

# Record No. 5686

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In the  
Supreme Court of Appeals of Virginia  
at Richmond

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WARD ALFORD, t/a AL'S CAB

v.

ROBERT O. FRYE

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FROM THE CIRCUIT COURT OF THE CITY OF WAYNESBORO

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## RULE 5:12—BRIEFS

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

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

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

# Supreme Court of Appeals of Virginia

AT RICHMOND.

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Record No. 5686

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VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 5th day of June, 1963.

WARD ALFORD, T/A AL'S CAB,          Plaintiff in Error,  
*against*

ROBERT O. FRYE,                          Defendant in Error.

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From the Circuit Court of the City of Waynesboro  
C. G. Quesenbery, Judge

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Upon the petition of Ward Alford, t/a Al's Cab, a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of the City of Waynesboro on the 14th day of January, 1963, in a certain motion for judgment then therein depending, wherein Robert O. Frye was plaintiff and the petitioner was defendant.

And it appearing that a suspending and *supersedeas* bond in the penalty of twenty-seven thousand, five hundred dollars, conditioned according to law, has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

**RECORD**

\*     \*     \*     \*     \*

Filed in the Clerk's Office of the Circuit Court of Waynesboro City, May 18, 1960.

Teste:

DORIS L. WOODS, Dep. Clerk.

**MOTION FOR JUDGMENT.**

The plaintiff, Robert O. Frye, hereby moves the Circuit Court of the City of Waynesboro, Virginia for judgment against the defendant, Ward Alford, trading as Al's Cab, in the sum of Seventy-five Thousand Dollars (\$75,000.00), for the damages, wrongs and injuries hereinafter set forth, to-wit:

That on the 26th day of September, 1959, at or about 3:30 P. M., the plaintiff was operating a certain motor vehicle owned by his employer, Macke Automatic Machine Corporation, in a southerly direction on Laurel Avenue in the City of Waynesboro, in a careful and lawful manner and, upon reaching the intersection of Laurel Avenue with Mulberry Street, looked in each direction on Mulberry Street and seeing no approaching vehicle at or near said intersection, proceeded to cross said intersection;

That, at said time and place, the defendant, through his agent, servant and employee, Gale R. Pitsch, was operating a taxi-cab east on Mulberry Street and it then and there became and was the duty of the defendant to use reasonable care to see that his said taxi-cab was driven by a prudent, safe and careful driver, to maintain a proper lookout for other  
page 2 } vehicles lawfully using the streets of the City of  
Waynesboro, to drive said taxi-cab at a lawful and reasonable speed under the circumstances then prevailing, to travel on the right half of the traveled portion of Mulberry Street, to keep said taxi-cab under proper control, to yield the right-of-way to any vehicle on Laurel Avenue that had previously entered the intersection of said Laurel Avenue and Mulberry Street and to avoid any act or acts of negligence that would endanger the life or safety of others;

That, in violation of said duties, the defendant was negligently permitting his said taxi-cab, at said time and place, to be operated by a notoriously reckless and unsafe driver, Gale

R. Pitsch, was negligently operating said taxi-cab without maintaining a proper lookout for other vehicles lawfully using said streets and at an unlawful, reckless and negligent speed, negligently failed to operate said taxi-cab on the right half of the traveled portion of Mulberry Street, negligently failed to keep said taxi-cab under proper control, and negligently failed to yield the right-of-way to plaintiff's vehicle, when it was lawfully in the intersection of said Laurel Avenue and Mulberry Street, and, as a proximate result of said acts of negligence on the part of said defendant or some one or more of them, collided with the vehicle operated by the plaintiff, striking it with terrific force and overturning it, after which said taxi-cab traveled some ninety-five feet east on Mulberry Street; and

That, as a direct and proximate result of said collision, the plaintiff was seriously and permanently injured, was caused to undergo great pain and suffering, which will continue in the future, was compelled to expend large sums of money for medical and hospital care and treatment, lost salary and income because of his incapacity to work and suffered and will continue to suffer inconvenience, discomfort and  
 page 3 } anguish; his injuries consisted of a fracture of the skull and face, concussion of the brain with resulting cerebral damage, maceration of the left arm and various lacerations and contusions, from which injuries he has largely lost the vision of his right eye and has completely lost the hearing of his right ear and partially of the left ear.

For all of which the plaintiff asks judgment against the defendant in the sum of Seventy-five Thousand Dollars (\$75,000.00).

Respectfully submitted,

ROBERT O. FRYE  
 By Counsel.

TIMBERLAKE AND SMITH  
 By W. B. TIMBERLAKE, JR., p. q.  
 Industrial Loan Building  
 Staunton, Virginia.

page 6 }

Filed in the Clerk's Office of the Circuit Court of Waynesboro City, June 3, 1960.

Teste:

DORIS L. WOODS, Dep. Clerk.

### GROUND OF DEFENSE.

The Grounds of Defense of the defendant, Ward Alford, t/a Al's Cab, to a Motion for Judgment filed against him in the Circuit Court for the City of Waynesboro by Robert O. Frye.

1. The defendant denies that he is liable to the plaintiff for the amount sued for or for any amount whatsoever;

2. The defendant denies that the plaintiff, Robert O. Frye, was operating the motor vehicle involved at the time of the accident complained of in a careful and lawful manner at the intersection of Mulberry Street and Laurel Avenue in the City of Waynesboro, Virginia, or that he looked in both directions as he approached the intersection;

3. The defendant says that Gale R. Pitsch, his employee, was a safe and careful driver and was operating the defendant's taxicab at the time and place of the accident in a proper and lawful manner in all respects;

4. The defendant denies each and every averment of negligence on the part of his taxicab driver contained in unnumbered paragraph four of the plaintiff's notice of motion for judgment;

5. The defendant denies that the plaintiff was injured as a direct and sole proximate cause of the negligence of the operator of the defendant's motor vehicle or that he sustained the injuries complained of in said notice;

page 7 } 6. The defendant avers and charges that the collision involved was solely due to the negligence of the plaintiff in that he failed to keep a proper look-out for other vehicles lawfully using Mulberry Street and Laurel Avenue, he negligently failed to keep his vehicle under proper control, he was driving at an excessive rate of speed, he negligently failed to yield the right of way to the defendant's vehicle entering the intersection from the right, he was negligently operating his vehicle at a speed and in a manner so as to endanger the defendant's motor vehicle and the driver thereof, and he was otherwise guilty of careless, negligent and reckless driving, and as a consequence thereof, drove into and collided with the taxicab of the defendant as it was law-

fully entering and passing through the said intersection; and

7. The defendant says if the defendant's driver was guilty of any negligence which proximately caused the accident involved, which is accordingly expressly denied, the plaintiff was guilty of contributory negligence which proximately contributed to cause the accident involved and bars the plaintiff's right to recover in this action.

WARD ALFORD, T/A AL'S  
CAB  
By Counsel.

G. H. BRANAMAN  
HUMES J. FRANKLIN  
Attorneys for the defendant,  
Waynesboro, Virginia.

\* \* \* \*

page 8 }

\* \* \* \*

Filed in the Clerk's Office of the Circuit Court of Waynesboro City, June 3, 1960.

Teste:

DORIS L. WOODS, Dep. Clerk.

### COUNTERCLAIM.

Now comes the defendant and files his counterclaim against the plaintiff and says as follows:

1. That the defendant, Ward Alford, hereby moves the Circuit Court of the City of Waynesboro, Virginia, for a judgment against Robert O. Frye in the sum of Eight Hundred Eighty and 85/100 Dollars (\$880.85) for damages and wrongs hereinafter set forth, to-wit:

2. That on the 26th day of September, 1959, the defendant's employee, Gale R. Pitsch, was operating the defendant's taxicab at the time and place of the accident set out in the original motion for judgment in a proper and lawful manner in all respects;

3. That the collision involved was solely due to the negli-



gence of the plaintiff, Robert O. Frye, in that he failed to keep a proper look-out for other vehicles lawfully using Mulberry Street and Laurel Avenue; he negligently failed to keep his vehicle under proper control; he was driving at an excessive rate of speed; he negligently failed to yield the right of way to the defendant's vehicle entering the intersection from

the right; he was negligently operating his vehicle  
 page 9 } at a speed and in a manner so as to endanger the  
 defendant's motor vehicle and the driver thereof;  
 and he was otherwise guilty of careless, negligent and reckless driving, and as a consequence thereof, drove into and collided with the taxicab of the defendant as it was lawfully entering and passing through the said intersection;

4. Wherefore, the defendant asks for a judgment against the plaintiff in the sum of Eight Hundred Eighty and 85/100 Dollars (\$880.85).

WARD ALFORD, T/A AL'S CAB  
 By Counsel.

\* \* \* \* \*

page 12 }

\* \* \* \* \*

In the Circuit Court of the City of Waynesboro, this 27th day of February, in the Year of Our Lord, Nineteen Hundred, Sixty-one.

\* \* \* \* \*

This day came again the parties and their counsel to the bar of the Court, ready for the trial of this matter. Whereupon a jury was called and thirteen members of the panel qualified. And the plaintiff and the defendant, striking alternately, each *struck* three members from the panel, leaving a jury of seven, without exception, as follows: Robert E. Kirby, Jr., A. E. Keiffert, Mrs. S. P. Olinger, Vincent Binion, M. V. Worley, V. R. Tarry and E. A. Carter, who were sworn to well and truly try the issues between the plaintiff and the defendant. The court reporter was also sworn.

During the introduction of the evidence numerous objections and exceptions were taken, the Court ruling on each as is shown in the stenographic record. At the conclusion of the plaintiff's evidence, the defendant moved to strike the evi-

dence on the ground that it was insufficient to support a verdict, which motion was overruled by the Court, and exceptions noted by the defendant as shown in the stenographic record of the case. At the conclusion of all the evidence the defendant renewed his motion to strike the evidence on the grounds previously stated, which motion is allowed by the Court, the plaintiff objecting and excepting to the Court's ruling as shown in the stenographic record.

Whereupon it is ordered by the Court that the motion for judgment and the counterclaim are dismissed and this case is ordered stricken from the docket of this Court.

It is ordered that the large exhibit plat introduced in evidence in this case may be withdrawn by the defendant after the expiration of the appeal period.

C. G. Q., Judge.

\* \* \* \* \*

page 37 } We the jury find our verdict for Robert O. Frye  
and fix his damages at \$25,000.

JOSEPH A. PIPLICO  
Foreman.

\* \* \* \* \*

page 38 } INSTRUCTION NO. 1.

The Court instructs the jury that, if they believe from the evidence that the plaintiff, Robert O. Frye, while traveling on Laurel Avenue, approached its intersection with Mulberry Street at a prudent and lawful rate of speed, that before entering the intersection he looked at his right and could see for a reasonable distance on Mulberry Street and the defendant's driver was not in sight, that, after entering the intersection, he then saw defendant's taxi-cab approaching on Mulberry Street at a negligent and unlawful rate of speed and that the taxi-cab driver thereafter negligently drove his cab into and against the plaintiff's truck, the jury shall find for the plaintiff, Robert O. Frye.

Given.

C. G. Q.



page 39 }

## INSTRUCTION NO. 3.

The Court instructs the jury that the burden of proving contributory negligence in this case rests upon the defendant; and, unless the defendant has established by a preponderance or greater weight of the evidence or appears from the plaintiffs own evidence that Frye was guilty of negligence which proximately contributed to cause the accident, the jury shall find for the plaintiff, Robert O. Frye.

Given as amended.

C. G. Q.

page 40 }

## INSTRUCTION NO. 4.

The Court instructs the jury that the credibility of witnesses is a question exclusively for the jury, and the law is that where a number of witnesses testify, directly opposite to each other, the jury is not bound to regard the weight of evidence as equally balanced, the jury has a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their means of information, their relationship, if any, their apparent candor and fairness, their apparent intelligence or lack of intelligence, and from all the other surrounding circumstances appearing in the trial which witnesses are more worthy of credit, and to give credit accordingly.

Given.

C. G. Q.

page 41 }

## INSTRUCTION NO. 5.

The Court instructs the jury that, if they find for the plaintiff Robert O. Frye, they shall fix his damages at such amount as will compensate him for the injuries and expenses which he suffered and incurred as a result of the accident complained of, not exceeding the amount sued for; and, in determining the amount of his damages, the jury may consider the nature and extent of his injuries and the extent, if any, that said injuries are permanent; the pain, suffering and inconvenience resulting from said injuries; the extent, if any, to which he is handicapped from carrying on his normal activities as a result of said injuries; the expense which he incurred in the care and

treatment of said injuries; and the loss of time from his employment which may have resulted from said injuries.

Given.

C. G. Q.

page 42 }

# INSTRUCTION A.

The Court instructs the jury that under the facts and circumstances disclosed by the evidence in this case, it was the duty of the plaintiff to exercise such care as a reasonably prudent person would exercise under the same or similar circumstances to perform each and every one of the following duties imposed by law :

1. Not to drive his vehicle at a speed or in a manner so as to endanger the life, limb, or property of any person;
2. Not to drive his vehicle so as to exceed a reasonable speed under the circumstances and traffic conditions existing at the time;
3. To keep said vehicle under proper control; and
4. To keep a proper lookout for vehicles approaching on Mulberry Street;

And if the jury believes from the evidence the plaintiff, Mr. Frye, failed to exercise such reasonable care to perform any one or more of the foregoing duties and that such failure under the circumstances then and there existing proximately caused or efficiently contributed to cause the motor vehicles to collide in the intersection, the plaintiff cannot recover and the jury should return a verdict for the defendant.

Given.

C. G. Q.

page 43 }

# INSTRUCTION B.

The Court instructs the jury that the law of Virginia is where two vehicles approach or enter an intersection at approximately the same time, the vehicle on the left is required to yield the right of way to the vehicle on the right if traveling at a lawful speed. The entry of the vehicle from the left into the intersection ahead of the vehicle on the right will not transfer the right of way to such vehicle from the vehicle on

the right as neither driver has the right of way over or is required to yield to the other; both drivers are under the duty to exercise ordinary care, such care as a reasonably prudent person would exercise under the same or similar circumstances to avoid a collision in the intersection and a failure so to do on the part of both drivers is negligence, and if such negligence proximately caused or was a contributing cause of the collision between the two vehicles, the plaintiff, Mr. Frye, is not entitled to recover even though the jury may believe that the driver of the defendant's vehicle was also guilty of negligence.

Given as amended.

C. G. Q.

page 44 }

INSTRUCTION C.

The Court instructs the jury that the mere happening of an accident with resulting injuries and damages does not constitute any basis whatever for a verdict in favor of the plaintiff in this case; on the other hand the burden rests upon the plaintiff to establish by a preponderance of the evidence that the driver of the Alford vehicle was guilty of negligence at the time and place of the accident complained of and that the driver's negligence of the Alford vehicle was the sole proximate cause of the accident. It is the duty of the jury to be guided by this principle in deciding this case and it cannot, in the absence of required proof that Mr. Alford's driver was guilty of negligence which the sole proximate cause of the accident, base a verdict upon surmise, speculation or sympathy.

Given.

C. G. Q.

page 45 }

INSTRUCTION D.

The Court instructs the jury that the operator of the defendant's vehicle, as he approached the intersection of Laurel Avenue with Mulberry Street, had the right to assume that any vehicle approaching the said intersection from his left would be operated in a lawful manner, at a proper and lawful speed, and the driver of such vehicle would maintain a proper lookout, and, upon approaching the intersection at ap-

proximately the same time from the left, would yield the right of way to the driver of the defendant's vehicle.

Given.

C. G. Q.

page 46 }

# INSTRUCTION E.

The Court instructs the jury that the law is that one party cannot recover from another for injuries where both parties were guilty of negligence that proximately contributed to cause such injuries irrespective of whether one or the other was guilty of a greater degree of negligence; therefore, if the jury believe from the evidence that the plaintiff, Mr. Frye, was guilty of any negligence that was a proximate cause or contributed to cause the collision of the two vehicles, they shall find for the defendant, and this is true—even though the jury may believe from the evidence that the driver of the defendant's vehicle was also guilty of negligence as a proximate cause or a contributing cause of the collision of the two vehicles in the intersection at Mulberry Street and Laurel Avenue.

Given.

C. G. Q.

page 47 }

# INSTRUCTION G.

The Court instructs the jury that they are the sole judges of the weight and creditability of the evidence and the jury has the right to discard or accept the testimony or any part thereof of any witness which the jury regards proper to discard or accept when considered in connection with the whole evidence in the case.

Given.

C. G. Q.

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page 59 }

• • • • •

November 17, 1962

Mr. G. H. Branaman, Attorney  
Waynesboro, Va.

Mr. H. J. Franklin, Attorney  
Waynesboro, Va.

Mr. W. B. Timberlake, Attorney  
Staunton, Va.

*Re: Frye v. Alford*

Gentlemen:

I have reviewed the record in this case several times. I can find no grounds on which the verdict should be disturbed.

It appears that the language "the investigators" was injected into the case by defense counsel—page 118 of the record. It does not appear that comment by counsel for Frye page 119 of the record could possibly be prejudicial.

The other main point urged by the defense is the refusal to give instruction F. This theory of the case was fully covered in instruction E.

While I might differ from the jury in the finding of fact, I have no right to invade their province. Accordingly the verdict will be affirmed.

Very truly,

C. G. QUESENBERRY, Judge.

CGQ/nh

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# JUDGMENT.

This day came the plaintiff and the defendant by their respective attorneys and the Court having materially considered the motion heretofore submitted by the defendant to set aside the verdict of the jury is now of the opinion that the motion should be over-ruled.

Whereupon, it is considered by the Court that the motion to set aside the verdict of the jury in this action be and the same is hereby over-ruled, and that the plaintiff, Robert O. Frye, have judgment against and recover of the defendant,

Ward Alford, t/a Al's Cab, the sum of Twenty-five Thousand (\$25,000.00) Dollars, damages, in accordance with the verdict of the jury returned herein together with interest thereon from the 11th day of September, 1962, the date the verdict was returned, as well as his costs in this behalf expended, to which action by the Court the defendant, by counsel, excepts.

And as an appeal is contemplated, it is ORDERED that a bond with satisfactory surety conditioned according to law be executed as for a supersedeas before the Clerk of this Court in the penalty of \$27,500.00 for and on behalf of the defendant within 10 days from the date of this order. Upon execution of the bond, the execution of the judgment is suspended for a period of 60 days.

Enter January 14, 1963.

C. G. Q.

\* \* \* \* \*

page 64 }

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# NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

## NOTICE OF APPEAL.

To Betsy N. Jordan, Clerk of the Circuit Court of the City of Waynesboro:

Counsel for Ward Alford, t/a Al's Cab, defendant in the above-entitled action, pending in the Circuit Court for the City of Waynesboro, Virginia, hereby gives notice of appeal from the judgment order entered in this case on the 14th day of January, 1963.

## ASSIGNMENTS OF ERROR.

The following are the errors assigned:

1. The Circuit Court of the City of Waynesboro, Virginia, erred in giving Instruction No. 1 to the jury for the plaintiff as it is a finding or binding instruction without limitation and is confusing and misleading for the jury in considering the evidence;
2. The Circuit Court of the City of Waynesboro, Virginia,

erred in not setting aside the verdict of the jury as contrary to the law and evidence and without evidence to support it and entering a judgment for the plaintiff on the jury's verdict.

WARD ALFORD, T/A AL'S CAB  
By Counsel

• • • • •

Filed in the Clerk's Office of the Circuit Court of Waynesboro City, January 30, 1963.

Teste:

BETSY N. JORDAN, Clerk.

• • • • •

The following is all of the evidence presented by the Plaintiff and the Defendant, respectively, at the trial of the above-styled case on February 27, 1961, in the City of Waynesboro before the Honorable G. G. Quesenbery, Judge of the Circuit Court for said City.

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2/27/61  
page 135 }

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2/27/61 Judge Quesenbery: Here is the trouble about page 136 } this thing. Take this intersection, and the impact obviously happened on the west side of the center point, almost in the center of the road. Now, the taxicab was, of course, on Mr. Frye's right, and if they arrived there at approximately the same time, and "approximately" is impossible—I mean the exact moment—to prove they arrived at exactly the same time is impossible, and I think "approximately" allows for a variation of five or ten feet, depending on the fact that no two cars are going at exactly the same speed; and it looks to me like the evidence, even your client's own evidence, he should have seen this car before he did if he used ordinary care, but the independent evidence of Mrs. Freed and Mrs. Gerni—I think if a verdict were returned, I would have to set it aside. I don't see how I can do anything but strike the evidence. I am sorry because this



boy had severe injuries. That is just the reason I can't let it go to the Jury. I found out recently when you do, on the injuries alone the jury will say, "Well, this is a taxi company, and they have insurance, let them pay for it."

Mr. Timberlake: Your Honor, is it your feeling this man, by looking to the right, if he had an unobstructed view of 125 feet and that taxicab wasn't in his range of vision at that time, and after he had gotten—after two-thirds of his truck had gotten into the intersection, the taxicab was still thirty-seven or forty feet from the intersection, he is bound to have seen it if he had looked?

2/27/61 Judge Quesenbery: You have to do more than page 137 } just look.

Mr. Timberlake: He had to look to his left after looking to the right, and I mean his sole duty was not to keep his attention—

Judge Quesenbery: Not in one direction—you have to use reasonable care out in that country, particularly. You have to keep a more effective lookout than he did. I don't see why in the world he didn't see it. If he had looked the way he should have looked he would have seen it. The physical facts, leaving out the evidence of everybody, unless this taxicab was going a hundred miles an hour, which it couldn't have been, or an exceedingly fast speed, if the cab was where Frye claims it was, clear out of his vision, he would have been across the intersection. It just couldn't have happened the way he thought it did. He maybe is telling what he believes. I think he missed seeing this car.

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

\* \* \* \* \*

Transcript of all the evidence and certain incidents of trial taken on the trial of the above styled action before The Honorable C. G. Quesenbery, Judge of the Circuit Court of the City of Waynesboro, at Waynesboro, Virginia, September 11, 1962.

Appearances: Wayt B. Timberlake, Jr., Esquire, counsel for the plaintiff; G. H. Branaman, Esquire, and Humes J. Franklin, Esquire, counsel for the defendant.

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page 2 }

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R. L. STOVER,  
a witness called on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION .

By Mr. Timberlake:

\* \* \* \* \*

page 3 } A. I am Sergeant with the Waynesboro Police Department.

Q. And were you employed in that capacity on September 26, 1959?

A. Yes, sir.

Q. Did you have occasion on September 26, 1959 to go to the scene of an accident at the intersection of Laurel and Mulberry Streets in the City of Waynesboro?

A. Yes, sir.

Q. Approximately what time did you arrive?

A. Around 3:30 P.M.

Q. And do you recall what day of the week this was?

A. It was on Saturday.

Q. Did you go in response to a call or did you just happen to go there, Sergeant Stover?

A. No, I received a call from the office.

Q. You were at the office?

A. No, I was on patrol in the patrol car.

Q. You arrived, you say, around 3:30?

A. Around 3:30.

Q. How many vehicles were involved in this accident, Sergeant?

A. Two vehicles.

Q. What type of vehicles were they?

A. One of them was a 1955 Ford sedan and the other was a Chevrolet Bardstown '55, it is a sort of a truck  
page 4 } —a panel truck.

Q. A closed body?

A. Yes, sir.

Q. Who did you find to have been the operator of the 1955 Ford Sedan?

A. Gary R. Pitsch.

Q. And who was the owner of this Ford Sedan?

A. Al's Cab.

Q. Will you state whether or not this Ford Sedan was marked or painted as a taxicab?

A. Yes, sir.

*R. L. Stover.*

Q. Now, who was the operator of the Chevrolet Bardstown truck?

A. Robert O. Frye.

Q. And, who did you learn was the owner of that truck?

A. The Macke Automatic Corporation.

Q. Sergeant Stover, do you know the width or approximate width of Laurel Avenue at the point where this accident occurred?

A. From the center of the street to each corner, where the marker is, is 32 feet wide and measured from right of the center the width is about 32 feet wide from curb to curb.

Q. What is the width of Mulberry from curb to curb?

A. The same width.

Q. Each of these two streets is 32 feet wide?

page 5 } A. Yes, sir.

By the Court:

Q. You are talking about the travelled portion?

A. That is true, not the sidewalk.

Q. The width between the curbs?

A. From curb to curb.

By Mr. Timberlake:

Q. In which direction does Laurel Avenue run?

A. Laurel runs south and north.

Q. And in which direction does Mulberry run?

A. East and west.

Q. What kind of surface do these two streets have?

A. Blacktop.

Q. Now Sergeant Stover, as you travel from north to south on Laurel approaching this intersection, will you state whether or not the terrain is level or on grade?

A. It is on grade.

Q. Would that grade be down toward the intersection from the north?

A. The grade would be on the south—coming south.

Q. In other words, for a person travelling from north to south it would be down grade?

A. That is right.

Q. Will you state what grade, if any, there is on Mulberry?

page 6 } A. The grade was traveling from west to east, traveling east there would be a grade.

Q. Which of these grades is the heavier?

A. Well I would say the grade on Mulberry is just a little bit steeper than the one on Laurel.

*R. L. Stover.*

Q. Sergeant Stover, do you know what property was located at the time of this accident at the northwest corner of this intersection?

A. The northwest corner was Freed's property.

Q. And across Laurel in the southwest corner what property was there?

A. That is an apartment house.

Q. That would be across Mulberry, excuse me.

A. Yes, sir.

Q. On the southwest corner is the apartment. Is that The Jefferson Apartments?

A. Jefferson Apartments, it used to be Martin Apartments but it is Jefferson now.

Q. Do you know what property was located on the northeast corner of the intersection?

A. The northeast would be the property—I forget who is there now, I use to own that property myself.

Q. You formerly owned that property?

A. That is right.

Q. You don't know who *owed* it and occupied it at page 7 } the time of the accident?

A. No, I don't.

Q. Do you recall what property was at the fourth of these corners, that would be the southeast?

A. Babers at the time lived there, I guess they still live there. I don't know.

Q. Now Sergeant Stover was there any object at or near the center of the intersection at the time this accident occurred or that you made your investigation? Any marker?

A. There is a street marker right in the middle of the street there.

Q. Where did you find this Chevrolet truck operated by Robert O. Frye when you arrived at the scene of the accident?

A. I found that, it turned out, down about 30 feet from the center of the street on the corner where Babers live.

Q. Would that be at the southeast portion of the intersection?

A. The southeast corner.

Q. And how far from that point was the taxicab when you arrived?

A. Part of that was sitting up in the yard at Babers back in, and my investigation was about 95 feet from the center.

Q. It was 95 feet from the center of the intersection?

*R. L. Stover.*

page 8 } A. Yes, sir.  
Q. Was the taxicab on its wheels?

A. Yes, sir.

Q. What about the truck?

A. It was turned over on the right side.

Q. Turned over on the right side, that would be the side opposite the driver's side?

A. Yes, sir.

Q. Was the driver of the truck there when you arrived?

A. He was in the truck, yes, sir.

Q. What was his situation in the truck?

A. He was pinned in the truck, the First Aid was working on him trying to get him out; I didn't talk to him there.

Q. Do you know whether or not he was conscious or unconscious at that time?

A. I couldn't say because I didn't talk to him.

Q. Where was the taxi driver when you arrived there?

A. He was out in the street there.

Q. Sergeant Stover, what, if any debris or marks were there in the street or in this intersection?

A. There was about two feet of marks—tire marks—there, right—I would say right at the center where the marker is in the middle of the street. Outside of that there wasn't no tire marks whatsoever.

page 9 } Q. Did this two-foot mark, that you have described, go in a straight direction with either of these streets or was it at an angle?

A. It was sort of diagonal, it started about a foot, I would say, on the right side of the marker headed south on Laurel Avenue.

Q. And it went in a diagonal direction to the southeast?

A. To the southeast corner.

Q. And that was the only tire mark or mark on the pavement that you were able to locate?

A. Yes, sir, that was all the marks that was there.

Q. What debris, if any, did you find in the street?

A. There was a small debris right there where the marker was and on down next to the truck there was right much laying on the street, I would say half way down from the marker to the truck.

Q. To the truck?

A. Yes, sir, there was small debris right in there where the marker was.

*R. L. Stover.*

Q. Do you know whether or not the truck was loaded with merchandise at the time of this accident?

A. Yes, sir, it was loaded.

Q. Did you observe whether or not the contents or any portion of the contents were knocked from the truck or in the street?

A. I couldn't say very definitely on that; Cap-  
page 10 } tain Whitlock taken care of all that stuff; there  
was some more in the truck, he looked after that  
while I worked the accident.

Q. Now Sergeant Stover, I hand you a photograph marked number 1 and ask you what that shows?

A. That shows the marker in the middle of the street and also the tire marks that were put down there, and it shows the truck turned upside down there.

Q. And is the location of that truck in the portion of the intersection you have previously described, that is the south-eastern portion of the intersection?

A. That is right.

Q. Is the truck in the position in which you found it when you arrived at the scene of the accident?

A. Yes, sir.

Q. And according to your investigation could you learn whether or not the truck had been moved following the time it came to rest following the accident?

A. No, I don't think the truck had been moved.

Q. In the background of that picture it shows a street with traffic on it and one vehicle, an automobile, near the center of the street headed towards the front of the picture. Now, what street is that?

A. That is Mulberry.

Q. And in which direction are you looking?

A. I am looking east.

page 11 } Mr. Timberlake: Your Honor, we would like to  
introduce this as—

The Court: It is already marked.

Mr. Timberlake: It is already marked Exhibit 1, yes, sir.

The Court: All right.

Q. I would like to ask you one further question in regard to the photograph that was just introduced. Can you see the taxicab in that photograph?

A. No, sir.

*R. L. Stover.*

Note: Here the Exhibit was passed to the jury.

Q. Sergeant Stover I hand you a photograph marked number 2 and ask you whether or not that shows the truck driven by the plaintiff in the same position as shown in photograph number 1?

A. Yes, sir.

Q. And do I understand that this number 2 is also looking east on Mulberry?

A. Yes, sir.

Q. I assume it is simply taken from a position further back to the west than the photograph number 1?

A. I would say so.

Q. I believe the officer shown in that photograph is you?

A. Yes, sir.

page 12 } Mr. Timberlake: We would like to introduce this as number 2, your Honor, for the plaintiff.

The Court: All right.

Note: The exhibit was thereupon handed to the jury.

Q. Sergeant Stover, I hand you a photograph marked number 3 and ask you whether that shows the truck operated by the plaintiff, Mr. Frye, in the position in which you found it before it was moved?

A. Yes, sir.

Q. And in which direction is the camera pointed in that photograph?

A. I would say it was taken from the west—headed west taken from down the east side of the truck.

Q. In other words, do I understand that this photograph is taken at a point on Mulberry Street east of the intersection looking west on Mulberry?

A. I would say so, yes, *ir*; I didn't take the picture but that is what it seems like.

Q. Does that reliably and correctly show the condition and the location of the truck as you found it?

A. Yes, sir.

Mr. Timberlake: I would like to introduce this as Exhibit 3, your Honor.

page 13 } The Court: All right.



*R. L. Stover.*

Note: The exhibit was handed to the jury.

Q. Sergeant Stover, I hand you a photograph marked number 4 and ask you if that photograph shows the taxicab in the position in which you found it when you arrived at the scene?

A. Yes, sir.

Q. So far as you could determine from your investigation is that the position in which the taxicab came to rest following the accident?

A. As far as I know.

Q. And I believe you have testified that that position, as shown on the photograph number 4, is approximately 95 feet from the center of the intersection?

A. Yes, sir.

Q. What street does this photograph show?

A. Mulberry.

Q. And in which direction is the photograph looking?

A. East.

Q. So that would show the taxicab partly on and partly off the southside of Mulberry Street?

A. Yes, sir.

Q. Now, the cover or lid shown in this photograph is that or not the marker in the center of the intersection, to which you have referred in your previous testimony?

page 14 } A. No, sir.

Q. What is that?

A. That is—I think that is a sewer drain put in there, that is not the marker in the center of the street.

Mr. Timberlake: Your Honor, we would like to introduce this photograph as Plaintiff's Exhibit number 4.

The Court: All right.

Note: The photograph was handed to the jury.

Q. Sergeant Stover, does this last photograph, this Exhibit 4, as to which you have just testified, does that show the degree of the foliage of the trees and shrubbery at that particular time?

A. Yes, sir.

Q. Where, from your investigation, was the damage to the taxicab?

A. The damage was on the left front back almost back to

*R. L. Stover.*

the left front door hinge where the door shuts, and the left back fender and tail-light.

Q. And how far across the front of the taxicab did the damage extend?

A. I don't recall right off hand.

Q. Is it or not true it buckled the hood all the way across?

A. Yes, sir, it did buckle the hood.

page 15 } Q. Going back to Plaintiff's Exhibit number 3, this photograph here, does that photograph show the property, or any portion of the property, known at the time of this accident as the Freed property?

A. Their front yard, yes, sir.

Q. Does it show any trees in foliage in that yard?

A. Yes, sir, two trees.

Q. There are various vehicles parked on Mulberry on the north side of Mulberry and facing the intersection, as shown in this photograph. Were those vehicles in the location shown in this photograph at the time you arrived?

A. There were some cars there at the time I arrived, but I couldn't say whether they are the same vehicles.

Q. And you do not recall the number or type of the cars shown on this photograph at the time you arrived?

A. No, sir, I couldn't say whether these cars were there or not; there were cars parked all around there on side streets and these streets, I couldn't tell you whether these cars were there at the time the accident took place or not.

Mr. Timberlake: I think that is all.

### CROSS EXAMINATION.

By Mr. Branaman:

Q. Mr. Stover, will you take photograph number 1. As I understand in the center of the street is a marker?

page 16 } A. Yes, sir.

Q. That is supposed to be the center of the intersection?

A. Yes, sir.

Q. Of Mulberry and Laurel Avenue?

A. Yes, sir.

Q. Is there any other indication of scratching or scraping in the roadway near that marker?

A. Only this tire mark right here.

Q. On what side of the center of the street is that?

A. There is about a foot of it on the west side of the mark-

*R. L. Stover.*

er and it went across the marker about two feet on the east side.

Q. Does it extend at an angle?

A. Yes, sir.

Q. Down to the southeast?

A. Yes, sir.

Q. And it begins north of the marker?

A. Yes, sir.

Q. How far?

A. I would say a foot.

Q. And extends in a southeasterly direction?

A. Yes, sir.

Q. Do you know by *thwat* that was made?

Mr. Timberlake: I object to that. It calls for a conclusion.  
The Court: That would be a conclusion.

page 17 } Q. Was there any other car involved in the accident at that place?

A. No, sir.

Q. And how long after the accident was it before you got there?

A. I would say not over three or four minutes, if that long, may be five.

Q. And the mark on the road or on the street runs in a diagonal direction across the street?

A. Yes, sir.

Q. Did you have a talk with Mr. Frye?

A. Not at the time of the accident; I went to the hospital after the accident and he said that he didn't think he was in shape to talk and I went back on Monday and talked to him.

Q. He could talk on Monday?

A. Yes, sir, he talked to me some on Monday.

Q. What explanation did he make to you then with reference to looking or not looking?

A. He stated to me that he had looked both ways before entering the intersection and he didn't see anything coming.

Q. Did he say how far west he could see?

A. I believe he stated he looked about 20 feet before he got to the intersection, I am not sure on that, but  
page 18 } I believe he said he looked about 20 feet from the intersection and that he didn't see anything coming.

*R. L. Stover.*

By the Court:

Q. You say he looked when he was about 20 feet of the intersection?

A. Yes, sir, and he said "I didn't see nothing coming either way."

Q. He didn't say now far up the street he could see?

A. No, sir, he didn't.

By Mr. Branaman:

Q. Did he, or not, state that he could see to the crest of the hill?

Mr. Timberlake: I object to that, your Honor.

Mr. Franklin: It is cross examination.

The Court: It is cross examination, it is all right.

A. I don't recall now whether he did make a statement or not. I do know he said that he looked and he didn't see anything coming.

Q. Did he say that he blew his horn?

A. No, he didn't.

Q. Did he say that he applied his brakes?

A. No, he didn't.

Q. Well, what explanation did he make to you?  
page 19 } A. What little bit I talked to him, just what he  
said, that he looked both ways and didn't see nothing coming.

Q. He never stopped?

A. No, sir, he said he never stopped.

Q. And that is all the explanation he made to you?

A. Yes, sir, what little bit I talked to him.

\* \* \* \* \*

page 27 }

\* \* \* \* \*

ROBERT O. FRYE,

a witness in his own behalf, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Timberlake:

\* \* \* \* \*

Q. Will you please state your full name?

A. Robert O. Frye.

Q. And Mr. Frye what is your age?

A. Thirty.

Q. Where do you live, sir?

A. 517 North Augusta Avenue, Waynesboro, Virginia.

Q. Were you living at 517 North Augusta Avenue in Waynesboro on September 26, 1959?

page 28 { A. No, sir.

Q. Where were you living?

A. 1456 North Commerce Avenue in Waynesboro.

Q. But whom are you employed?

A. Macke Automatic Merchandise Corporation.

Q. What is the type and nature of your employer's business?

A. Servicing vending machines in industrial plants, cafeteria style, mostly vending machines.

Q. What were your duties in connection with your employment?

A. Servicing machines, keeping them in operation.

Q. With whom do you make your home in Waynesboro?

A. With my wife and two children.

Q. Were you employed by your present employer the Macke Automatic Merchandise Company?

A. Yes, sir.

Q. Were you employed by that concern on September 26, 1959?

A. Yes, sir.

Q. In the same capacity in which you are now employed?

A. Yes, sir.

Q. Mr. Frye, what day of the week was September 26, 1959?

A. On Saturday.

Q. And did you perform any labor or duties for page 29 { your employer on that date?

A. Yes, sir, most of the day that day.

Q. About what time did you complete your duties that day?

*Robert O. Frye.*

A. Well it was approximately 2:30, something to 3. I don't know the exact time.

Q. And where were you when you completed your day's work?

A. At our warehouse in Fishersville.

Q. So, you completed your day's work around 2:30 on September 26, 1959, where did you go and by what means did you travel?

A. I came back to Waynesboro on Route 250 east.

Q. And how did you travel, I mean what did you travel in?

A. In a truck that I drive and work out of.

Q. And what kind and type and nature of truck was that?

A. 1955 Bardstown.

Q. What about the body of that truck, what type or nature of body was it?

A. Well, it is a closed-in truck, the Company that makes them they just call them Bardstown.

Q. Is it something in the nature of a panel truck?

A. Yes, sir.

Q. Do you know the length of that vehicle that you were driving on this particular day?

A. Yes, sir, it was 16 and a half feet.

Q. And do you know the approximate width of the truck?

A. I have notes here that I will glance at, that page 30 } truck was six feet four inches wide.

Q. What is the weight of this particular vehicle?

A. The gross weight is 5500 pounds, and the empty weight is 5,000 pounds.

Q. What represented the difference between the gross weight and the empty weight?

A. Well, when it is loaded it should weigh close to 5500 pounds.

Q. Was it loaded or empty on the day you left from Fishersville to go to your home in Waynesboro?

A. It was loaded.

Q. And what was it loaded with?

A. Cigarettes, coffee, candy, and things of such nature as this.

Q. What were the weather conditions on this afternoon of September 26, 1959?

A. It was clear.

Q. Were the streets or road wet or dry?

A. They were dry.

*Robert O. Frye.*

Q. When you left Fishersville to go to Waynesboro in this truck, that you have described, did you go along or in company with anyone?

A. With a fellow employee.

Q. And what was his name?

page 31 } A. Mr. Norris Hudson.

Q. Who was driving the vehicle?

A. I was.

Q. And did Mr. Hudson accompany you up to the point where this accident occurred?

A. No, sir, just up to prior to where the accident occurred.

Q. Where did he leave you?

A. I let him out on the corner of Randolph and Madison.

Q. Mr. Frye, what route did you follow from Fishersville up to the point where you let Mr. Hudson out?

A. I came east on 250, I turned left on Randolph beside the old hospital, and I went to the corner of Madison and Randolph, where he lives.

Q. And after letting him out what route did you follow?

A. I proceeded east on Madison.

Q. To what point?

A. To Laurel Avenue, where I turned right on Laurel.

Q. And how far was the corner of Madison and Laurel Avenue to the point where this accident occurred, in blocks?

A. Two blocks.

Q. Now, after turning right from Madison on to Laurel Avenue, will you please tell the Court and jury the manner in which you proceeded toward the intersection of Laurel and Mulberry Street?

page 32 } A. I proceeded south on Laurel, I came to the intersection—the first intersection, which was Ohio Street, I stopped for moving traffic that was already in the intersection, then I proceeded south on Laurel going toward Mulberry.

Q. And as you approached the intersection of Laurel and Mulberry, please tell the Court and jury what you did and what you observed and what took place?

A. As I approached Mulberry I looked to the right, I looked to the left, I looked straight ahead, I didn't see no traffic coming in either direction, I proceeded on into the intersection, as I was two-thirds of my truck in the intersection that is when I first noticed the taxicab coming up on me.

Q. On what street was the taxicab?

A. It was coming down Mulberry.

Q. Headed east or west?



*Robert O. Frye.*

A. Headed east.

Q. Was this taxicab to your right to your left?

A. It was to my right.

Q. And approximately how far from you was this taxicab when you observed it for the first time?

A. When I seen it in the intersection, he was about forty feet back from me.

Q. How do you fix this distance of approximately page 33 } forty feet?

A. Well, since the accident I went out and checked it, marked it off just about where the cab was, and after I thought it over, and it come out to the forty feet.

Q. Were you able to tell in what portion of Mulberry Street this taxicab was driving and at what speed it was driving?

A. It was in the proper lane of travel and at an excessive speed.

Q. Were you able to judge or estimate in any way or can you judge and estimate in any way the approximate speed it was traveling?

Mr. Franklin: I object.

The Court: He can estimate the speed, if he can do so.

A. I figured it to be doing around forty-five miles an hour.

Q. What did you do at that time?

A. I didn't have a chance to do anything, but I must have hit my brakes from all indications, from the brake lights being on.

Q. Then what took place?

A. That is the last I remember.

Q. Do you remember anything that took place following the accident and prior to your arrival at the page 34 } Waynesboro Community Hospital?

A. No, I remember being conscious just momentarily for a moment while I was pinned under the truck and that is all I remember until the next day.

Q. Mr. Frye, as you approached this intersection of Laurel Avenue and Mulberry Street, can you tell the Court and jury the approximate speed at which you were traveling?

A. As I approached the intersection I was doing between fifteen and twenty miles an hour.

Q. Was your truck as you approached the intersection increasing or decreasing its speed?

A. Decreasing speed.

*Robert O. Frye.*

Q. Would you state approximately how far you were from this intersection when you first looked to your right?

A. I was approximately twenty feet back from the intersection.

Q. How do you fix that?

A. Well, I know just where I was at when I looked and when I went out and marked it off—walked it off that is what it was.

Q. At that point what was your view or visibility to the west on Mulberry Street, or to your right?

A. I could see approximately a hundred and twenty-five feet west on Mulberry.

Q. What, if anything, prevented you seeing a  
page 35 } further distance than a distance of approximately  
a hundred and twenty-five feet?

A. There were trees in the yard and parked vehicles on the road.

Q. Do you know how many and the type of vehicles that were parked on Mulberry?

A. No, sir, I don't.

Q. Do you know how far down toward the intersection on Mulberry these parked vehicles were?

A. I couldn't say definitely, no, sir.

Q. You made reference to trees or foliage that prevented your seeing west on Mulberry Street, where were they and what were the nature of these trees?

A. One tree was at the left of the Freed home on the hill as you approach the intersection; then over on the other side of the yard there is another one, and then around the house there is some kind of rose bush or some kind of bush there.

Q. After you looked to your right when you were some twenty feet from this intersection and saw nothing within the area that you had view of, what did you do?

A. After I looked right I looked left, and then I looked straight ahead and proceeded on into the intersection.

Q. Was there any moving traffic on Mulberry headed west  
when you looked to your left?  
page 36 } A. No, sir.

Q. And do you know approximately how far from the intersection you were when you transferred your observation or moved your eyes from the right to the left?

A. I was still approaching the intersection.

Q. I see. All right, now, which way did you look after you ascertained that there was no moving traffic headed west on Mulberry?

*Robert O. Frye.*

A. I looked toward the left, east on Mulberry.

Q. And then seeing nothing, which way did you look?

A. I looked straight ahead, south on Mulberry.

Q. For what purpose?

A. To see if there was any moving vehicle anywhere around as I approached the intersection.

Q. Where did you say your truck was with reference to the intersection when you again looked to your right?

A. I would estimate that two-thirds of my truck was in the intersection when I looked back to the right and that is when I first noticed the taxicab.

Q. Now Mr. Frye, as I understand you do not recall anything that took place at the scene of the accident following your observation of this taxicab?

A. No, sir, I don't.

Q. When were you first conscious of things and all?

A. Well the next day I was conscious for a short  
page 37 } while, then on Monday—I began to know things  
on Monday.

\* \* \* \* \*

page 44 }

\* \* \* \* \*

CROSS EXAMINATION.

By Mr. Branaman:

\* \* \* \* \*

page 46 } Q. And it was on Saturday afternoon?

A. Saturday afternoon.

Q. And you came to Waynesboro over the route you have stated to the jury?

A. Yes, sir.

Q. Who was with you?

A. Mr. Norris Hudson, he is a fellow employee.

Q. Did you pick him up at the place of business at Fishersville?

A. No, sir, he started out with me that day.

Q. And was with you the whole day?

A. Yes, sir.

*Robert O. Frye.*

Q. You had taken him home prior to that time on occasions, had you?

A. Yes, sir.

Q. From time to time?

A. Yes, sir, from time to time, not often.

Q. Particularly on Saturday?

A. No, sir.

Q. No?

A. No, sir.

Q. You had traveled Laurel Avenue a number of times, hadn't you?

A. A few times.

Q. You were familiar with the conditions on page 47 } Laurel Avenue, weren't you?

A. I was familiar, but not what you would say too familiar.

Q. You knew that the Freed house was at the northwest corner of the intersection of Laurel and Mulberry, didn't you?

A. I knew there was a house there, I didn't know who lived there, I didn't inquire.

Q. Well, you had driven by there a number of times before hadn't you?

A. A few times, yes, sir.

Q. As I understand it you stopped your truck at Ohio Street?

A. Ohio Street, yes, sir.

Q. There was a car going in what direction there?

A. In fact it was one going west and one going east, in fact it was two cars.

Q. You let those go passed?

A. Yes, sir.

Q. And then you proceeded on south on Laurel Avenue?

A. Yes, sir.

Q. What is the distance from Ohio Street to Mulberry Street?

A. It is approximately three hundred feet.

Q. Are the lots there a hundred and fifty foot front on those streets?

page 48 } A. Indeed I don't know.

Q. Well, you started then on the north side of Ohio Street and proceeded then southward on Laurel, is that right?

A. I was going south all the time after I turned off Madison.

Q. You were on the north side of Laurel when you stopped at Ohio?

*Robert O. Frye.*

- A. No, I was on the west side.  
 Q. On the west, but north of Ohio?  
 A. Yes, sir.  
 Q. And you proceeded south?  
 A. Yes, sir.  
 Q. And then you drove at your normal speed?  
 A. Yes, sir.  
 Q. Until you reached Mulberry Street?  
 A. Until I approached Mulberry Street.  
 Q. And then did you look, you say, to the right first?  
 A. I looked to the right and then to the left.  
 Q. And you were twenty feet of the north line of Mulberry when you looked?  
 A. I was twenty feet back from the intersection.  
 Q. How do you know that?  
 A. Well, I done it.  
 Q. Did you measure it?  
 A. Yes, sir, since then I have measured it, I  
 page 49 } could guess then, and I stated after the accident it  
 was twenty feet.  
 Q. Do you know where you were when you looked west on Mulberry Street?  
 A. Yes, sir.  
 Q. How do you happen to know that?  
 A. How was that again?  
 Q. How do you happen to know you were twenty feet north of the intersection of Mulberry when you looked west?  
 A. Well, if anybody looked I reckon they would know.  
 Q. You didn't measure it?  
 A. Not at that time, no.  
 Q. You went back afterwards and took a check?  
 A. I went back afterwards and took a view of it, yes, sir.  
 Q. And you concluded you were twenty-feet back when you looked first?  
 A. Yes, sir, but I had said prior to going out and looking at it that I was approximately twenty feet back.  
 Q. Did you see anyone in the Freed yard?  
 A. As I approached you mean?  
 Q. When you were twenty feet back from the intersection?  
 A. No.  
 Q. Did you see anybody standing by the automobile, the station wagon?  
 page 50 } A. I paid no attention.  
 Q. If you had looked and anybody had been

*Robert O. Frye.*

standing by the station wagon parked in front of the Freed house, wouldn't you have seen them, unless they were hid?

A. Not necessarily.

Q. Not necessarily?

A. No, I drive through town and don't see a number of people.

Q. And you drive through intersections and don't see anything coming?

A. I can see cars, yes, sir.

Q. Didn't you state that you looked both wayes when you testified before the Civil and Police Court in connection with this matter?

A. As I approached the intersection, yes, sir.

Q. And you saw nothing coming?

A. That is right.

Q. Didn't you see the crest of the hill in front of the apartment house?

A. I may have testified to that, I don't deny that, but the crest—the grade would be too much, it would be in such a manner that when you looked and saw as far as you could you would imagine it would be the crest of the hill.

Q. So it was the crest of the hill?

A. No, not the crest of the hill.

page 51 } Q. You were under oath when you testified before the Civil and Police Court?

A. I was still under the doctor's car and, of course, I hadn't been back out and seen actually how far you could see.

Q. You did testify that you could see to the crest of the hill, though?

A. I said I don't deny it.

Q. You don't deny it?

A. No, sir.

Q. But you don't admit that there might have been standing by the station wagon parked down next to the intersection?

Mr. Timberlake: That is not what he testified to.

The Court: He said he didn't see anybody.

Mr. Branham: If he didn't see anyone then he doesn't admit it.

The Court: That is a conclusion the jury will have to draw.

Q. You didn't see Mrs. Freed about two, three or four feet from the walk into her house?

*Robert O. Frye.*

A. No, sir.

Q. You saw nobody?

A. I wasn't looking for anybody in the yard, I was looking for—

page 52 } Q. Wasn't that in your line of vision?

A. I was looking for a moving vehicle, I wasn't looking for anybody standing in the yard.

Q. If anybody had been standing in your line of vision wouldn't you have seen them when you looked west?

A. It would depend on whether I was looking for them.

Q. In other words if anyone was standing in your view and you weren't looking you wouldn't have seen them?

A. I didn't say that I wasn't looking.

Q. What were you looking for?

A. I was looking for moving vehicles.

Q. You weren't paying any attention to anything else?

A. As I approached the intersection that was my duty.

Q. That is what you were looking for?

A. Yes, sir.

Q. And you didn't see any?

A. When I was twenty feet back from the intersection I didn't see any moving vehicles.

Q. Didn't you testify on November 24, 1959 before Justice Garver in answer to a question from your attorney, Mr. Timberlake, as follows:

“Question: Well now, Mr. Frye, how far back on Mulberry Street were you able to see at the time you looked to your right on Mulberry?”

“Answer: At a point twenty feet from the intersection—

page 53 } Mr. Timberlake: Your Honor, I object. This witness has not made any denial of that, there is no groundwork *laid* for the impeachment of this witness.

Mr. Branaman: I am laying it now.

The Court: That is what I thought.

Mr. Timberlake: The witness has already testified when asked if he didn't testify he could see to the crest of the hill that he didn't deny it.

The Court: He said he didn't deny it, he didn't admit it. I think he has a right to show he said that.

Mr. Timberlake: We save the point, we except to the Court's ruling.



*Robert O. Frye.*

Q. Your answer: "And before I entered the intersection?"

Question: "Yes, sir."

Your Answer: "Well I could see, I imagine—It is a short distance from the intersection to the top of the hill, there is a right steep grade on Mulberry coming toward me, and I could see pretty close to the top of that."

Question: "You could see to the crest of the rise?"

Answer: "Yes, sir."

Another question: "Now, Mr. Frye,—

The Court: Are you going to read all this evidence? page 54 }

Q. Did you or not make those answers to those questions?

A. I don't deny it, no.

Q. This question, please.

Question: "Now Mr. Frye, can you be positive that this taxicab, that was involved in this collision with you, was not in the area from the crest of the hill down to the intersection at the time you looked to the right?"

Answer: "No, sir, it wasn't in sight."

Do you deny that answer?

A. No, I don't deny it.

Q. Question: "When you again looked to your right, Mr. Frye, after getting into the intersection approximately how far from you was the cab when you first saw it?"

The Court: There has been no denial of that; he has testified to that Mr. Branaman. If you want to impeach him you have to bring out something that he has denied.

Mr. Branaman: I cannot bring it out any other way unless I ask him.

The Court: He doesn't deny it.

Mr. Branaman: I would like to have the answer in the record.

The Court: Ask him where the taxicab was when he first saw it.

page 55 } Q. Where was the taxicab at this time?

Mr. Timberlake: At what time?

Mr. Branaman: That is the question I just propounded.

A. When I was entering the intersection or after I was in the intersection?

*Robert O. Frye.*

The Court: When you first saw it?

A. When I first seen it it was approximately forty feet back from the intersection. I made the previous statement that it was approximately two car lengths and the reason I said that I was thinking a car was approximately twenty feet long.

Q. Then, your answer to this question was that it was two car lengths from the intersection?

A. Yes, sir.

Q. So, it is two car lengths or forty feet?

A. When you are under the impression that a car is twenty feet long you would say two car lengths.

Q. After you measured the car—

A. Since then, yes.

Q. What is the length of the car?

A. My Ford is sixteen and a half feet.

Q. Was that the same model Ford as involved in this accident?

A. Yes, sir.

Q. And it is sixteen and a half feet long?

page 56 } A. Yes, sir.

Q. What was the length of the truck?

A. Sixteen and a half feet.

Q. The same length?

A. Yes, sir.

Q. Didn't you testify that the truck's length was sixteen feet four and a half inches?

A. No, sir.

Q. What was the weight of the truck?

A. Full or empty?

Q. Both?

A. Gross it is 5500 pounds, empty it is 5000 pounds.

Q. 5000 pounds empty?

A. Yes, sir.

Q. You didn't apply any brakes when you were approaching the intersection or near it?

A. I don't recall whether I had my foot on the brakes or not, I was prepared to stop if it was necessary, so, undoubtedly I was resting my foot on the brake, as I always do, but I cannot say positively.

Q. You were still going fifteen or twenty miles an hour?

A. Fifteen miles an hour and slowing down.

Q. And then you drove out in the intersection when the cab was within 40 feet of the intersection?

*Robert O. Frye.*

A. I was two-thirds of the way in the intersection when I seen him.

Q. And the collision took place in the intersection?

A. Yes, sir.

Q. The cab was approaching you from your right, is that right?

A. Yes, sir, at a rapid rate of speed.

Q. You never applied brakes?

A. I must have hit my brakes because the brake lights were jammed on.

Q. Did you sound your horn?

A. Do you mean as I approached the intersection?

Q. Yes.

A. No, sir.

Q. You didn't give any sound or warning whatever?

A. You are not supposed to blow your horn in the City.

Q. You knew the intersection?

A. Not too well, I had been over it a few times.

Q. And you saw cars parked in front of Mrs. Freed's house?

A. Yes, sir.

Q. And still you continued going through the intersection without giving any warning?

A. I didn't see no need, I didn't see no moving vehicle.

Q. You didn't see anyone standing in the yard at Mrs. Freed's house?

page 58 } A. No, sir, I didn't look for anyone in the yard.

Q. Why didn't you look?

A. If everybody did that there would be more accidents than what it is, if everybody looked for people in the yard.

Q. You never saw anyone?

A. No, sir.

Q. You continued to drive knowing the house was thirty feet back from the intersection, I believe you testified to that before, didn't you?

A. I haven't given no measurement on the house.

Q. The house sets back from the street in front, doesn't it?

A. It sets back but I don't know the measurements.

Q. You don't know how far?

A. No, sir.

Q. Now, if there had been a cab or moving vehicle within a hundred and fifty feet, I believe you say, on Mulberry—

A. No, sir, a hundred and twenty-five.

*Mary Myrtle Freed.*

Q. A hundred and twenty-five, you would have seen it, wouldn't you?

A. Within that hundred and twenty-five feet I could have seen it.

Q. But you didn't see it until it was two car lengths from you?

A. It was not in that distance.

page 59 } Q. Until it was within two car lengths, then you saw it?

A. After I was in the intersection.

Q. You saw it?

A. After I was in the intersection, it was not within that hundred and twenty-five feet when I was twenty feet back from the intersection.

Q. I believe you testified you were familiar with the intersection?

A. I was familiar, not too familiar.

\* \* \* \* \*

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\* \* \* \* \*

MRS. MARY MYRTLE FREED,  
a witness called on behalf of the defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Franklin:

Q. State your full name?

A. Mary Myrtle Freed.

Q. Where do you live at the present?

A. 2129 Forest Drive.

Q. Where did you live in September of 1959?

A. 1601 Mulberry Street.

Q. 1601 Mulberry Street?

page 68 } A. Yes, sir.

Q. Is 1601 Mulberry Street the residence that is in the northwest intersection of Laurel and Mulberry?

A. Yes, sir, it is.

Q. Since that time you have moved away from there?

A. Yes, sir.

*Mary Myrtle Freed.*

Q. Do you recall an accident that took place in the intersection of Mulberry and Laurel on September 26, 1959?

A. I do.

Q. What time of day did this accident take place?

A. Late afternoon.

Q. Where were you? Were you in the house or out of your house?

A. No, I was at the foot of the steps to the porch leading to the porch.

Q. You were out on your sidewalk, not the public sidewalk?

A. Yes, sir.

Q. In front of your house?

A. Yes, sir.

Q. How close were you to the steps leading up to your house?

A. About two feet.

Q. Do you know how far your house sets back from the street?

page 69 } A. No, sir.

Q. Was anyone visiting you that day?

A. Yes, I had a friend visiting me.

Q. Who was visiting you?

A. Mildred Gerni.

Q. Mildred Gerni?

A. Yes, sir.

Q. At the time you were at the front steps where was Mrs. Gerni?

A. She had left the property and was ready to get into her car.

Q. Now, as you were there at your front steps did you have a view of Mulberry Street?

A. Yes, sir.

Q. Did you have a view of Laurel Avenue?

A. Yes, sir.

Q. Did you observe a taxicab there?

A. On Mulberry Street?

Q. On Mulberry Street.

A. Yes, sir.

Q. Did you also observe a truck on Laurel?

A. Yes, sir.

Q. Now, when you observed this car or taxicab on Mulberry, how far was it from the corner, or where was it in reference to your property?

page 70 } A. The taxi and—

Q. The taxi and the other car?

*Mary Myrtle Freed.*

A. About forty feet.

Q. From the intersection?

A. Yes, sir.

Q. Where was the Frye car at that time, the Frye truck?

A. The truck?

Q. Yes.

A. Well, it was just where I could see beyond the bush at the side of the house.

Q. How far would you estimate?

A. They were about equi-distance from the corner.

Q. When you observed them both, the car and the truck were equi-distant from the corner?

A. Yes, sir.

Q. Did you observe them further?

A. Further away, no.

Q. Did you observe them as they went on into the intersection?

A. A little distance, but then I couldn't see them.

Q. You actually didn't see the accident occur?

A. No, sir.

Q. When you observed this truck, which was operated by Mr. Frye, and the taxicab, did you tell the jury they were equi-distant—

page 71 } A. Did I on the last time, you mean?

Q. Yes.

A. Yes, sir.

Q. Were they equi-distant from the intersection when you saw them?

A. As far as I could estimate, yes, sir.

Q. This tree you were talking about is in the east—north-east corner of your yard, is it not?

A. Southeast.

Q. That is right, southeast. At this particular day were there any cars parked in the front—

A. Mrs. Gerni's car was and my small Willys.

Q. You had a Willys and it was there and where was Mrs. Gern's car parked in reference to your property?

A. Well, it was almost down by the mail box, which is on the corner.

Q. Almost by the mail box?

A. Yes, sir.

Q. Mrs. Freed, this has been introduced in evidence as Plaintiff's Exhibit number 3, it shows a station wagon in the picture and some people. Who are the people in the photograph, or do you know any of them?

*Mary Myrtle Freed.*

A. One is my daughter, I don't know who the other one is.

Q. Are you in the photograph?

A. No—yes, I am.

page 72 } Mr. Franklin: I would like for the witness to  
come up here so she can point this out to the jury.

The Court: All right.

Q. Mrs. Freed, is this the mail box in front of your house

A. Yes, sir.

Q. It was near the intersection, was it not?

A. Yes, sir.

Q. Is this Mrs. Gerni's car?

A. Yes, sir.

Q. Is it a station wagon?

A. Yes, sir.

Q. I see several cars there, were they there when the accident occurred?

A. No, just two cars, the others came.

Q. You say you are in the picture?

A. I am up on the lawn.

Q. Is Mrs. Gerni in the picture?

A. I think this is she sitting here.

Q. On the step?

A. No, on the ground.

Note: Thereupon, the witness resumed the witness stand.

Q. Mrs. Freed, did either of these vehicles that  
page 73 } were approaching the intersection, as you say in  
your estimate at approximate the same time—

Mr. Timberlake: I object to that, it has already been covered.

The Court: What was the question?

Mr. Franklin: I was just phrasing the question.

What I was going to say was, when she saw these cars, did either one blow their horns.

Mr. Timberlake: I have no objection to that.

Q. Did either blow their horn?

A. No, sir.

Q. After the *accide* was there any noise or not, after the accident, or did any of the cars run or make any noise?

A. They just crunched down on Canada's lawn.

*Mary Myrtle Freed.*

Q. Down on Canada's lawn?

A. Yes, sir.

Q. As you watched the taxicab as it entered the intersection did it slow up?

A. No.

Q. As you watched the truck enter the intersection, did it slow up?

A. No.

Note: At this point certain photographs were handed to counsel for the plaintiff.

page 74 } Mr. Timberlake: Your Honor, certain exhibits are being admitted by agreement, with the stipulation or understanding that they weren't taken in the season of the year this happened and that they in no way depict the foliage at the time this accident happened.

Mr. Franklin: The date is stamped on them.

The Court: It is merely for the purpose of showing the terrain and surroundings.

Mr. Franklin: The date is stamped on them, they were taken November 21, 1960.

Q. Mrs. Freed, I show you an Exhibit, it is marked Exhibit number 11, is that a picture of the house you did own?

A. Yes, sir.

Note: The exhibit was handed to the jury.

The Court: I believe Exhibit number 3 shows the condition of the foliage at the time of the accident.

Q. Mrs. Freed, I hand you an exhibit, marked Exhibit number 6, the mail box shown in the picture is that the mail box in front of your house?

A. Yes, sir.

Q. Are the buildings across the street the Jefferson Apartments?

A. Yes, sir.

page 75 } Q. And this white house in the picture is that the west side of the Jefferson Apartments?

A. Yes, sir.

Q. Do you know where the private driveway comes out west of the Jefferson Apartments?



*Mary Myrtle Freed.*

A. Directly east of this white house, between the apartment and the white house.

Q. You say that was between the white house and the apartment as shown on that picture?

A. And the apartments, yes.

Note: The exhibit was handed to the jury.

Q. Mrs. Freed, I hand you Exhibit number 8. Does that show another angle of your house taken from Laurel looking north?

A. Yes, sir.

Note: The exhibit was handed to the jury.

Q. Mrs. Freed, I hand you a picture. Is that a picture of the southwest corner of the intersection of Jefferson Apartments?

A. Yes, sir.

Q. Does that show where the alley entrance is behind the Jefferson Apartments?

A. Yes, it does.

Q. Is that right near the telephone pole in the picture?

A. It is right directly north.

page 76 } Note: The exhibit was handed to the jury.

Mr. Franklin: That is number 2.

The Court: It is number 2 on the face of the photograph, not the exhibit number. Put it in as Defendant's Exhibit number 2.

Q. I hand you Exhibit Defendant's number 10. Does that show your house and the mail box?

A. Yes.

Q. That picture is taken looking west?

A. Yes.

Q. That shows the apartments and the house to the west of the apartments?

A. Yes.

Mr. Franklin: I believe that is all.

*Mary Myrtle Freed.*

CROSS EXAMINATION.

By Mr. Timberlake:

Q. Mrs. Freed, how long has it been since you lived at 1601 Mulberry Street?

A. We moved a year ago in March.

Q. Do you normally wear glasses?

A. No, sir.

Q. And Mrs. Freed have you discussed the subject matter of your testimony with Mr. Alford or his attorneys prior to the hearing here today?

A. I was in the office one day.

page 77 } Q. On one occasion?

A. Yes, sir.

Q. Since the accident?

A. Yes, sir.

Q. And have you discussed the matter with Mrs. Gerni?

A. We have talked about it.

Q. Mrs. Freed, didn't Sergeant Stover, immediately following the accident, ask you and Mrs. Gerni, in your presence, if you all knew anything about this accident?

A. No, sir.

Q. Was Mrs. Gerni the only visitor you had at your home at this particular time?

A. Yes.

Q. How long has she been visiting with you?

A. Several hours.

Q. And as I understand at the time the accident occurred you were standing within a foot at the bottom of the steps to your front porch or stoop?

A. Yes, sir.

Q. And Mrs. Gerni was standing down at her parked station wagon, which was parked opposite or at the end of the walk to your house?

A. Beyond it.

Q. Which way?

A. East.

page 78 } Q. Nearer the corner?

A. Yes.

Q. And at the time when you first observed either one of these vehicles you and Mrs. Gerni were carrying on a conversation, were you not?

A. Yes.

*Mary Myrtle Freed.*

Q. Do you recall what you were talking about?

A. No.

Q. And I believe it is correct, is it not, that the first thing that you saw or observed was the taxicab?

A. Yes.

Q. And it was proceeding east on Mulberry?

A. That is right.

Q. How wide is the lot of the home where you were living at that time?

A. Seventy-five feet.

Q. Seventy-five feet, and that runs from the intersection or from the street line at the intersection on west on Mulberry?

A. Yes.

Q. And who was the adjoining property owner?

A. Some people from Orange, I don't know, it was a vacant lot.

Q. Isn't it true that there were cars parked on west from your home on Mulberry?

page 79 } A. That I don't know, there may have been some in front of the Walker's.

Q. You don't recall how many?

A. No.

Q. Now, how many trees were there in your front yard and where were they located?

A. There are two trees, and one is on either side of the front walk.

Q. One would be—

A. On the west.

Q. On the east side of the front walk and the other to the west?

A. Yes, sir.

Q. And they are in the location shown in these various photographs?

A. Yes, sir.

Q. What other shrubbery do you have in your lawn?

A. We had a large bush close up to the house.

Q. You don't recall the subject of your own conversation with Mrs. Gerni?

A. No, sir.

Q. When you first noticed it the taxicab wasn't it at approximately the property line between your property and the adjoining property to the west?

page 80 } A. When I was first noticing it it was several feet beyond our walk, which would be about half way between the walk and our property line.

*Mary Myrtle Freed.*

Q. Half way between the walk and the western edge of your property, and does the walkway run—does it more or less bisect the lot?

A. I think it does.

Q. So, it would be about  $37\frac{1}{2}$  feet from the western corner of your lot?

A. I presume so.

Q. Mrs. Freed, haven't you previously testified in connection with this matter that you cannot say how far west of your walkway the taxicab was when you first saw it?

A. I think I said several feet from the walkway.

Q. Now, you say it was midway between the walkway and your property line?

A. No, you asked me that, and I said approximately.

Q. I understood you to say it was midway between your walk and the western end of your property?

A. That is where it would be.

Q. The point where you were standing, Mrs. Freed, you had no vision of traffic approaching this intersection on Laurel Street until it cleared the side of your house, did you?

A. That is right.

Q. And your house was approximately thirty feet? It sets back approximately thirty feet?

page 81 } A. I don't know.

Q. Wouldn't that be a reasonable estimate?

A. I believe so.

Q. And you only have a narrow corridor between that and the foliage of this tree?

A. Yes, sir.

Q. And the tree obliterated your view on up further toward the intersection?

A. You can see underneath the branches to a certain point.

Q. The branches extend down in full foliage to within a foot or so of the ground, don't they?

A. You could see the wheels, you couldn't see the whole truck.

Q. As a matter of fact, doesn't the bank obliterate a view of the wheels?

A. No, the bank slopes, and the land slopes.

Q. You think you could see the wheels below the limb of the tree?

A. Yes.

Q. Were you standing than the top?

A. Not higher than the top of the tree.

Q. Weren't you higher than the base of the tree?

*Mary Myrtle Freed.*

A. No.

Q. Doesn't your yard slope down?

A. Yes, some.

page 82 } Q. You feel that in spite of that, and in spite of the fact that the tree was in full foliage you were able to see part of the truck after it cleared this narrow corridor, after clearing the corner of your house and the tree?

A. Yes, sir.

Q. And are you as confident of that as any other testimony you have given?

A. Yes.

Q. You weren't in a position, Mrs. Freed, where you could see both of these vehicles at the same time as they were approaching this intersection?

A. Yes, because when you face the corner you have a vision on either side about equi-distant, so you could see both of them.

Q. I thought you were facing Mrs. Gerni?

A. You see when you face where Mrs. Gerni was parked you are almost facing the intersection.

Q. Wasn't she only a foot or so down from your walk?

A. No, she was down by the mail box, that is down near the corner.

Q. Mrs. Freed, directing your attention to this picture marked Plaintiff's Exhibit 3, doesn't it correctly show the position of Mrs. Gerni's station wagon?

A. Yes it does, that is just two feet back of this mail box.

page 83 } Q. Did you undertake to make any actual measurement of that distance?

A. No, I know where she was parked and my car was between her car and the walk.

Q. You are positive of that?

A. Yes.

Q. And you don't know what was transpiring between you and Mrs. Gerni?

A. No.

Q. Other than you were carrying on some conversation?

A. Yes, sir.

Q. And you think that while you were carrying on this conversation with her you were able to see traffic on Mulberry as well as traffic on Laurel?

A. Yes, sir.

Q. And you are as certain of that as anything you have said?

*Mildred Elsie Gerni.*

A. Yes.

Q. Both at the same time?

A. Yes, sir.

Mr. Timberlake: I think that is all.

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MRS. MILDRED ELSIE GERNI,  
another witness called on behalf of the defendant, being first  
duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Franklin:

Q. Would you state your full name?

A. Mildred Elsie Gerni.

Q. Where do you live, Mrs. Gerni?

A. 1036 Woodrow Avenue.

Q. In September, 1959, were you visiting Mrs. Mildred  
Freed?

A. Mary Mildred, yes, sir.

Q. Mary Mildred Freed?

A. Yes.

Q. How long had you been visiting her that day?

A. I don't remember how long I had been visiting, I had  
been in the house.

Q. Are you and Mrs. Freed good friends?

A. Yes, sir.

Q. When you got ready to leave about what time was it,  
do you recall?

page 85 } A. No, I know it was getting toward supper  
time.

Q. Getting toward supper time?

A. Yes.

Q. As you left did Mrs. Freed come out the house?

A. Yes, she did.

Q. Did you proceed toward your car?

A. Yes.

Q. Were you talking to Mrs. Freed while you were—

*Mildred Elsie Gerni.*

Mr. Timberlake: I think these questions are a little leading and I object.

The Court: They are not of any great importance. Don't lead her.

Q. When you left the—you were getting ready to leave the house?

A. Yes, I had walked down to the car—very close to the car.

Q. Tell the Court whether or not you observed this accident between the truck and the taxicab?

A. Well, Mrs. Freed was standing at the foot of her steps down on the sidewalk—the steps going up to the house—and I had come down the sidewalk down the steps and was walking along the grass or gravel beside the road to my car, and I realized that a car—the taxi—was coming from my right and I heard a noise and realized this truck was coming from my left; it all happened so quickly and I couldn't holler  
page 86 } to warn or stop anyone, and so I covered my face with my hands so I wouldn't be hit, I was afraid I would be hit.

Q. When you first observed the taxi and first observed the truck how far were they from the intersection?

A. To me they were about the same distance and they were coming along at the same speed. I just knew they were going to meet in that intersection. As to how far it was, I believe the property line of Mrs. Freed's property is what? About seventy-five feet, and the truck was about the same distance.

Q. When the taxicab was at Mrs. Freed's property line then the truck was equi-distant from the intersection?

A. Yes.

Q. Did either of the parties, Mrs. Gerni, blow their horn?

A. No, and as I stated before there was no sound of brakes, neither one was aware the other was coming.

Mr. Timberlake: I object to the last statement, that is a conclusion.

The Court: That is not proper, that is a conclusion.

Q. Mrs. Gerni, in observing the truck did you notice whether or not he was looking to the west or to—

A. No, this is so long ago but I don't picture the man looking, my feeling is—

*Mildred Elsie Gerni.*

page 87 } The Court: Don't express your feelings, just tell us what you saw and heard.

Q. Mrs. Gerni, I want to show you a picture. I hand you this exhibit number 3—

The Court: Is that Plaintiff's Exhibit 3?

Q. Plaintiff's Exhibit number 3. Are you in that picture?

A. Yes, this person sitting here.

Q. The person sitting on the ground, that is you?

A. Right.

Q. Is that your station wagon in front?

A. The one we owned then.

Q. Was it beside the station that you were when you observed this accident?

A. Yes, on the driver's side.

Q. Mrs. Gerni, would you come up here please?

A. Yes, sir.

Note: The witness left the witness stand and came up in front of the jury.

Q. Mrs. Gerni, would you point out to the jury where you were standing when you observed this accident?

A. At the driver's side of this station wagon here; just about ready to open the door, getting ready to open the door.

Mr. Franklin: All right, that is all.

page 88 } Note: The witness thereupon resumed the witness stand.

CROSS EXAMINATION.

By Mr. Timberlake:

Q. Mrs. Gerni, have you discussed your testimony with Mrs. Freed before appearing here and testifying today?

A. Well, we talked of the accident.

Q. And have you discussed it with the attorneys for the Defendant, Mr. Franklin and Mr. Branaman?

A. We have gone over what we said before.

Q. Mrs. Gerni, how long had you visited with Mrs. Freed on this afternoon when the accident occurred?



*Mildred Elsie Gerni.*

A. As I stated before I don't recall how long I was in her home.

Q. What time do you normally have your supper?

A. Oh, about five.

Q. And you think it was getting close to that time?

A. It was time for me to think about getting dinner or supper.

Q. How long prior to five would that be?

A. I should be home by four.

Q. Mrs. Gerni, had you and Mrs. Freed both left Mrs. Freed's—I mean the interior of the home about the same time?

A. Yes, we walked out the door of the house.

Q. After you walked out the door did you remain  
page 89 } at or in the vicinity of the door for any period of  
time before you went down to your car?

A. I don't remember whether we stood at the top of the steps or whether we talked as I went down the sidewalk.

Q. Had you just reached the foot of the steps?

A. No, the steps were in the middle of the yard and my car was parked on down toward the intersection.

Q. How far from the steps would you say your car was parked?

A. It was very near that mail box, as you see.

Q. It is where it is shown in this picture? I don't know whether your attention has been directed to that particular photograph or not. This is Plaintiff's Exhibit 3, and that shows where your station wagon was parked?

A. Yes, this car that is right behind me, I believe it was Mrs. Freed's, is at the foot of the steps and I was down below that.

Q. Do you know how many cars were parked on west of Mrs. Freed's property?

A. I don't remember any others but Mrs. Freed's and my own.

Q. You don't recall any other cars being parked out there?

A. No, I don't.

Q. Mrs. Gerni, there is evidence from Mrs. Freed's testimony that at the time this accident occurred or  
page 90 } immediately prior to that you and Mrs. Freed  
were carrying on a conversation one with the other.

Is that correct?

A. Yes, sir.

Q. Were you facing here in carrying on that conversation?

*Mildred Elsie Gerni.*

A. No.

Q. Were you facing away from her?

A. I was getting ready to get in the car, I would have to have my back to her approaching the car.

Q. Do I understand that you were carrying on a conversation with Mrs. Freed with your back to her?

A. I was trying to get away, trying to leave to get home.

Q. Do you recall what you were talking about?

A. No, I don't.

Q. But as I understand you tell the jury that with your back to Mrs. Freed you were carrying on a conversation with her about some subject, the subject of which you don't recall?

A. That is right.

Q. And the first thing you notice, as I understand, was the taxicab going east on Mulberry Street at or near Mrs. Freed's property line?

A. Yes, sir.

Q. And were you able to observe who the driver of that taxicab was?

page 91 } A. No, I don't, or I don't recall any more.

Q. Did you observe what that driver was doing, other *that* sitting at the wheel?

A. No.

Q. Now Mrs. Gerni, as I understand, the taxicab was the first of the two vehicles that came in your view?

A. Yes.

Q. Or the first one that you noticed?

A. That is right, it all happened so quick.

Q. And you had to be looking in a westerly direction in order to see the taxicab?

A. No, it was out of the corner of my eye, I was fixing to get in the car, so I was facing in a southwesterly direction getting ready to get in the car—approaching the door of the car.

Q. You could still see the cab back to your west?

A. Yes.

Q. Mrs. Gerni, that would put the cab, if you face sitting just as you are, that would put the cab in this relative position, if you were facing southeast and the cab was up at Mrs. Freed's property line headed east, would it not?

A. As I say, if this is the intersection, this corner—

Q. That would be southeast.

*Mildred Elsie Gerni.*

A. I was approaching the car and I saw this out of the corner of my eye, I saw this car was coming.

page 92 } Q. If you were facing southeast and the car was at Mrs. Freed's western property line, wouldn't it necessarily be in this direction?

A. Not back here, not from this corner and this street.

Q. I want to be fair. Wouldn't it be more or less in this relative position?

A. No, I believe you would have to stand over here.

Q. You feel that would be the relative position if you were facing southeast and the car was at Mrs. Freed's western property line?

A. Yes, right over here.

Q. And you could see it facing in this direction?

A. I can see Mr. Branaman facing like this out of the corner of my eye.

Q. And that is the way you saw the taxicab?

A. Yes.

Q. Did you observe the truck on Laurel Avenue in the same manner?

A. Now, I can see looking from here back.

Q. That was in spite of the fact that there was a tree in full foliage at the southeastern portion of Mrs. Freed's *law* and the Freed house, itself, was within thirty feet of the street?

A. That tree is back up into the yard into the middle of that side of the yard, it is back, there is nothing in the  
page 93 } view from that I stood looking back up in the lawn.

Q. How much bushes were there around the porch at the eastern portion of the Freed property?

A. Right up against the house.

Q. After making these observations you have described you thought there was going to be an accident and covered your head or covered your eyes?

A. That is right.

Q. And you observed the two vehicles in just the manner you illustrated to the jury from the witness stand?

A. That is right.

Mr. Timberlake: That is all.

*Mildred Elsie Gerni.*

RE-DIRECT EXAMINATION.

By Mr. Franklin:

Q. Mrs. Gerni, do you have any financial or other interest in Al's Cab?

A. No, sir, I have never even met the gentleman.

Q. You have never even met him?

A. No.

Q. When you observed these cars, one coming from Laurel and one coming down Mulberry, at what point did you realize there was going to be an accident and throw your hands over your face? Had both entered the intersection at that time?

A. No, at the rate of speed they must have been very close—

page 94 } Mr. Timberlake: I object to the witness stating what they must have been.

The Court: State what you saw.

Q. What did you see?

A. The one coming at me by the time I got my hands up it was coming along by Mrs. Freed's sidewalk, and, of course, the truck was moving all this time too.

Q. The truck was moving at the same time?

A. Yes.

Q. Did you hear any brakes?

A. No.

Q. Did you hear any horn?

A. Just nothing. As soon as the accident was over I looked and the truck was overturned and the car was coasting on down on Mulberry Street.

Q. The taxi was coasting?

A. Yes, sir.

Mr. Franklin: That is all.

\* \* \* \* \*

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\* \* \* \* \*

CHIEF C. H. BENSON,  
another witness called on behalf of the defendant, being first  
duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Branaman:

\* \* \* \* \*

Q. How long have you been Chief of Police, Chief?

A. Since July 1st of 1955.

Q. How long have you been a Police Officer in Waynesboro?

A. Since March of 1943.

Q. Were you on the force and in your present position as Chief in September of 1959?

A. Yes, sir.

Q. State whether or not you visited the scene  
page 102 } of the accident at Mulberry and Laurel?

A. I did.

Q. On the 27th day of September, 1959?

A. Yes, sir, I was at this accident. It was the 26th, I believe.

Q. The 26th, the record shows. What was the situation when you got there?

A. When I arrived there Sergeant Stover, investigating officer, was there; there was a truck, which Mr. Frye was operating, which was turned over in the street and a cab owned by Mr. Alford was down the street on Mulberry Street east of the intersection of Laurel and Mulberry approximately a hundred feet.

Q. Did you make any photographs?

A. Yes, sir.

Q. Are any of those photographs offered in evidence your productions?

A. These were copies of the pictures that I took.

Q. Is that the location of the taxicab?

A. Yes, *ir*.

Q. When you took the photograph?

A. Yes, sir.

Q. Where was the truck?

A. The truck was at the intersection of Laurel and Mulberry; the truck was turned over, this was kind of  
page 103 } in the southeast corner of the intersection of  
Laurel.

Q. Did you talk to Mr. Frye?

*Chief C. H. Benson.*

A. No, sir.

Q. Either then or thereafter?

A. No, sir.

Q. What was the condition of the street?

A. The street was dry, it was a clear day, this happened at approximately 3:30, I arrived very shortly after that—after the accident occurred.

Q. Were there any indication of the application of brakes in Laurel or in Mulberry?

A. No, sir, there was no indication of brake marks that I could see. There were several feet of skid marks across the center plate of the intersection; those were the only skid marks that I saw. There were no brakes marks back of the intersection that I could take at all.

Q. Either on Mulberry or on Laurel?

A. That is correct.

Q. Do the marks you refer to show on either one of the exhibits?

A. Yes, sir, in Exhibit 1 it shows the skid marks across the center plate of the intersection.

Q. That is slightly west over the edge of the center marker?

A. Yes, sir.

page 104 } Q. And that is the center of the street?

A. Yes, sir.

Q. In what direction does that mark indicate that the vehicle continued after it was made, if it was made by a vehicle?

A. It continued—The marks run from sort of north to south across the intersection toward where the car was turned over in the street.

Q. You mean the truck?

A. The truck was turned over in the intersection.

Q. Was it a four-wheel brake truck?

A. Yes, sir.

Q. Do you have the scale of stopping distances in applying brakes with you?

A. Yes, sir, I have the State scale, it is in the State Code.

The Court: Is this the section of the Code?

Mr. Branaman: Yes, sir.

A. Section 46.1-196.

Q. At twenty miles an hour a truck with four wheel brakes, unloaded, what is the distance it may be stopped?

A. Well the overall distance, that is including reaction

*Chief C. H. Benson.*

time, braking distances and stopping distance, at 20 miles an hour would be 52 feet, that is based on a three-page 105 } quarter of a second reaction time.

Q. If a truck was within twenty feet on Laurel Avenue of the norther Mulberry line extending across, and the brakes were applied, where would the truck stop?

Mr. Timberlake: I object to that.

The Court: That is a matter of opinion. The jury will have to draw its own conclusion.

Q. The ground was free from grit and gravel—any refuse, was it?

A. There may have been a little loose gravel along scattered in some portion of the intersection, but nothing of any great nature that I could see; it was blacktop.

Q. The street was dry?

A. Yes, sir.

Mr. Branaman: That is all.

### CROSS EXAMINATION.

By Mr. Timberlake:

Q. Chief, there are several questions I want to ask you. As I understand this stopping time or distance you have given is based upon the average?

A. Yes, sir.

Q. And not any particular vehicle or individual?

A. The average person.

Q. On level ground and under ideal conditions?

A. Yes, sir.

page 106 } Q. What is the stopping time, the average stopping time, exclusive of reaction time—the average stopping distance exclusive of reaction time for a vehicle such as we are here considering going at twenty miles per hour?

The Court: Do you mean the truck or taxicab?

Mr. Timberlake: I am speaking of the truck.

A. Well, it breaks it down here into miles, at twenty miles an hour miles traveled, feet per second traveled would be 29.34, that is the distance you would travel in feet per second; and then it also gives automobile brakes in feet, which would

*Chief C. H. Benson.*

be twenty-one feet; and then it gives truck brakes on all four wheels, which would be thirty feet.

Q. That is the actual stopping distance?

A. Yes, sir, that is the actual stopping distance, thirty feet.

Q. Chief, is true that when an individual has his foot on the brake pedal—

The Court: You are asking for an opinion, too.

Mr. Timberlake: I will withdraw it.

Q. What is the actual stopping distance going at fifteen miles per hour?

A. The overall?

Q. No, sir, the actual stopping distance.  
page 107 } A. Seventeen feet.  
Q. That is for a truck?

A. Yes, sir.

Q. What is it for an automobile?

A. For an automobile would be sixteen feet.

Q. And at twenty miles per hour, did you say thirty feet for a truck?

A. Thirty feet for a truck.

Q. What is it for an automobile?

A. Twenty-two feet for an automobile.

Q. Will you state whether or not this table that you have used in your testimony makes any distinction between the kind and type of truck?

A. No, sir, other than four wheel brakes on the truck, that is all.

Q. It makes no distinction as to size, whether it is a pick-up truck or two-ton truck?

A. It just says trucks.

Q. Of course, that is where the average aspect of it comes in, is it not?

A. Yes, sir.

Mr. Timberlake: I think that is all.

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\* \* \* \* \*



The Court: I am going to give number 1, I am going to refuse number 2; I am going to amend number 3 to include "unless it appears from plaintiff's own evidence"; I will give 4 and 5.

For the defendant, I will give A, B as amended, C, D, E, and I will refuse F, as repetitious, and give G.

\* \* \* \* \*

Mr. Franklin:

\* \* \* \* \*

The instruction has this clause, "Defendant's page 117 } driver was not in sight" referring to in sight of the plaintiff. The plaintiff is charged with seeing him if he was within the street whether or not it was in sight of the plaintiff driver. This is a finding instruction and as such it does not take into consideration all the facts. It does not take in consideration that the plaintiff must be free of fault or negligence in controlling his vehicle and in operating it; and we except to the giving of this instruction for the above reasons.

We object to the Court's refusal to give Instruction F, as it is a correct statement of the law, and it is not accumulative in that it defines another aspect of contributory and concurring negligence, a point that was not covered by any other instruction; and we except to the Court's ruling for the grounds stated.

\* \* \* \* \*

A Copy—Teste:

H. G. TURNER, Clerk.

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