidence. He is bringing it in through the opening statement obviously to prejudice the jury.

THE COURT: He has prior injuries in these accidents?

MR. WOOD: None whatsoever.

MR. WICKER: He had a fatal accident just before and---

THE COURT: Just a minute. I will take the objection out of the presence of the jury.

Members of the jury, step outside for just a little time while the Court considers a matter of law.

JURY OUT (T-13-23)

MR. WOOD: May it please the Court, in his opening remarks to the jury, near the closing portion thereof, Mr. Wicker made references to the fact that Mr. Carter, the plaintiff in this case, had previous accidents.

Your Honor, I know Mr. Wicker is an experienced attorney at this bar, with many years before this Court. He has tried many personal injury cases. He is well aware that the previous accidents of the plaintiff, unless they are in some way connected with his injuries, are clearly inadmissible.

What he is referring to is a fatal accident in North Carolina a week or so prior to this accident back in 1971, for which the gentleman did not even receive a summons to Court, and another one some years back. I believe it might have been reckless driving. It may be in the discovery deposition. As far as I know, it did not involve any injury to Mr. Carter.

Now, Mr. Wicker has taken discovery depositions and knows this. I submit, Your Honor, that as the Court may well know, we have got a motorcycle case. Attorneys are always afraid that some people are going to be prejudiced against motorcycle drivers.

Now, to bring out this additional fact, which would not have gotten to the jury by evidence, he did it in his opening statement. He said he had prior accidents and this young man, who has only been driving a short while, has not had any.

I submit, Your Honor, that is an extremely unfair and prejudicial appeal to the jury. I would be compelled to ask the Court for a mistrial.

THE COURT: All right.

MR. WICKER: If Your Honor please, I did not refer in my remarks to the injury -- to the fatal accident. I merely referred, and the evidence will show by an independent medical doctor, Dr. Deyerle, who will be here to testify, that in his examination, that Mr. Carter himself said his chief complaint was his right knee and that he himself admitted that he had not injured this knee in the recent accident. Although that was the only personal injury of this type that he had that was caused -- just a minute -- the evidence will show that Mr. Carter volunteered on examination that he had a previous injury to his right knee in 1957. And that it was extremely weak. He wanted to have that examined also.

I am saying that he had accidents before in which he incurred some injuries, but the only injury we are concerned with here is not that of the previous accident but only the left knee.

We have his own statement to Dr. Deyerle --

THE COURT: Do you expect to present evidence or do you expect there to be any evidence that the plaintiff suffered an injury which is any way connected with the injury claimed in a prior motorcycle accident at this time?

MR. WICKER: Yes, we think that the evidence will show that he had this accident and had this injury to his right knee and that it had something to do with his operation of the motorcycle at the time of this accident. We are certainly not responsible for that.

THE COURT: You are alluding to the football injury?

MR. WICKER: I don't know whether it was a football injury or what it was.

THE COURT: On what basis do you make that statement in your opening remarks, that the plaintiff had prior accidents? The only purpose, wouldn't you agree, for which the evidence could be presented to the jury would be as it relates to the injury claimed in this suit. Certainly, the fact that the plaintiff had prior accidents while operating a motor vehicle has nothing to do with the issues in a negligence case of this sort, does it?

MR. WICKER: I realize full well that Mr. Wood --

THE COURT: The objection is made to the statement that the defendant has had no prior accidents. How does that relate?

MR. WICKER: I think there are two things. First of all, it shows that the man is accident prone. The other shows the

plaintiff is not accident prone.

THE COURT: That is clearly inadmissible under the Virginia decisions.

MR. WICKER: All right. But the fact is that he is claiming various injuries and I think we are entitled to show that he did not -- that some of these injuries he is claiming were not obtained in this accident and are not in any way related to this accident, but were related to previous accidents. He himself admits that.

THE COURT: Again, I ask the question. Do you have any evidence which you expect to develop which will show that the plaintiff received any injury in a prior motor vehicle collision?

MR. WICKER: I cannot say whether it was a motor vehicle --

THE COURT: What is the basis?

MR. WICKER: It doesn't matter to my viewpoint -- it doesn't matter whether it was a motor vehicle collision or whether he was running down the street or what he was doing. He did suffer an injury, which we think the evidence will show is the only permanent injury that he has today. He suffered that as a result of doing something totally disconnected with this. We just want to bring out that he had these previous accidents and consequently this disability, which he claims. And that all of these disabilities were not caused by our accident.

THE COURT: I understand that. You used the word "accidents" in the plural. What evidence do you have to show or expect to

come out as to prior accidents in the plural?

MR. WICKER: Well, there are two. One was this injury to the right knee and the other was when --

THE COURT: When did that occur, according to your understanding of the evidence? Was that a football injury?

MR. WICKER: I don't know, sir. It occurred in 1957. I don't know. It occurred in '57, according to Mr. Carter. And the other --

THE COURT: What is the basis of your opening statement, if you don't know whether there will be any evidence?

MR. WICKER: I don't know whether it was a football injury. I simply know that Mr. Carter's own statement was that he had an injury and had an accident in '57 which had caused him disability to his right knee and that he is still suffering from that.

Other evidence will show that is the only thing he is suffering from in the way of a permanent disability.

THE COURT: You said "accidents" in the plural, to the jury.

MR. WICKER: Two more. The first one was in 1957 to the right knee. In 1966, the evidence will show that Mr. Carter was driving either a motorcycle or a car and rear-ended it into another car. Anyone knows that I have a right --

THE COURT: Do you have any evidence that he suffered an injury in that accident?

MR. WICKER: None except the assumption that when you drive into another car, you know how this Court has heard people talking about whiplash and forward lash and hitting their knees --

THE COURT: What is the other evidence you expect to develop as to another car accident besides the one in 1966?

MR. WICKER: By Mr. Carter's own statement that he was involved in a fatality just three weeks beforehand, which I believe the jury is entitled to consider on the basis --

THE COURT: Do you have evidence? You have taken his discovery deposition. Do you have evidence of any injury to the plaintiff in that accident?

MR. WICKER: No, sir, except this: I think that anyone who is operating a car or a motorcycle and kills a seventeen year old girl is liable to be suffering at least a month or so afterwards from the mental effect of that, and that is bound to have an effect on him in operating this motorcycle on this occasion. I think I am entitled to argue that, too.

THE COURT: All right. I do not agree. Now, Mr. Wood, I will sustain your objection, but before I do that -- can you find that statement to which objection was made and read it back?

NOTE: The following statement was read by the court reporter:

"The evidence will be he had been in several previous accidents while Mr. Shoemaker has never been in any."

THE COURT: Mr. Wood, at this stage, in view of the representations of counsel as to what they now expect the evidence to show, I feel that your objection should be sustained. However, the Court will not declare a mistrial. If you like, I will instruct the jury to disregard that statement, pointing out to them that it should not be considered by them for any purpose, even as part of the opening statement.

MR. WOOD: May I make one more statement to the Court? If Your Honor please, when we came up to the bench and, of course, I realize Mr. Wicker's hearing difficulty and he sometimes speaks loudly. He made reference to the fact that three weeks before he was involved in a fatal accident. My law partner told me that it was audible way back there. Under these circumstances, Your Honor, the man was never charged, even with failing to yield. It has no relationship to the accident involved here. Senator Wicker knows it because he took his discovery deposition.

The boy never claimed that right knee was in any way involved in this accident. It is merely a pre-existing disability. We never made any complaint about it.

Now, you have got seven men sitting in that box who heard this reference to a fatal accident. You have a boy on a motorcycle. I don't feel I can get a fair trial.

THE COURT: I will tell the jury to disregard any statements they may have heard, by the Court or counsel, in their presence. If you like, I will be glad to do that and instruct the jury to disregard not only the statement made by counsel to the jury as a part of his opening statement, which I have written down and I can read back to the jury, but I also, in my statement, will tell them to disregard what they may have heard at the bench.

MR. WOOD: All right, sir. I would again move for a mistrial and object to the Court not granting it.

THE COURT: All right. The motion for a mistrial is overruled. Now, without waiving your right to your objection, do you want me to instruct the jury as I have indicated?

MR. WOOD: Yes, sir.

MR. WICKER: I don't think it is necessary for me to note an exception.

JURY IN

THE COURT: Members of the jury, as part of the opening statement on behalf of the defendants, you were told that the evidence will be that the plaintiff may have been in several previous accidents, while the defendant, Shoemaker, has never

been in any. You will completely disregard that statement and will not consider it for any purpose.

As the lawyers have already told, what the lawyers say is not evidence in the case. Certainly, nothing they say should be considered as evidence, and any inferences you may draw from that statement you will completely disregard. It has nothing to do with this case. The Court has ruled, furthermore, you will disregard any statement you may have overheard by either of the attorneys or by the Court when the Court and counsel were discussing that objection here at the bench before you had been excluded from the courtroom.

You will disregard completely any statement that you may have overheard.

* * * *

FROM THE TESTIMONY OF PATROLMAN LAWRENCE G. SIMPKINS

BY MR. WOOD (Direct):

* * * * (T-24)

Q. Okay. Mr. Simpkins, on the 21st of April, 1971, did you have occasion to investigate an accident that occurred on Forest Hill Avenue near Huguenot High School? A. I did, sir.

* * * *

(T26,27)

Q. Now, tell us what the physical layout of this road is at that point. How wide is it and how many lanes and so forth and so on? A. It is just a two-lane highway with one lane of traffic in each direction.

Q. Now, what was the point of the collision? Could you determine that? A. There was not dirt or debris or metal in the roadway. I found one set of skidmarks in what I considered the eastbound lane of Forest Hill running east and west.

I found one set of skidmarks from the motorcycle. I found one continuous skid.

Q. Did you measure these skidmarks? A. Yes, sir. They began at what I consider the center of the eastbound travel lane and veered over to the right towards the shoulder. I never could ascertain if it went off the shoulder or the extent of it. It was approximately thirty-eight feet.

Q. Did they begin and end in the eastern travel portion of the roadway? A. They did, sir.

* * * *

(T28)

Q. What is the speed limit in this area? A. Forty-five.

* * * *

Q. Now, is there a driveway that comes into -- explain that layout as far as Huguenot is concerned. Explain where these driveways are, if you can? A. Well, traveling west on Huguenot in the direction that the Rambler was going, the Rambler would be turning into the first driveway there. There are at least two other driveways to this high school complex.

Q. They are down the road? A. Yes, sir.

* * * *

(T29-30)

Q. All right, sir. Now, Mr. Simpkins, did you talk with the defendant, Mr. Shoemaker, who was driving the Rambler? A. I did, sir.

Q. Did he make a statement to you, sir? A. Yes, he did.

Q. Would you read that to the jury and the Court? A. He indicated that he was going west, going to attempt to -- his statement was this: "I came up to make my turn. I saw the cars back far enough for me to turn. I went into my turn. My sister yelled, and I cut short to try to keep from hitting him."

* * * *

BY MR. WICKER (Cross): (T31)

Q. By Mr. Shoemaker or anyone else. I will leave it to just Mr. Shoemaker. Did he say anything about the lights? A. He indicated to me that when he did see the motorcycle's headlights, they appeared to be very dim. That was his indication. I don't remember his exact statement.

* * * *

(T32-34)

Q. Were any skidmarks -- you say they began about the middle of the eastbound lane -- correct? A. Yes, sir.

Q. And then they went which way? Did they go to the left or did they go to the right -- which way? A. The motorcycle? Right.

Q. It went to the right? A. Yes, sir.

Q. Now, you say the mark on the back of the automobile, on the extreme right fender and bumper. You saw that, didn't you? A. Yes, sir, I did.

Q. You told us about how far that was. How far was it? Was it about two feet or less? A. I would say 18 inches.

Q. Eighteen inches? A. Yes, sir, a foot and a half.

THE COURT: Eighteen inches to what? Do you mean 18 inches from the rear of the vehicle or 18 inches with reference to the hard surface or --

THE WITNESS: I might have misunderstood his question. He was asking me how far from the rear did the damage begin. I would say 18 inches from the very rear of the car.

BY MR. WICKER (Cross):

Q. What I was referring to was the damage to the rear of Mr. Shoemaker's car, where the motorcycle hit it. A. Yes, sir.

Q. I understood you to say it was about 18 inches, a foot and a half, from the rear? A. Possibly.

Q. Now, let me ask you one further thing, sir. You say there are about three entrances there. This occurred at the easternmost entrance? A. Yes, sir.

Q. And then there is another one further up, and still another one further up, going into the high school; is that right? A. Three of them.

Q. All told? A. There is at least two or more, sir. I don't know how many more.

Q. Officer, I want to show you a rough sketch. It is not to scale. I will ask you if that indicates the relative distance that you are speaking of from Forest Hill Avenue into the parking lot, first, and then into the high school grounds? A. Yes, sir, I would say it is represented fairly.

* * * *

(T35)

Q. You would say only two or three feet of the car was left in the driveway? Excuse me -- left in the roadway of Forest Hill Avenue? A. Yes, sir.

* * * *

BY MR. WOOD (Redirect): (T37)

Q. Would that indicate a speed of approximately 35 miles an hour? A. My question to him was how fast were you going when you approached the driveway.

* * * *

(T38)

Q. Now you say that the damage began some 18 inches from the end of the car? A. Well, I say a total of 18 inches. It was caved in slightly.

Q. The damage extended no farther than 18 inches? A. I can't say the damage was 18 inches or 16 inches. I would not say over 18 inches all together from the rear to where the dent ceased.

Q. From the point of impact, did the damage extend farther up? A. Than 18 inches?

Q. Yes. A. No, sir. I would not say so. No, sir, it did not.

* * * *

FROM THE TESTIMONY OF DR. WILLIAM R. MAUCK

(T52)

BY MR. WOOD (Direct):

Q. All right, sir. Now, Dr. Mauck, was there any evidence of any injury to the right knee? A. Not at the time of this accident.

Q. All right, sir. Do you have any history of the condition of that right knee? A. I have no history of his right knee, other than to say that Mr. Carter informed me during my treatment of my him that he had in the past had trouble with his right knee. His right knee was never treated by me nor was it examined by me, nor did I give him any advice about his right knee.

Q. Was it treated by someone in your office? A. I believe Mr. Carter told me that my colleague and partner, Dr. Butterworth, had seen him in the past for treatment.

* * * *

FROM THE TESTIMONY OF MR. JOHN H. SAUNDERS

BY MR. WOOD (Direct):

* * * * (76-78)

Q. Okay. Now, what, if anything, occurred, sir? A. Well, I was out in the yard. I had my two grandchildren with me. I had gotten home from work. I had gone into the house. I asked if anyone had gone to get the mail. They said they had not. So, the two grandchildren wanted to go out with me. I walked out in the yard and, of course, they wanted to play a little while. I was fiddling around in the front yard with the grandchildren.

I saw this motorcycle. I was just watching up the road for no particular reason.

Q. Now, let me stop you right there. When you were watching up the road, were you looking east or west? A. I was looking west from my house.

Q. That would be that you were looking up this way (indicating)? A. Looking west. At that moment, I noticed a motorbike with the lights bouncing up and down. That was all I noticed about it. I just saw it coming down and the motorcycle was bouncing his lights a little bit. The lights were bouncing up and down.

Q. Did you notice anything else unusual about the lights? A. I didn't notice anything unusual.

Q. All right, sir. Now, at the point that you first observed this motorcycle -- I am referring to Mr. Wicker's diagram. Where would it be with respect to these three entrances? Can you tell me? A. When I saw the motorbike -- you see, I have a hedge in front of my house. It is about up to my shoulders (indicating). I keep it at that height. I was standing over -- I was not right against the hedge but I was in the yard playing with the children. I saw the motorbike. I saw it from the entrance at this point (indicating). I would say it was possibly 75 feet up Forest Hill Avenue west of this entrance (indicating).

Q. Seventy-five feet? A. It was 75 to 100 feet. I don't know whether it was 75 or 80 or 90 or 100. It was about that.

Q. What was the next thing that you observed, Mr. Saunders? A. Well, traffic was relatively heavy. You people know Forest Hill Avenue. I call it Broadway now. The traffic was real heavy.

Q. All right. Now, with respect to the traffic, did you observe traffic in both directions? A. Traffic was going west. Traffic was building up as if a party was attempting to turn into Huguenot High School.

Q. What is the next thing you observed, if anything? A. Well, the next thing that I observed -- I was playing with the children. I just didn't -- I just seen that motorcycle.

I also observed that the traffic was building up. The tires were not squealing. You can always hear tires when the brakes are being applied. The next thing I really heard was a little crash.

Q. Did you see the crash? A. No, sir, I cannot say I saw the actual crash. I was not looking at it so therefore it is unfair for me to say I saw it. No, sir.

* * * *

(T-79)

Q. Did you observe the Rambler? A. I don't know what type of a car it was. I honestly didn't pay any particular attention.

Q. Did you observe a car turning left at any time?

MR. WICKER: What was that question?

Q. (By Mr. Wood) Did you see any car making a turn? You said the traffic was slowing up. A. There was a car attempting to make a left turn.

* * * *

BY MR. WICKER (Cross):

(T-82-83)

Q. Mr. Saunders, were you able to tell the speed of the motorcycle when you saw it with the lights bouncing up and down? A. I can estimate, but that is all.

Q. It was dark and you just saw the lights bouncing up and down? A. I would say he was moving with the traffic.

Q. Moving? A. Moving with the traffic -- with the other traffic.

Q. Was there anything in front of it? A. Not immediately in front.

Q. Was there a car a hundred feet or two hundred feet ahead of it? A. I don't know.

Q. Was there anything behind it? A. Yes, sir.

Q. What? A. There was an automobile with lights on.

Q. Just one? A. More than one.

Q. More than one? A. Yes, sir.

Q. This high hedge that you have, as you said, you could not see anything because the high hedge was there? A. That is right.

* * * *

(T83)

Q. How long was it after you saw these lights bouncing up and down and the motorcycle coming down the road that you turned away? A. Well, the children were there. I didn't see the actual crash.

* * * *

T84-85)

Q. And you maybe had some small talk with them? How long was it before the time that you first saw that motorcycle and the time that you heard the crash? A. Oh, it was a very short period of time.

Q. Three or four or five seconds? A. Well, it was --

Q. A minute? A. It was not any minute. No, indeed.

Q. What is your estimate? How long? A. I would say that I estimate the time at maybe eight seconds.

Q. Maybe eight seconds? A. Eight to ten seconds.

* * * *

FROM THE TESTIMONY OF MR. FARRELL B. CARTER

BY MR. WOOD (Direct):

* * * * (T100-101)

Q. Would you describe for the jury the highway outside Forest Hill Avenue as you approach Huguenot School? A. Prior to the school, there is a curve bearing to your left as you travel east.

Q. All right. A. At that time, I reached the speed of approximately forty miles an hour to negotiate the curve.

Q. All right. Now, what, if anything, did you observe while you were negotiating this turn? A. As I was coming out of the curve, I thought I saw what appeared to be a vehicle in the westbound lane, the oncoming lane, signalling for a lefthand turn.

Q. What was the position of this vehicle? A. I believe it was stopped.

Q. All right. Now, did you see anything after you came out of the curve? A. It was still there. It was in front of me.

* * * *

(T103)

Q. Where did the accident occur on this picture? A. This accident occurred at this intersection here (indicating).

MR. WICKER: Show the reporter so she can get something down.

It occurred where?

THE WITNESS: At this intersection right here (indicating), the third entrance traveling from west to east.

* * * *

(T104)

Q. Now, Mr. Carter, from the point of the curve to the point where this collision ultimately took place, how good a distance is that, do you know? A. A hundred yards.

* * * *

T105-107)

Q. Mr. Carter, as you came out of the curve, tell the Court and the jury what you observed? A. Once again, I observed a vehicle in the oncoming lane.

Q. Yes, sir. A. Signalling for a left-hand turn.

Q. All right, sir. A. I believe it was stopped.

Q. What was your reaction at that time, sir? A. I was slowing down midway through the curve.

Q. How fast were you going? A. At that particular curve, I was going about forty. I had slowed down to less than that.

Q. Now, tell the jury what happened as you proceeded up to the point where the impact took place. A. As I proceeded up about thirty or forty feet from the vehicle, the car suddenly pulled out across my travel lane.

Q. What happened, sir? A. There was not way I could avoid the vehicle. I immediately slammed on the brakes. My foot was already resting on it. The motorbike slid into the car.

Q. What, if anything, did you attempt to do when this car cut across your path? A. There was absolutely nothing. It was unavoidable.

Q. Did you make any attempt -- A. I don't believe I could have.

Q. Did you cut your wheels in any direction? A. I thought I cut them to the left, but I don't believe that is so.

Q. Now, Mr. Carter, were there any -- had you noticed prior to this, any vehicle in back of you? A. Yes, sir, there was a vehicle in back of me. There may have been just one or there may have been more than one. I know there was one.

Q. Did you have an opportunity to calculate the distance this vehicle or vehicles would have been in back of you? A. Well, a quick estimate, I would say greater than fifty yards. I am not sure.

Q. Now, at the point where the defendant cut in front of you, what was your speed at that point? A. It was less than

thirty, or maybe thirty miles an hour.

Q. Now, describe to the jury, what happened upon impact? A. Upon impact, I was thrown from the motorbike and sailed over the Shoesmith vehicle and hit the roadway.

* * * *

(T-107)

Q. Tell the jury how far you were from this vehicle when it turned in front of you. A. Roughly thirty or forty feet.

* * * *

(T-121)

Q. Now, Mr. Carter, I believe that there has been testimony about your right knee. I believe your right knee was injured in this accident. A. No, sir, it was not.

Q. Describe the conditions of your right knee? A. It is very weak.

Q. Why is it weak, sir? A. I sustained an injury in 1957. It was of the same nature as my left knee.

Q. Were you operated on in 1957? A. No, sir. It was put in a cast for a period of eight weeks.

Q. How did you injure that knee in 1957? A. I was playing football for Manchester High School. I was clipped from the inside during a game. The pressure or the forces just tore the knee apart.

* * * *

BY MR. WICKER (Cross):

* * * * (T-127)

Q. How long have you been driving motorcycles? A. I have been driving motorbikes about five years, sir.

Q. Five years. You were an experienced motorcycle driver, were you not, at the time of the accident? A. Yes, sir.

* * * *

(T127)

Q. Can you give us any idea how many times you had traveled back and forth on Forest Hill Avenue past these entrances to Huguenot High School? A. Three hundred and sixty-five days times two times a day times thirty-two years. I have traveled it quite frequently.

Q. You might say every day for five years? A. At least.

Q. So you knew, of course, that these entrances were there and that cars were constantly going in and out of there, did you not? A. Yes, sir, I did.

* * * * (T146)

Q. All right. Now, how fast were you going when you came out of the curve? I believe you said that you were going about forty miles an hour and you say that you slowed down then. You said you slowed down as you came out of the curve. You saw this car -- you saw the left turn signal light on, did you not?

A. Yes, sir.

Q. What did that indicate to you? A. The vehicle was preparing for a left-hand turn, sir.

Q. You were familiar with that territory and so you knew then that he was preparing for a left-hand turn into that parking lot, did you not? A. Yes, sir.

Q. Now, when you got down to thirty miles an hour, you say you later slowed down and you were going at such speed that you could not stop before you reached the automobile there in that entrance? A. The vehicle jumped me suddenly. I was unable to make that maneuver in time to avoid the collision, sir.

Q. Well, there was nothing preventing you from seeing that left-hand turn signal way back there for some one hundred yards as you said before, was there? A. Yes, sir.

Q. Over three hundred feet back there, you saw it preparing to make this left-hand turn and your speed was such that if he did go ahead and make the left-hand turn, you would not be able to stop without an accident; is that right? A. I had it under control. He held off. At one time it looked like he was going to make it and then he stopped.

* * * *

(T149)

Q. In your five years' experience before this, you had been confronted with people making turns and going straight and for other reasons that you had to immediately stop, had you not? A. Yes, sir.

Q. And you knew that in occasions like that, that your vehicle might skid? A. Yes, sir.

* * * * (T156)

Q. Isn't it a fact when he made his left-hand turn that there was no other traffic in sight coming from east to west? A. I really don't know. There may have been or there may not have been.

Q. You don't know and yet you were looking ahead and you saw Mr. Shoemaker's vehicle, but you did not see any other vehicles, did you? A. I don't believe I did. I am not sure about that, sir.

Q. That is right. Now, do you know how wide the lane was that you were in? A. Twelve foot, I believe, sir.

Q. And the shoulder is how wide? A. The shoulder would be roughly six foot.

Q. You had about eighteen feet on your side and an additional twelve to eighteen on the other side; is that right? A. I don't know those exact measurements. I would guess at that.

Q. About that. Now, do you disagree with the officer about skidding or are you prepared to admit that you skidded and that your vehicle left skid marks of thirty-eight feet? A. I did not actually see them. I believe his testimony would be accurate to that fact.

* * * *

(T157)

Q. All right. Mr. Carter, you could, instead of just slowing down from forty to thirty, you could have slown down considerably more if you had wanted to, could you not have? A. Yes, sir.

* * * *

BY MR. WICKER (Recross): (T165)

Q. Mr. Carter, you don't mean to tell this jury that when you were going thirty miles an hour -- I think thirty or forty, when you realized danger ahead of you; is that correct, you realized when you were going -- how fast were you going? A. Thirty miles an hour or less.

Q. Thirty miles or less. All right. Now, do you mean to say that at that speed you, as an expert motorcycle driver could not turn your vehicle to get out as much as two feet or two and a half feet to the left? A. I believe you could probably maneuver two feet in that interval.

* * * *

TESTIMONY OF MISS DIANE SHOEMAKER

BY MR. WICKER (Direct):

(T172-174)

Q. Your name is Miss Diane Shoemaker? A. Yes.

Q. Is Barry Shoemaker your brother? A. Yes, sir.

Q. Were you in the automobile that was in collision with Mr. Carter's motorcycle back at the entrance to Huguenot parking lot last April? A. Yes, sir.

Q. Where were you sitting, Miss Shoemaker? A. In the middle of the front seat.

Q. In other words, you were next to -- A. My brother.

Q. Now, did you see or when did you first see this motorcycle the first time? A. When we were at the stop waiting to turn.

Q. About where was the motorcycle at that time? A. It was up at the first entrance.

Q. Well, there are three entrances to that school. A. It was up the road.

Q. At the third entrance, did you say? A. Yes.

Q. Take a look at this sketch. It is not to scale. Do you see the divider here (indicating)? A. It was up about here (indicating).

Q. Put your finger -- I would like for you to mark it, if you will. Take this pencil and mark, if you will, where it appears that you were when you say your first saw the motorcycle? A. (Witness so complies)

THE COURT: You have marked it.

Now, make a "1" underneath it.

Q. Now, where was the motorcycle at that time when you looked? Where was the motorcycle? A. I guess it was about here (indicating).

Q. That is X-2? A. Yes.

MR. WICKER: Now, this is X-1 and X-2. Now, this is going this way here and the motorcycle is X-2.

Q. Now, Diane, when was the next time that you noticed the motorcycle? A. When we were turning into the parking lot.

Q. While you were turning? A. Yes, sir.

Q. And what did you see then? A. That it was coming closer and might hit us.

Q. Coming closer and what? A. It might hit us.

Q. What did you do? A. Screamed.

Q. You screamed? A. Yes, sir.

Q. And then what happened? A. We got almost into the parking lot and it hit us in the back.

Q. You got almost into the parking lot? A. There was about a foot of the car out in the road.

* * * *

BY MR. WOOD (Cross): (T177)

* * * *

Q. I see. Was there any traffic behind Mr. Carter's motorcycle, coming towards you? A. Yes, sir, there was.

Q. What happened to that traffic? Did that collide with you or with the motorcycle? A. No, they did not. They went around us.

* * * *

TESTIMONY OF MR. BARRY C. SHOEMAKER

BY MR. WICKER (Direct):

* * * * (T180-181)

Q. Will you please tell the Court and jury, as you approached the intersection to the opening into the Huguenot parking lot, what did you see and what did you do? A. I came to a complete stop because I was coming up. I put on my left-hand turn signal.

Q. Where were you when you put that left-hand turn signal on? A. I was -- well, I measured it. It was around fifty paces. My pace is about two and a half feet. It was about a hundred feet before I got to the entrance.

Q. How do you know that? Had you measured it off at all? A. Yes, sir, I walked it off.

Q. When? A. A few days ago.

Q. And it was how many paces? A. Fifty.

Q. How long is your pace? A. Around two and a half feet, give or take a few inches.

Q. So it was somewhere over a hundred feet? A. Yes, sir.

Q. And you stopped? A. Yes.

Q. What did you do then? A. I looked up ahead to see if there was anybody coming. There were some cars in the curve. I looked behind me to make sure nobody was coming up too fast. I looked in my rear-view mirror and there was nobody coming up.

Q. There was nobody coming up behind you? A. Yes, sir.

Q. And looking ahead, what traffic did you see at that time up ahead -- say west of you? A. What I saw was two cars. There may have been others. I remember two cars.

Q. Where were they? A. They were up at the curve.

* * * *

(T183)

Q. Where were the oncoming lights at the time you started your turn? Describe where they were? How far up the road were they? A. They were at the third entrance up here (indicating). They were right around this sign (indicating).

* * * *

(T185-187)

Q. Now, Barry, are you able to tell the Court and the jury -- have you paced off at all how far away the oncoming lights were or the motor vehicle was from you at the time you actually started in your turn? A. I walked it off. It was around 128 paces.

Q. It was 128 paces? A. True.

Q. I don't know if I can multiply that in my mind. That would be 128 -- it was around 200? A. Over 200 feet.

Q. Now, when was the first time that you had any indication at all that there was any danger of the motorcycle running into

you? A. Well, as I was almost through my turn, my sister yelled.

Q. When your sister -- A. I looked out and I saw this motorcycle coming straight at me. The first thing I did was to stand on the accelerator.

Q. Where was your car at that time? A. About half of it was in the parking lot when I saw the motorcycle. Then I stood on it.

Q. Your car was about halfway in it and halfway out? A. Yes, sir.

Q. How far was the motorcycle away from you? A. About -- I don't know. I couldn't tell how many feet. I don't know how many.

Q. How many paces -- I think you paced it, didn't you? A. He was too far away. We had moved out quite fast. I didn't think he was moving that fast. He was around, I would say between forty to -- I don't remember exactly how far he was from me.

Q. Barry, was there any indication at all at the time you started your turn and while you were making your turn, was there any indication of any kind that there was going to be any danger of this motorcycle colliding with your car? A. None until I was almost through with my turn.

Q. None until you were almost through with your turn? A. Through with my turn.

Q. At the time of the impact, how much of your car was protruding or still protruding out in the roadway? A. Less than two feet.

* * * *

BY MR. BABER (Cross): (T190-193)

* * * *

Q. And you stated you put on your left turn signal and rolled up to a stop? A. Yes, sir.

Q. So when Mr. Carter came around the curve and you saw him, your car had its left turn signal on and that is when you rolled up to your stop? A. Yes, sir.

Q. Then you came to a full stop and did you bring your car to a complete stop? A. Yes, sir.

Q. Why sir? A. It's a habit.

Q. Well, if there were no other cars coming except these cars -- A. I had to negotiate; I had to --

Q. Were these cars coming so fast -- A. The cars I saw were not moving fast. They were -- I had, you know, calculated my brain to see how fast they were moving. I took the precaution of looking in my rear view mirror to see if anybody was coming up on me fast.

Q. Well, now, these cars that you saw, according to your estimation, were up there at the curve and you had the accident about a hundred yards -- A. Yes, sir, it was around that.

Q. So you didn't feel when you first saw, that they were of any danger for you to make a left turn? A. No, sir.

Q. From a hundred feet prior to getting up to this turn that you were slowing down for, with your left turn signal on, it is a clear shot all the way up to that curve? A. Yes, sir, it is a straight shot.

Q. There is nothing to block your view? Why did you stop if these vehicles were such a distance away for you to go ahead and negotiate your turn? A. 'Cause it is what I always do.

Q. You always look and after you do that -- A. Yes, sir.

Q. Okay. Did you look up toward these vehicles? A. Yes, sir.

Q. Now, I take it from what you said that you looked up but you didn't see a motorcycle? A. I saw lights. It was dusk, you know, it was dark at this time. It was not -- there may have been a few rays of sunlight. It was dark.

Q. Well, you said you saw two vehicles. You didn't see a motorcycle? A. I saw car lights.

Q. All right, sir. Then you proceeded on to make your turn; is that right? A. Yes, sir.

Q. And then you never did see the motorcycle until you -- until your sister yelled out? A. Yes, sir.

Q. All right. And at the time that you were looking to your right and you saw it was bearing down on you at that point -- A. Yes, sir.

Q. -- this motorcycle was already in the skid at that point, was it not? A. Well, I don't know if he was in a skid. I didn't look at him long enough to see if he was skidding at that point.

Q. You were crossing that lane, were you not? A. Yes, sir.

Q. Now, the two cars that you saw -- I believe you said that you saw one up at the first entrance as you proceeded in the easterly direction and then I believe your sister said she saw them -- she saw a motorcycle at that time? Did you hear her testify to that? A. Yes.

Q. She saw them at that time -- she saw the motorcycle at the next entrance, which is only a short distance from you; is that correct? A. That is around a hundred and fifty feet. It is about halfway.

Q. All right sir. It was about a hundred and fifty feet and that is when you saw the car and she saw the motorcycle also, but you didn't? Was her visibility any better than yours? A. No, her angle was a little different than mine. Let me say this. The guy who was next to her did not see it either because of the lights.

* * * *

(T194)

Q. Now, are you telling this jury that you were able to distinguish any light or not from ten feet to forty feet before he hit you? Is that what you said? A. I could distinguish the lights.

Q. You were trying to get out of the way all the time? A. When I saw him, the first thing I did was to try and get out of his way.

Q. You were already straddling his lane at that time, were you not? A. I was almost through with my turn.

Q. Well, then, if you were almost through with your turn and you goosed the car or hit the accelerator or whatever you said to get out of his way, you still got hit in the right rear? Why? Where were you when you started? It is only twelve feet wide? A. Yes, sir. I was not making a fast turn.

Q. You goosed it? A. Yes, sir, to get out of the way.

Q. Yet you still got hit? A. Yes, sir.

Q. So you were not almost out of your turn when your sister hollered and you saw him? A. I said I had gunned it when she screamed.

Q. Okay. A. Then I looked and I saw him when I was stepping on it.

Q. You could not have been almost out of your turn and still get hit, could you? A. I was seventy-five or between seventy-five to ninety percent through with my turn. It would almost have been at the end of my turn.

Q. He was hit at the time your sister screamed, was he not? A. No, sir.

* * * *

TESTIMONY OF DR. WILLIAM MINOR DEYERLE

BY MR. WICKER (Direct): (T205)

A. * * * He volunteered that he had previously injured his right knee in 1957, which was extremely weak. He told me that he would like to have me evaluate it also. At that time, I examined both knees.

* * * *

(T206)

A. * * * The inside of the right knee had some rotary instability, suggesting an injury to it.

Q. You are speaking now about the right knee? A. The right knee. The knee that was not injured in this accident.

* * * *

BY MR. BABER (Cross):

* * * * (T211)

Q. Well, he had a bad right knee, which he hurt in '57. Now, he has two bad knees. A. Well, he has one bad knee and one knee has a scar on it. The one that has a scar on it is better than the one without the scar on it. You use the word "bad". I don't know if that is a good term.

* * * *

MOTION

THE COURT: Are there any motions?

MR. WOOD: The plaintiff moves to set aside the verdict as contrary to the law and the evidence, for reasons already stated in arguments relative to the instructions.

Your Honor, we take the position, now, that there was no evidence that there was any contributory negligence on the part of the plaintiff that the jury could consider, nor was there any instruction that the jury could support such a finding, that there was a lack of negligence on the part of the defendant.

We submit that the evidence as a matter of law shows that he was negligent and for these reasons we would move to set the verdict aside.

THE COURT: Your motion is overruled. I will enter judgment in favor of the defendant.

FROM THE DISCOVERY DEPOSITION OF FARRELL B. CARTER

* * * *

(Dep. 6)

MR. WOOD: Senator Wicker, I do not mean to interrupt you. The witness has a statement from his employer which will clarify this matter.

* * * *

BY MR. WICKER (Cross):

(Dep. 19-22)

* * * *

Q. No one else at the time of the accident? Now, Mr. Carter, what accidents have you had before this one? A. I had an accident in about May of 1966.

Q. Were you hurt in that accident? A. No, sir.

Q. Was it an automobile accident or a motorcycle accident? A. Automobile.

Q. Did you run into somebody or did somebody run into you? What happened? A. I was charged with reckless driving.

Q. Did you run into somebody else's car or did somebody in another car run into you? A. I ran into someone else's car.

Q. Where was that, sir? A. Malvern and Cary, Richmond.

Q. You were not hurt? A. No, sir.

Q. How did you plead? You say you were charged with reckless driving. How did you plead? A. I pleaded not guilty. The Honorable Judge Cooper was presiding.

Q. Well, if you plead not guilty, it does not matter what happened as long as you plead not guilty. Let's go off the record for a moment.

NOTE: Discussion off the record.

Defendant's Exhibit No. 2 was marked for indication.

Q. What other accidents have you had? A. I had an accident in Carolina.

Q. When? A. It was around the first part of April, 1971.

Q. April of 1971? What kind of accident was it? A. It was a fatality.

Q. Were you operating a motorcycle or an automobile? A. Automobile.

Q. Were two automobiles involved or just one automobile? A. One automobile.

Q. It was a single-car accident? A. Single car.

Q. Who was killed? You said it was a fatality. A. A seventeen-year-old girl.

Q. Was she a passenger? A. No, sir.

Q. Was she a pedestrian or what? A. Yes, sir.

Q. You were the driver? A. Yes, sir.

Q. Do you remember the type of car it was? A. A Ford Van.

Q. Were you on some business at that time working for somebody, or were you just on your own time? A. Yes, sir, business.

Q. I suppose you were charged with the fatality. What did you plead? A. I was not charged.

Q. You were not charged? A. No charge.

* * * *

CERTIFICATE

I certify that I have mailed three copies of this Appendix to John J. Wicker, Jr., Esq., counsel for the Appellee, at his mailing address, Suite 706 Mutual Building, Richmond, Virginia 23219, on this the 22nd day of January, 1973, prior to filing the required number of copies in the office of the Clerk, pursuant to Rule 5:35, Rules of Court.

Andrew W. Wood