

4134
199 Va. 85

Record No. 4652

In the
Supreme Court of Appeals of Virginia
at Richmond

**VIDA TATUM SMITH, ADMINISTRATRIX,
ETC.**

v.

DORA TATUM

FROM THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

RULE 5:12—BRIEFS.

§5. NUMBER OF COPIES. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel 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.

H. G. TURNER, Clerk.

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

199VA85

NOTICE TO COUNSEL

This case probably will be called at the session of court to be held.

FEB 1957

You will be advised later more definitely as to the date.

Print names of counsel on front cover of briefs.

MAR

1957

H. G. Turner, Clerk.

RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned, and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of the record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of said fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel 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.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 4652

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 5th day of October, 1956.

VIDA TATUM SMITH, ADMINISTRATRIX, ETC.,
Plaintiff in error,

against

DORA TATUM, Defendant in error.

From the Law and Equity Court of the City of Richmond

Upon the petition of Vida Tatum Smith, Administratrix of the estate of Norman C. Tatum, deceased, a writ of error is awarded her to a judgment rendered by the Law and Equity Court of the City of Richmond on the 5th day of June, 1956, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Dora Tatum was defendant; no bond being required.

RECORD

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* * * * *

AMENDED GROUNDS OF DEFENSE.

The defendant, Dora Tatum, for her amended grounds of defense, answers and says:

(1) That she denies, except as is hereinafter specifically admitted, the allegations in paragraph 1 of the motion for judgment.

(2) That she alleges that the deceased knew she held only a learner's permit to drive and that she was being instructed by the deceased to drive an automobile; that at the time and place alleged she held a learner's permit and the deceased was a duly qualified and licensed operator of automobiles; that she and the deceased were the only persons in the said automobile at the time of the collision; that she was operating the said vehicle under the supervision, direction, and control of the deceased; that the plaintiff's decedent was guilty of negligence which constituted the sole proximate cause of the injuries and death complained of; and to each of the allegations of this paragraph the defendant requests a reply.

(3) That she alleges that the deceased knew she held only a learner's permit to drive and that she was being instructed by the deceased to drive an automobile; that at the time and place alleged she held a learner's permit and the deceased was a duly qualified and licensed operator of automobiles; that she and the deceased were the only persons in the said automobile at the time of the collision; that she was operating

the said vehicle under the supervision, direction,
page 15 } and control of the deceased; that the defendant
without admitting, but expressly denying that she
was guilty of any negligence whatever, nevertheless, says
that the plaintiff's decedent was guilty of contributory negligence, which constituted a proximate cause of the injuries and death complained of; and to each of the allegations of this paragraph the defendant requests a reply.

(4) That she denies she was guilty of any negligence which proximately caused the injuries to and the death of the plaintiff's decedent.

(5) That plaintiff's decedent was guilty of negligence which constituted the sole proximate cause of the injuries and death complained of.

(6) That the plaintiff's decedent assumed the risk of the injuries and death he sustained.

(7) That the injuries to and the death of the plaintiff's decedent were the result of an unavoidable accident.

(8) That without admitting, but expressly denying that she was guilty of any negligence whatever, nevertheless, says that the plaintiff's decedent was guilty of contributory negligence, which constituted a proximate cause of the injuries and death sustained by him.

(9) That she denies the plaintiff is entitled to recover damages from her in any amount.

This is to certify that the original of the foregoing amended grounds of defense was handed to the Clerk of this Court for filing, and a copy was mailed to George E. Allen, Esquire, 613 Mutual Building, Richmond, Virginia, counsel for the plaintiff, on the 1st day of March, 1954.

DORA TATUM
By G. KENNETH MILLER
(May, May and Garrett),
Counsel,
1233 Mutual Building
Richmond 19, Virginia

Received and filed Mar. 1, 1954

Teste:

LUTHER LIBBY, JR., Clerk
By IRA M. BARR, D. C.

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* * * * *

REPLY TO THE ALLEGATIONS OF THE AMENDED
GROUNDS OF DEFENSE EXPRESSLY REQUEST-
ING A REPLY.

Paragraph Numbered 2 of the Amended Grounds of De-
fense.

The deceased was under the impression that the defendant held a learner's permit as provided by statute and he entered the automobile for the purpose of accompanying the defendant while she was driving, to comply with Code Section 46-361.

The deceased was a duly qualified and licensed operator of automobiles.

The defendant and the deceased were the only persons in the automobile at the time of the collision.

The defendant was operating the automobile while the deceased, a licensed operator, was occupying a seat beside her for the purpose of aiding her in any proper way.

A sister of the defendant, a licensed operator of automobiles, was supposed to accompany the defendant on the occasion, but was unable to do so, and plaintiff's decedent accompanied her instead at the instance of the defendant.

The plaintiff denies that her decedent was guilty of negligence which constituted the sole proximate cause of the injuries resulting in decedent's death.

page 17 { Paragraph Numbered 3 of the Amended Grounds
of Defense.

The deceased was under the impression that the defendant held a learner's permit to drive as provided by law and that he, a licensed operator, was to accompany her and occupy the seat beside her and aid her in any proper way.

The deceased was under the impression that the defendant held a learner's permit but he did not know the provisions thereof.

The deceased was a duly qualified, licensed operator of automobiles.

The defendant and the deceased were the only persons in the said automobile at the time of the collision.

The defendant was operating the said automobile while the deceased occupied a seat beside her for the purpose of aiding her in any proper manner.

Plaintiff denies that her decedent was guilty of any contributory negligence which constituted a proximate cause of the collision and resulting injuries which caused his death.

GEO. E. ALLEN

Attorney for the plaintiff.

Dated: November 18, 1954.

NOTICE.

To: G. Kenneth Miller, Esquire
Attorney for defendant
1233 Mutual Building
Richmond, Virginia

Please take notice that the original of the above Answer will be presented to the Law and Equity Court of the City of Richmond, City Hall, Richmond, Virginia, for filing, at 9:15 A. M. on the 24th day of November, 1954, or as soon thereafter as the plaintiff may be heard.

GEO. E. ALLEN.

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* * * *

ORDER.

This day came the plaintiff, by her attorney, pursuant to notice duly served, and moved the Court for an extension of time in which to file a reply to the allegations of the amended Grounds of Defense which contain words expressly requesting a reply, which Motion was granted and thereupon the plaintiff, by her attorney, tendered her reply which was accordingly filed, and leave is granted the defendant to file responsive pleadings thereto within 15 days, if he be so advised.

Enter Nov. 24, 1954.

T. C. F.

Dated: November 18, 1954.

NOTICE.

To: G. Kenneth Miller, Esquire
 Attorney for defendant
 1233 Mutual Building
 Richmond, Virginia.

Please take notice that the original of the above draft for an order will be presented to the Law and Equity Court of the City of Richmond, City Hall, Richmond, Virginia, for entry, on the 24th day of November, 1954, at 9:15 A. M. of that day or as soon thereafter as the plaintiff may be heard.

GEO. E. ALLEN
 Attorney for the plaintiff.

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* * * * *

In the Law and Equity Court of the City of Richmond, the 5th day of June 1956.

* * * * *

This day came again the parties, by counsel, and came also the jury sworn in this case, pursuant to their adjournment on yesterday, and having heard the arguments of counsel, were sent out of Court to consult of a verdict, and after some time returned into Court with a verdict in the words following, to-wit: "We, the jury, on the issues joined, find for the defendant."

Thereupon the plaintiff, by counsel, moved the Court to set aside the verdict of the jury on the ground that it was contrary to the law and the evidence, which motion the Court overruled.

Therefore, it is considered by the Court that the plaintiff recover nothing of the defendant, but that the defendant recover of the plaintiff her costs by her about her defense in this behalf expended.

To all of which action of the Court, the plaintiff, by counsel, objected and excepted.

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INSTRUCTION 1-C.

The Court instructs the jury that to the extent that the decedent knew or reasonably should have known the defendant to be an inexperienced and unskilful driver, he assumed the risks incident to such inexperience and lack of skill. If the jury believe from a preponderance of the evidence that the defendant was guilty of gross negligence, other than such inexperience and lack of skill, which proximately caused the decedent's injury and resulting death, they should find for the plaintiff, unless they also find from a preponderance of the evidence that the decedent was himself guilty of negligence which proximately caused or contributed to cause such injury.

Given June 5, 1956.

T. C. F.

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INSTRUCTION NO. B.

The Court instructs the jury that gross negligence is something more than lack of ordinary care; it is an utter disregard of prudence amounting to complete neglect of the safety of the guest; it is heedless, reckless disregard of the rights of the guest; to be gross negligence it is conduct that shocks fair minded men.

Therefore, unless you believe from a preponderance of the evidence that the defendant was guilty of gross negligence, then your verdict must be for the defendant.

Given June 5, 1956.

T. C. F.

page 45 }

INSTRUCTION NO. C.

The Court instructs the jury that the mere failure to successfully operate an automobile under all conditions or to be alert and observant, and to act intelligently and operate an automobile at a low rate of speed or keep the same under control may or may not be a failure to do what an ordinarily prudent person would have done under the circumstances, and thus amount to a lack of ordinary care, but such lack of attention and diligence or mere inadvertence does not amount

to wanton or reckless conduct or constitute culpable or gross negligence for which the defendant would be legally responsible to the plaintiff.

Given June 5, 1956.

T. C. F.

page 46 }

INSTRUCTION NO. G.

The Court instructs the jury that if you believe from the evidence that the plaintiff's decedent was guilty of negligence which was a proximate cause of, or efficiently contributed to cause, the collision, then you should find your verdict for the defendant. In this connection you are told that the law does not attempt to apportion negligence, that is to say, to determine the degree of negligence which both parties may have been guilty of and award a finding in favor of the one guilty of the lesser degree of negligence. In such an instance, the law does not permit a recovery of the one guilty of the lesser degree of negligence if it efficiently contributed to cause the accident.

Given June 5, 1956.

T. C. F.

page 47 }

INSTRUCTION NO. 4-a.

The Court instructs the jury that contributory negligence on the part of Norman C. Tatum, the deceased, cannot be presumed. On the contrary, he is presumed to have exercised due and proper care at the time of the accident, in the absence of evidence to the contrary, and the burden is upon the defendant, Dora Tatum, to prove contributory negligence on the part of the said Norman C. Tatum by a preponderance of the evidence to the satisfaction of the jury, unless the evidence offered by the plaintiff shows that he was guilty of contributory negligence, or unless it may be fairly inferred from all the evidence and the circumstances in the case.

Given June 5, 1956.

T. C. F.

page 48 }

INSTRUCTION NO. F.

The Court instructs the jury that the law recognizes that although a party to a collision has exercised the legal degree of care required of him, nevertheless, accidents occur. In such an event, the accident is known as an unavoidable one. If, from the evidence, you believe the collision in question was an unavoidable accident, you should find your verdict in favor of the defendant.

Given June 5, 1956.

T. C. F.

page 49 }

INSTRUCTION NO. I.

The Court instructs the jury that the law recognizes that sudden and extreme pain frequently drives from the memory what immediately preceded it.

Given June 5, 1956.

T. C. F.

page 50 }

INSTRUCTION NO. 5.

The Court instructs the jury that, should they find for the plaintiff, they may award such damages as to the jury may seem fair and just. On fixing the damages the jury may take into consideration the loss of the decedent's care and attention and society to his family, together with such sum as they may deem fair and just by way of solace and comfort to them for the sorrow, suffering and mental anguish occasioned to them by his death, not to exceed the sum of \$25,000, and should direct in what proportions the damages shall be distributed to the surviving widow and children and grand children of the deceased.

Given June 5, 1956.

T. C. F.

page 51 }

INSTRUCTION NO. 1.

The Court instructs the jury that it is provided by law in Virginia that whenever the death of a person shall be caused by the negligence of another, the person whose negligence causes the death shall be liable to an action for damages by the Administrator of the deceased person, and such Administrator is entitled to recover against the person whose negligence was the proximate cause of the death.

Refused June 5, 1956.

T. C. F.

page 52 }

INSTRUCTION NO. 1-A.

The Court instructs the jury that if they shall believe from the evidence that the defendant had only a learner's or instruction permit, and that the deceased was riding with her at her instance in order that she might comply with the law by having a licensed driver with her, then the defendant owed the deceased the duty to exercise ordinary care for the protection of the deceased. Ordinary care as used in this instruction means such care as might be expected of an ordinarily prudent person of the competency, intelligence and maturity of the defendant, and her experience in driving an automobile. If the jury shall believe from the evidence that the defendant failed to exercise such care, and that such failure was a proximate cause of the death of the decedent, the jury must find for the plaintiff.

Refused June 5, 1956.

T. C. F.

page 53 }

INSTRUCTION NO. 3.

The Court instructs the jury that if they shall believe from a preponderance of the evidence that the automobile in question was within the exclusive control of the defendant; that it de-

parted from the designated and usually traveled roadway and entered a forbidden area and thereby caused injury to the decedent from which he died, this was an occurrence which in the ordinary course of things does not happen if the one having exclusive control of the automobile uses proper care, and was an occurrence which imposed upon the defendant the duty of producing evidence that the car left the roadway without negligence on her part,

And the Court further tells the jury that the plaintiff was not bound to discover or prove the precise act or omission which directly caused the automobile to leave the highway.

Refused June 5, 1956.

T. C. F.

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INSTRUCTION NO. 4.

The Court instructs the jury that a verdict cannot be returned in favor of the defendant on the defendant's uncorroborated testimony.

Refused June 5, 1956.

T. C. F.

page 55 }

INSTRUCTION NO. 6.

The Court instructs the jury that the loss of decedent's care, attention and society, and the sorrow, suffering and mental anguish occasioned the beneficiaries by reason of his death may be considered and taken into account by the jury and are elements for which damages may be given to the beneficiaries even though they may have had no reasonable expectancy of support from the decedent had he not been killed.

Refused June 5, 1956.

T. C. F.

page 56 { INSTRUCTION NO. A.

The Court instructs the jury that as a matter of law, that is, as a matter over which reasonable fair-minded men should not differ, that there is no evidence in this case that the defendant was guilty of gross negligence proximately causing the accident in question.

Refused June 5, 1956.

T. C. F.

page 57 { INSTRUCTION NO. D.

The Court instructs the jury that the law places upon every person the duty to take such precautions for his own safety as a reasonably prudent person would take under like circumstances and conditions, and the failure to do so constitutes negligence in law.

Therefore, if you find from a preponderance of all the evidence that the plaintiff's decedent continued to ride in the defendant, Tatum's, automobile after having notice of negligent operation, without protest or making any effort to get out of the same, and that he had an opportunity to do so after such discovery, and that a reasonably prudent person under these circumstances would have taken such precautions for his own safety, then the plaintiff's decedent would be guilty of negligence; and if you further find that such negligence contributed to cause the collision in question, then your verdict should be in favor of the defendant, Tatum.

Refused June 5, 1956.

T. C. F.

page 58 { INSTRUCTION NO. E.

The Court instructs the jury that one who knowing that a driver is incompetent or inexperienced, undertakes to ride in a vehicle operated by such driver assumes the risk of injury or death from an accident resulting from such incompetency or inexperience and cannot recover therefor.

The Court tells you that as a matter of law that is as a matter over which reason men to not differ, that the plaintiff's decedent knew that the defendant was or might be an inexperienced and incompetent driver at the time he entered the

defendant's vehicle and thus if you find from the evidence that the accident in question resulted from such inexperience or incompetency of the defendant, your verdict shall be for the defendant.

Refused June 5, 1956.

T. C. F.

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INSTRUCTION NO. H.

The Court instructs the jury that at the time of the accident in question the following state statute was in full force.

"§ 46-361. Issue of instruction permits.—The Division upon receiving from any person over the age of fifteen years an application for a temporary instruction permit may in its discretion issue such a permit entitling the applicant, while having such permit in his immediate possession, to drive a motor vehicle upon the highways for a period of sixty days when accompanied by a licensed operator or chauffeur who is actually occupying a seat beside the driver."

The Court instructs the jury that it is the duty of a licensed operator or chauffeur accompanying a person with a temporary instruction permit to use reasonable care to direct, supervise and control the operation of the vehicle so as to see that it is operated with safety to other persons upon the highways and to the occupants of such vehicle and that the failure to use such care is negligence.

You are thus told that if the plaintiff's deceased failed to use reasonable care in the selection or approval of the place or places where the vehicle was operated, or failed to use reasonable care to see that the vehicle was operated at a proper speed or in a proper manner so that it could be kept under control, then he was guilty of negligence and if you find that such negligence was a proximate cause of the collision in question, then you shall find your verdict for the defendant.

Refused June 5, 1956.

T. C. F.

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INSTRUCTION NO. 2.

The Court instructs the jury that if they shall believe from a preponderance of the evidence that immediately before and at the time of the accident in question, the automobile was in the exclusive control of the defendant, Dora Tatum, and that the accident was of such a nature and character as does not ordinarily occur, if due care is used, then an inference of negligence against the defendant arises and the duty devolves upon the defendant to produce evidence that it was without negligence.

Withdrawn June 5, 1956.

T. C. F.

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Received and filed July 31, 1956.

Teste:

LUTHER LIBBY, JR., Clerk
By EDWARD G. KIDD, D. C.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

The plaintiff, Vida A. Tatum, Administratrix of the Estate of Norman C. Tatum, deceased, hereby gives notice of her appeal to the Supreme Court of Appeals of Virginia from the final judgment entered by the court in the above-captioned action on the 5th day of June, 1956; and duly files her appeal to the Supreme Court of Appeals of Virginia from the said judgment; together with the following assignments of error:

1. The court erred in giving to the jury instruction 1-C on the grounds (1) that gross negligence is made the basis of recovery and that the gross negligence doctrine has no application to this case because the decedent was in the automobile solely to perform a service for the defendant, and (2) that there is not sufficient evidence in the case upon which to

base any instruction on contributory negligence of the deceased.

2. The court erred in granting instruction B upon the ground that it makes gross negligence a basis of recovery and requires proof of gross negligence by the plaintiff, whereas the gross negligence rule has no application to the case for the reason stated in assignment No. 1.

page 64 } 3. The court erred in granting instruction C upon the same grounds asserted in assignments Nos. 1 and 2.

4. The court erred in granting instruction G on the contributory negligence of the plaintiff because there was no basis in the evidence for such an instruction.

5. The court erred in granting instruction F on unavoidable accident upon the ground that there was no evidence to support any such instruction.

6. The court erred in refusing instruction No. 1 offered by the plaintiff upon the ground that the instruction is authorized by the statute and is a proper instruction to be given in a wrongful death case.

7. The court erred in refusing instruction No. 1A asked for by the plaintiff upon the ground that the instruction is in accordance with the law of the case and is applicable to the facts proven, since it was not denied that the decedent was in the automobile at the instance of the defendant and for her benefit and not to serve any interest or purpose of his own.

8. The court erred in refusing instruction No. 3 offered by the plaintiff upon the ground that it is applicable to the facts and is in accordance with the law.

9. The court erred in refusing to give instruction No. 4 at the instance of the plaintiff upon the ground that the statute expressly provides for such an instruction.

10. The court erred in refusing to grant instruction No. 4A requiring the defendant to prove contributory negligence by testimony other than her own, inasmuch as the court had given, over the objection of the plaintiff and at the instance of the defendant, instructions on the subject of contributory negligence.

page 65 } 11. The court erred in overruling the motion of the plaintiff to set aside the verdict as contrary to the law and the evidence.

Given under my hand this 30th day of July, 1956.

GEO. E. ALLEN
Attorney for plaintiff.

* * * * *

* * * * *

Received and filed Aug. 10, 1956.

Teste :

LUTHER LIBBY, JR., Clerk
By EDW. G. KIDD, D. C.

ASSIGNMENTS OF CROSS ERROR.

The defendant files her assignments of cross error :

1. The Court erred in permitting the introduction of evidence and photographs to show the condition of the vehicle after the accident.

2. The Court erred in permitting the introduction of evidence to show that the defendant made statements as to how her foot was injured.

3. The Court erred in permitting the introduction of evidence as to how much the defendant had ridden in automobiles prior to learning to drive.

4. The Court erred in permitting the introduction of evidence of physical suffering by deceased.

5. The Court erred in permitting the plaintiff to contradict her own witness as to position of deceased in vehicle.

6. The Court erred in permitting the plaintiff to introduce the statements of the deceased in connection with a licensed driver accompanying the defendant.

7. The Court erred in not sustaining the defendant's motion to strike the evidence at the conclusion of the plaintiff's evidence and renewed at the conclusion of the evidence and in the giving of any instructions on the grounds that the evidence was insufficient to sustain a verdict against the defendant and for the reason that the deceased assumed the risk of the injuries and death sustained as a matter of law and that the deceased was guilty of contributory negligence as a matter of law.

page 67 } 8. The Court erred in granting Instruction 4-A which told jury that plaintiff's decedent is presumed to be exercising due and proper care as not being applicable and upon the further ground that the instruction is not applicable as plaintiff was bound by defendant's uncontradicted testimony when testifying as adverse witness.

Hugh G. Findley, Jr.

9. The Court erred in granting instruction No. 5 for the same reason stated in 7 above.

10. The Court erred in refusing instructions A, D, E, and H submitted by defendant for the reason that each stated the law correctly upon the evidence presented.

DORA TATUM
By G. KENNETH MILLER
Counsel.

* * * * *

page 4 } HUGH G. FINDLEY, JR.,
a witness called by and on behalf of the Plaintiff,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Manning:

Q. Please state your full name, age and address.

A. Hugh G. Findley, Jr., age thirty-three. I live at 8524 Rolando Drive, Richmond, Virginia.

Q. Where do you work?

A. I work with the Employers Group Insurance Company.

Q. In July, 1952 what was your occupation?

A. At that time, I was employed by the City of Richmond as a police officer in the Traffic Bureau, on investigations.

Q. Mr. Findley, on July 25, 1952 at about nine o'clock in the morning were you called to investigate an accident?

A. Yes, but it wasn't nine o'clock.

page 5 } Q. Tell us about what time it was when you were called.

A. The accident on July 25 happened at 9:15 so I could not possibly have been called before then.

Q. Where was that accident?

A. The accident call I got was at Pump House Drive and Rugby Road, which is to the west of the Carillon.

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

A. I don't have the exact time but if I remember correctly I wasn't too far away from the scene when I received the call so I imagine it took me four or five minutes to get there.

Q. Did you investigate the accident?

A. Yes, sir.

Q. Tell us what your investigation of that accident dis-

Hugh G. Findley, Jr.

closed, the condition of the vehicle, the parties injured, if any, and so forth.

Mr. Miller: I object to such a general question.

The Court: Sustained. Ask him to state what he saw and heard.

page 6 } By Mr. Manning:

Q. Tell us what you saw when you arrived at the scene of the accident.

A. When I got the call, as I came down Rugby Road in my police vehicle I could see this automobile against a tree on Pump House Drive at the intersection of Rugby Road. It was a 1941 Cadillac, Virginia license number 884-972. The full front of the vehicle was against that tree on the east side of Pump House Drive right across Rugby Road.

When I got there a Mr. Norman C. Tatum was lying on the ground and when I first got there he was the first one I saw and he was at that time still alive and raving, out of his head, apparently, because he had a terrific gash across his forehead. It was not bleeding so I theorized he was bleeding internally so there wasn't too much I could do for him but I tried to hold him down because he kept trying to get up.

Q. Was he in the car or out of the car?

A. Out of the car, lying ten or fifteen feet from the tree they hit, on the right side of the automobile, and he kept yelling, "I am going to die, I am going to die." That is all I heard him say because I had to leave him for a second to

page 7 } put in a call to headquarters to tell them to speed up the ambulance because we had a right bad one and after I was there two or three minutes I looked to my left and there was Mrs. Dora Tatum, lying flat on her back with her head facing in an easterly direction and I was kind of surprised because I thought Mr. Tatum was the only one there. After quieting him down, and I believe someone else came and helped me, I did go over to see this lady lying on her back, sprawled out on her back on the ground to the right of the automobile also.

She had two terrific gashes across her knees, they looked rather deep and very wide but they were not bleeding either.

That is as far as I looked because the ambulance arrived and took them both to the hospital.

I had to call a wrecker to tow the automobile away and by the time I got to the hospital they informed me Mr. Tatum

Hugh G. Findley, Jr.

had died and Mrs. Tatum was admitted to the Medical College of Virginia Hospital on that same day, July 25, 1952.

Q. Can you describe the condition of the vehicle at the scene of the accident?

page 8 } Mr. Miller: I object. I do not think that evidence would be material.

The Court: Overruled.

Mr. Miller: We note an exception.

A. The front of this 1941 Cadillac had hit the tree in a dead center, it was so close to being dead center that the bumper on the front of the automobile had wrapped around the tree and both ends of the bumper were facing in an easterly direction almost even with each side. Of course, the hood on the Cadillac was pushed up too from the impact and the right windshield was broken where I assumed Mr. Tatum had hit that side with his head.

Mr. Miller: I move that that be stricken from the evidence.

The Court: You gentlemen of the jury will disregard such portion of the witness's answer as expressed a conclusion. That was the part you objected to, Mr. Miller, the conclusion as to how it happened?

Mr. Miller: Yes, sir.

By Mr. Manning:

Q. Officer Findley, I hand you a photograph and ask you whether or not you can identify the object in the page 9 } photograph?

Mr. Miller: We have some matters we would like to take up with the Court in regard to the photographs.

(The following occurred in the absence of the jury.)

The Court: Let me see the photographs that are being offered.

Mr. Miller: Your Honor, this case involves the question of whether or not the defendant was negligent.

The Court: Are you objecting to the admission of these?

Mr. Miller: Yes, Your Honor. We see no relevancy to the condition of a motor vehicle which has hit a tree to show how the accident occurred or what caused it to occur. We see

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nothing at all except a picture which will be put in
page 10 } evidence to prejudice the jury without any material
value at all to show the essential facts of this case.

These pictures are taken some place other than at the scene of the accident, after the vehicle had been moved. I don't know what they are trying to prove but certainly this could not be proof of how the accident occurred.

The Court: It would have a tendency to show the violence of the impact which might have a relation to the speed. I will admit them.

Mr. Miller: I am certain the Supreme Court of Appeals has said you cannot show damage to a vehicle to show speed, because you cannot show the relation of the speed to the damage.

The Court: I have overruled you, Mr. Miller.

Mr. Miller: We except for the reasons stated.

page 11 } (The following occurred in the presence of the jury.)

By Mr. Manning:

Q. Officer Findley, I hand you a photograph of an automobile and ask you can you identify it?

A. Yes, sir, I would say that was the 1941 Cadillac that hit the tree we were just discussing.

Mr. Allen: There are two pictures already designated as Plaintiff's Exhibits Numbers One and Two in the deposition.

(The picture identified by Officer Findley was filed in evidence and marked Plaintiff's Exhibit Number Three.)

The Court: There is a memorandum on the back that ought to come off.

Mr. Allen: We agree to remove it from all of them.

Mr. Miller: The same objection is made to all
page 12 } of the pictures and the same exception noted.

The Court: I will identify the rest of these as Plaintiff's Exhibits Numbers Four, Five and Six. It is understood that the objection and exception relates to all four of the photographs.

By Mr. Manning:

Q. Officer Findley, I hand you a photograph which has been marked Plaintiff's Exhibit Number Four for identification

Hugh G. Findley, Jr.

purposes and ask you can you identify the automobile in this picture?

A. That is the same as the other picture you showed me.

Q. Is that or is that not the automobile involved in the Tatum collision?

A. Yes, sir.

Q. I hand you a photograph marked Plaintiff's Exhibit Five and ask you can you identify the automobile portrayed in that photograph?

A. Yes, sir, that automobile was the one involved in that accident with Mr. Tatum.

Q. I hand you a photograph marked Plaintiff's page 13 } Exhibit Six and ask you can you identify that photograph?

A. Yes, sir, that is the same automobile.

Mr. Allen: We offer those in evidence and would like for the sheriff to pass them to the jury.

(The photographs were handed to the jury for inspection.)

CROSS EXAMINATION.

By Mr. Miller:

Q. Mr. Findley, you say you arrived at the scene of the accident approximately five minutes after it occurred?

A. Approximately.

Q. And you spoke of seeing Mr. and Mrs. Tatum outside the automobile?

A. Yes, sir.

Q. Other persons had assisted them from the automobile, had they not?

page 14 } A. I don't know.

Q. You don't know?

A. No, I don't.

Q. You don't know whether the persons landed there after the accident or whether somebody helped them there?

A. No, sir, I don't.

Q. There were other people there, I believe?

A. I know there were some other people there.

Q. You are not testifying you found these people where they were as a result of the accident, are you?

A. Yes, sir, that's right.

Q. As a matter of fact, there was a colored man there, wasn't there?

Dora Tatum.

A. Yes, there was.

Q. And a Mrs. Ingraham, who lives near there. All those people had been there and were trying to aid these people, weren't they?

A. I believe they were.

Q. Did you talk to the defendant, Mrs. Dora Tatum, that day?

A. No, sir, I couldn't.

page 15 } Q. Why couldn't you?

A. She was injured too badly.

Q. Was she unconscious when you saw her?

A. Yes, sir.

Q. Now you have identified these pictures as being the vehicle involved?

A. Yes, sir.

Q. This, of course, is not where you saw the vehicle at all, is it?

A. Of course, I saw the vehicle.

Q. But you didn't see it where it is shown here?

A. No, sir, I moved it.

Q. And the wrecker came and got it?

A. I called the wrecker.

Q. And of course, they had to move certain things in order to move the car?

A. Yes. We have to fill out reports when the man comes with the wrecker.

Q. You identified pictures of the inside of the vehicle. Are you certain this is the same vehicle?

A. Yes, sir, I looked inside.

page 16 } Q. Oh, you looked inside?

A. Yes, sir.

Witness stood aside.

MRS. DORA TATUM,
an adverse party called by the plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Allen:

Q. Please state your name.

A. Dora Tatum.

Q. Do you mind telling us your age?

Dora Tatum.

A. Fifty years old.

Q. What relation was Mr. Tatum, the deceased, to you?

A. Father-in-law.

Q. I understand you don't remember a great deal about the accident but I would like for you to tell us exactly what you do remember.

page 17 } Mr. Miller: I don't think a general question should be put to the witness.

By Mr. Allen:

Q. All right. Did you have a learner's license or a regular driver's license?

A. I had a learner's permit.

Q. How long had you had it at the time of the accident?

A. I got it in July.

Q. Had you had any learner's permit before that time?

A. I had had a learner's permit several years prior to that but I never had gone into it enough to get a regular permit.

Q. How long had you been driving, out on the farm or something like that?

A. Well, on Sunday afternoons when we were out on the farm we tried to take a few lessons out there on the farm.

Q. Where was the farm?

A. Greendale.

Q. When did you first commence to try to drive, about how long before the accident?

page 18 } A. I had driven some on the highways with my husband when he was traveling, not with this car but with the other permit I had. More or less, on the open highway. Occasionally, not too often.

Q. What was the longest distance you drove at any one time, driving for your husband?

A. I wouldn't know.

Q. Do you remember driving from Baltimore to Richmond?

A. No, sir.

Q. Did you drive from Philadelphia or some city like that?

A. No, sir.

Q. Did you drive to Richmond from any point outside of Richmond?

A. I haven't driven very far at a time with him other than West Point, Roanoke, White Stone, and different places in the northern neck. I would drive part of the way but I never did make a whole trip.

Dora Tatum.

Q. Was he a very good driver?

A. Very good driver.

Q. How did Mr. Tatum, your father-in-law, happen page 19 { pen to be with you on this day of the accident?

A. Well, I was working at the Richmond Quartermaster Depot and I was on the night shift. It was in the summer, it was so hot that summer, I guess you all remember. I was a parachute inspector and I worked on long tables and those tables had very strong lights built in the table and strong lights over the table so we could inspect the parachutes and of course, it made the place very hot and so many of the girls were passing out, and when we would check in to go to work if it was too hot they would send us home.

Friday night prior to the accident was the only night I worked that week and I got home around one fifteen and probably got to bed at a quarter to two or two o'clock and naturally I was sleeping later than usual by working at night.

My apartment was at 1601 Hanover Avenue, on the corner of Lombardy, and my bedroom was on the front. And that morning I was awakened by the noise of a horn tooting and I looked out to see who it was and it was Mr. Tatum. He was across the street sitting in his car and I believe he had been

to take his wife to work and was on his way back page 20 { home, as I understood it, and he wanted to know if I wanted to take a driving lesson. I said I hadn't gotten up and eaten breakfast and he said his daughter was coming in town and she would take me out.

Q. Who was that, his daughter?

A. Mrs. Lorente.

Q. Did he get out of the car?

A. He didn't get out of the car, and he went on and I got up and dressed and had my breakfast and waited for them to come by. I didn't know whether both of them would come or not but anyway he came by without her. I was ready and waiting, and he didn't come upstairs.

I asked where she was and he said she had an appointment with the dentist and he said he would take me, and I asked him if he felt like taking me and he said yes, we wouldn't be gone long.

We proceeded up Hanover Avenue to the Boulevard, going twenty miles an hour, and I gave my signal at the Boulevard and stopped and I asked him which way he wanted me to go and he said across the Boulevard and turn to your left, which I did and had no trouble, and then I went down the Boulevard

Dora Tatum.

to where that little fountain thing is, I don't know
page 21 } how many blocks, I wasn't familiar with the location but it might have been Sheppard Street. Anyway, the bus was coming and he said, "How did you know which way the bus was going?" And I said, "I am not in the way of the bus and it is not in my way."

I don't know from then on.

Q. Where were you at that time?

A. I guess Sheppard Street but I am not sure. A couple of blocks from where you turn off the Boulevard.

Q. You mean, where you turn off the Boulevard to go right?

A. Yes, to go right.

Q. Do you know where you turned to the right?

A. Yes, sir.

Q. What road did you turn to the right on?

A. I don't know, but anyway, it was somewhere close to where the buses come. I didn't know the streets. The bus wasn't in my way and I wasn't swerving over much.

Q. In the accident, were you knocked unconscious?

A. I evidently was. Like I say, I don't know.
page 22 } Q. Can you remember anything after the point you just mentioned?

A. Just a second I was to hit something I saw an object but I would hate to say I remember definitely.

Q. How did you get along driving up to the point where you don't remember anything more?

A. I had no trouble.

Q. You made all the turns and drove all right?

A. I had no trouble.

Q. Do you remember whether your right foot on the right side, the one you put on the brake or accelerator was injured on the right side?

A. Yes, sir.

Q. It was?

A. Yes, sir.

Q. Point out about where that was.

A. (The witness does so) All over here, it looked like it was stomped or kicked.

Q. On top of your foot?

A. Yes, sir.

Q. And you don't know how that happened?
page 23 } A. No. It was evidently done but I don't know how it happened or anything about it.

Q. Do you remember making a statement at the Medical College of Virginia on Monday after the accident?

Dora Tatum.

Mr. Miller: I think he should lay the proper foundation. He should advise the witness who was present and the circumstances.

By Mr. Allen:

Q. Do you remember making a statement after the accident at the Medical College of Virginia in the presence of Mr. Norman C. Tatum, Jr. and his wife about your foot being hurt like that and stating that evidently your foot was on the accelerator instead of the brake and he was trying to kick it off?

A. I don't recall it.

Mr. Miller: I object to the question in that form. The proper question is did she make a statement, but anyhow, the statement would be pure speculation and it is not relevant.

The Court: Overruled.

Mr. Miller: We note an exception.

page 24 } By Mr. Allen:

Q. Did you make any such statement?

A. I don't recall making any such statement.

Q. Do you remember seeing them at the hospital?

A. I remember them coming to see me but I don't remember what day it was.

Q. Do you remember Mrs. Lorente coming to see you on that same day?

A. She and her mother made a visit but I don't know what day it was.

Q. Do you know whether you made any such statement to them?

A. I don't recall.

Q. Well, now, is it that you simply don't recall or do you deny making the statement?

A. I don't deny it. I don't recall it.

Q. Had you had any accidents before that time while you were learning to drive?

A. No, sir.

Q. How had you gotten along in your learning, pretty well or poorly?

page 25 } A. I guess as well as the average person.

Q. Had you ridden in automobiles very much before you started to try to learn to drive?

Dora Tatum.

Mr. Miller: I don't think that is relevant evidence. Lots of people ride in an automobile and it has nothing to do with the operation of the vehicle.

The Court: Overruled.

Mr. Miller: Note an exception.

By Mr. Allen:

Q. How long had you been riding in automobiles?

A. Well, more or less since 1947.

Q. Of course, you knew the difference between the accelerator and the brake?

A. Well, I had to learn that to drive.

Q. And you knew about the mechanism of the steering wheel and what that was for?

A. Yes.

Q. You knew if you had your foot on the gas pedal the car would run faster?

Mr. Miller: I object to Mr. Allen testifying.

page 26 } The Court: It is under the rules of cross examination. The objection is overruled.

Mr. Miller: Note an exception.

By Mr. Allen:

Q. To whom did this car that you were driving belong?

A. It was in my name.

Q. How long had you had it?

A. It was purchased in June, the last part of June.

Q. That same year?

A. Yes.

Q. Do you know whether the car was in good condition or not?

A. Well, I just bought it and as a rule they usually go over them. I haven't any knowledge of the condition of the car.

Q. So far as the operation of it, the brakes and the steering wheel, was the car all right?

A. I was told it was.

Q. Did you find out anything different from driving it before this accident?

page 27 } A. No.

Q. Did it drive all right up to the time of the accident?

A. Yes.

Q. Had you had occasion to apply the brakes in the past?

Dora Tatum.

A. Sure.

Q. Was there anything wrong with them?

A. Not to my knowledge.

Q. Did Mr. Tatum go with you any time? Was this the only time or had he been with you at other times?

A. That was the only time.

Q. Had other members of the family gone with you?

A. Mrs. Lorente took me out one time.

Q. Of course, you knew you had to have a licensed driver with you?

A. Yes, sir.

page 28 } CROSS EXAMINATION.

By Mr. Miller:

Q. Mrs. Tatum will you tell the jury what injuries you sustained in the accident, first your injuries as to your face?

A. I had a concussion and fractured jaws and severe cuts on the knees and a broken manacle.

Q. How many teeth did you lose?

A. I guess about ten.

Q. You stated that you injured your knees also?

A. Yes, sir.

Q. After the accident did you suffer from headaches or anything like that?

A. Yes, sir.

Q. When was that?

A. Well, it seemed to be about two weeks after I was in the hospital.

Q. Did they keep you pretty well doped up at first?

page 29 } A. I guess they did. I was taking shots and medicine all the time, but those headaches struck me every other morning and I couldn't eat breakfast.

Q. How long were you in the hospital?

A. Twenty-four days.

Q. After you got out of the hospital, did you have to be confined to your home for a while after that?

A. Yes.

Q. How long?

A. About two or three weeks before I was able to go to work. I could go up and down the steps once a day.

Q. I take it you were the daughter-in-law of the deceased?

A. Yes.

Dora Tatum.

Q. Was he working at the time this accident occurred?

A. No, he was retired.

Q. Had he been retired a long time?

A. Ever since I have known him.

Q. Had he been a patient at Pine Camp Hospital?

A. Yes.

Q. Do you know what he was out there for?

page 30 } A. When you go to Pine Camp, I guess your
answer is just one thing. I don't know any de-
tails.

Q. Was this car a 1941 Cadillac?

A. Yes.

Q. Was it a heavy car?

A. Yes.

Q. I believe you had a learner's permit?

A. Yes.

Q. How many lessons had you had since you got your learner's permit?

A. Mrs. Lorente gave me one and Mr. Tatum and Mr. and Mrs. Clark took me out and of course, I would fool around in the country.

Q. On these occasions with your husband, that was on the open road?

A. Yes, that was before this.

Q. I believe you had three lessons, one from Mr. and Mrs. Clark and one from Mrs. Lorente and then, this one that ended so tragically, was that all the lessons you had in the city?

A. Other than those out in Greendale, with that
page 31 } particular car.

Q. Now, what time did you leave the house that morning?

A. It was somewhere close to nine.

Q. What time did he awaken you, do you recall?

A. I imagine it was about twenty minutes to nine or eight-thirty, somewhere in that neighborhood.

Q. All right. Now, when your husband had let you take the car on the open highway, do you recall how many years that was before this accident occurred?

A. Let me see. That was probably in 1949.

Q. About three years prior to this?

A. Yes. It might have been sooner or later, I wouldn't say for sure.

Dora Tatum.

RE-DIRECT EXAMINATION.

By Mr. Allen:

Q. About how far did you drive on the open road in 1949?

A. Well, I would just take the wheel sometime
page 32 } and help drive part of the way home.

Q. From 1949 to 1952, about how many times
did you do that, do you think, as well as you can remember?

A. Well, I just don't remember because I didn't go out of
town with him too often.

Q. Would you say it was many times or few times?

A. I would say a few times.

Q. Two or three or four, something like that?

A. I would say maybe ten or fifteen, maybe not that much.
Certainly, no more than that.

Q. Of course, that was not in connection with this Cadillac,
was it?

A. That's right.

Q. You didn't get the Cadillac until 1952?

A. That's right.

Q. About how many times do you think you drove an auto-
mobile on the farm and on those country roads?

A. Maybe half a dozen times.

By Mr. Miller:

Q. Was this Cadillac a standard shift automobile, did it
have first, second and third gears?
page 33 } A. Yes.

Witness stood aside.

Note: In the absence of the jury, the Court and counsel
argued the objections noted in the deposition of Mrs. G. B.
Ingraham taken on June 1, 1956.

As to the first objection on page 11, the question was aban-
doned and withdrawn.

As to the next objection on page 11, relating to the ques-
tion "Describe his injuries." Mr. Miller made the follow-
ing objection:

Mr. Miller: Your Honor, this question and the objection
on the next page go to the question of whether or not the
suffering of the deceased is admissible as evidence. We have

Sherman Walker.

been able to agree on all the other objections and
page 34 } corrections. We take the position that the de-
scription of the injuries and suffering of the de-
ceased is not an element of damages.

(The question was argued by counsel.)

The Court: If this evidence comes in, it will have to be connected up by showing it was communicated to the beneficiaries. I will overrule your objection, Mr. Miller.

Mr. Miller: We note an exception. We take the position it should be what the beneficiary comes in and tells the Court she heard had occurred.

Mr. Allen: We have agreed to strike out the first line on page 12.

Mr. Miller: The objection on page 12 is the same objection we have just made and of course we continue the objection and exception on the grounds stated.

Otherwise, we have agreed as to the remaining
page 35 } parts of the record which should be corrected.

On page 14, line 14, in the answer, insert the words "or semi-conscious."

On page 14, line 16, insert the words "I mean, semi-conscious."

On page 18, change the word "had" to "hadn't."

On page 19, eliminate the objection on lines 22 and 23.

On page 20, lines 1 and 2, eliminate the objections.

Thereafter, the deposition of Mrs. G. B. Ingraham, taken on June 1, 1956, was offered on behalf of the plaintiff and was read to the Court and jury by counsel.

There followed a brief recess.

page 36 } SHERMAN WALKER,
a witness called by and on behalf of the plaintiff,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Allen:

Q. Tell us your name.

A. Sherman Walker.

Q. How old are you?

A. Thirty-three.

Q. Do you live in Richmond?

Sherman Walker.

A. Yes, sir.

Q. What do you do?

A. Housework,—yard work, I mean.

Q. Do you recall seeing the accident or wreck in which Mr. Tatum lost his life?

A. Yes, sir.

Mr. Miller: I object to the question. That is drawing a conclusion in the question, and I ask that it be re-phrased.

By Mr. Allen:

Q. Did you see an accident on Rugby Road near page 37 { Mrs. Ingraham's house?

A. Yes, sir.

Q. Where were you?

A. In Mrs. Ingraham's yard.

Q. Tell us what you saw.

Mr. Miller: Again we object to that question. It is turning the witness loose to tell what he saw.

The Court: Overruled.

Mr. Miller: Exception.

By Mr. Allen:

Q. All right, go ahead.

A. The car came down the hill, I wasn't paying any attention to it, but it kept making a noise, but it sounded like they put the brake on and lost control of it just before they got to the tree and the next thing I heard was the noise when it went into the tree.

Q. In which direction was it going when you first saw it?

A. It was coming down the hill.

Q. Down Rugby Road?

A. Yes, sir.

Q. When you saw it, had it gotten as far as page 38 { Mrs. Ingraham's house?

A. Just about, not quite.

Q. Did you see it as it passed the house?

A. As it passed.

Q. What direction was it going then with reference to the tree in the bend?

A. Just before it got to the tree, it was sort of wobbling.

Q. What direction was it going?

A. Downgrade.

Sherman Walker.

Q. Who was driving?

A. A lady was driving.

Mr. Miller: I object. He is contradicting his own witness.

The Court: I see nothing objectionable about it.

Mr. Miller: We object on the ground that counsel is contradicting his own witness. Mrs. Ingraham has just testified when the car passed the house this witness ran into the house and would not have been in a position to have seen page 39 } it.

The Court: Overruled.

Mr. Miller: We note an exception.

By Mr. Allen:

Q. Did you go to the wrecked car?

A. Yes, sir.

Q. What was the position of the parties in the car?

A. Well, when I got there the lady was under the wheel.

Q. What wheel?

A. The steering wheel.

Q. The lady was under the steering wheel?

A. Yes, sir.

Q. And where was the man?

A. He was down in the foot, in a ball.

Q. On which side of the lady?

A. Right-hand side of the lady.

Q. Now, can you tell us whether or not Mr. Tatum was suffering and the extent of it?

A. He was suffering.

Mr. Miller: We note the same objection to this page 40 } testimony.

The Court: The objection is sustained. That is a conclusion. You gentlemen of the Jury will disregard the question and answer.

By Mr. Allen:

Q. What, if anything, did Mr. Tatum say or do?

A. He was hollering for help and wanted somebody to pull his shoes off.

Mr. Miller: It is understood that all this testimony is objected to. We have taken up this particular point previously and we want to make the record clear we do not waive the objection and exception.

Sherman Walker.

The Court: The Court's ruling was favorable to you.

Mr. Miller: We object to his testimony as what Mr. Tatum did or said after the wreck.

The Court: Overruled.

Mr. Miller: We note an exception on the same grounds.

By Mr. Allen:

Q. Can you tell us about where Mr. Tatum was sitting in the car as it passed you?

A. On the right-hand side next to the door, as page 41 } far as I could see.

Mr. Miller: Again we object. The testimony of their witness, by which they are bound, is that he was not and it is further the testimony of their witness that this witness was running towards the house and would not have been in a position to have seen where Mr. Tatum was sitting when the car passed the house.

The Court: Overruled.

Mr. Miller: We note an exception for the reasons stated.

CROSS EXAMINATION.

By Mr. Miller:

Q. You noticed nothing unusual about the vehicle until it started to weaving?

A. That's right.

Q. It was coming down the hill like most vehicles, as far as you are concerned, is that right?

page 42 } A. That's right.

Q. And you say it started weaving and then made a sharp turn to the left?

A. That's right.

Q. Did you pay any particular attention to the car?

A. Really I didn't, not before it started to wobbling a little.

Q. How long ago has this been?

A. I can't tell you that.

Q. Three or four years, hasn't it?

A. It has been a pretty good while, I know.

Q. There wasn't anything unusual about that vehicle, as far as you are concerned, when it reached the front of Mrs. Ingraham's house?

A. That's right.

Q. And the only thing you know is that the car wobbled like it was putting on brakes?

Sherman Walker.

A. That's right.

Q. And then what happened?

A. It turned and the next thing I know it hit the page 43 } tree.

Q. Did you pay any particular mind to what the people in the car were doing or was it just like any other car going by, as far as you were concerned?

A. As far as I was concerned, it was just like any other car.

Q. And there wasn't anything particularly unusual for you to look at to see what they were doing, was there?

A. No, sir.

Q. And if I understand you correctly, there was no unusual speed or anything in regard to this car before it started this weaving?

A. It was running pretty good but I didn't pay any attention to how fast it was running.

Q. That didn't attract your attention at all?

A. No, sir.

Q. Was it in front of Mrs. Ingraham's house that it started to weaving?

A. Practically in front.

Q. And is that where you start into the curve?

A. Yes, sir, and the next thing I know it hit page 44 } and the seat was on top of them.

RE-DIRECT EXAMINATION.

By Mr. Allen:

Q. How close were you to the road when the car passed by?

A. I was just about as close as from here to that side of the wall. About as far as from here to the wall.

Mr. Miller: Could we agree as to that approximate distance?

A Juror: It is about eighteen feet.

Mr. Miller: We will agree to that.

Mr. Allen: All right, eighteen feet.

By Mr. Allen:

Q. Do you know whether either of the right wheels of that car struck the curbing along there near Mrs. Ingraham's house?

A. I don't know whether it did or not.

Witness stood aside.

page 45 } NORMAN C. TATUM, JR.,
 a witness called by and on behalf of the plaintiff,
 after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Allen:

Q. Will you state your name?

A. Norman C. Tatum, Jr.

Q. How old are you?

A. Thirty-seven.

Q. What relation were you to the deceased?

A. He was my father.

Q. Where were you the day this accident happened?

A. At work.

Q. Where?

A. Reynolds Metals Company, Seventh & Bainbridge Streets.

Q. How soon afterwards did you hear of the accident?

A. I would say approximately an hour, more
 page 46 } or less.

Q. Did you then go out to the scene of the accident?

A. Shortly thereafter, I did. Of course, I immediately went to the hospital.

Q. When you got to the hospital was your father living or dead?

A. No, sir, he was dead.

Q. Following his death, did you learn how the accident happened? I mean, how he came to his death and whether he suffered and what he said and did?

A. I heard after the accident.

Mr. Miller: I object to his stating hearsay evidence as to how the accident occurred.

Mr. Allen: This is not to prove how the accident happened. It is to show he did hear the next day about how the man suffered and died.

The Court: Overruled.

Mr. Miller: Note an exception.

By Mr. Allen:

Q. Go ahead and answer.

A. From what I understand from Mrs. Ingraham, she was on the scene of the accident, she told me they used practically every sheet and pillow
 page 47 }

Norman C. Tatum, Jr.

case and everything else they could get to take care of his wound and he was crying and carrying on, wanted somebody to take his shoes off. Of course, he lost his teeth and he was fighting to find his teeth, and he was hollering at the top of his voice for my mother.

Q. How did that affect you when you heard that?

A. It tore me all to pieces for quite a while and I will never get over it, I don't believe.

Q. How old was your father when he died?

A. Fifty-seven.

Q. Where was he living?

A. He was then living at 3004 Monument Avenue.

Q. Were he and your mother living together at that time?

A. Yes, sir.

Q. Can you describe their life as to whether it was happy or unhappy together?

A. They were very happy. They never had very much discord, naturally a little misunderstanding now and
page 48 } then but I think they got along as good as any
couple I have ever known and I know they dearly
loved one another.

Q. Did you see Mrs. Dora Tatum at the Medical College Hospital on the Monday after the accident and have any conversation with her about the injury that she received on the top of her right foot and the right side of her ankle?

A. Yes, sir, her foot was bruised right here in the instep (indicating) where it had been kicked.

Mr. Miller: I object to the witness testifying how the bruise was received. It is entirely speculative.

The Court: That portion of the answer will be stricken out. You gentlemen of the Jury will disregard such portion of the witness' answer as expressed a conclusion from something other people told him.

By Mr. Allen:

Q. Leave off what people other than Mrs. Tatum, the defendant, told you. I am asking you if she made any statement to you about how she received that injury to that foot.

A. Yes, sir, she said he must have kicked her
page 49 } foot as hard as he could to get it off the accelerator.

Norman C. Tatum, Jr.

Mr. Miller: I object to that. It has't been denied by the defendant, she might have said it but the statement itself is speculative. The Jury can draw any conclusion they wish as to how the foot might have been bruised and we are asking that it be stricken.

The Court: Overruled.

Mr. Miller: Note an exception.

By Mr. Allen:

Q. Do you know whether she had been driving before this or not? Unless you know, don't say.

A. Yes, on one occasion she was living with my mother at 6110 West Grace Street. My brother is an alcoholic and he drank a little too much and she had to drive practically all the way from Baltimore.

Q. Do you know about her going with anybody else in trying to learn to drive?

A. She had been with several people.

Mr. Miller: I object to the questions and answers. He is making answers which he does not know for a page 50 } fact.

The Court: The Court does not care to hear argument on the question of the admissibility of testimony unless it is invited. You may state your objection and the grounds for it but not argument. Your objection is overruled.

Mr. Miller: We note an exception.

By Mr. Allen:

Q. Do you live on the farm?

A. Yes, sir, I live at Greendale.

Q. Do you know whether or not she came up there and drove around on the farm?

A. Yes, sir.

Q. Did you see her?

A. Yes, sir.

Q. Often or not often?

A. I would say three or four Sundays anyway. Most particularly on Sundays.

Mrs. Kenneth E. T. Lorente.

page 51 }

CROSS EXAMINATION.

By Mr. Miller:

Q. Where did you live when this accident occurred?

A. When the accident occurred, I lived at Greendale, B. F. D. 12, Box 286.

Q. You didn't live in the city, you didn't live near her?

A. No, sir, I didn't.

Witness stood aside.

MRS. KENNETH E. T. LORENTE,

a witness called by and on behalf of the plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Allen:

Q. Will you please state your name for the page 52 } record?

A. Mrs. Kenneth E. T. Lorente.

Q. Mrs. Lorente, where do you live?

A. Roanoke, Virginia.

Q. What relation are you to the deceased, Norman C. Tatum?

A. His daughter.

Q. What do you know about Mr. Tatum going with Mrs. Dora Tatum on the day this accident happened?

A. Well, my father called me at eight-thirty the morning of the accident and told me he had dropped by to see Dora and she would very much like to go driving that morning and would I be able to go out with her, it was only a matter of sitting beside her because she had been out several times with my father.

Mr. Miller: We object to the hearsay statements.

The Court: Make your answers responsive to the question.

Mr. Allen: The statute especially provides if the defendant testifies, any statement made by the deceased page 53 } is evidence.

Mr. Miller: They have called the defendant as their witness in order to establish what the defendant has to say. It is not of her own volition she came in and told what occurred on that morning and under those circumstances, I submit that the rule does not intend that at all.

Mrs. Kenneth E. T. Lorente.

The Court: Repeat your question.

By Mr. Allen:

Q. What statements, if any, did Mr. Norman C. Tatum make to you in connection with someone who was a licensed driver going along with Mrs. Dora Tatum that morning so she could drive under her learner's permit?

The Court: Objection overruled.

Mr. Miller: We except on the grounds it is hearsay and for the other reasons stated.

A. (Continuing) He asked me would I be able to go that day, I had been out with Dora on Saturday and then on Tuesday he said she had been with Mr. and Mrs. Clark and had done beautifully and it was only a matter of sitting beside her but that he didn't feel like going. I told him:
page 54 { that I was terribly sorry but I had a dental appointment and I couldn't do it. I knew my sister-in-law was very anxious to get her regular permit.

Q. Now, do you recall being at the Medical College Hospital on Monday after the accident and talking to Mrs. Dora Tatum there or her talking to you about the injury to her foot and how it came about?

A. Yes, sir.

Q. Tell us what she said.

A. She believed that my father must have kicked her foot to try to get it off the accelerator.

Mr. Miller: Same objection to this.

The Court: Overruled.

Mr. Miller: Exception.

By Mr. Allen:

Q. Now, Mrs. Lorente, did you hear all the circumstances under which Mr. Tatum came to his death and particularly with reference to whether he suffered pain, what he said and what he did immediately following the accident?

A. Yes, I did, from the friends who were there.

Mr. Miller: I don't want to keep objecting to
page 55 { the same thing. May it be understood we object to this testimony and we do not waive our objection by not making the same objection each time the question is asked.

The Court: That is agreeable to the Court. It is understood.

Mrs. Vida Tatum Smith.

By Mr. Allen:

Q. How did that affect you?

A. It broke my heart because I could imagine if I had gone it would have happened to me and I would much rather it would have been me because if I had gone maybe it wouldn't have happened and maybe it would have but I would have been the one to have gone and not him.

* * * * *

MRS. VIDA TATUM SMITH,

a witness called by and on behalf of the plaintiff, after being duly sworn, testified as follows:

page 56 } DIRECT EXAMINATION.

By Mr. Allen:

Q. Mrs. Smith, I understand that you are the widow of Mr. Norman C. Tatum?

A. Yes, that is correct.

Q. And you are now married to Mr. Smith?

A. Yes, sir.

Q. Do you recall when the accident happened in which your former husband died?

A. Oh, yes, definitely. I will never forget it.

Q. What was the date?

A. July 25, 1952.

Q. When did you get married again?

A. April, 1954.

Q. Are you the regular qualified Administratrix of the estate of your former husband?

A. I am.

Q. Did he have a regular driver's license?

A. Yes, he did. I brought it to you this morning.
page 57 }

Q. I hand you what purports to be the driver's license referred to and will ask you to look at it and tell me if that is the driver's license he possessed?

A. Yes, it is. I was with him when he got it.

Q. Where were you when you heard of the accident?

A. At work.

Q. Where do you work?

A. Friedman-Marks Clothing Company.

Q. Did you hear of the circumstances under which he died,

Mrs. Vida Tatum Smith.

and I have particular reference to what he said and what he did.

A. I did.

Q. As related by Mrs. Ingraham?

A. Yes. He begged for me and I will always regret I didn't get there.

Q. How long did you suffer from things like that?

A. I am still suffering. I have a very understanding husband that sympathizes with me.

Q. Was your husband working at that time?

page 58 } A. He was retired.

Q. Was he drawing any retirement?

A. \$100.00 a month.

Q. Were you and your husband living together at that time?

A. Certainly, we never lived apart.

Q. What was the status of your domestic life, happy or unhappy?

A. Very happy, inseparable in other words.

Q. How many children did you have?

A. Three.

Q. Please state their names and ages.

A. Arlene Lorente, she is thirty-nine; Norman C. Tatum, Jr., thirty-seven; Kenneth Tatum, thirty-five.

Q. Now, did your husband leave any grandchildren?

A. Yes, four.

Q. Will you name them, please?

A. Kenneth E. Lorente, Jr., eighteen; Mildred Letitia Lorente, twelve; Vida Arlene Lorente, ten; and Norman C. Tatum, III, eleven years old.

Q. Has the other boy any children?

page 59 } A. No.

Q. What do you know, if anything, about the driving experiences of Mrs. Dora Tatum?

A. I know she had a learner's permit before and I judge she did very well.

Q. I am asking you what you know. Did you go up in the country on the farm?

A. Oh, yes, I had seen her driving around up there getting experience.

Q. How much did she drive up there?

A. Quite a bit on Sunday afternoons.

Q. Did you ever go along with her?

A. I had never been in the car with her except out in the country.

Mrs. Vida Tatum Smith.

Q. At the farm?

A. Yes.

Q. How did she drive then?

A. Oh, very well.

Q. How long had she been driving, taking into consideration the driving in the country and any other driving she may have done?

A. Off and on I would say since 1947.

page 60 } Mr. Miller: I object to this testimony. She doesn't know these facts. It is pure conjecture.

The Court: Stick to matters you know, Mrs. Smith.

By Mr. Allen:

Q. You do know she had driven out in the country?

A. Oh, sure.

Q. Were you there and did you see her?

A. Yes. She told me she had driven on several occasions, short trips and such as that.

Q. My question was did you see her drive up in the country?

A. Oh, definitely.

CROSS EXAMINATION.

By Mr. Miller:

Q. Do you drive, Mrs. Smith?

A. Yes, sir.

Q. How long have you been driving?

page 61 } A. I would say I have been driving off and on since 1929.

Q. Then you are rather an experienced driver?

A. Yes.

Q. I believe you said you work at Friedman-Marks Clothing Company?

A. Yes.

Q. And you were working there at the time of the accident?

A. Yes.

Q. Was your husband retired because of a physical disability?

A. His feet. He had incurable eczema.

Q. Had he been a patient at Pine Camp Hospital?

A. He went to Pine Camp but I have never definitely had any details. He came back because it was so hot.

Mrs. Vida Tatum Smith.

Q. Didn't you apply for admission out there for him?

A. Yes.

Q. And he had TB?

A. I don't know whether it was ever definitely
page 62 { decided. He had a negative case, but he couldn't
give it to anybody else. He had scars and calcifi-
cation.

Q. But he had been in a sanitarium some years past?

A. Yes, but they claimed it was cured.

Q. Had he ever been a patient at St. Elizabeth's Hos-
pital?

A. Yes, for a checkup. He had a kidney difficulty and I
called Doctor Robertson and he said it was nothing to worry
about with treatments.

Q. You say the only time you ever saw Dora Tatum drive
was on a Sunday afternoon at the farm?

A. Yes, just practicing.

* * * * *

page 63 {

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Mr. Allen: I believe I overlooked filing this driver's
license.

(The driver's license was filed and marked Plaintiff's Ex-
hibit Number Eight.)

Mr. Allen: We close our evidence in chief.

* * * * *

Mr. Miller: If Your Honor please, we move to strike the
plaintiff's evidence on several grounds:

1. There is no evidence or insufficient evidence to
page 64 { sustain a verdict, and no evidence to show negli-
gence on the part of the defendant.

2. The plaintiff's decedent assumed the risk, as a matter
of law.

3. The evidence is clear, in any event, that the plaintiff's
decedent was negligent in permitting this vehicle to be driven

Douglas Kirkland.

by a beginner under these circumstances in a dangerous place, or, if he did not know it was a dangerous place, he was negligent in allowing the vehicle to be operated in a place which he did not know whether it was dangerous or not.

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page 66 }

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The Court: The motion is denied.

Mr. Miller: We object and except to the ruling of the Court on the grounds stated.

* * * * *

page 67 }

DOUGLAS KIRKLAND,

a witness called by and on behalf of the defendant,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Miller:

Q. State to the Jury your name and occupation.

A. Douglas Kirkland. I am a commercial photographer working for Wray Selden Studio.

Q. Mr. Kirkland, did you take some pictures of the scene of an accident for me?

A. Yes, on Friday morning.

Q. First I hand you two exhibits which are marked Defendant's Exhibit One and Defendant's Exhibit Two and I will ask you to state where you were standing at the time you took those two pictures?

A. Exhibit Number One, I was looking down towards the river about thirty paces from the beginning of the grade on the street the accident took place on, or where the girl drove down the hill, facing south. It was taken from the middle of the road the way the driver's vision would be.

page 68 } Q. You say it is thirty paces south of the crest of the hill looking south?

A. That's right, looking towards the river.

Q. Now on this Defendant's Exhibit Number Two. Where were you standing when you took that picture?

A. Also looking towards the river and eighty-six paces

Douglas Kirkland.

from the original point which I just mentioned, from the crest of the hill.

Q. Now, I hand you another photograph and will ask you to state where you were standing when you took that picture?

A. Looking south toward the river again but one hundred and twenty paces from the crest of the hill, and it is in front of No. 3014 on whatever street it is.

Q. Rugby Road?

A. That is correct.

Q. How many paces south of the crest of the hill were you?

A. One hundred and twenty.

page 69 } (The picture was filed in evidence and marked
Defendant's Exhibit Number Three.)

Q. I hand you another picture.

A. The last picture, No. 4, is looking north at the corner of Rugby Road and Pump House Drive, looking toward the direction where the car came from.

(The picture was filed in evidence and marked Defendant's Exhibit Number Four.)

Q. You said one hundred and twenty paces. About what size pace do you use?

A. It might be slightly larger than the average person but not much.

Q. Would three feet be fair?

A. Yes, that is about it. In fact, it has been checked at that.

page 70 } CROSS EXAMINATION.

By Mr. Allen:

Q. With reference to Defendant's Exhibit Number Three, that picture was taken with your camera looking toward the river, that is, south?

A. Yes, sir.

Q. How far were you from the tree right there in the bend of the road?

A. I haven't got that measurement. I just have the measurement from the top of the hill which was one hundred and twenty paces.

Q. One hundred and twenty paces from the top of the hill?

A. That is correct.

Douglas Kirkland.

Q. Do you know how much grade there is there?

A. I haven't got the degrees or anything but I would say it was a steep hill but not an extremely steep hill.

Q. Can you tell us whether or not it began to level out some distance before you got to the tree?

A. No, there wasn't much difference.

page 71 } Q. I can see part of an automobile in this picture.

A. Yes, sir.

Q. Had the road commenced to level out there?

A. No, sir.

Q. But it was more level than it was back further, wasn't it?

A. Not to speak of, no.

Q. Do you know anything about engineering at all?

A. No, sir.

Q. You are no judge of grades at all?

A. No, sir.

Q. You don't know whether it was a three per cent or a five per cent grade?

A. No, sir. Actually, you can see on Defendant's Exhibit Four where the grade begins.

Q. This picture was taken looking north?

A. That is correct.

Q. That is, the direction from which the car came?

A. Yes, that's right.

page 72 } Q. And you can see the grade pretty well there?

A. That's right. Here is where it is.

Q. Looking beyond, back up that way, you can see the grade?

A. That is all grade up there and it is a relatively steep hill.

Q. I see a car back there. Is that about the top of the hill?

A. No, sir. Actually, the beginning of the hill is right at this point here. In fact, that is the bottom of the stop sign, that is where our measurements were taken from.

Q. Your measurements were taken from the stop sign at the top of the hill down to where you took the picture?

A. Yes, sir.

Q. And that was how far in this Exhibit Number Four?

A. We haven't got the actual measurement from the top because there is a twist in the road.

Q. Do you see the stop sign there?

page 73 } A. Yes.

Q. Is that at the top of the hill?

Douglas Kirkland.

A. There are two stop signs in the picture.

Q. I am pointing to the stop sign on the left-hand side as you come down.

A. I am pointing to this dot here which is just the post of the stop sign. It is extremely minute.

Q. Take this pencil here and mark for me where that stop sign is, the stop sign I am pointing my finger to.

Mr. Miller: I object. Mr. Allen is putting in the witness' mouth. Evidently he has the witness confused. There are no stop signs there.

The Witness: I am very sorry, I am incorrect. It is a no parking sign. In fact, it can be read on one of the signs.

Mr. Allen: I am not interested in what the sign said, I was just using it as a point.

Mr. Miller: You can't read the no parking sign.

page 74 } By Mr. Allen:

Q. Haven't you put that mark some distance south of the sign?

A. North, that is looking up the hill, looking north.

Q. That is true, and you can see that sign looking north, can't you?

A. Looking north you can see the sign.

Q. Now, I am asking you is that sign at the top of the hill or over the top of the hill or south of the top of the hill?

A. It is at the top of the hill, that is where I would estimate the grade begins, where the crest is.

Q. Do you see a car standing there?

A. Yes, sir.

Q. Is that car anywhere near that sign?

A. No, the cars are much south of the sign.

Q. And you cannot give us an estimate of the distance from the sign to the tree?

A. I can give you an estimate, if you wish.

Q. Yes, I wish you would.

A. This Exhibit Three was taken one hundred and twenty paces from the crest of the hill or the parking sign
page 75 } which I have marked, and I would estimate—and
this is only an estimate—that there are about forty paces from where this Exhibit Three was taken.

Q. You mean the sign is about—

A. (Interrupting) One hundred and fifty paces from the crest of the hill. That is only an estimate.

Dora Tatum.

Q. Now, where is Mrs. Ingraham's house? Can you point that out?

A. I am afraid I don't know Mrs. Ingraham.

Q. 3014 Rugby Road.

A. I may be able to do it.

Q. If you can point it out, mark it with this pencil.

A. I cannot point it out.

Q. You can't? All right. Do you know whether she lives north or south of the curve?

A. She lives north of the curve because Exhibit Three was taken from No. 3014.

* * * * *

page 76 }

DORA TATUM,

the defendant, recalled to the stand, testified as follows:

DIRECT EXAMINATION.

By Mr. Miller:

Q. Mrs. Tatum, you testified this morning so there is not a great deal to go over, but will you tell the Jury here have you ever been to Baltimore with your husband in an automobile?

A. No.

Q. Never been there?

A. No.

Q. Now from the time that you saw the bus you referred to this morning and after you passed the area where the bus was, what was the next thing you definitely remember seeing?

A. Well, the last thing we discussed anything about was the bus and he wanted to know how I knew which way the bus was going and I said it wasn't in my way and I wasn't in its way and I wasn't excited about it. From then on, it must

have been the second I hit the object, I don't
page 77 }

Q. Do you remember anybody at all at the scene of the accident?

A. It seems I recall somebody standing at the door of the car but I can't tell you anything about it.

Q. Do you remember being carried to the hospital?

A. No, sir.

Dora Tatum.

Q. When were you first conscious of the fact you were in the hospital?

A. I know I was talked to before I was put in a room but I can't say who to or what about.

Q. When do you first remember talking with someone or coming to?

A. About the only thing I remember was the lady that was in the room with me, admitted the same night, she had a girl friend that stayed with her and I remember seeing her. I remember my son from Washington came in around six o'clock the next morning.

Q. And I believe you said you were in the hospital twenty-three days?

A. That's right.

page 78 } CROSS EXAMINATION.

By Mr. Allen:

Q. I believe the accident happened on a Friday?

A. Yes, sir.

Q. You said something about the bus and getting around a bus. I didn't just exactly catch that.

A. There was a bus coming and it pulled into the curb to put off passengers or take on passengers and I don't know whether he thought I was too near the bus or what, but I went on and crossed the street and he asked me, "How did you know where the bus was going?" And I said, "It is not in my way and I am not in its way."

Q. Were you driving then?

A. Yes, sir.

Q. And that is the last you remember?

A. That is the last I had to say to him.

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page 79 }

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Mr. Miller: Your Honor, we want to renew our motion to strike the evidence before taking up the instructions. May we do so at this time?

The Court: Very well, let the record show that motion is made to strike all of the evidence and the motion is denied

and that exception is noted on the same grounds as previously stated.

Mr. Miller: As to the instructions, of course, we object to the giving of any instructions on the ground we think the evidence is insufficient to sustain a verdict and we think the plaintiff assumed the risk, but without waiving our exception to the denial of our motion, we offer instructions.

The Court: I have already ruled on the motion page 80 } to strike.

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page 81 }

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Mr. Allen: May it please the Court, counsel for the plaintiff, having objected to the giving of instructions, now states the exceptions and briefly the grounds:

Counsel for the plaintiff objects and excepts to the giving to the jury of Instruction 1-C upon the ground that gross negligence is made the basis of a recovery and that page 82 } the gross negligence doctrine does not apply to this case because the decedent was in the automobile to perform a service for the defendant and not for his own pleasure or any business or reason of his own; and further upon the ground that there is not sufficient evidence in the case upon which to base any instruction of contributory negligence of the deceased.

Instruction B is objected to and excepted to on the ground that it makes gross negligence a basis of recovery and requires proof of gross negligence, when, as stated in the objection to Instruction 1-C, the gross negligence rule is not applicable to this case.

Instruction C is objected to and excepted to on the same grounds.

Instruction G is objected and excepted to because there is no evidence to support any instruction that the plaintiff's decedent was guilty of any contributory negligence.

page 83 } Instruction F is objected to and excepted to because there is no basis in the evidence for the giving of an instruction that the accident was unavoidable.

We object and except to the action of the Court in refusing to give Instruction No. 1 offered by the plaintiff on the ground that the instruction is authorized by the statute and is a proper instruction to be given in a wrongful death case.

We object and except to the action of the Court in refusing to give Instruction No. 1-A asked for by the plaintiff on the ground that the instruction is in accordance with the law and is applicable to the facts proven since it is not denied that the decedent was in the automobile at the instance of the defendant for her benefit and for no benefit or in no in-
page 84 } terest of his own.

Counsel for the plaintiff objects and excepts to the action of the Court in refusing to give Instruction No. 3 offered by the plaintiff, upon the ground that it is applicable to the facts in the case and is in accordance with the law, as applicable to those facts.

Counsel for the plaintiff objects and excepts to the action of the Court in refusing to give Instruction No. 4 at the instance of the plaintiff, upon the ground that the express provision of the statute provides for such an instruction.

Counsel for the plaintiff objects and excepts to the action of the Court in refusing to give the last sentence in Instruction 4-A offered by the plaintiff, requiring the defendant to prove contributory negligence by testimony other than her own, which requirement is in accordance with the
page 85 } statute.

Mr. Miller: The defendant objects and excepts to the giving of each and every instruction on the grounds set forth in the argument on the motion to strike at the end of the plaintiff's evidence and renewed at the close of the case; further on the ground that the evidence is insufficient to sustain a verdict of negligence against the defendant, and that the plaintiff's decedent was guilty of negligence, as a matter of law, which was the sole proximate cause of his injury and death; and further that as a matter of law the plaintiff's decedent assumed the risk of the injury and death sustained by him, and cannot recover.

As to Instruction 4-A, the defendant objects and excepts to that part of the instruction which says that the plaintiff's decedent is presumed to be exercising due and proper care,
as not being applicable to the evidence presented;
page 86 } and further on the ground that the plaintiff called the defendant as an adverse witness and is bound by the defendant's testimony.

The defendant objects and excepts to the giving of Instruc-

Mrs. G. B. Ingraham.

tion No. 5 on the grounds that there is no evidence on which a verdict can be based; that the plaintiff's decedent was guilty of contributory negligence as a matter of law, and that the plaintiff's decedent assumed the risk, and therefore the instruction should not be given.

The defendant objects and excepts to the action of the Court in the refusal of each and every instruction tendered by the defendant which was not given, on the ground that each instruction so tendered correctly stated the law on the evidence presented to the Court.

page 87 } After hearing arguments of counsel, the jury retired at 11:56 a. m. to consider its verdict. The jury returned at 12:15 p. m. with the following verdict:

"We, the jury, on the issue joined find for the defendant.

(Singed) RAY P. STAGG, SR.
Foreman."

Whereupon, the jury was discharged.

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page 4 }

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MRS. G. B. INGRAHAM,
a witness introduced on behalf of the plaintiff, first being duly sworn, deposes and says as follows:

DIRECT EXAMINATION.

By Mr. Allen:

Q. Mrs. Ingraham, where do you live at the present time?
A. 6223 Monument Avenue.

Q. Where were you living at the time of the happening of the accident under investigation?

A. 3014 Rugby Road.

Q. What is your occupation?

A. Third grade teacher, Short Pump Elementary School, Glen Allen, Virginia.

page 5 } Q. A public school?

A. Yes.

Mrs. G. B. Ingraham.

Q. How long have you been teaching in the public schools of Virginia?

A. Three years.

Q. Would you mind stating your age, please?

A. Fifty-five. I am also a member of the official Board of the Barton Heights Church, and before this happened I was president of the Richmond Council of Women's Organization.

Q. Mrs. Ingraham, did you witness an accident while you were living at 3014 Rugby Road?

A. I did.

Q. Do you recall about when that was?

A. Well, it was early summer. You will have to supply the year because I have forgotten.

Q. How long was it before you moved away from 3014 Rugby Road? How long was it approximately?

A. It was approximately 15 months before I moved away.

Q. Do you remember the persons who were involved in the accident, that is those who were in the automobile?

A. Yes.

Q. Will you state their names?

A. Dora Tatum and her father-in-law, Mr. Tatum—I don't remember his given name.

page 6 } Q. Did you see the automobile before it was wrecked?

A. Yes.

Q. Just describe what you saw.

A. Well, it was in the early part of the morning and I would say 9:00 o'clock, and the gardener that I had, a colored man named Sherman Walker, had come to do some work, and I had gone out to the front yard to put him to work.

At my house we had a ledge, a brick ledge, which was certainly about 3 feet from the regular pavement. I was standing on that ledge. I was down at the foot of the hill, the location of my home, and we heard a noise, sort of a heavy sound of wheels and some screeching, and I looked up just as an old car came into view. We saw it right at first.

We knew the car was out of control, not so much by its swerving from one side of the road to the other, but by the terrific speed at which it was coming. Down at the very foot of the hill, which was, oh, two houses, the length of two houses below me, was a tree, and there is a curve in the road which made it seem that a tree would be right directly in the path of the automobile—that is the racing automobile. It seemed that the driver or drivers of the car were trying to avoid hitting

Mrs. G. B. Ingraham.

that tree, and the car first swerved right into the
page 7 } sidewalk in front of my house, hitting the curb,
which left tire marks, and then suddenly it seemed
to avoid hitting that tree down there, and they made a terrific
pull which pulled them clear across the fork of a road, the
two roads leading into Pump Road, and he went directly into
a tree over on the opposite side and, of course, he wrecked
the car and that was that.

This gardener, this colored man, and I raced down there
immediately. First there was no sound whatsoever from the
car, and time we got there the woman was driving and she
was sort of draped over the wheel, and the man in the car had
been thrown down in the foot of the car by her, and he began
immediately to call for help, though she had nothing to say
except, "Please help me," so we raised her up from the
steering wheel and as we did she fainted.

Then I left Sherman there with her and I went back into my
home and called the City Ambulance and also the police and
went back to the car and still there was no one in the neigh-
borhood who had come to the rescue, yet, many of them had
heard the crash.

Oh, in a period of about five minutes following that three or
four men who were employed by the City Recreation Depart-
ment and were working in Byrd Park came and together we
began to try to remove the people from the car.

Now what else do you want me to tell you?

page 8 } Q. What direction was the car traveling when you
saw it, that is north, east, south or west?

A. South.

Q. Then when it turned and went across the road into the
tree with which it collided, in which direction was it going
then?

A. I am not so very good on direction, but I think it was
east over that way (indicating). I don't know whether it was
east or west, but it went to the left whatever direction that
would be.

Q. I now hand you a photograph and will ask you to look at
it and state whether or not you can identify it as approxi-
mately the place the accident happened?

A. (Examining photograph) I certainly can, yes, sir.
That is the tree that I was describing (indicating).

Mr. Allen: We now offer this picture in evidence as Plain-
tiff's Exhibit No. 1.

Mrs. G. B. Ingraham.

Note: At this point the photograph just identified is marked as Plaintiff's Exhibit No. 1, and filed in evidence.

Q. I now hand you Plaintiff's Exhibit No. 1 which we have just referred to and will ask you to put a cross mark on the tree that you were describing, the first tree.

A. Now, Mr. Allen, this first tree is the one that looks to the driver as he is coming down Rugby Road and just page 9 } before he enters the Pump Road very much as if it might be in the center of the road, and I am going to put this cross right here to identify that. Now with your permission I would like to emphasize the curve in here.

Q. That is exactly what I want you to do.

A. This is the curbing right along here that comes along here to give you an idea (marking on photograph), and this little place here is grass and right over here is the city sidewalk. I have drawn a line from the cross mark with a blue pencil showing the curb as it circled, curb to the highway. It is just about 8 inches up from the road and I think that is important. There is another one over here (indicating)

Anyhow, as the car was coming down it was going, not too much zig zag, but it was somewhat zig zagging and he hit the curbing right up above the photograph. He hit the curbing here and I am putting the blue mark here, blue cross to show you. That is the blue mark on the curbing.

Q. Now draw the tracks of the car approximately.

A. Now the car came back right here and it looked as if it were going right into that tree, and it came on right here and it came just about here (indicating on photograph).

Q. Put a little circle right there.

A. All right. A terrific amount of force was put on by the driver or drivers to the wheel and it pulled the car, page 10 } and it seemed almost in a single jump or two it got over so quick, and, the car naturally hit the curbing right over here somewhat—wait a minute, let me find the word.

Q. Where?

A. The second tree, the tree that it actually hit.

Q. Place a mark there; place two little marks.

A. All right, I have done that, and that broke it somewhat and then it went right on into the tree, and I am going to circle this tree and there it is that it hit and that was the wreck and the car was torn up.

Q. Was it against that tree when it finally came to rest?

Mrs. G. B. Ingraham.

A. Yes, and the car stopped; the motor stopped; everything stopped.

Q. When you went to the tree Mrs. Tatum was—

Mr. Miller: Objection to counsel leading the witness.

Q. —in what position?

A. She was laying over sort of prostrate over the wheel with the face turned away from the car out. She was looking like this looking out.

Q. Where was Mr. Tatum when you got there?

A. Mr. Tatum was down in the foot of the car at page 11 } her right.

Q. Which side of the car?

A. Well, it would have been to the right of the driver. The back seat of the car had been jolted and it came over on the seat by Mrs. Tatum and it slid down and pinned him under. The front door on the right of the car was battered in in such a way that it couldn't be opened without force. I couldn't open it.

The windshield had broken; the top windshield had broken as I remember it. It might have been a break in the bottom, but I don't remember that, and there was a good bit of broken glass and the glass had cut him on the forehead but not deeply, but enough to bleed.

Q. Just briefly what condition did you find Mr. Tatum in physically?

A. Well, he was—he was yelling by that time for help and for his wife, for someone to please notify his wife, and then—

Mr. Miller: Objection to the question and to the answer.

Q. Just describe his injuries.

A. I couldn't describe them at that time. I could just see him bleeding. I went back to call the ambulance and left him there.

Q. Do you know whether he died there or died after getting to the hospital?

page 12 }

* * * * *

Mrs. G. B. Ingraham.

A. (Continued) I said he was alive when he left the accident.

Mr. Miller: It is understood that the questions and answers as to the physical condition is objected to, as to his physical condition.

Q. Just briefly describe the extent of his injuries and his physical condition when you left the car or when you arrived at the car?

A. Well, when I arrived at the car, naturally, he was bleeding from wounds on his head, and a wearer of false teeth, they had been knocked out and he had a cut it seemed to me on his lip. Anyway, he was bleeding and he was trying so hard to replace his teeth, and I was very conscious of the blood, so after we had received help and got him out we laid him as nearly as possible and as quietly as possible, because he was just like a worm in hot ashes. He seemed to be suffering intensely.

He had a cut over his head or his ear that we tried to bandage. One of the neighbors had come and had-
page 13 } ing been a nurse she was trying to bandage that wound, and as soon as we would he would pull it right off, and he cried so much about his feet and said, "Please take my shoes off," so finally we did, but his feet were not injured as we could see it. His feet were paining him so, but I didn't see anything wrong with his feet, but his wife told me later that he had had a great deal of trouble with his feet.

I couldn't see a great deal of other injuries myself. I couldn't see anything but those cuts, and whether he had others, I am sure he must have had others.

Q. To what extent did he appear to be suffering from the injuries which he received?

Mr. Miller: We continue the same objection to the question.

Q. Go ahead.

A. Mr. Allen, he seemed to be just scared to death, and I can't explain to you how much the man cried, but he cried just like a child would cry and every other breath was "Please call my wife."

Q. I now hand you another photograph, Mrs. Ingraham, and will ask you if you can identify that photograph and the tree that was struck by the automobile?

Mrs. G. B. Ingraham.

A. (Examining photograph) Yes, and I am circling it with a blue mark.

Mr. Allen: We offer this in evidence as plain-page 14 } tiffs's Exhibit No. 2.

Note: At this point the Photograph just identified is marked as Plaintiff's Exhibit No. 2, and filed in evidence.

CROSS EXAMINATION.

By Mr. Miller:

Q. Mrs. Ingraham, what was the condition of Dora Tatum when you first saw her?

A. Well, Mr. Miller, she was very seriously injured in the chest and had an awfully red bruised place at the side of her jawbone or neck, and she had two very deep cuts across both knees that had been driven into the underboard of the car and she was semi-conscious at times.

Q. Was she conscious when she left in the ambulance or semi-conscious?

A. Yes, yes.

Q. When you first saw the vehicle, were the wheels of the vehicle bouncing back and forth?

A. Yes.

Q. That is the front wheels were swerving from side to side?

A. Mr. Miller, they were sort of, not exactly a screeching of brakes, but there was some sort of grinding noise. I don't know whether it was the speed of the wheels on that page 15 } pavement—you know sometimes they have a loose gravel or something on it.

Q. Did you see the drivers in the vehicle as it passed?

A. Yes, I saw the drivers.

Q. And were both of the drivers huddled together?

A. Well, it is right difficult to say whether they were actually huddled together or not. It all happened in a twinkling.

Q. From what you could see weren't they both on the driver's side of the vehicle?

A. Yes, yes, they were.

Q. Behind the steering wheel?

A. Yes.

Q. This hill you lived on, that is the hill that is used in the winter time for sledding out in the park?

Mrs. G. B. Ingraham.

A. Yes, there was a time 8 or 10 years ago that when we have a freeze they would close off the traffic for a while and young folks would come over and slide down. The hill isn't traveled much now. It is more or less a private road.

Q. I hand you a photograph and ask if you will first identify the direction which that picture is looking?

A. (Examining) South.

Note: At request of counsel the photograph page 16 } identified is marked as Defendant's Exhibit No. 1,
and filed in evidence.

Q. This picture is taken at a place north of where you lived on Rugby Road?

A. Yes.

Q. Do you recognize that as Rugby Road however?

A. Yes, this is Rugby Road. Now this high ledge here was not there then.

Q. You mean the white ledge?

A. The white ledge, this high ledge, and then between the end of this ledge and my home is a vacant lot and it was on that lot that we were standing.

Q. Mrs. Ingraham, you lived fairly near to the curve in the road, isn't that correct?

A. Yes.

Q. And the picture is taken from up on the hill north of where you lived?

A. That is right, and here is my house top here. I will circle my house top there with a green pencil.

Q. All right, now I hand you another picture and ask you if that isn't also a picture of Rugby Road taken just north of your home?

A. Yes, there is a tree in the center of the road there and it was from that tree that he swerved over there (placing cross-mark on photograph).

page 17 } Q. You have put an "X" at that spot I believe?

A. That is right, and I am also putting a circle on the tree that was struck. Now they look opposite, but they are not.

Note: At request of counsel the photograph just identified is marked as Defendant's Exhibit No. 2 and filed in evidence.

Q. You lived on the west side of Rugby Road I believe?

A. Yes.

Mrs. G. B. Ingraham.

Q. Are there any houses or businesses or anything on the other side of the road from you at any place?

A. No.

Q. Are there any within a city block either way on the other side of the road?

A. You mean residences?

Q. Residences or businesses or anything?

A. Yes, residences.

Q. On the other side of Rugby Road?

A. Oh, no, not on the other side of Rugby Road.

Q. This colored gardener that you had, did he immediately upon seeing the vehicle come down the hill run towards the house?

A. Yes, sir, he did.

Q. Well, he wouldn't have been in a position to page 18 } see what occurred if he had?

A. That is right.

Q. Is this generally regarded, or do you know, as a dangerous curve right there where Rugby Road goes into there?

A. Very dangerous.

RE-DIRECT EXAMINATION.

By Mr. Allen:

Q. What do you mean by the car bouncing back and forth? Can you describe a little better what you meant by that?

Mr. Miller: If I might correct counsel, I believe she said the front wheels were bouncing.

A. It seemed to bounce.

Q. What do you mean by the front wheels were bouncing back and forth? Back and forth means going forward and back I take it?

A. No, to me it didn't mean that. The car was coming and it was bouncing. It bounced two or three times as if the car was jerking, as if someone was trying to stop it.

Q. You do not know who that someone was though?

A. I couldn't say.

Q. Was it doing that when you first saw it? page 19 } A. That would be very difficult for me to say because it all happened in a split second.

Q. What attracted your attention to it?

A. Noise at first.

Mrs. G. B. Ingraham.

Q. What was the nature of the noise? That is was it brakes or squeaks or speed or what?

A. Speed, you hear the speed. Every now and then you will hear a car go by this door and you can hear that speed, and I repeat there was a type of a noise, not that the brakes were squeaking, but there was a grinding. I cannot describe it more than to say grinding, and I don't know whether it was the car—an old car that would make that noise under speed or whether there was new gravel on the road and it was doing that. I just don't know because I am not very good at that, but I know it frightened us nearly to death.

Q. That was what frightened you?

A. The thing that frightened me so it looked as if it was headed right straight into me.

Q. Were you frightened thinking that it might hit you?

A. That is right.

Mr. Miller: I object to the leading question.

Q. What was it that frightened you?

A. I just answered that.

page 20 } Mr. Miller: I object to that question. I object to it being repeated.

Q. Go ahead and answer it.

A. I just answered it a minute ago. I told you that it frightened me for fear that it was going to run into me.

Q. What did you do when you were both frightened by this?

A. Oh, I stood my ground.

Q. What direction did the car take then?

A. As I marked on your photograph, it hit the curb and then almost centered itself in the road, tried to, but then in viewing the tree made the last terrific pull to the opposite side, which pulled the car into the tree.

Q. How far was it from you where it hit the curb?

A. Well, you have a grass plot and then you have the pavement and the pavement and my ledge, and my yard was built up from the pavement. I had stepped down from the pavement right inside my yard. By this time Sherman had gotten on my porch.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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