

1659  
178-343  
**Record No. 2407**

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In the  
Supreme Court of Appeals of Virginia  
at Richmond

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**WALTER E. BLOXOM**

v.

**CHARLES GOODE McCOY**

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FROM THE CIRCUIT COURT OF NORFOLK COUNTY

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**RULE 14.**

¶5. **NUMBER OF COPIES TO BE FILED AND DELIVERED TO OPPOSING COUNSEL.** Twenty copies of each brief shall be filed with the clerk of the court, and at least two 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 printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records. The record number of the case shall be printed on all briefs.

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The foregoing is printed in small pica type for the information of counsel.

M. B. WATTS, Clerk.

178 VA 343



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IN THE  
**Supreme Court of Appeals of Virginia**  
AT RICHMOND.

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**Record No. 2407**

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WALTER E. BLOXOM,

*versus*

CHARLES GOODE McCOY.

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PETITION FOR WRIT OF ERROR.

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*To the Chief Justice and Justices of the Supreme Court of  
Appeals of Virginia:*

Your petitioner, Walter E. Bloxom, respectfully represents that he is aggrieved by the certain judgment of the Circuit Court of Norfolk County, Virginia, entered against him on the 13th day of August, 1940, in favor of the above styled defendant wherein the said court determined that your petitioner, the plaintiff in the said action, take nothing by his suit and that the defendant recover his costs by him in said action expended, the said proceedings by the Circuit Court of Norfolk County, Virginia, being held pursuant to a notice of motion for judgment for seven thousand five hundred dollars (\$7,500.00) by your petitioner, Walter E. Bloxom, against said Charles Goode McCoy.

This notice of motion was filed in Norfolk County, Virginia before the Circuit Court aforesaid and in said notice of motion claim was asserted for seven thousand five hundred dollars (\$7,500.00) damages based upon personal injuries suffered by your petitioner as the result of the neg-

ligence of the defendant, Charles Goode McCoy, who was operating an automobile upon a state highway in Norfolk County, Virginia.

There was a verdict and judgment in favor of the said defendant and against your petitioner as herein set out, which the Judge of the Circuit Court of Norfolk County, Virginia, refused to set aside as being contrary to the law and evidence, of which verdict and judgment your petitioner now complains.

2\* \*A transcript of the record is presented herewith as a part of this petition. Page references herein are to the pages of the transcript of the record, p. being used to indicate page and L. the line or lines thereof with the respective numbers following.

### FACTS.

On June 23, 1939, about 4:30 P. M., the defendant, Charles Goode McCoy, was driving the automobile involved in this collision en route from Portsmouth to Battery Park, Virginia, on a State Highway in Norfolk County. With him in the front seat of the automobile was W. E. Clarke. Sitting on the back seat was Walter E. Bloxom on the right, C. L. McCoy in the middle, and Nathan Stowe on the left immediately behind the driver. These men worked on individual jobs in Portsmouth and lived at Battery Park and Rescue in Isle of Wight County, Virginia. They had an arrangement whereby each contributed fifty cents a day as his share of the expenses, the same being in reimbursement of costs of gasoline, oil, bridge toll and other expenses incident to the trips to and from Portsmouth, the said sum being paid to the man driving the car. The case was tried by the court under the theory that neither the guest doctrine nor the for hire doctrine applied and under the rules applicable to the cases requiring ordinary care and proof by the plaintiff of simple negligence. This theory is not contested before the Supreme Court.

It was raining and on several occasions after leaving Portsmouth the windshield misted or fogged over and the driver of the car had wiped the windshield with a handkerchief (R., p. 94, L. 16) (R., p. 100, Ls. 6 & 7). Immediately prior to the upset the windshield misted and he undertook to clear it up by wiping it, taking one hand off the steering wheel, and, according to the plaintiff, focused his attention on the wiping process and took his eyes off the road (R., p. 29, Ls. 20-25) (R., p. 30, Ls. 1 & 2). According to the defendant, he was

"trying to keep his eyes ahead of him" (R., p. 104, Ls. 5-6). The car drifted to the right and ran off of the edge of the concrete on the shoulder (R., p. 104, Ls. 11-14). Using 3\* his own language, the driver \*undertook to "ease" it back on the road and at that time stated that it made a "slip" whereupon he applied the brakes and made a left-hand swing, whereupon the car got out of control, made a U-turn across the highway and stopped in the ditch facing Churchland (R., p. 104, Ls. 15-18). Mr. Bloxom was injured as the car struck the ditch bank.

The car was a 1939 Chevrolet, in use about seven (7) months and in perfect mechanical condition (R., p. 96, Ls. 14-16). At the point of the upset the concrete roadbed is 18 feet wide with a 22 foot (the word "brush" probably stenographic error for "grass") shoulder on each side and a four foot ditch beyond that. The upset occurred on the portion of the road from Churchland to Bellville which is perfectly straight for 1.9 miles. There was no traffic in sight either way; it was raining, with no wind, and the road was wet (R., p. 29, Ls. 1-17) (R., p. 95, Ls. 1 & 2). The car was being driven at a speed of 30 to 35 miles per hour. The driver of the car was familiar with the highway, having travelled it going to and from his work daily over a long period of time (R., p. 92, Ls. 24-25) (R., p. 93, Ls. 1-14) (R., p. 91, Ls. 21-22) (R., p. 92, Ls. 1-5). He had ample room on the concrete (R., p. 104, L. 10). The driver of the car testified that on the occasion which resulted in the upset that he noticed the glass misted up "pretty quick" (R., p. 97, Ls. 5-6), but that he didn't know how long the glass stayed clear but admitted that it would take some time for the glass to get frosted so that he couldn't see; in other words, that it would be 3, 4 or 5 minutes, and that if he was driving the car, he couldn't help but see that the glass was getting frosted and would expect to have to do something (R., p. 100, Ls. 13-22). The driver further testified that he had an opportunity to stop if he wanted to (R., p. 101, Ls. 3-5), and that he knew that the road was wet and slippery (R., p. 106, Ls. 11-13), and with that knowledge he took his right hand off the wheel and undertook to wipe the windshield without stopping and without slowing his speed (R., p. 106, Ls. 14-17). The driver further testified that he did not put the brakes on until after the car came back on the road (R., p. 103, Ls. 15-21).

Mr. Bloxom was severely and painfully injured, sustaining a fractured back and other injuries not so serious.

## \*THE ASSIGNED ERRORS.

The appellant assigns as error:

(1) That the court erred in granting defendant's instruction #1, which was as follows:

"The court instructs the jury that a person who is required to act in a sudden emergency which is not occasioned by his negligence even if he acts unwisely, is not guilty of negligence in law, since in case of sudden and unexpected danger, necessitating an immediate decision as to which of two or more ways of escape will be resorted to, the law makes allowance for errors of judgment, even though it appears that the resulting accident could have been avoided if the party so placed had pursued a different course."

(2) Improper remarks of Mr. Tom E. Gilman of counsel for the defendant when he told the jury that any verdict which they rendered against Mr. McCoy in this case would have to be paid out of his own pocket and out of his own hard-earned wages. Counsel for the defendant had knowledge at that time that the car was insured, McCoy having a liability insurance policy and counsel having been employed by the insurance company to defend the case.

(3) That the verdict of the jury and the judgment of the court based thereon is contrary to the law and evidence.

Addressing ourselves to the first assignment of error, namely, the granting of the sudden emergency instruction in this case, we submit that there are two requisites which must exist in order to make such an instruction applicable. They are: First, a sudden emergency must in fact exist; and second, it must appear that the emergency was brought about through no fault of the defendant himself. *Gaines v. Campbell*, 166 S. E. (Va.) 704. *Ball v. Witten*, 154 S. E. (Va.) 547. *Clark v. Farmer*, 159 So. 47.

It cannot be said that there was a sudden emergency under the facts in this case. The testimony is hardly in  
5\* conflict. We cite \*that of the defendant since the verdict was in his favor and the court will have to view it from the point of view of the evidence most favorable to the defendant. The defendant knew that it was raining (R., p. 94, L. 12), and that the road was wet and slippery (R., p. 106, Ls. 11-13). He knew that the windshield had misted or frosted several times before on that afternoon (R., p. 95,

Ls. 16-18). As to whether or not the misting or fogging of the windshield happened suddenly, the defendant testified that it took some time for the glass to get frosted so he couldn't see; in other words, 3, 4 or 5 minutes (R., p. 100, Ls. 13-18). There is certainly nothing sudden about this phase of the testimony. There was no traffic on the road (R., p. 104, Ls. 7-8) to interfere with the operation of the car or to create any emergency. Now let us follow Mr. McCoy in his testimony (R., p. 94, Ls. 11-23). He states that he had a handkerchief on the seat by him and undertook to clear up the mist. The car ran off the road. He pulled it back and pulled the brakes on. It turned around to the left and headed in the bank. His testimony is clearer on cross examination (R., p. 104, Ls. 11-15) where he states that while he was in the act of wiping the windshield with only his left hand on the wheel, and when the right side of the car left the highway, that he put both hands on the wheel to "ease her back up on the road." It would therefore appear that he was approaching the problem up to this point with anything but an attitude of sudden emergency. Then we find Mr. McCoy says (R., p. 104, L. 16) that the car made a slip and that the first thing that popped in his mind was to stop. What did he do then? He applied the brakes at once and made a left-hand swing (R., p. 104, Ls. 17-18). It was at this point that Mr. McCoy testified that the car got out of control (R., p. 104, Ls. 19-24). In other words, according to the McCoy testimony, the car got out of control when he applied the brakes on a road that he knew to be wet and slippery and when he made a left-hand swing. Is this not negligence, deliberate and considered, instead of an act in emergency?

The defendant's only other witness as to how the accident happened was his brother, C. L. McCoy. He testified:  
6\* "It happened \*just like that, as quick as you could do that" (Illustrating) (R., p. 88, Ls. 14-15), and further (R., p. 89, Ls. 8-12) "all of a sudden I felt the car kind of slip, you know, like it would be. I was sitting in the rear seat and naturally I kind of noticed it, you know, and as quick as that you might say the car was in the ditch \* \* \*." See also p. 89, Ls. 21, 22, 23. He further testified that he wasn't paying any attention to the windshield (R., p. 90, Ls. 17-19); that he did not pay any attention to the wiping of the windshield; that he didn't see the driver wipe it; that if he did he wasn't paying any attention to it; that he wasn't looking that way; that he was talking with Mr. Stowe, and wasn't paying any attention to what the driver was doing and naturally wasn't noticing the driver (R., p. 91, Ls. 11-18).



It is obvious from C. L. McCoy's testimony that he did not see, notice or pay any attention to any of the things that led up to the upset. He says all of a sudden he felt the car kind of slip, and he naturally kind of noticed it. There is nothing in that to show sudden emergency. The very language that he kind of noticed it shows an absolute absence of sudden emergency. When a sudden emergency arises does not a man do more than "kind of notice it"? Obviously the thing that happened quickly and suddenly which was referred to by C. L. McCoy was the driver's left swing and application of the brakes on the slippery road. Up to this point where the car "kind of slipped" he "kind of noticed it". But when the car came back on the concrete road after running off the shoulder, he placed both hands on the back of the front seat and said, "My God, brother Jack, what are you doing?" (R., p. 31, Ls. 2-12). Up until that time one can hardly say from the evidence that C. L. McCoy was paying any attention at all or that he felt himself confronted with any emergency which required any act *in extremis* on the part of the driver.

We respectfully submit that this evidence does not show that a sudden emergency existed in fact. The defendant was confronted with the danger of the windshield frosting when he left the shipyard in Portsmouth (R., p. 94, Ls. 11-13). 7\* He had been called upon to wipe \*the windshield on several previous occasions. He knew the road intimately. He knew definitely the conditions of the weather. It was his duty to operate the car and clear the windshield in such a manner as not to injure Mr. Bloxom. He had sufficient time and means and space to have avoided the injury by proceeding with a proper degree of care. See Huddy on Automobiles, Section 14, page 36.

Of course, in all automobile wrecks, there is a point when the car goes out of control. There might be said to be always a point when there is an emergency. In this case, there were certain definite factors which caused this car to go out of control. These factors were the negligence of the defendant. Let us see some of the things which he did, in discussing the second requisite which must exist for the granting of the sudden emergency instruction.

It is certain that the defendant operated his automobile in a manner so as to endanger and be likely to endanger the life and limb of the plaintiff. This definitely was what happened. (See Va. Code 2154-108). He failed to operate his automobile upon the paved surface of the road at a time when he had the entire road to himself. By his own evi-

dence, he failed to keep his automobile under proper control (R., p. 104, Ls. 15-24). He undertook to operate his automobile with one hand (R., p. 104, Ls. 11-14) travelling at a speed of 30 to 35 miles per hour (53 feet per second), at a time when the windshield was clouded to such an extent that it interfered with his vision. He certainly was inattentive to the course of the automobile which resulted in its running off the road. Mr. Bloxom who was seated on the right-hand side of the rear seat and who obviously, from that position, had a good view of the profile of Mr. McCoy's face, said that he took his eyes off the road and focused his attention on wiping the windshield (R., p. 29, Ls. 24-25) (R., p. 30, Ls. 1-2). We think it perfectly obvious that if Mr. McCoy had seen that the car was about to run off the road, he would have manipulated the steering wheel so as to have prevented it, and the fact that it did run off the road was obviously due to the fact that he was not looking at the direction the car was 8\* going \*and did nothing to prevent it from drifting off the road and that therefore, it is perfectly obvious that he failed to keep a proper lookout. It was his duty to exercise ordinary care to keep the car from running off the concrete; to see the road and shoulder and to keep on the concrete. Then after it went off the road, what was the situation? It was his duty to handle the car so as not to injure those riding therein. Is a man who puts "both hands on the wheel to ease her back up on the road" (R., p. 104, Ls. 15-16) acting in a sudden emergency? (R., p. 9, L. 5) Mr. McCoy states that he had his foot off the accelerator when he ran into the fog, by which we presume he means the foggy or misty condition of his windshield, since no witness has testified that there was what is commonly known as a fog over the road (R., p. 103, Ls. 4-7). He says that he slackened the speed of the car, but (R., p. 103, L. 20) that he didn't put the brakes on and (R., p. 106, Ls. 11-17) further that at the time of the collision it was raining, that he knew the road was wet and slippery, and with that knowledge, he took his right hand off the wheel to wipe the windshield without slowing his speed. No effort, according to the witness' own testimony, was made to stop the car when he ran off the road (R., p. 103, Ls. 20, 21).

(R., p. 103, Ls. 16, 20-21) The rule with reference to the application of the sudden emergency doctrine is stated in Michie's Law of Automobiles, Section 8, pages 10-15, citing Virginia decisions, including *V. E. P. Co. v. Ford*, 166 Va. 619. See also Blashfield's Encyclopedia of Automobile Law, Vol. 3, paragraph 1739, and Vol. 1, paragraph 668. See also

*Smith v. Norfolk and Western Railway*, 107 Va. 725, *C. & O. v. Hall*, 190 Va. 296, and *Virginia, etc., Railway Co. v. Hill*, 119 Va. 837.

In these authorities, the view is expressed that while the law views acts done or omitted in cases of sudden emergency with a certain degree of leniency, the court will not permit a person to take advantage of such leniency where the situation of danger has been brought about by the negligence of the 9\* party seeking to invoke the \*rule. No allowance will be made in favor of one whose own fault has brought him into the peril which disturbs his judgment. The cases refer to sudden and unforeseen emergency which overpower the judgment of reasonable and prudent men, rendering them incapable of deliberate and intelligent action. The cases refer to situations requiring immediate action and decision, the exigency of the moment requiring immediate action to avoid the sudden peril. He is then required to act in the same manner as a reasonably prudent man would act under such circumstances. The instruction, under examination, does not charge McCoy under this rule with ordinary care under the circumstances existing. The evidence of McCoy himself which is the most favorable to him, shows all time for reflection and deliberation which could possibly be wanted or needed, and shows nothing which placed him in a sudden emergency. His last deliberate acts threw the car out of control and precipitated the crash. He pulled on the brakes and made a left swing. Reading his testimony, we come to the inescapable conclusion that at no time did any sudden peril or emergency arise to overpower the judgment of Mr. McCoy. From the time his windshield misted or fogged up after requiring from three to five minutes to do so, until he took his swing to the left, which certainly appears to be deliberate from his testimony, nothing appears in the evidence to confront him with a sudden emergency. He states that he lost control of the car at the instant of his swing to the left.

We submit that the instruction does not properly state the law; that the final emergency which appears in every automobile collision when Mr. McCoy lost control of his car, was brought about by his own negligence; and further, any instruction on the sudden emergency doctrine under the evidence in this case is inapplicable.

As to whether or not it is negligence to remove one hand from the wheel temporarily, see *Bryant v. Marshall*, 10 Pac. 2nd, 868, wherein it is held that such may, but need not be, negligence, depending on the associated facts. See also *Kirby v. Keating*, 171 N. E. 671, where it was held negli-

gence for the driver to hold his hand under dashboard to look at wristwatch. See also *Polumbo v. Campo*, 85 Penn. 10\* \*Super, 440. See also *Dow v. Lipsitz*, 185 N. E. 921 and *Meaney v. Doye*, 177 N. E. 6. In the *Dow* case, it was held that a finding of gross negligence was warranted where the driver attempted to adjust lights while travelling 30 to 35 miles per hour and the car left the road. In the latter case, finding of gross negligence was held warranted where the driver lit a cigarette, permitting the automobile to strike a boulder.

We submit that the case at bar is to be distinguished from those cases of which *Boggs v. Plybon*, 160 S. E. 77, and *Jones v. Nugent*, 180 S. E. 161, are examples, in this respect, among others. In those cases, the plaintiffs relied solely on the fact that the car ran off the road to establish negligence. In the case at bar, the plaintiff has proved the negligent acts of the defendant which caused the car to go off the shoulder and his negligent conduct thereafter which precipitated the upset and all of which proximately caused the accident. In those cases, the plaintiffs practically relied upon the doctrine of *res ipsa loquitur*.

Addressing ourselves to the second assignment of error, namely, the improper argument of Mr. Gilman before the jury, it is a familiar principle of the law of the state of Virginia that any evidence of or mention by counsel in arguing the case, of insurance, is improper and grounds for a mistrial. See *Lanham v. Bond*, 160 S. E. 89 (S. E. Digest Key 127 Trials). At the time Mr. Gilman made these remarks, had the plaintiff objected, he could not have made the objection without imparting the information to the jury that there was insurance involved in the case. The objection was made immediately after the jury retired and before the verdict was rendered. We respectfully submit that it is just as improper for counsel for the defendant to say to the jury that there is no insurance as it is for the counsel for the plaintiff to say that there is. The jury should be left to try the case without reference to the question. Mr. Gilman's argument becomes particularly objectionable when the true facts are realized that there was a public liability insurance policy \*covering the car involved in the collision. The fact that counsel for the defendant disputed liability thereon does not justify the statement. This question has been before the court on a number of occasions and as far as counsel for the plaintiff have been able to ascertain, it has been held in no case that the objection comes too late when made before verdict. The court has held in a number

of cases that objection is too late after verdict and that the objection should be made before the verdict. See *Southern Railway Co. v. Johnson*, 146 S. E. 367. *P. Lorillard and Co. v. Clay*, 127 Va. 753. (*Wickham v. Turpin*, 112 Va. 236. *N. and W. Railway Co. v. Shott*, 92 Va. 48. *Price v. Commonwealth*, 77 Va. 393.

In the present case, plaintiff has a very potent reason as to why the objection was not made prior to the time the jury retired.

In this connection, see *Majestic Steam Laundry v. Puckett*, 171 S. E. 491, in which counsel for the defendant remarked to the jury about "a police officer from Detroit down here to go into the pockets of Mr. Bradley". In his reply, plaintiff's counsel retaliated by saying: "If you give me a verdict for \$11,000.00, I won't go into Mr. Bradley's pocket for one cent of it." In this case, a statement of the plaintiff's counsel was held not improper where so provoked by defendant's counsel. The court in effect excused a statement which might very reasonably have been taken by the jury as indicating insurance because it was provoked by such a remark as we have in this case.

We submit that there was no evidence before the court upon which any such argument of Mr. Gilman could be predicated; and that counsel improperly injected this irrelevant matter for the purpose of prejudicing the jury.

Addressing ourselves to the third assignment of error, much of which has been covered in the arguments on the other assignments we further submit that:

As to all the evidence including that on which there 12\* is \*and is not conflict we respectfully submit that the plaintiff should not be bound by the jury's verdict because the jury considered it under an improper instruction from the court and upon improper argument of counsel not based upon the evidence and partly based upon immaterial matters injected into the argument for the purpose of prejudicing the jury and wrongly telling them that there was no insurance in the case.

There is no conflict in the evidence that the road was wet and slippery and that the fact was known to the defendant; that the windshield was fogging up from time to time so as to interfere with his vision; that the driver was undertaking to drive with one hand, and wipe the windshield with the other; that he was driving under these existing conditions at thirty to thirty-five miles per hour; that he did not undertake to stop his car when it ran off the concrete; that



he undertook to get the wheels back on the concrete while still continuing on his way; that under any of the testimony he did not apply the brakes until he got the car back on the highway and then simultaneously with a left swing; that he lost control of the car; that the driver failed to reduce his speed to such a rate that the car could be controlled under his method and manner of operation under the conditions then existing; that the driver of the automobile failed to apply his brakes in such a manner as to control his car; that he applied the brakes at such a time and in such a manner that he was unable to stop the car until it crashed in the ditch, injuring Mr. Bloxom; that he permitted this to happen on an 18 foot concrete road straight for nearly two miles, with no car in sight either way when he admittedly had ample room to drive his car on the concrete. There being no conflict in this evidence and no evidence of any contributory negligence on the part of the plaintiff, we respectfully submit that any verdict of the jury in favor of the defendant is contrary to the law and the evidence. There is proof of other negligence which is disputed but on this alone the jury should have returned a verdict for the plaintiff.

There being no dispute as to this evidence of negligence, we respectfully submit that there is \*sufficient evidence before the court to enable the court to decide the case upon its merits and therefore that the judgment of the lower court should be reversed and a proper judgment entered in favor of the plaintiff as to the question of negligence remanding the case to the trial court for the purpose of ascertaining the amount of damages only.

It is a general principle of law that even though the question of negligence is ordinarily one for the jury, yet it is a question for the jury to decide under proper instructions from the court. Your petitioner maintains that the first instruction granted by the court was entirely improper under the evidence as will appear from the arguments hereinbefore set forth. Your petitioner further maintains that the granting of that instruction under the facts and circumstances of the case at bar threw an altogether erroneous outlook of the case upon the jury so that the error was highly material and could not have done otherwise than to affect the jury's deliberations and ultimate verdict against your petitioner.

Your petitioner respectfully contends and submits that the judgment of the lower court in this case should be reversed, that the case should be remanded to the trial court for a new trial on all points and/or judgment should be entered in this court in favor of the plaintiff as to the negligence of the de-

fendant and the case remanded to the trial court for the purpose of ascertaining damages only, as the Court of Appeals may consider proper. For the foregoing reasons assigned, he respectfully prays that he may be awarded a writ of error pending the review of the record by this court and that this petition may be read in addition, as your petitioner's opening brief, for which said petitioner intends it. A copy of this petition has been mailed to Mr. A. E. S. Stephens in Smithfield, Virginia, and Mr. Tom E. Gilman in Portsmouth, Virginia, who were the attorneys appearing for the defendant in the trial of this case before the Circuit Court of Norfolk County, Virginia, and said copies of this petition were mailed to them on the 10th day of December, 1940.

14\* \*Counsel for your petitioner desire to state orally the reasons for reviewing the decision and action of the lower court hereinabove complained of and will present this petition to the Honorable C. Vernon Spratley at Hampton, Virginia.

Respectfully submitted,

WALTER E. BLOXOM,  
By CARLTON E. HOLLADAY,  
Of Counsel.

CARLTON E. HOLLADAY,  
I. W. JACOBS,  
HARRY H. KANTER,  
Counsel for Petitioner.

15\* \*We, the undersigned attorneys practicing before the Supreme Court of Appeals of Virginia, do certify that in our opinion, the judgment complained of in the foregoing petition is erroneous and should be reviewed and reversed by the Supreme Court of Appeals of Virginia.

Given under our hands this the 9th day of December, 1940.

HARRY H. KANTER,  
I. W. JACOBS.

Received Dec. 10, 1940

C. V. S.

January 7, 1941. Writ of error awarded by the court.  
Bond \$300.

M. B. W.

**RECORD**

page 2 } VIRGINIA:

In the Circuit Court of Norfolk County.

Walter E. Bloxom

v.

Charles Goode McCoy and Charles Edward McCoy

**NOTICE OF APPEAL.**

To Messrs. Tom E. Gilman and A. E. S. Stephens:

PLEASE TAKE NOTICE That on the 4th day of Oct., 1940, at 3 o'clock P. M., or as soon thereafter as we may be heard at the Courthouse of Norfolk Co., Va. in Portsmouth, the undersigned will present to the Honorable A. B. Carney, Judge of the Circuit Court of Norfolk County, Virginia, who presided over the trial of the above mentioned case in the Circuit Court of Norfolk County, Virginia, June 25, 1940, a stenographic report of the testimony and other incidents of the trial in the above case to be authenticated and verified by him.

And also that the undersigned will, at the same time and place, request the Clerk of the said court to make up and deliver to counsel a transcript of the record in the above entitled cause for the purpose of presenting the same with a petition to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* therein.

CARLTON E. HOLLADAY,  
By A. E. S. STEPHENS,  
Counsel.

Service accepted this 2 day of October, 1940.

A. E. S. STEPHENS,  
TOM E. GILMAN,  
Attorneys for the defendants.

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RECORD.

Virginia:

Pleas before the Circuit Court of Norfolk County, at the Courthouse of said County, on the 4th day of October, 1940.

Walter E. Bloxom, Plaintiff,

v.

Charles Goode McCoy, and Charles Edward McCoy, Defendants.

Be it remembered, that heretofore, to-wit: on the 19th day of December, 1939, came the plaintiff, Walter E. Bloxom, and filed his notice of motion against Charles Goode McCoy and Charles Edward McCoy, in the words and figures following, to-wit:

To Charles Goode McCoy and Charles Edward McCoy:

You and each of you are hereby notified that on the 1st day of January 1940, at 10 o'clock A. M., or as soon thereafter as counsel may be heard the undersigned Walter E. Bloxom will move the Circuit Court for the County of Norfolk, State of Virginia, at the Courthouse thereof, for a judgment against you and each of you, jointly and severally, for the sum of Seven Thousand Five Hundred Dollars (7,500.00) which sum is due by you and each of you to the undersigned for the wrongs, injuries and damages hereinafter set forth, to-wit:

That heretofore, to-wit: on or about the . . . . day of June, 1939, in the daytime of the said day, the said Walter E. Bloxom was riding in your automobile, which was then and there owned, operated, controlled and driven by you  
page 4 } and each of you upon and along Virginia State Highway # . . . . in Norfolk County, Virginia, at a point about one mile northwest of Churchland, Virginia; that is to say, proceeding from Portsmouth and Churchland to Battery Park, Virginia, and while the said plaintiff was then and there riding in the said automobile, you, the defendants, did then and there unlawfully, recklessly and negligently and in violation of the laws of the State of Virginia, run, drive and operate the said automobile in such manner as to cause it to come into violent collision with the person,

body, head, back and limbs of the said Walter E. Bloxom, thereby severely and permanently injuring the said Walter E. Bloxom internally and externally and in all parts of his person body, back, head and limbs, and by reason of your said negligence in so operating the said automobile you did knock and throw the said Walter E. Bloxom with great force and violence upon and against the said roadway, the ground adjacent thereto, the said automobile in which he was riding and upon and against the other passengers riding therein and you did thereby knock and throw the other passengers riding in the said automobile at the said time and place with great force and violence upon and against the said Walter E. Bloxom, inflicting in and upon the person, body, back, head and limbs of the said Walter E. Bloxom, severe and permanent cuts, bruises, fractures, contusions, breaks, and lacerations, both internally and externally, thereby permanently injuring him in all parts of his back and body and causing him great pain and distress and permanent and incurable injuries. And as a further result of the injuries

caused by your negligence as aforesaid, the said  
page 5 } Walter E. Bloxom has been caused from hence  
hitherto to suffer great mental anguish and physical pain and will continue to suffer and has been obliged to spend divers sums of money aggregating a large sum of money in and about endeavoring to be cured and relieved of said injuries and has been forced to lose a great deal of time from working and attending to business matters, and from engaging in any lawful, gainful or productive occupation or calling and has suffered and will continue to suffer great loss from the permanent diminution of his earning capacity by reason of the injuries aforesaid.

That heretofore, to-wit, on or about the . . . day of June, 1939, in the daytime of the said day, the said Walter E. Bloxom was riding in your automobile, which was then and there owned, operated, controlled and driven by you and each of you upon and along Virginia State Highway Route # . . . in Norfolk County, Virginia, at a point about one mile northwest of Churchland, Virginia; that is to say, proceeding from Portsmouth and Churchland to Battery Park, Virginia, and while the said plaintiff was then and there riding in the said automobile, you, the defendant, did then and there run, drive, and operate the said automobile in a grossly negligent, reckless, careless and unlawful manner and with wilful and wanton disregard of the safety of the plaintiff, who was then and there being transported by you and each of you, so as to cause said automobile to come into violent collision



with the person, body, head, back and limbs of the said Walter E. Bloxom, thereby severely and permanently injuring the said Walter E. Bloxom internally and externally and in all parts of his person, body, back, head and limbs, page 6 } and by reason of your said gross negligence and wilful and wanton disregard of the safety of the plaintiff in so operating the said automobile you did knock and throw the said Walter E. Bloxom with great force and violence upon and against the said roadway, the ground adjacent thereto, the said automobile in which he was riding and upon and against the other passengers riding therein and you did thereby knock and throw the other passengers riding in the said automobile at the said time and place upon and against the said Walter E. Bloxom with great force and violence, inflicting in and upon the person, body, back, head and limbs of the said Walter E. Bloxom—severe and permanent cuts, bruises, fractures, contusions, breaks and lacerations, both internally and externally, thereby permanently injuring him and causing him great pain and distress and permanent and incurable injuries. And as a further result of the injuries caused by your gross negligence and wilful and wanton disregard of the safety of the plaintiff as aforesaid, the said Walter E. Bloxom has been caused from hence hitherto to suffer great mental anguish and physical pain and will continue to suffer and has been obliged to spend divers sums of money aggregating a large sum of money in and about endeavoring to be cured and relieved of said injuries and has been forced to lose a great deal of time from working and attending to business matters, or from engaging in any lawful, gainful or productive occupation or calling and has suffered and will continue to suffer great loss from the permanent diminution of his earning capacity by reason of the injuries aforesaid.

The plaintiff further avers that at the time the page 7 } said injuries were inflicted upon him by you, that he the plaintiff, W. E. Bloxom, you the defendant, Charles Goode McCoy, and three other parties were severally and separately employed in the City of Portsmouth, Virginia; that the plaintiff, you the said Charles Goode McCoy and some of the other parties resided at and now reside at Battery Park in the County of Isle of Wight, Virginia, the other parties residing nearby at Rescue, Virginia; that in traveling to and from their several and separate jobs the said plaintiff and you the said defendants alternated in driving their respective automobiles from Battery Park to Portsmouth and from Portsmouth to Battery Park, you driving

your automobile daily for periods of a week and the plaintiff driving his daily during alternate weeks, and further each person so riding from Battery Park to Portsmouth and returning paid and agreed to pay to the person and persons furnishing and driving the said automobiles the sum of fifty cents for each day the same being in payment of transportation to and from Portsmouth, Virginia; the said plaintiff further avers that there was no element of joint enterprise in said undertaking or any part thereof, each person being severally and separately employed and being solely interested in his own job and the wages he received therefor, and each paying his own cost of transportation which was collected, accepted and retained by the person and persons furnishing such transportation to each party, for each day each of said parties was so transported, you the said defendants collecting, receiving and retaining all of said funds for each and every day on which you transported each of said parties,

including the plaintiff to and from Battery Park  
page 8 } and Portsmouth as aforesaid, and particularly on the date on which you inflicted the injuries on the plaintiff set forth herein. The plaintiff further avers that at the time of the said collision and the inflicting of the injuries herein set out on the plaintiff the said W. E. Bloxom was then and there being transported by you and each of you under said agreement whereby the plaintiff agreed to and did pay you the sum of fifty cents per day to transport him from his said home to his place of employment back to his said home, and that at the time of the said injuries to the plaintiff you were then and there undertaking to transport said plaintiff from his said place of employment to his said home in accordance with and in fulfillment of said agreement. And the plaintiff further avers that he did not have and did not exercise any control over the said automobile in which he was riding or over the driver thereof or the owner thereof.

Wherefore the undersigned alleges that as a proximate result thereof damages have been sustained by him to the amount of seven thousand five hundred dollars (\$7,500.00) and payment therefor will be asked at the hands of the said court at the time and place hereinaabove set out.

Given under my hand this 12th day of December, 1939.

WALTER E. BLOXOM  
By CARLTON E. HOLLADAY  
His Counsel.

page 9 } And the return of the Sheriff of the County of  
Isle of Wight, on the foregoing Notice of Motion,  
is in the words and figures following, to-wit:

Executed the within Notice of Motion this the 15th day  
of Dec. 1939 by serving a true copy of the same on Charles  
Goode McCoy, in person in the County of Isle of Wight,  
Va.

W. C. WHITEHEAD,  
Sheriff Isle of Wight County, Va.

Not finding Charles Edward McCoy at his usual place of  
abode I executed the within Notice of Motion this the 15th  
day of Dec. 1939 by serving a true copy of the same on  
Mrs. Charles Goode McCoy for the said Charles Edward  
McCoy and explained to her the purpose of same, she being  
a member of the family of the said Charles Edward McCoy  
and over the age of sixteen years in the County of Isle of  
Wight, Va.

W. C. WHITEHEAD,  
Sheriff of Isle of Wight. *County*, Va.

And an affidavit filed on the 11th day of May, 1940 is in  
the words and figures following, to-wit:

State of Virginia,  
County of Isle of Wight, to-wit:

This day personally appeared before me, A. E. S. Stephens,  
a Commissioner in Chancery for the Circuit Court of the  
County of Isle of Wight, State of Virginia in my said County,  
Charles Edward McCoy, after first being duly sworn deposed  
and says as follows, to-wit:

That I am the same Charles Edward McCoy mentioned in the  
Notice of Motion filed in this matter; that the said automo-  
bile in which the plaintiff was riding belongs to  
page 10 } me but at the time complained of in the plaintiff's  
Notice of Motion, the said Charles Goode McCoy,  
was not acting as my agent, employee, or servant; that I had  
loaned said automobile to the said Charles Goode McCoy  
who was, at the time of the accident in question, in full and  
exclusive custody thereof, and was operating and using the  
same in and about his own affairs and free from any control

in such operations or use on my part; that the transaction between the said Charles Goode McCoy and myself was a pure bailment with the said Charles Goode McCoy as the bailee and myself as the *the* bailor.

CHARLES EDWARD McCOY.

Taken, subscribed and sworn to before me, A. E. S. Stephens, a Commissioner in Chancery as aforesaid, in the County aforesaid, this the 4th day of May, 1940.

A. E. S. STEPHENS  
Commissioner in Chancery

And, at another day, to-wit: May 29, 1940, the defendants filed a motion in the words and figures following, to-wit:

The defendants, by their attorney, move the Court to compel the plaintiff to elect what position he expects to take in the trial of this case, that is upon which count he expects to rely, for the reason that:

The plaintiff in the first count of his Notice of Motion alleges simple negligence; in the second count gross negligence; and in the third count that the plaintiff was a paid passenger in the automobile of the defendants

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CHARLES GOODE McCOY  
CHARLES EDWARD McCOY  
A. E. F. STEPHENS  
TOM E. GILMAN

Counsel.

And, at another day, to-wit On the 29th day of May, 1940, the following order was entered:

This day came the defendants and filed their written motion to compel the plaintiff to elect upon which count in his Notice of Motion he will proceed, and the Court being of the opinion that although the degrees of negligence alleged are different, that at this time he would not compel the plaintiff to elect, it is, therefore, ordered that the defendants' motion is denied, to which action of the Court the defendants except.

And, at another day, to-wit: On the 31st day of October, 1940, the plaintiff filed his amended Notice of Motion, in the words and figures following, to-wit:

To Charles Goode McCoy and Charles Edward McCoy:

You and each of you are hereby notified that on the 1st day of January, 1940, at ten o'clock A. M. or as soon thereafter as counsel may be heard the undersigned Walter E. Bloxom will move the Circuit Court for the County of Norfolk, State of Virginia, for a judgment against you and each of you, jointly and severally, for the sum of seven thousand five hundred dollars (\$7,500.00) which sum is due by you and each of you to the undersigned for the wrongs, injuries and damages hereinafter set forth, to-wit:

That heretofore, to-wit, on or about the 23rd day of June, 1939, in the daytime of the said day, the said Walter E. Bloxom was riding in your automobile, which was then and there owned, operated, controlled and driven by you and each of you upon and along Virginia State Highway Route #.... in Norfolk County, Virginia, at a point about one mile northwest of Churchland, Virginia, that is to say, proceeding from Portsmouth and Churchland to Battery Park, Virginia, and while the said plaintiff was then and there riding in the said automobile, you, the defendants, did then and there unlawfully, recklessly, carelessly and negligently and in violation of the laws of the State of Virginia, run, drive and operate the said automobile in such manner as to cause it to come into violent collision with the person, body, head, back and limbs of the said Walter E. Bloxom, thereby severely and permanently injuring the said Walter E. Bloxom internally and externally and in all parts of his person, body, back, head and limbs, and by reason of your said negligence in so operating the said automobile you did knock and throw the said Walter E. Bloxom with great force and violence upon and against the said roadway, the ground adjacent thereto, the said automobile in which he was riding and upon and against the other occupants riding therein and you did thereby knock and throw the other occupants riding in the said automobile at the said time and place with great force and violence upon and against the said Walter E. Bloxom, inflicting in and upon the person, body, back, head and limbs of the said Walter E. Bloxom, severe and permanent cuts, bruises, fractures, contusions, breaks and lacerations, both internally and externally, there-



by permanently injuring him in all parts of his  
page 13 } back and body and causing him great pain and  
distress and permanent and incurable injuries. And  
as a further result of the injuries caused by your negligence  
as aforesaid, the said Walter E. Bloxom has been caused  
from hence hitherto to suffer great mental anguish and physical  
pain and will continue to suffer and has been obliged to  
spend divers sums of money aggregating a large sum of  
money in and about endeavoring to be cured and relieved of  
said injuries and has been forced to lose a great deal of time  
from working and attending to business matters, and from  
engaging in any lawful, gainful or productive occupation or  
calling and has suffered and will continue to suffer great loss  
from the permanent diminution of his earning capacity by  
reason of the injuries aforesaid.

That heretofore, to-wit, on or about the 23rd day of June,  
1939, in the daytime of the said day, the said Walter E.  
Bloxom was riding in your automobile, which was then and  
there owned, operated, controlled and driven by you and  
each of you upon and along Virginia State Highway Route  
# . . . in Norfolk County, Virginia, at a point about one mile  
northwest of Churchland, Virginia; that is to say, proceeding  
from Portsmouth and Churchland to Battery Park, Virginia,  
and while the said plaintiff was then and there riding  
in the said automobile, you, the defendants, did then and  
there run, drive and operate the said automobile in a grossly  
negligent, reckless, careless and unlawful manner and with  
disregard of the safety of the plaintiff, who was then and

there being transported by you and each of you,  
page 14 } so as to cause said automobile to come into violent  
collision with the person, body, head, back and  
limbs of the said Walter E. Bloxom, thereby severely and  
permanently injuring the said Walter E. Bloxom internally  
and externally and in all parts of his person, body, back, head  
and limbs, and by reason of your said gross negligence and  
disregard of the safety of the plaintiff in so operating the  
said automobile you did knock and throw the said Walter  
E. Bloxom with great force and violence upon and against  
the said roadway, the ground adjacent thereto, the said automobile  
in which he was riding and upon and against the other  
occupants riding therein and you did thereby knock and throw  
the other occupants riding in the said automobile at the said  
time and place upon and against the said Walter E. Bloxom  
with great force and violence, inflicting in and upon the person,  
body, back, head and limbs of the said Walter E. Bloxom  
severe and permanent cuts, bruises, fractures, contusions,

breaks, and lacerations, both internally and externally, thereby permanently injuring him and causing him great pain and distress and permanent and incurable injuries. And as a further result of the injuries caused by your gross negligence and disregard of the safety of the plaintiff as aforesaid, the said Walter E. Bloxom has been caused from hence hitherto to suffer great mental anguish and physical pain and will continue to suffer and has been obliged to spend divers sums of money aggregating a large sum of money in and about endeavoring to be cured and relieved of said injuries and has been forced to lose a great deal of time from working and attending to business matters, and from en-  
 page 15 } gaging in any lawful, gainful or productive occupation or calling and has suffered and will continue to suffer great loss from the permanent diminution of his earning capacity by reason of the injuries aforesaid.

The plaintiff further avers that at the time of the said injuries were inflicted upon him by you, that he, the plaintiff, W. E. Bloxom, you, the defendant, Charles Goode McCoy, and three other parties were severally and separately employed in the City of Portsmouth, Virginia; that the plaintiff, you, the said Charles Goode McCoy and some of the other parties resided at and now reside at Battery Park in the County of Isle of Wight, Virginia, the other party residing nearby at Rescue, Virginia; that in traveling to and from their several and separate jobs the said plaintiff and you, the said defendants alternated in driving their respective automobiles from Battery Park to Portsmouth, and from Portsmouth to Battery Park, you driving your automobile daily for periods of a week and the plaintiff driving his daily during alternate weeks, and further each person so riding from Battery Park to Portsmouth, and returning paid and agreed to pay to the *to the* person or persons furnishing the said automobiles the sum of fifty cents each day, the same being in reimbursement of the costs of gasoline, oil, bridge toll, and other expenses incident to the trips to and from Portsmouth, Virginia; the said plaintiff further avers that there was no element of joint enterprise in said undertaking or any part thereof, each person being severally and separately employed and being solely interested in his own job and the wages he received therefor, and each pay-  
 page 16 } ing his own costs of transportation which was collected, accepted and retained by the person or persons furnishing such transportation to each party, for each day of said parties were so transported, you the said defendants collecting, receiving and retaining all of said

funds for each and every day on which you transported each of said parties, including the plaintiff to and from Battery Park and Portsmouth as aforesaid, and particularly on the date on which you inflicted the injuries on the plaintiff set forth herein. The plaintiff further avers that at the time of said collision and the inflicting of the injuries herein set out on the plaintiff the said W. E. Bloxom was then and there being transported by you and each of you under said agreement whereby the plaintiff agreed to and did pay you the sum of fifty cents per day to cover your expenses incident to transporting him from his said home to his place of employment and from his place of employment back to his said home, and that at the time of the said injuries to the plaintiff you were then and there undertaking to transport said plaintiff from his said place of employment to his said home in accordance with *an* in fulfillment of said agreement. And the plaintiff further avers that he did not have and did not exercise any control over the said automobile in which he was riding or over the driver thereof or the owner thereof.

Wherefore, the undersigned alleges that at a proximate result thereof damages have been sustained by him to the amount of seven thousand five hundred dollars (\$7,500.00) and judgment therefor will be asked at the hands  
page 17 } of the said Court at the time and place herein-  
above set out.

Given under my hand this 12th day of December, 1939.

WALTER E. BLOXOM  
By CARLTON E. HOLLADAY  
His Counsel.

And, at another day, to-wit: May 31st, 1940, the plaintiff filed his bill of particulars, in the words and figures following, to-wit:

For bill of particulars, plaintiff relies on the allegations in the Notice of Motion, and also in addition thereto says:

That the defendants drove and operated their automobile upon the highway at the time mentioned in the Notice of Motion for Judgment recklessly, and at a speed and in a manner so as to endanger and be likely to endanger the life, limb and property of the plaintiff who was then and there riding in the automobile driven, operated and controlled by the defendants, the said Walter E. Bloxom as an occupant of the

said automobile being then and there a person using the said highway at the said time and place set forth in the Notice of Motion.

That the defendants failed and neglected to operate their said automobile on the highway at the time and place set out in the Notice of Motion for Judgment at a careful speed; and did drive their said automobile at a speed which was greater than was reasonable and proper having due regard to the traffic, surface and width of the highway and of any other conditions then existing.

page 18 } That the defendants operated their said motor vehicle when the same was not equipped with steering gear adequate to insure the safe control of the vehicle.

That the said defendants had their motor vehicle equipped with defective tires, which were slick and worn and which further failed to furnish adequate traction surface for the control of the braking of the said car.

That the said defendants although running, driving and operating their said automobile upon a paved highway of sufficient width, failed to operate their said automobile thereon but did operate the same on the shoulder thereof, and did run, drive and operate it *an* violently propelled it into a ditch adjacent thereto;

That the said defendants did operate their said automobile with inadequate and *improperly* brakes and failed to equip it with brakes adequate to control the movements thereof and to stop such vehicle and failed to maintain the brakes thereof in good working order;

That the defendants caused and permitted their said automobile to skid;

That the said defendants failed to keep their automobile under proper control and drove the same when it was not under proper control;

That the defendants permitted mist and vapor and dirt and other foreign matter to collect on the windshield of the automobile so as to interfere with the vision of the driver and his ready *preception* of the road;

page 19 } That the driver of the said automobile undertook to remove from his pocket a handkerchief for the purpose of wiping the windshield while continuing to operate the said automobile with full knowledge of the dangerous condition of the road, the weather and other conditions existing at the time;

That the said driver of the automobile undertook to wipe the windshield of the said automobile while operating it and travelling along said highway with full knowledge of the

dangerous conditions then existing, including the stormy weather, the wet and slippery surface of the roadbed and other conditions then and there existing at the said time;

That the driver of the car was guilty of inattention immediately before and at the time the injuries were inflicted upon the plaintiff;

That the said driver of the said automobile took his eyes off the road to look at the clouded windshield and his operations in wiping the same, while still travelling along said highway;

That the driver of the car in undertaking to wipe the windshield while still driving and operating the car travelling along the said road, obscured the vision of the roadway and his opportunity to see through the windshield;

That the driver of the said car undertook immediately before and at the time of the inflicting on the injuries complained of upon the plaintiff, to drive the said automobile with one hand;

That the driver of the said automobile failed to apply his brakes when the application thereof would have effectively controlled the car;

page 20 } That the driver of the automobile failed to decrease the speed thereof;

That the driver of the said automobile failed to apply his brakes, when the application thereof would have avoided the injuries to the plaintiff;

That the driver of the automobile failed to cut off the gas and failed to remove his foot from the accelerator thereof;

That the driver of the said automobile increased the speed thereof immediately before and at the time the defendants inflicted the injuries upon the plaintiff;

That the driver of the automobile failed to stop it when he became aware that it was being operated dangerously;

That the said driver of the said car drove the same as to cause it to run off the pavement on the right shoulder of the said highway; that he attempted to drive it back on the pavement in an improper manner; that he drove it back on the pavement improperly; that thereafter he drove and propelled it violently across and along said pavement and the shoulder of the said road and into the ditch adjacent thereto;

That the windshield wiper of the said car was not in proper order and was not operating properly immediately before and at the time the injuries complained of were inflicted upon the plaintiff;

That the defendants knowingly undertook unnecessary



risks in operating the car at the time and place mentioned in the Notice of Motion;

That the plaintiff and other occupants of the page 21 } car were paying the defendants fifty cents per day to cover the expenses of the defendants incident to gasoline, oil, and bridge toll in travelling from Battery Park to Portsmouth and from Portsmouth to Battery Park;

That the said defendants failed to properly apply the brakes on their said automobile in such a manner as to control said automobile;

That the said defendants failed to keep a proper lookout;

That the said defendants operated their car in such a careless and reckless manner that they lost control thereof;

That the defendants were guilty of reckless driving which was negligence *per se*;

That the plaintiff relies on each and every allegation contained in his Notice of Motion as a *party* of his Bill of Particulars;

That in all of the things committed and omitted as herein set forth the said defendants acted carelessly, negligently, unlawfully and recklessly and were guilty of both simple and gross negligence;

That the plaintiff sustained a compressed fracture of the third lumbar vertebra and was permanently injured.

To the damage of the plaintiff in the sum of seven thousand five hundred dollars (\$7,500.00).

WALTER E. BLOXOM,  
By CARLTON E. HOLLADAY,  
His Counsel.

And, at another day, to-wit: On the 17th of page 22 } June, 1940, the defendant Charles Goode McCoy filed his grounds of defense, in the words and figures following, to-wit:

For grounds of defense, defendant, Charles Goode McCoy, in addition to his plea of general issue, states as follows, to-wit:

1. That this defendant is not guilty of any negligence which caused, or in any wise contributed to, the alleged injuries of which the plaintiff complains.

2. That this defendant drove and operated the automobile involved in the accident of which the plaintiff complains in a careful and prudent manner under proper control, at a reasonable and proper rate of speed having due regard to

traffic, surface and width of the highway and the conditions existing at the time of the accident, and maintaining at all times a proper and efficient lookout.

3. That the automobile operated by this defendant was in good mechanical condition, was free of all defects, that the tires thereon were in good condition; and that said automobile had been duly inspected in accordance with the Statute in such cases made and provided.

4. That this defendant denies, specifically and categorically each and every allegation of negligence alleged against him in plaintiff's motions, both original and amended, and the statements of negligence set out in plaintiff's bill of particulars.

5. That the misty condition of the windshield of the automobile operated by this defendant was brought  
page 23 } about by conditions over which he had no control  
and which created, and caused, a sudden emergency, resulting in an unavoidable accident.

6. That this defendant, confronted by a sudden emergency, used all possible care, caution and means in an attempt to safely extricate himself, and those riding in said automobile with him at the time, from the position in which he was placed through no fault of his own.

7. That this defendant denies that the plaintiff was injured in the manner, and to the extent, set out in his pleadings in this action.

8. This defendant will further rely upon the contributory negligence of the plaintiff as a defense, in that he failed to properly brace and protect himself when he saw, or should have seen, that an accident was imminent, and failed to exercise ordinary care to avoid being injured.

9. That upon the occasion of the accident of which plaintiff complains, plaintiff and this defendant, together with the other occupants of said automobile, were engaged in a joint venture which fact, standing alone, precludes the plaintiff from any recovery in this case.

10. That this defendant intends to further rely upon all defenses available to him under his plea of the general issue and all other matters that might be shown by the evidence in this case.

CHARLES GOODE MCCOY,  
By A. E. S. STEPHENS  
and  
TOM E. GILMAN,

Counsel.

page 24 } And, at another day, to-wit: On the 17th day of  
June, 1940, the defendant Charles Edward McCoy, filed his grounds of defense, in the words and figures following, to-wit:

For grounds of defense, defendant, Charles Edward McCoy, in addition to his plea of the general issue, states as follows, to-wit:

1. That this defendant was not operating the automobile involved in the accident alleged in plaintiff's pleadings, nor was it under his supervision or control; that said automobile had been loaned by this defendant to the defendant, Charles Goode McCoy, who, at the time of the accident, was operating said automobile about his own affairs, was in exclusive custody thereof, and was not acting as the agent, employee or servant of this defendant.

2. That this defendant has committed no act of negligence towards the plaintiff, or done or committed any act which would give the plaintiff a cause of action against him.

3. This defendant will further rely upon the contributory negligence of the plaintiff as a defense, in that he failed to properly brace and protect himself when he saw, or should have seen that an accident was imminent, and failed to exercise ordinary care to avoid being injured.

4. That in addition to the matters and things here set out, his affidavit heretofore filed, this defendant intends to rely upon all matters provable under the general issue and such other matters and things as may be disclosed by the evidence at the trial of this case.

CHARLES EDWARD McCOY,  
By A. E. S. STEPHENS  
and  
TOM E. GILMAN,  
Counsel.

page 25 } Virginia:

In the Circuit Court of Norfolk County.

Walter E. Bloxom

v.

Charles Goode McCoy and Charles Edward McCoy.

*Walter E. Bloxom.*

RECORD.

Stenographic report of all the testimony together with all the motions, objections and exceptions on the part of the respective parties, the action of the court in respect thereto, all the instructions granted, amended and refused, and the objections and exceptions thereto, and all other incidents of the trial of the case of *Walter E. Bloxom v. Charles Goode McCoy* and *Charles Edward McCoy*, tried in the Circuit Court of Norfolk County, Virginia, on June 25, 1940, before the Honorable A. B. Carney, and jury.

Present: Mr. I. W. Jacob, Mr. C. E. Holladay, and Mr. Harry H. Kanter, for the plaintiff. Messrs. Tom E. Gilman and A. E. S. Stephens, for the defendants.

page 26 } Note: The witnesses were excluded on motion  
of counsel for the defendants.

WALTER E. BLOXOM,  
the plaintiff, being duly sworn, testified as follows:

By Mr. Holladay:

Q. Please state your name?

A. Walter E. Bloxom.

Q. Where do you live, Mr. Bloxom?

A. Battery Park, Virginia.

Q. Are you the plaintiff in this suit?

A. Yes, sir.

Q. How old are you, Mr. Bloxom?

A. I will be forty years old in October.

Q. Do you recall the 23rd day of June, 1939, about 4:30  
o'clock in the afternoon?

A. Yes, sir, very well.

Q. Were you riding in an automobile at that time?

A. Yes, sir.

Q. In what kind of an automobile were you riding?

A. A '39 Chevrolet coach.

page 27 } Q. Were you the owner of that car?

A. No, sir.

Q. Who was the owner of it?

A. Mr. Charles Edward McCoy.

Q. Who was driving the car?

A. Charles Goode McCoy.

Q. Do you know whether or not Mr. Charles Goode McCoy

*Walter E. Bloxom.*

was using it with the consent and permission of Charles Edward McCoy?

A. Mr. Charles Edward McCoy was the owner of the car, and his father was using the car.

Q. Do you know whether or not he was using it with the owner's permission?

A. That is right.

Q. How did it happen that you were riding in that automobile?

A. Well, we were employed at Dunn's Marine Railway, in West Norfolk.

By Mr. Stephens:

Q. Employed where?

A. At Dunn's Marine Railway, in West Norfolk. I would drive one week, and Mr. Clark one week, and Mr. McCoy one week, alternating every third week.

By Mr. Holladay:

Q. Were you driving the same car or different page 28 } cars?

A. A different car each week. It happened that Mr. McCoy was driving his car at this time, June 23rd.

Q. What arrangement did you all have about driving those cars?

A. The arrangement that we had was at the end of each week, if I drove my car, each one would give me fifty cents to help pay the expenses, the bridge toll, gasoline and upkeep of the car. When Mr. McCoy drove we did likewise. When Mr. Clark drove we did the same.

Q. Did any of you make any profit out of the transaction?

A. No, sir.

Q. Who else was in the automobile at that time?

A. Mr. McCoy was driving, Mr. Clark was on the right side opposite the driver, Mr. Stowe on the left back seat, Mr. C. L. McCoy in the center, and I was on the right.

Q. When someone else was driving the car, in other words, Mr. McCoy, did Mr. Clark have any voice in the control or management or operation of that car?

A. No, sir.

Q. On what road was this automobile traveling at that particular time?

A. On Route 17 between Churchland and Bellville.

Q. Tell the Court and jury just where you had started from and where you were going when the wreck occurred?

*Walter E. Bloxom.*

A. We left West Norfolk at approximately 4:20 page 29 } in the afternoon of June 23rd, heading for our homes at Battery Park, and we arrived at this place on Route 17 approximately half way between Churchland and Bellville when the accident occurred.

Q. Describe the road in the vicinity where this wreck took place?

A. It is a concrete roadbed 18 feet wide, with a 22-foot brush shoulder on each side, and about a 4-foot ditch beyond that, and the road was 1.9 miles from Churchland to Bellville just as straight as it could have been surveyed.

Q. What were the traffic conditions at that time?

A. There was no traffic in sight either way.

Q. What was the condition of the weather?

A. The weather was raining, no wind, and the road wet.

Q. Do you know how fast the machine was going as you approached the place where the accident or wreck occurred?

A. Approximately 35 miles.

Q. As you approached the place that this wreck occurred, will you describe to the jury just what happened?

A. We were riding along at this said speed, it was raining, not hard, just a light rain, and the glass fogged up on the car on the outside, and more or less fogged up on the inside, and Mr. McCoy was driving and he reached for his handkerchief or a rag there some place to wipe off the windshield on the car, and in doing so he took his right hand off page 30 } the wheel and focused his attention to wiping the windshield off, and his eyes taken from the road.

In so doing the right wheel to the car left the concrete road and jogged down on the shoulder. Mr. McCoy pulled back the car on the concrete road, and she went out of control. Now, she left the road and leaped approximately 12 feet on the left-hand side, and when she hit, the front wheels hit first, throwing the rear end of the car against the ditch bank.

Q. When he started to wipe the windshield did he slacken his speed or apply his brakes in any way?

A. No, sir.

Q. Now, when the car left the road and went off on the shoulder, did he apply his brakes or slacken his speed then?

A. No.

Q. When the car came back on the road did he apply his brakes or slacken his speed then?

A. No.

Q. Now, when the car returned to the pavement could you

Walter E. Bloxom.

tell or did you observe whether or not he increased or decreased his speed?

A. Well, that is a rather hard thing to say, because we were all trying to take care of ourselves, but the way the car was going sidewise it seemed like the speed had increased double what we were traveling first.

Q. Do you recall whether any remarks were  
page 31 } made by any of the parties in the automobile at  
the time this happened?

A. When the car came back on the concrete after running off the shoulder, Mr. C. L. McCoy, the brother of the driver—

Mr. Stephens: I don't think what Mr. C. L. McCoy said would be pertinent.

The Court: It was said then and there at the instant. I think it is part of the *res gestae*.

Mr. Stephens: I save my point.

A. (Continuing) Mr. C. L. McCoy placed both hands on the back of the front seat and said, "My God, brother Jack. What are you doing?"

By Mr. Holladay:

Q. How far did this car travel from the time that it left the road until it came to a stop in the ditch?

A. I would say approximately from the time she went off the shoulder of the concrete until she landed in the ditch would be about 120 feet.

Q. Were you injured at that time?

A. I was injured when the car went into the ditch.

Q. Will you explain to the Court and jury the best you can how your injury took place?

A. As I stated, I was seated on the right of the back seat, and these two men, Mr. McCoy and Mr. Stowe, to my left.

page 32 } When the car landed, she hit front wheels first,  
throwing the rear end against the ditch bank. The  
arm rest caught me on this hip, and these two men  
came down on me, twisting me back to the extent that I felt something snap, and I made the remark, "My God, my back is broken". Now, my hand, my right hand was placed above the window or to my right, and my left hand on the back of the front seat braced for the impact. I knew something was going to happen, not knowing what. When the car hit my hand slipped off that window and went through the upholstery in the top of the car.

Q. Did you sustain any injury to your hand?

A. I knocked the knuckle off my thumb.

*Walter E. Bloxom.*

Q. You mean the skin?

A. Yes, the skin.

Q. Will you point out to the jury just where you were injured on your back?

A. I was injured right in the small part of my back, but Dr. Buxton says the picture showed the third lumbar—

Q. Stand up and show the jury?

A. Right in the small part of my back, and here the third lumbar *vertebrae*, Dr. Buxton explained was crushed as though you would hit a glass marble with a hammer.

Q. In what direction was the car headed when it stopped?

A. Our car was headed back to Norfolk, in the opposite direction from the way we were going.

Q. After you were injured did you get out of page 33 } the car yourself, or were you helped out?

A. Yes, sir, through the excitement we all got out of the car, and I got out on the right side and walked across the ditch and fell on the ditch bank.

Q. Did you fall as a result of your injuries?

A. Yes, sir.

Q. What was done for you or with you at that time?

A. Well, they got a blanket from the car, which was used to cover the upholstery, and placed it over me, it was raining, and I remained there for four or five minutes until a car came along. They put me in a car, two men, and carried me to the service station beyond the Nansemond Bridge, where I was later carried home.

Q. Were you able to walk by yourself?

A. Not when they put me in the car. When I got out of the car with the help of two men I walked into the service station.

Q. When they carried you home did you have a doctor?

A. I had a doctor about 6 P. M., I think, when I arrived home, and Dr. Warren arrived about 9.

Q. Did you suffer any physical pain as a result of these injuries?

A. Untold agony.

Q. Will you describe it to the jury just briefly what it was?

page 34 } A. Well, my pain, as Dr. Warren said, both hips were pulled out of the socket, the ligaments broken and some strain, and after lying on my bed for about four hours I tried to get up and walk, and every step I would take was just as though a knife was being stuck in me all around my back and through my hips. That was the effect of that.



*Walter E. Bloxom.*

Q. Won't you describe the treatment that Dr. Warren gave you?

A. Dr. Warren strapped my hips, tape about 10 inches wide just as tight as could be drawn, and that stayed on there for about three days, and he came back and it had slackened, and he re-tied it again, and it remained that way until I went to the hospital.

Q. Did you suffer any pain during this time?

A. Yes, sir.

Q. Is that the same pain that you had suffered?

A. Not quite so bad, because the strapping had pulled my hips back in place.

Q. Were you carried to a hospital?

A. I was carried to the hospital the second Monday following the accident, on July 3rd I was carried to the hospital.

Q. Before being carried to the hospital were you confined to your bed?

A. Yes.

page 35 } Q. To what hospital were you taken?

A. Elizabeth Buxton, in Newport News.

Q. At the hospital who attended you?

A. Dr. Buxton, Dr. Russell Buxton.

Q. For how long a period were you under Dr. Warren's care before you went to a hospital?

A. From the night of the accident until the second Monday following the accident. I was in my home until the Sunday before I went to the hospital on Monday morning.

Q. For how long a period did Dr. Buxton treat you?

A. I stayed in the hospital from Monday to Thursday some time in the afternoon, and went back home, but I went back to Dr. Buxton on several occasions for examination and X-Rays.

Q. What treatment did Dr. Buxton prescribe for you?

A. Dr. Buxton placed me in a cast which extended from here (indicating) up under my armpits to around here, to the extent that I couldn't set down, couldn't get off my bed only by someone else standing me on my feet in that cast, even standing up to eat.

Q. Have you that cast with you?

A. Yes, sir, I have, on the back seat.

Q. Is this the cast which Dr. Buxton put on you?

A. Yes, sir.

Mr. Holladay: If Your Honor please, we intro-  
page 36 } duce that in evidence.

*Walter E. Bloxom.*

(Cast above referred to and offered in evidence was marked for identification Plaintiff's Exhibit No. 1.)

By Mr. Holladay:

Q. How long did you stay in that cast?

A. Three months, approximately three months.

Q. After Dr. Buxton removed the cast what treatment did he prescribe for you?

A. He placed me in a brace with a heavy padding in the back and steel reinforcements in the front.

Q. Have you followed his instructions in the treatment?

A. Yes, sir.

Q. Are you still wearing the brace?

A. Yes, sir.

Q. Will you show the jury how that brace is worn?

A. (Illustrating) It is worn from here to here, about 10 inches wide.

Q. Open your shirt and show it.

A. I don't know whether they can see it or not. It is a little wider in the back than it is in the front. It is padded in the back to slip over the plates. There are four straps, three to pull it in place and the fourth one holds it in place in the back.

Q. Did you receive a bill from Dr. Buxton?

A. Yes, sir.

page 37 } Q. Have you that statement with you?

A. My total bill?

Q. From Dr. Buxton. Will you state what the total amount of the bill is?

A. The total bill, the amount of the bill at the time I was at the hospital was \$94.50. I had one or two visits later, which has not been added to the total.

Q. Have you made a visit since April 21, 1940?

A. No, not to Dr. Buxton.

Mr. Holladay: If Your Honor *place*, we desire to file these in evidence.

(Papers above referred to and offered in evidence were marked for identification Plaintiff's Exhibits Nos. 2 and 3.)

By Mr. Holladay:

Q. Did you receive a statement from Dr. Warren?

A. Yes, sir.

*Walter E. Bloxom.*

Mr. Holladay: We desire to file that in evidence.

(Statement above referred to and offered in evidence was marked for identification Plaintiff's Exhibit No. 4.)

By Mr. Holladay:

Q. What is the amount of that statement?

A. \$12.00.

Q. Did you receive a bill from the hospital?

A. That was included in the first bill.

page 38 } Q. It was included in the first bill?

A. Of which \$50.00 was paid. The whole bill was there. \$91.00 the hospital bill was. \$50.00 was paid, and Dr. Buxton's is the balance.

Q. Did you have X-ray examinations?

A. Yes, sir.

Q. Is that included in this bill?

A. That is all included, except possibly that final examination. I haven't received a statement for that yet.

Q. What date were those last examinations made approximately?

A. The last examination was some time in November. I just can't recall, or October. I just can't recall the exact date I went back for a final examination.

Q. How long did you stay in the hospital?

A. A part of four days.

Q. Where did you go then?

A. Back home.

Q. Do you remember what day you were taken back home?

A. I was carried back home on Thursday, the 6th, I think, of July.

Q. While you were in the hospital, will you describe to the Court and jury what the treatment was that was given you, the method of caring for you?

page 39 } A. I was carried to the operating room on the 4th day of July, about 7:30 in the morning, and they placed me on a frame, a wood frame with mattress straps across this way and one down the center, and I was placed down upon this with a block and tackle on both ankles and hoisted up on my back with just as much care as they could give, with the strap against me there, my whole weight was against me in that position, and this cast you see was placed on me at that time while hanging in that position.

Q. Did they give you an anesthetic?

*Walter E. Bloxom.*

A. Yes.

Q. Did you suffer any pain as a result of that, or do you recall?

A. Just the agony from being in that position and from the pain of the cast, and while in that position I might say my kidneys failed to act.

Q. When you returned home were you confined to the house?

A. I was confined to the house for about thirty days, then I began to move around, after being taken off the bed I could walk for about thirty minutes and then I would have to go back again.

Q. Did you have the cast off during that time, during the three months?

A. The cast was taken off by Dr. Buxton for the first time and was put back temporarily, just for me to go to town and have the brace fitted. It couldn't be taken off until  
page 40 } he cut it off when I went back for my examination.

Q. When was that?

A. I don't recall the exact date.

Q. How long did you keep the cast on there, can you recall that? How long was the cast on in all?

A. It was something over two months, I don't know, I just can't recall the exact date, the exact time.

Q. Tell the Court and jury what your present condition is?

A. My present condition, in the work that I have been doing prior to the time that I was hurt, I can't do. My back gives me a great deal of trouble at this time. If I stay in one position for any length of time, when I get up it takes me five minutes to get my back straight in its normal condition. If I work in one position for more than an hour I have to stop and sit down, and I can't do any lifting, and I can't do my regular work.

Q. What is your regular work?

A. My regular work is boat building.

Q. Had you ever had any trouble with your back before this injury?

A. No.

Q. Do you have any trouble lifting now?

A. I can't lift.

Q. How does riding in an automobile affect you?

page 41 } A. It affects me to the extent that I ride for a certain distance, for probably an hour, and then have to get up and walk around, change positions.

*Walter E. Bloxom.*

Q. Did you ever sustain any injuries which affected your ability to do your work before this accident?

A. No.

Q. Were you employed on the day that you were hurt?

A. Yes.

Q. By whom were you employed?

A. W. F. Dunn Marine Railway, West Norfolk.

Q. Will you explain the general nature of this work?

A. Well, now, anybody that is familiar with boats knows more or less the nature of it, it is work that takes in anything from the laying of the keel to the sailing of it, that is, installing machinery, and my work mostly at that time was installation, installing the machinery and operating the same.

Q. How long had you worked for this concern?

A. I worked for Mr. Dunn eighteen months prior to the accident.

Q. Could you before the day you were injured perform your work capable and well?

A. Before the injury?

Q. Yes.

A. Yes.

Q. How much did you earn at that job per hour?

page 42 } A. My minimum salary was 80c per hour, but my maximum was around \$40.00 per week.

Q. What were your average wages?

A. My average wages were around \$40.00.

Q. What was your maximum?

A. I have made as high as \$55.00 and \$60.00.

Q. What was your minimum?

A. My minimum was \$35.00.

Q. How long were you away from your work after sustaining these injuries?

A. I went back to work in the first week in December.

Q. Of 1939?

A. 1939.

Q. Did you return at that time to your regular job at Dunn's Railway?

A. No.

Q. When did you return—go to work?

A. I went to work with Bloxom Boatbuilding Company, Battery Park. They had a job of work there, light work, and told me to come there and work to suit myself, which I am doing to the present time.

Q. Is that work as difficult as the work at Dunn's Railway?

*Walter E. Bloxom.*

A. It is light work, more or less cabinet work,  
page 43 } light work.

Q. Does it pay the same wage?

A. No.

Q. What is the wage per hour at Bloxom's Boatbuilding Corporation?

A. It pays me 50c an hour, or the equivalent of \$20.00 a week.

Q. What is your average weekly wage since you have been working at this kind of work for the Bloxom Boatbuilding Corporation?

A. Around \$30.00. Of course, that is over and above the 40 hours a week.

Q. Do you know what your loss of wages has been as a result of this injury since that time?

A. Yes, sir.

Q. Will you state what that loss is?

A. From June 23, 1939, to November 30, 1939, a loss of 23 weeks at \$40.00, \$920.00; from December 1, 1939, to June 22, 1940, 29 weeks at \$20.00 per week, total \$580.00. From December 1, 1939, to June 22, 1940, a loss of 30c per hour for 29 weeks, the difference between 50c and 80c per hour, a loss of 30c per hour for 29 weeks because of physical disability to do regular work to the amount of \$346.00, a total of \$1,268.00 loss.

Q. The memorandum that you read from was made by you or at your direction?  
page 44 } A. Yes, sir.

Mr. Holladay: We offer this in evidence.

Mr. Gilman: We object. If that bill or memorandum was made—

Mr. Holladay: We will withdraw it, if counsel objects.

By Mr. Holladay:

Q. Then if I understand, from the testimony you have given your actual loss in wages in dollars and cents up to June 22, 1940, you have lost \$1,268.00?

A. That is right. That is at the salary that I was getting at the time of the accident. I don't know what it would have been at this time if I had remained working.

Q. For six months you didn't get any salary at all?

A. No.

Q. No one was interested in the wages you received at Dunn's Railway but yourself, were they?

*Walter E. Bloxom.*

A. No, sir.

Q. And you were not interested in anybody else's wages?

A. That is right.

### CROSS EXAMINATION.

By Mr. Gilman:

Q. Mr. Bloxom, where were you employed before your employment with Dunn?

A. We were in business for ourselves at Battery page 45 } Park.

Q. Under the style and firm name of what?

A. Bloxom Boatbuilding Company.

Q. So you have really gone back to your old job?

A. No, sir, I severed my relationship with that firm when I went to go with Dunn's Marine Railway in Norfolk.

Q. You are now working there?

A. Yes, I am now working there as an employee, not as an owner.

Q. At the place you were formerly working and were interested in financially?

A. That is right.

Q. And is that at your home?

A. Yes, sir.

Q. And, of course, you have no transportation to pay in going to and from work?

A. That is true.

Q. For meals or any additional expenses?

A. No.

Q. And what you earn there is practically net?

A. That is right.

Q. Mr. Bloxom, you had been driving with McCoy for some time, had you not?

A. About eighteen months.

Q. Was there anything unusual about his driving?

A. How is that?

page 46 } Q. Was there anything unusual about his driving?

A. I hadn't noticed any. I have driven with lots of people, and Mr. McCoy drove just like I do and all the rest of them until this particular time.

Q. He drove just like you did, and you drove all right?

A. Yes, until this particular time.

Q. At this particular time you were driving along in a

*Walter E. Bloxom.*

straightaway with a perfectly clear road at approximately 35 miles an hour?

A. That is right.

Q. Was there anything unusual about his driving then?

A. Yes, he ran off that road.

Q. Well, I haven't got that far. Up to that point was there anything unusual?

A. No, I didn't notice anything.

Q. He was driving to suit you?

A. Yes.

Q. You felt perfectly safe?

A. Absolutely.

Q. And when you ran into this sudden thunder shower all of you ran your windows up, did you not?

A. There was no sudden thunder shower. It was just a mist of rain after the storm of about thirty minutes before. We continued on home after the storm, but it continued to rain.

page 47 } Q. How about the window alongside of you?

A. That was up.

Q. So that you had your window up, too?

A. I did.

Q. Why didn't you lower it so the mist would clear from the inside of the car?

A. We weren't in the habit of sitting and letting it rain on us. We put it up.

Q. I understood you to say it was a light shower?

A. Yes, I did, but driving along at 30 miles an hour, you automatically make 35 miles an hour, because you are traveling at that speed, and therefore it would rain in if your window came down.

Q. But it is the heat inside of the car that causes the fogging of your windows?

A. Yes, sir.

Q. But you continued to drive with your windows up?

A. Yes.

Q. To keep the mist off of you?

A. Yes.

Q. Did you run the window up?

A. I don't say now Mr. McCoy didn't have his window down, or someone else, but my window was up.

Q. Did you put it up?

A. No, it was up. It had been up all the time.  
page 48 } I didn't bother. It was up when I got in the car and remained up.



*Dr. Russell Buxton.*

Q. Now, as to this windshield clearing, Mr. McCoy made an effort to clear it?

A. Yes.

Q. And when he made an effort to clear it he ran off the concrete on his right side?

A. That is right.

Q. And in an effort to get back his car skidded around and ran into the embankment of the ditch on your side of the road?

A. That is true.

Q. And as a result of that you were injured?

A. Yes.

DR. RUSSELL BUXTON,  
sworn on behalf of the plaintiff, testified as follows:

Mr. Jacobs: When the examination was made of Mr. Bloxom by Dr. McAlpine on last Sunday morning, it was agreed, I understand, with Mr. Holladay that we were to have a copy of his report. We would like to have page 49 } it.

Mr. Stephens: Yes, I have it.

By Mr. Holladay:

Q. Please state your name?

A. Russell Buxton.

Q. How old are you, doctor?

A. Thirty-two.

Q. Are you a licensed physician?

A. Yes, sir.

Q. Are you engaged in the practice of your profession now?

A. Yes, sir.

Q. Where is your office?

A. Newport News.

Q. How long have you been practicing?

A. I have practiced in Newport News for three years.

Q. What is your professional education?

A. Four years at University of Pennsylvania Medical School.

Mr. Stephens: We admit his qualifications.

By Mr. Holladay:

Q. With what hospital are you connected now?

A. Buxton Hospital.

*Dr. Russell Buxton.*

Q. Do you know the plaintiff here, Walter E. Bloxom?

A. Yes, sir.

Q. How long have you known him?

page 50 } A. Since July, 1939.

Q. Were you called to treat him at that time?

A. Yes, sir.

Q. Where did you see him, doctor?

A. At the hospital.

Q. Doctor, when you first saw Mr. Bloxom did you make an examination of him?

A. Yes.

Q. Will you kindly describe to the Court and jury, doctor, the condition in which you found the plaintiff, Mr. Bloxom?

A. Mr. Bloxom was brought into the hospital by ambulance on a stretcher, and on examination I found that he was suffering with pain in his back, located in the lower portion of his back, the small of his back.

Q. What did you find as a result of that examination?

A. Well, there were no obvious signs of injury except tenderness in the small of his back.

Q. Did you take X-Rays?

A. We had him X-Rayed immediately.

Q. Have you got those X-Ray plates?

A. Yes, sir.

Mr. Holladay: Gentlemen, we want to offer these in evidence. Do you all want to see them?

Mr. Stephens: No, you may offer them in evidence.

page 51 } Mr. Gilman: You might as well let the doctor say what was wrong with his back.

The Witness: These are a little bit difficult to show out of the light.

By the Court:

Q. When were those pictures taken?

A. On July 3, 1939. This set was made then. I have another set. Part of them were made July 3rd and part, I think, July 5th.

Q. At approximately the same time?

A. Yes, sir.

By Mr. Holladay:

Q. Will you explain those plates?

A. This is a picture taken. this one, an anterior posterior picture, taken with the person standing in front of the X-Ray

*Dr. Russell Buxton.*

machine. These are the bones of the back and spine. These are the ribs. These are the hip bones, and this is the particular bone which was injured in this man's case. This is a lateral picture taken with the machine sidewise to the X-Ray film, and these are the bones of the back, this is the hip bone, and you cannot see the ribs there. This is a picture taken at the same time. This shows the injury to the spine, and is called a compressed fracture of the second lumbar *vertebrae*. The bone is broken and jammed together.

Mr. Gilman: Point that out again.

page 52 } The Witness: This is the first, second, third, fourth, fifth lumbar *vertebrae*. There are only five. This is the one that is broken.

Mr. Gilman: Mashed?

The Witness: Yes, sir, mashed together.

By Mr. Holladay:

Q. Did you exhibit all of the X-Ray pictures which you have there?

A. No, sir. They were the original pictures taken upon admission.

Q. Do you have other X-Ray pictures?

A. Yes, I have one taken immediately after his cast was applied, and then one taken six weeks after the injury. about six weeks after the injury.

Q. Will you explain to the Court and jury what you found from those pictures?

A. This is a picture taken two days approximately after the operation of setting. This shows the cast here. This is only a lateral view, and this shows the partial reduction of the fracture, and what is called the lumbar extension, which is the bending backward of the spine so that the fluid is borne not on the broken part of the bone, but on the good part of the bone here. This picture was taken on August 15th, which shows the anterior posterior view there. This is the broken bone, and a lateral view here, there is  
page 53 } the broken bone with a certain amount of repose of the bones there.

Mr. Holladay: If the Court please, we offer all of the X-Ray pictures in evidence.

The Court: Let them be admitted and marked.

Mr. Gilman: Are the dates on them?

*Dr. Russell Buxton.*

The Witness: The numbers are on them. The dates are on the envelope corresponding to the numbers.

By Mr. Holladay:

Q. Will you explain to the Court and jury how the numbers and the dates work?

A. Yes, I will. When we take an X-Ray picture we put a lead—they are left off of these—a lead die with a number—in this case it is L-12371, which is the left side, and that number is placed on the folder, and the date is on the folder, and in one case here the number is left off, but we knew which it was because the case was on. We identified it in that way, and the other is written in in ink, so that all of these were taken—three of them were taken on the 3rd of July and the other was taken on the 5th of July after the operation, and the other set was taken on the 15th of August and has the number 12521 on the film, on the larger film, and written in in ink on the smaller film.

(X-Ray folders above referred to and received in evidence were marked for identification Plaintiff's Exhibits page 54 } Nos. 6 and 7.)

By Mr. Holladay:

Q. Doctor, will you state what treatment you prescribed for Mr. Bloxom?

A. Mr. Bloxom was put to bed immediately upon—after this examination, and given a sedative for relief of pain, and put in a bed with boards under the mattress to make the mattress stiff, with a pillow under his back and he was given a cathartic to get his bowels in condition for this treatment the following morning. The following morning, July 4th, he was given a sedative and taken to the operating room and placed upon a frame with a canvas sling smack on his face. at which time he was given an anesthesia, and his back was hyper-extended, that means bent far backward, and he was placed in this cast, plaster paris jacket. He was left in that position for about an hour and then removed from the frame and the sling and taken to his room, where he was placed upon a bed again. He was taken home the following day, and the cast was trimmed to be made more comfortable, and following that he was allowed to go home on July 5th—July 6th.

Q. Was his condition an efficient and co-producing cause of pain?

*Dr. Russell Buxton.*

A. You mean could it cause pain?

Q. Yes, could it cause pain?

page 55 } A. Yes.

Q. To what extent?

A. It could cause a very marked pain.

Q. Was he suffering from pain when he was in the hospital?

A. Well, he was suffering at the time of his admission.

Q. Was this treatment, the application of the cast and the treatment received, painful? Does that cause pain?

A. Well, to a certain extent, yes.

Q. What was his position, bodily position, during the time he had this cast on?

A. He was what we call hyper-extended. That means that the back is bent, the back is arched similar to a sway-backed animal.

Q. Could he sit down while that was on?

A. Not very comfortably.

Q. After the cast was removed what treatment did you prescribe for him?

A. I recommended that he—well, first, after the cast was removed we took an X-Ray picture to determine whether or not further healing had taken place, which we felt it had, and then I advised him to get a plate in order to strengthen his back and keep him from bending over too far forward.

Q. How long did he keep the cast on?

A. He had the cast on from July 4th until August 15th.

Q. Is it necessary that he wear that brace or  
page 56 } plate as you see now?

A. You mean is it necessary now?

Q. Yes.

A. I haven't seen Mr. Bloxom since November. At that time I felt that he was in fairly good condition. I told him to wear it as long as he had pain. I left that part of it up to him.

Q. Will you tell us in layman's language just how serious this break was in importance to the back in his situation in life, in the occupation that he follows?

A. This type of injury is likely to be a painful type of injury for a long time. It may cause low back pains for a period almost indefinitely, depending upon what the result is as far as healing, the original part healing, is concerned.

Q. How would that low back pain and the condition that you state he is likely to suffer affect him in his work as a marine carpenter?

*Dr. Russell Buxton.*

A. Well, if it didn't give him pain, it wouldn't affect him at all. That is the only way I can answer that question. If it caused pain, why it would affect him.

Q. Do you think he could lift heavy weights?

A. Not for at least six months after the injury.

Q. Do you think he could lift heavy weights now?

A. If it doesn't hurt him.

Q. But if it does hurt him?

page 57 } A. He oughtn't to do it.

Q. When was the last time that you examined

Mr. Bloxom?

A. On the 27th of November, 1939.

Q. Dr. Buxton, you said that you used sedatives to relieve him of pain?

A. Yes, sir.

Q. What type of sedative did you use?

A. When he was first admitted to the hospital he was given codein sulphate, a half a grain. That was immediately after admission. He was given sodium amytol, which is a sleep-producer, at night, in order to let him sleep. Then before the operation he was given morphine sulphate, a quarter of a grain, I believe. He was given scopolamin, 1/15 of a grain, which is given before most any operation, or any anesthesia, and then following his operation he was given morphine sulphate, 1/16 of a grain, every four hours, I believe, for about twenty-four hours. He was given dilaudid, which is a substitute for morphine, after the operation.

Q. Was your bill included in the hospital bill?

A. Yes, sir, it was.

Q. How much was it?

A. My bill at the time he left the hospital was \$35.00, and for one follow-up visit was \$5.00, and for two others was \$2.00.

Q. Will you give the dates of those follow-up  
page 58 } visits?

A. August 14th, September 14th—it should be August 15th—September 14th, and November 27th, all in 1939.

Q. Your bill, if I understand you correctly, is the \$35.00 item on this hospital bill?

A. Yes, sir.

Q. It doesn't include the other items here?

A. No, sir, that is the hospital and X-Ray pictures.

Q. Do you have a separate statement of your bill?

A. No, sir. There is an addition to that bill that you have of \$5.00 for the follow-up visits.

*Dr. Russell Buxton.*

CROSS EXAMINATION.

By Mr. Gilman:

Q. Doctor, if I understand you correctly, he was admitted to the hospital on July 3rd?

A. Yes, sir.

Q. And was put in this cast on the 4th?

A. Yes, sir.

Q. And left the hospital on the 6th?

A. Yes, sir.

Q. The next time you saw him was August 15th?

A. Yes, sir.

Q. At which time upon examination and X-Ray you deemed his injury sufficiently healed to remove the cast?

A. Yes, sir.

Q. And since that time you have only seen him page 59 } twice?

A. September 14th and November 27th.

Q. You have no X-Ray picture since August 15th?

A. No, sir.

Q. And from what you have said today and what you said in your letter, you deemed he would be completely healed of his injury within six months?

A. Ordinarily, yes, sir.

Q. And you saw nothing unusual, no reason why you should not apply to this man the six-month period?

A. At the time I saw him I thought he was in good condition.

By the Court:

Q. Was there any injury to his spinal cord?

A. No, sir, his spinal cord was not injured.

By Mr. Gilman:

Q. One other question. Something has been said about hips. I notice from the pictures that the hip bone was shown there. Was there any injury to those?

A. None that we determined, except the bruises he may have had.

page 60 } Mr. Jacobs: Dr. Buxton says that when we are through with his X-Rays he would like to have them back. I mean after the entire trial.

Mr. Gilman: That is perfectly all right.

NATHAN H. STOWE,  
sworn on behalf of the plaintiff, testified as follows:

By Mr. Jacobs:

Q. What is your name, sir?

A. Nathan H. Stowe.

Q. Where do you live?

A. Rescue, Virginia.

Q. How old are you, Mr. Stowe?

A. Fifty-one.

Q. How long have you lived at Rescue?

A. Six years.

Q. What is your trade?

A. Painter.

Q. House painter?

A. House painter and boat painter.

Q. Where are you employed at this time?

page 61 } A. At this time I am employed by the Naval Operating Base.

Q. What do you do there, Mr. Stowe?

A. Painter.

Q. Where were you employed in June, 1939?

A. At Dunn's Railway, West Norfolk.

Q. Were you employed at the Dunn Railway on June 23rd?

A. Yes, sir.

Q. How did you get to and from work?

A. I went with Mr. Bloxom and Mr. McCoy and Mr. Clark in their automobiles.

Q. Where did they live?

A. They lived at Battery Park.

Q. How far is Battery Park from Rescue?

A. I judge about a mile.

Q. Do you have an automobile?

A. No, sir.

Q. Well, what arrangements, if any, did you have with reference to your transportation to and from work? Did you pay anything for it?

A. I paid \$3.50 a week.

Q. What did that cover?

A. It just covered the expenses driving backward and forward.

Q. What expenses were there?

page 62 } A. Well, there was gasoline and bridge toll.

Q. Was it the thought between you gentlemen that there would be any profit out of the \$3.50?

A. No, sir.



*Nathan H. Stowe.*

Q. Or was that to cover the expenses?

A. No, sir.

Q. No profits?

A. No, sir.

Q. One thing I would like to get straight, Mr. Stowe, did this accident occur during a thunder and lightning storm?

A. Just a little after it.

Q. How long after it?

A. Well, I *should* just about ten or fifteen minutes.

Q. What was the condition of the weather when the accident occurred?

A. It was raining.

Q. Was it a heavy rain, or light rain, or medium rain? Give us your best judgment about that.

A. I think it was a light rain. I judged it to be a light rain.

Q. Now, approximately what time did you start from Dunn's Railway in Mr. McCoy's car on the day the accident occurred?

A. Well, we knocked off at 4 o'clock, and I judge we left there about twenty minutes after 4.

Q. Where were you sitting in the car?

page 63 } A. I was sitting on the left-hand side in the back.

Q. Now, how fast were you going?

A. I judge about 35 miles.

Q. Now, tell us in your own language just what occurred shortly prior to the accident and during the course of it?

A. Well, it was raining, slight rain. The windshield clouded, and I saw Mr. McCoy take a rag or handkerchief and wipe the windshield. The car ran off the hard surface on the shoulder, and he pulled her back on and lost control of it, and we went on across the road and we landed in the ditch headed back towards Churchland.

Q. When you say "headed back towards Churchland", you had passed Churchland when the accident occurred?

A. Yes, sir, we had.

Q. Do you know where Mr. McCoy got the rag or handkerchief from?

A. No, I don't.

Q. Had he finished wiping the windshield when the car went off the road?

A. I don't think so. I think she went off the road while he was wiping the windshield.

*Nathan H. Stowe.*

Q. Which hand did he use to wipe the windshield, the right or the left?

A. The right hand.

page 64 } Q. The right hand?

A. His right hand.

Q. Well, did he have his left hand on the wheel at the time?

A. I judge he did, I couldn't see. I was sitting behind him.

Q. Were you conscious of any slackening of speed while this operation was going on incident to wiping off the windshield?

A. No, it seemed to me about the same speed.

Q. He didn't slow down?

A. It didn't seem to me that he slowed down any.

Q. Was there any traffic on the road?

A. No traffic, no, not at that time.

Q. Was there anything that would have prevented Mr. McCoy from stopping to wipe off his windshield?

A. Nothing to stop him.

Q. Will you describe the road at the point of the accident, that is as to whether it is hard surfaced?

A. The road is hard surfaced, but there is a shoulder there, a good wide shoulder that a car can run on to.

Q. A car can run on the shoulder?

A. Yes, sir.

Q. Well, was there anything to prevent him from driving on the shoulder of the highway and stopping to wipe off his windshield?

page 65 } A. No.

Q. If you know, please tell His Honor and these gentlemen of the jury how far the car went from the time that it left the hard surface until it came to a stop in the ditch?

A. Well, I judge it went between 75 to 100 feet before she went into the ditch.

Q. If you know, tell us the motions of the car or the movements that it made from the time it left the hard surface until it stopped in the ditch?

A. Well, that is a hard thing to tell, because she twisted (illustrating), and I was struck and I don't remember.

Q. At the time of the accident do you know where Mr. Bloxom was employed?

A. He was employed at Dunn's Railway.

Q. What did he do there?

*Nathan H. Stowe.*

A. He is a carpenter.

Q. What?

A. He is a carpenter, a joiner, you might call it.

Q. A joiner?

A. A joiner.

Q. Building boats?

A. Building boats.

Q. After the accident, Mr. Stowe, do you recall what happened to Mr. Bloxom, where he went?

A. Mr. Bloxom got out of the car.

page 66 } Q. Yes?

A. Walked around the back of it and fell down on the shoulder, and I got out behind him, and they placed this blanket about him, and we carried him up. Probably about five minutes afterwards a car came along and we helped him to get in this car, and from that time on I don't know what happened.

### CROSS EXAMINATION.

By Mr. Stephens:

Q. You all were coming up the highway?

A. Yes, sir.

Q. And hit that straight stretch between Churchland and Bellville?

A. Yes, sir.

Q. I believe I understood you to say that it had been raining very hard?

A. Yes, sir.

Q. There had been a thunder shower?

A. Yes, sir.

Q. And you all had the windows of your car closed?

A. Yes, sir.

Q. Did you close the window on your side?

A. I didn't bother the window, no, sir.

Q. I can't hear you.

A. I didn't bother the window, no, sir.

page 67 } Q. It was closed up when you got in the car and still remained closed up?

A. Yes, sir.

Q. And all of a sudden the windshield misted over on the inside?

A. Yes, sir.

Q. Is that correct, sir?

A. Yes, sir.

*Nathan H. Stowe.*

Q. And then Mr. McCoy took a handkerchief or rag, you don't know where he got it from, and attempted to wipe it off?

A. Yes, sir.

Q. And as he did, did you see two wheels or how many wheels did you see run off on the shoulder?

A. I didn't see.

Q. Which part was it, if you know, Mr. Stowe? What part of the car ran off on the shoulder on the right side?

A. The front wheel.

By Mr. Gilman:

Q. The front wheel on the right side?

A. Yes.

By Mr. Stephens:

Q. I understood you to say after that happened Mr. McCoy did not slacken his speed, is that correct?

A. It didn't seem to me that he slackened it any.

Q. As the car went off the hard surface, he at page 68 } tempted to pull it back and it immediately went into a skid, didn't it?

A. Yes, sir.

Q. You said the automobile traveled a distance of between 75 and 100 feet from the time it left that hard surface until it ended up against the ditch bank?

A. Yes.

Q. That 75 or 100 feet includes that circle, doesn't it?

A. Yes, sir.

Q. It didn't run, in other words, 75 to 100 feet down the highway, it went in a round shape, a "U" turn over into the ditch?

A. Right across the road.

Q. You had been riding with Mr. McCoy how long?

A. Well, probably two months.

Q. Was there anything unusual about his driving that afternoon?

A. No, sir.

Q. Was he driving the car—you say the speed didn't exceed 35 miles an hour?

A. No, sir.

Q. Was there anything about his driving that excited your fear in any way, that made you fear something would happen?

A. No, sir.

*William E. Clark.*

Q. Nobody else, so far as you know in the car,  
page 69 } was hurt?

A. No one that I know of.

Q. Do you know the extent of the damage to Mr. McCoy's  
car?

A. No, sir.

Q. Was there much damage to it, Mr. Stowe?

A. Not much.

WILLIAM E. CLARK,

sworn on behalf of the plaintiff, testified as follows:

By Mr. Jacobs:

Q. What is your name?

A. William E. Clark.

Q. How old are you, Mr. Clark?

A. Fifty-six.

Q. Where do you live?

A. Battery Park.

Q. How long have you lived there?

A. Thirty-five years.

Q. What is your trade, Mr. Clark?

A. Well, ship carpenter.

Q. Where were you employed on the 23rd day  
page 70 } of June, 1939?

A. Dunn's Railway.

Q. Where are you employed now?

A. Dunn's Railway.

Q. How long have you been working at Dunn's Railway?

A. Well, not steady, but off and on for the past six or  
seven years.

Q. Mr. Clark, how did you get to and from work?

A. Automobile.

Q. Whose automobile?

A. I and Mr. McCoy's and Mr. Bloxom's.

Q. What arrangement did you gentlemen have with each  
other?

A. We paid the driver 50c a day.

Q. What did that cover?

A. Gasoline and bridge toll.

Q. What?

A. Gasoline and bridge toll.

Q. Was it the intent that either of *your* gentlemen should  
make a profit from the transportation?

A. No, sir.

*William E. Clark.*

Q. I understand that Mr. Bloxom worked at Dunn's on the 23rd of June, 1939?

A. Yes, sir.

Q. What was his trade there, what did he do?

A. He was a carpenter.

page 71 } Q. Now, on the evening of June 23rd, whose car were you riding in towards home?

A. Mr. McCoy's.

Q. Had there been a thunderstorm that afternoon?

A. Yes, sir.

Q. Did the accident occur while you were on your way home?

A. Yes, sir.

Q. How long prior to the accident had the thunder and lightning storm ended?

A. Oh, I don't know, it hadn't been long. I don't know the exact time.

Q. Can you approximate it and give us the benefit of your judgment?

A. Oh, fifteen or twenty minutes, I suppose.

Q. Now, when the accident occurred I believe it was raining?

A. Yes, sir.

Q. Was it raining hard or lightly?

A. It was raining pretty good.

Q. Were the windows in the car up or down?

A. Mine was up, the one on my side, on the right side.

Q. Who put it up?

A. I did.

Q. Who was driving the car?

page 72 } A. Mr. McCoy.

Q. Which McCoy?

A. C. G.

Q. Now, tell us in your own way, Mr. Clark, just what happened prior to the accident and during the course of it?

A. Well, we left the Railway and were on the way home. It was raining. The windshield clouded up, and Mr. McCoy wiped his windshield or was wiping it, and the car ran off the surface just enough to bump, he never stopped, crossed the road and stopped it back in the ditch.

Q. How far did it go from the time the car left the hard surface until it stopped in the ditch?

A. I have no idea.

Q. Where did Mr. McCoy get the rag or handkerchief from that he used to wipe the windshield?

*William E. Clark.*

A. I don't know.

Q. Did he slacken his speed prior to wiping the windshield?

A. No, sir.

Q. What was the condition of traffic on the highway?

A. Not any.

Q. Is the road at the point of the accident hard surfaced?

A. Hard surfaced.

Q. Do you know how wide it is?

A. I don't know, but I judge 18 feet.

page 73 } Q. Are there shoulders adjacent to the highway?

A. Yes, sir.

Q. How wide are they?

A. They are good wide shoulders, I judge 18 feet.

Q. Are they aprons or are they covered with grass?

A. With grass.

Q. Do you know whether you can drive a car on those shoulders?

A. What?

Q. Do you know whether or not an automobile can be driven on those shoulders?

A. Yes, in dry weather.

Q. Was there anything to have prevented Mr. McCoy from stopping to wipe off his windshield?

A. No.

Q. Or slacken his speed?

A. No.

Q. Did the act of Mr. McCoy in trying to pull the car back on the highway accelerate the speed of the car, or did that slacken it just before it went across the road into the ditch?

A. I didn't see any difference.

Q. In other words, did it increase the speed or slacken it?

A. I couldn't see any difference.

page 74 }

### CROSS EXAMINATION.

By Mr. Stephens:

Q. In other words, this thing happened just like snapping your fingers, you might say. You all were coming up that highway driving about 35 miles an hour, and this windshield misted and Mr. McCoy attempted to wipe it off, and as he did the car ran partly off the hard surface, and it swung around in a half moon shape and ran into the ditch on the other side?

*William E. Clark.*

A. That is right.

Q. Did you feel or was there anything about that car to indicate to you that Mr. McCoy actually increased the speed of the car himself?

A. No, sir.

Q. All of the windows in this car so far as you know were up, your window was up?

A. Mine was up.

Q. And you were riding on the front seat with Mr. McCoy?

A. Yes, sir.

Q. Was there anything unusual about his driving that day, Mr. Clark?

A. No, sir.

Q. So far as you know was the car in good mechanical condition?

A. Yes, sir.

page 75 } Q. You were in no way injured in the accident?

A. No, sir.

Q. You got out of the car and you say Mr. Bloxom got out and walked up to the rear of the car and fell on the shoulder?

A. Yes, sir.

Q. And was it raining hard at that time, or just a little, or was it misty, or what was it?

A. It was raining pretty good.

Q. As you came up there it was still raining, and that is the reason the windows in the car were closed, wasn't it, Mr. Clark?

A. Yes, sir.

Q. I believe you said a little while ago you wouldn't attempt to estimate the distance that Mr. McCoy's car ran from the time it left the hard surface until it got off in the ditch on the other side?

A. No, sir.

Q. Would you say it ran a considerable distance up the highway?

A. No, sir.

Q. It made almost a complete turn?

A. Yes, sir.

Q. You said Mr. Bloxom worked down there at Dunn's Marine Railway as a carpenter?

A. Yes, sir.

page 76 } Q. What was your work, Mr. Clark?

A. Carpenter, only heavier work. Mr. Bloxom's was light work.



*William E. Clark.*

Q. How much did you receive per hour?

A. 75c.

Q. Do you know whether or not Mr. Bloxom had had an opportunity to go back to his old job in Dunn's Railway since his recovery from this injury?

A. Only from Mr. McCoy. I heard Mr. McCoy say—

Mr. Holladay: We object. You don't know yourself?

The Witness: No, sir.

Mr. Holladay: Don't tell what somebody else told you.

RE-DIRECT EXAMINATION.

By Mr. Jacobs:

Q. In other words, Mr. Clark, as long as Mr. McCoy kept his hands on the wheel of that car on the trip from Dunn's Marine Railway to the point of the accident, nothing happened, did it?

A. No, sir.

Q. When he took his hand off the wheel of the car didn't this—

Mr. Gilman: Let him testify.

A. He went across the road with it.

By Mr. Jacobs:

Q. That is when the accident occurred, wasn't page 77 } it?

A. Yes.

RE-CROSS EXAMINATION.

By Mr. Stephens:

Q. It isn't unusual for a man to take his hand off the steering wheel, is it?

Mr. Jacobs: That is objected to. I think that is a question for the jury.

The Court: The objection is sustained.

DR. HUGH WARREN,

sworn on behalf of the plaintiff, testified as follows:

By Mr. Holladay:

Q. You are Dr. Hugh Warren, from Smithfield?

A. Yes, sir.

Q. Have you your office there?

A. Yes, sir.

Mr. Holladay: Will you admit his qualifications, Mr. Stephens?

Mr. Stephens: Yes, sir.

By Mr. Holladay:

Q. Doctor, were you called to see Mr. Walter  
page 78 } Bloxom on June 23, 1939?

A. Yes, sir.

Q. Will you state the condition in which you found Mr. Bloxom when you arrived there?

A. Mr. Bloxom was on the bed. They had brought him home. He was in very much pain in his back. He wasn't in agony at that time. He complained entirely of his back. He had some slight bruises on his hands and one to his right thumb.

Q. Did you examine his back?

A. Yes, sir.

Q. What did you find?

A. I couldn't tell anything definite. It seemed to be from his pain—history of the pain, that his muscles had been bruised and pulled. Of course, I had no X-Ray to make a diagnosis. The wings of the hip bone I thought had been separated from the spine, according to his statement, and therefore I strapped the hip tight with adhesive, and in order to relieve his pain I had to give him heavy sedatives, to relieve the pain and make him comfortable.

Q. How many times did you see him?

A. Three times.

Q. What treatment did you give him on each one of those visits?

A. The first time I treated for the pain and  
page 79 } bruises, and I strapped him. The second time the  
strap had loosened so much I had to re-strap him,  
and the third time I saw him I decided he must have some  
deep-seated injury that required X-Ray to find, and I sent  
him to the hospital.

*Miss Malinda Bloxom.*

Q. Were the injuries for which you treated him the efficient cause of pain?

A. Yes, sir.

Q. You didn't treat him after he went to the hospital?

A. No, sir.

CROSS EXAMINATION.

By Mr. Gilman:

Q. What injuries did you treat him for?

A. For pain and for bruising of the back.

Q. Your diagnosis as to the wing of the hip bone was wrong, wasn't it?

A. Evidently, according to the X-Ray. You understand the wings of the hip bone are where it joins to the back bone and not to the hip bone.

page 80 } MISS MALINDA BLOXOM,  
sworn on behalf of the plaintiff, testified as follows:

By Mr. Holladay:

Q. Please state your name?

A. Malinda Bloxom.

Q. Where do you live?

A. Battery Park.

Q. Are you the daughter of Mr. Walter Bloxom?

A. Yes, sir.

Q. You live with him at Battery Park?

A. Yes, sir.

Q. And you make your home with your father?

A. Yes, sir.

Q. Were you present at your father's home on the 24th day of June, 1939?

A. Yes, sir.

Q. Do you recall whether or not Mr. C. G. McCoy came to your home on that day?

A. Yes, sir.

Q. Did he make any remark at that time?

A. Yes, sir.

Q. To you or to your father?

A. Yes, he remarked to my father.

Q. Will you state what the remark was?

page 81 } A. He was speaking to my father. He says,  
"Walter, I am sorry it all happened and I blame it all on myself. I shouldn't have done what I did".

*Miss Malinda Bloxom.*

CROSS EXAMINATION.

By Mr. Stephens:

Q. What did he say he did?

A. He didn't say. He just said he was sorry and—

Q. He tried to clean the windshield and inadvertently went off the concrete, did he say that?

A. He didn't say.

Mr. Jacobs: As to C. E. McCoy, who was not driving the car, we are going to take a non-suit as to him. With that we rest.

Plaintiff rests.

page 82 } Recess until 2 o'clock P. M.

(During recess:)

Mr. Gilman: If Your Honor please, I understand they have taken a non-suit as to the owner of the car, and we move to strike out the evidence as to C. G. McCoy, first, for the reason that there has been no gross negligence proved. The plaintiff has shown that during a rain or just after a thunder squall the windshield suddenly misted, and the driver of the car in an effort to clear his windshield inadvertently left the concrete to the right, his front wheel leaving the road—the right front wheel or both the right front and the right back wheel leaving the road, and in an effort to get back on the road he skidded and turned around, or partially around, striking the ditch bank. We submit that state of facts under the decisions in this State and other states, and we will cite them at the proper time, does not constitute gross negligence, and in line with the decisions not even ordinary negligence.

(Discussion off the record.)

Mr. Kanter: We take the position that he is a passenger for a consideration, and will stand on that. We think we are entitled to an instruction on ordinary damages. We say it is not a case under the gratuitous guest doctrine.

The Court: The Court holds that this is not a gratuitous guest case, that it does not fall within the gross negligence doctrine, and therefore overrules the motion.

*Dr. L. A. McAlpine.*

Mr. Gilman: We except to the ruling of the Court for the reason that the undisputed evidence is the plaintiff used defendant's car one week and paid him 50c a day, and the next week he used the plaintiff's car and the defendant paid the plaintiff 50c a day, and nothing was done that benefited defendant on this trip, and that is necessary to take it out of the category of gratuitous transactions. There must be a pecuniary benefit to the defendant, or some benefit to him, and the undisputed evidence is that there is no pecuniary benefit or any other benefit accruing to the defendant by the arrangement with the plaintiff and defendant on these various trips from their work.

We also move that the plaintiff has not proved ordinary negligence.

The Court: That is overruled also.

Mr. Gilman: We except to that.

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#### AFTERNOON SESSION.

#### DEFENDANTS' EVIDENCE.

DR. L. A. McALPINE,

sworn on behalf of the defendants, testified as follows:

By Mr. Gilman:

Q. Your name is Dr. Louis A. McAlpine?

A. Yes, sir.

Q. And you are a practicing physician in the City of Portsmouth, and you have been practicing how long?

A. Twenty-four years.

Q. You are connected with Parrish Memorial Hospital?

A. Yes.

Q. Your work is principally confined to surgery, I believe?

A. Yes, sir.

Q. Doctor, did you examine Mr. Bloxom at my request several days ago?

A. Yes, Sunday morning, June 23rd, I think.

Q. What did you find his present condition to be from your opinion?

A. Well, he did have a fracture of his second lumbar *vertebrae* that did not involve the spinal cord or any of the nerves that come off from the spinal column, and he had no residual paralysis, or anything of that kind, and as a matter of fact

*Dr. L. A. McAlpine.*

from my physical examination he has got a per-  
page 85 } feet result as far as the healing of the *vertebrae*  
goes, and there is no residual condition left from  
the accident.

Q. In your opinion can he follow his usual vocation as carpenter?

A. Well, in answer to that question, we usually regard this—I have got two exceptions here—one, where your spinal cord or nerve is injured. That is a very severe thing. He hasn't had that. He has had no injury whatever to the spinal cord or nerve roots. In consequence all he has had has been a fracture of the body of the second lumbar *vertebrae*. We always regard certain prerequisites for a man to get well. The first is that diagnosis shall be made early. The second is that he shall have adequate treatment. The third is he shall heal without any deformity. Now, if a patient has all of those things done to him we consider that when his reasonable period of time is up that he is able to go back and do his usual work, even though it is hard labor, the same as he was ever able to do. Now, the question in this case, he says he has pain mostly at night. I don't know that his work that he is doing now is not aggravating the condition, and, of course, pain is something I cannot see or feel, nobody can tell except him, and as I say following the rules we think he should be free from pain and able to do his work at this time.

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#### CROSS EXAMINATION.

By Mr. Jacobs:

Q. Do you want the jury to understand that you will take the responsibility of recommending to this man that he take this brace off of his back and start lifting heavy 12 by 12 logs and start to work on the keel of a boat, as he is required to do?

A. I say he should be able to do it according to all experience.

Q. According to the time that has elapsed and experience?

A. Yes.

Q. Of course, you concede there are exceptions to that; you are merely stating the general rule?

A. I say the greatest number of these cases should do that.

Q. When he says he has pain in his back and cannot lift heavy weight, and he has these complications he testified this morning—

*C. L. McCoy.*

A. I don't know why.

Q. He has pain in his back and can't lift heavy weights, you are not in a position to say that is not correct?

A. They are entirely subjective symptoms. I can't tell whether he has or has not. I can only tell what from my experience in the past most of these cases do have.

Q. In the most of these broken back cases isn't page 87 } this sort of thing to be worn by the patient in a case where there is a broken or compressed fracture?

A. Yes.

Q. You saw the cast?

A. Yes.

Q. You are in agreement with Dr. Buxton, you agree with his diagnosis?

A. I agree thoroughly with him. I think he has had excellent attention and has shown excellent results.

By Mr. Gilman:

Q. You say, Dr. McAlpine, that he has had excellent treatment and excellent results?

A. Yes.

By Mr. Jacobs:

Q. You only saw this man once, that was last Sunday?

A. Yes, sir.

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C. L. McCoy,

sworn on behalf of the defendants, testified as follows:

By Mr. Stephens:

Q. Your name is C. L. McCoy?

A. Yes, sir.

Q. You are the brother of the defendant, C. G. McCoy?

A. Yes, sir.

Q. You were there in this automobile on the occasion this accident happened on June 23, 1939?

A. Yes, sir.

Q. Will you tell the jury just as briefly as you can exactly what took place as far as you can recall it?

A. Well, so far as what took place, that is quite a hard thing to do, because it happened just like that, as quick as you could do that it happened (illustrating).

Q. Let me help you maybe a little. You were working down at Dunn's Shipyard?

*C. L. McCoy.*

A. Yes, sir.

Q. You left somewhere between 4:10 and 4:20 on the afternoon of the 23rd of June?

A. Yes, sir.

Mr. Jacobs: Don't lead him.

The Witness: Yes, I was in the car, and I didn't think I would have to—

page 89 } By Mr. Stephens:

Q. Start at the shipyard and bring us up to it?

A. We left the shipyard soon after the whistle blew as we generally do, and it was raining some just before we left, and it continued raining and rained on at moderate speed—I don't know—I wasn't noticing the speedometer—until we got up at least a little above Churchland. That is where the accident occurred, and it was raining moderately, and all of a sudden I felt the car kind of slip, you know, like it would be. I was sitting in the rear seat, and naturally I kind of noticed it, you know, and as quick as that you might say the car was in the ditch, so that is about the way it happened. The cause of it I don't know.

Q. The car was proceeding—the car in which you were riding—towards the James River Bridge?

A. Yes.

Q. In a westerly direction?

A. Yes, sir.

Q. You had gotten beyond Churchland?

A. Yes, sir.

Q. And as you were riding along all of a sudden this thing happened?

A. Yes, sir.

Q. Can you give this jury any idea how long it was from the time you first thought there was something  
page 90 } amiss until it actually came on the other side of the road and came to a rest?

A. That I couldn't say, just a little space of dirt between the concrete and the ditch, that isn't as wide as this room. You know how the roads are, of course, and just how far she went before she hit the ditch I just really don't know, because it wasn't a great ways. The car went off the concrete and naturally it went for the ditch, and it seems like it was just as quick as that. She went off before she hit the ditch, so I just really couldn't say how far she ran before she hit



*C. L. McCoy.*

the ditch. I never went and measured it or nothing of that kind. It is only a narrow space.

Q. You were traveling, I believe you said, on the right side?

A. Yes, sir.

Q. Do you know whether or not the windshield did become moist?

A. No, I wasn't paying any attention to it.

Q. You were riding on the back seat?

A. Yes, perfectly safe. I wasn't expecting anything of that kind, neither did Mr. Stowe.

Q. He was the gentleman who testified this morning?

A. Yes, he was.

Q. He was riding on the back seat with you?

page 91 } A. Yes, sir.

Q. Were you on the left side or in the middle?

A. Between the two.

Q. Mr. Walter Bloxom was sitting on the right-hand rear seat, wasn't he?

A. Yes, sir.

### CROSS EXAMINATION.

By Mr. Jacobs:

Q. You don't know anything about the wiping of the mist off the windshield?

A. I never paid any attention to it. In other words, I didn't see him when he wiped his windshield. In other words, if he did it I wasn't paying any attention to it. I wasn't looking that way. I was talking with Mr. Stowe sitting on the side of me, I wasn't paying any attention to what he was doing, because we always drove at a moderate rate of speed and we felt perfectly safe and naturally wasn't noticing the driver.

Q. This was your brother driving, wasn't it?

A. Yes.

Q. And he has driven that road many times?

A. Many times.

Q. How long has your brother worked at Dunn's Railway?

A. That I don't know. I haven't checked up on him.

Q. Give me the benefit of your best recollection?

page 92 } A. My brother? He has been working there several years. Just how many years I have no idea.

Q. He drives backward and forward up and down that road every day, doesn't he, except Sunday?

A. The weeks that he drives.

Q. Do you have a car, too?

*C. G. McCoy.*

A. No.

Q. Were you a party to this arrangement?

A. No, sir, I didn't have any car.

C. G. McCOY,

one of the defendants, being duly sworn, testified as follows:

By Mr. Stephens:

Q. You are Mr. C. G. McCoy?

A. Yes, sir.

Q. You are a defendant here in this case?

A. Yes, sir.

Q. You live at Battery Park?

A. Yes, sir.

Q. And you were working at this Dunn's Marine Railway?

A. Yes, sir.

Q. How far is it from Battery Park by the road  
page 93 } you all use in traveling from Battery Park to  
Dunn's Railway?

A. 22 miles.

Q. Did you go over any bridges, or what bridges did you go  
over?

A. We go over two toll bridges and one free bridge.

Q. You go over two bridges in the James River System?

A. Yes, sir.

Q. And one free bridge at Rescue?

A. Yes, sir.

Q. And Battery Park is located on the banks of Pagan  
River?

A. Yes, sir.

Q. What is your job at the shipyard?

A. Ship carpenter.

Q. Ship carpenter?

A. Yes, sir.

Q. How does the work you do at the shipyard compare  
with the work Mr. Bloxom has been doing at the shipyard?

A. He is a sort of joiner. His work is light in those yards.

Q. He does a lighter type of work?

A. Yes, sir.

Q. The type work you do is a heavy type of work?

A. Yes, sir.

Q. How much are you paid an hour?  
page 94 }

A. 75c.

Q. Do you know whether there is any difference

*C. G. McCoy.*

between the work you did and the type of work done by Mr. Bloxom?

A. No, sir, I don't.

Q. You all were coming back from the shipyard when this accident occurred?

A. Yes, sir.

Q. Will you please tell the jury in your own words just as briefly as you can exactly what took place, Mr. McCoy?

A. We left the yard about I judge a quarter or maybe twenty minutes past four and proceeded on up the road. It was raining, and when we got about a mile past Churchland we ran into a still heavier rain, and the windshield fogged over inside, and I had a handkerchief on the seat by me and I undertaken to clear it up, which I had during the trip coming up, and it seemed as though she bumped off, and naturally when I pulled her back she slid, and the first thing that popped in my mind was to stop it, and I pulled the brakes on, and when I pulled the brakes on it turned right around to the left and headed in the bank on the left-hand side of the road, heading back towards Churchland. She hit the car a bump, the right-hand side.

Q. Do you know at what rate of speed you were traveling immediately before the accident occurred?

A. I was traveling between 30 and 35. It had page 95 } been raining the whole way up.

Q. Do you know whether you decreased the speed of your car any—I mean whether it accelerated?

A. No, sir. I had my foot off the accelerator when I ran into this fog.

Q. What was the condition of the windows with reference to being down or closed?

A. Most of them was open all the way, but after I ran into this heavy rain naturally they closed them up.

Q. Then is when your windshield misted over?

A. Yes, sir.

Q. And that is when you took this handkerchief or rag from your side and attempted to wipe it off?

A. Yes, sir.

Q. Had you cleared that windshield up before that afternoon?

A. Yes, I had done that before.

Q. Does that account for the handkerchief lying on your right side?

A. Yes, lying between me and Mr. Clark.

*C. G. McCoy.*

Q. You did repair the automobile you were driving, in which Mr. Bloxom was riding?

A. I had it repaired, yes.

Q. To what extent was it damaged?

A. Eight dollars and seventy some cents, if I re-  
page 96 } call right.

Q. And that was the full cost of repairing all the damage that arose out of that accident there?

A. Yes. I had it rechecked to see whether it was out of line.

Q. You had it rechecked to see whether it was out of line?

A. Yes, sir.

Q. Did you have it inspected at that time?

A. She had been inspected just a month before.

Q. It had been inspected a month before?

A. Yes.

Q. Do you know of any physical defect or mechanical defect that that automobile had?

A. No, sir.

Q. It was a Chevrolet automobile?

A. 1939.

Q. Do you recall, Mr. McCoy, how much mileage was on it?

A. No, sir, I don't remember, somewhere around twenty-five or thirty thousand, maybe. I don't remember the amount that was on it.

Q. You said a moment ago they closed the windows on the automobile when you ran into a heavy rain?

A. Yes, sir, it increased and they closed the windows.

Q. Just before this thing occurred?

page 97 } A. Yes, sir.

Q. Whom do you mean when you say "they"?

A. Mr. Clark closed the one on his right. I don't know what the fellows on the back seat did. I noticed the windshield misted up pretty quick, but I think I pulled up the one on my left on account of the rain.

Q. Do you know whether or not the window opposite where Mr. Bloxom was sitting was closed after the accident?

A. I wouldn't say. I never noticed.

Q. Could you give us any idea how far your automobile traveled from the time that the right front wheel as you said ran off the concrete until it came to rest against the ditch bank on the other side?

A. I don't think it ran over 25 or 30 feet. The next morning we came to the place, and you could see exactly the tracks where she come around. I don't think she went over 25 or

*C. G. McCoy.*

30 feet when I slapped the brakes on. She made a "U" turn right around.

Q. You mean it didn't go ahead more than 25 or 30 feet?

A. Yes, dead ahead.

Q. It made a perfect "U" turn and went back facing the opposite direction from which you were traveling?

A. Yes, sir.

Q. Now, Mr. Bloxom lives at Battery Park?

A. Yes, sir.

page 98 } Q. And you all are neighbors?

A. Yes.

Q. Did you hear the comments this morning of Mr. Bloxom's daughter with reference to a statement you are supposed to have made over at his house?

A. Yes, I heard her, but I don't remember saying anything about it.

Q. Did you go to Mr. Bloxom's on this occasion?

A. Yes, sir.

Q. Do you remember having any conversation with him?

A. Not along that line, no, sir.

Q. What conversation did you have, Mr. McCoy?

A. Just about the condition of him, and that is all.

Q. You went over to see how he was, because you were interested in him, is that correct?

A. That is how it is.

### CROSS EXAMINATION.

By Mr. Jacobs:

Q. Mr. McCoy, you stated you don't remember the conversation that Miss Bloxom testified about this morning?

A. I don't remember saying what she said, no, sir.

Q. Would you deny that you said it?

A. I say I don't remember it.

Q. Would you deny it?

page 99 } A. I wouldn't deny it. I don't remember having said it. I remember having a conversation with Mr. Bloxom, I don't remember what it was.

Q. Was the arrangement incident to the transportation wherein each of you paid the other 50c a day to cover bridge toll and expenses and upkeep of the car? Was that statement testified to correct? Was that the way you paid it?

A. Yes, that is right.

Q. It wasn't an undertaking for profit, was it?

*C. G. McCoy.*

A. No, sir.

Q. You stated that Mr. Bloxom was called a joiner?

A. Shipyard.

Q. A ship's joiner?

A. Yes.

Q. You are a ship carpenter?

A. Yes.

Q. Now, a ship joiner, from the standpoint of a mechanic, is one step higher in the scale than a ship carpenter?

A. Right, yes.

Q. In other words, Mr. Bloxom would be termed more of a cabinetmaker?

A. Yes.

Q. He does this fine woodwork in mahogany and walnut?

A. Yes, sir.

Q. How long have you known Mr. Bloxom?

A. How long have I known him?

page 100 } Q. Yes.

A. I would say 35 years.

Q. What kind of mechanic is he as a joiner?

A. Very good.

Q. You stated that you had wiped off the windshield before?

A. Yes, I had.

Q. Where did you do that?

A. On the way up.

Q. What did you do it with?

A. A handkerchief.

Q. How long did the glass stay clear?

A. Oh, I don't know.

Q. In other words, it takes some time for the glass to get frosted so you can't see—in other words, it would be three, four or five minutes?

A. Yes.

Q. You would have plenty of notice that the glass was getting frosted, so you would expect you would have to do something?

A. If you are driving you can't help see it.

Q. You were able you say a previous time to safely wipe the windshield off when it became frosted gradually after a period of time; why weren't you able to do it safely this time?

page 101 } A. Well, that is hard to say.

Q. You had an opportunity if you had wanted to stop, didn't you, to do it?

*C. G. McCoy.*

A. Of course, a man could have stopped, but I don't often see them stop just to clear the windshield up.

Q. Well, you stated that it had rained much harder a few minutes before the accident than it had previously?

A. Yes, sir.

Q. Now, there are pretty wide shoulders along that highway, aren't there?

A. Yes, fairly wide.

Q. How wide would you say they are?

A. I would say they are around 10 feet.

Q. You testified that as a result of this accident your car was only damaged to the extent of \$8.74?

A. Eight dollars seventy some. I won't say the pennies—seventy some cents.

Q. What damage was done to Mr. Bloxom that you could see right after the accident?

A. Well, he got out of the car and rode behind, but, of course, I couldn't tell how much he was hurt, that is myself.

Q. You and Mr. Bloxom worked together at the shipyard, did you not?

A. Yes, sir.

Q. How long after the accident did he come  
page 102 } back to work?

A. He never had come back when I was there.

Q. He never returned to work at the shipyard?

A. No.

Q. Prior to that time he was working pretty steadily there, wasn't he?

A. Yes, pretty steady.

Q. And with your knowledge of the Dunn shipyard there is plenty of work there for him to do, isn't there?

A. Oh, yes.

Q. They have been building these large bridges or repairing them for the railroads for a number of years, haven't they, or the last two years?

A. Yes.

Q. And they have considerable building work and yard work, do they not?

A. Yes.

Q. Now, as a matter of fact, aren't there only about three joiners there at the yard that do this highly specialized work?

A. There are three of them.

Q. Mr. Kirk, Mr. Burns and Mr. Bloxom are the three, are they not?

*C. G. McCoy.*

A. Yes.

Q. Now, Mr. McCoy, just prior to the time that the accident occurred you had taken your right hand off page 103 } the steering wheel?

A. Sure, to wipe the windshield.

Q. You didn't slacken your speed when you did that?

A. Yes, sir.

Q. You say you did slacken your speed?

A. Yes, sir.

Q. To what extent?

A. Well, you know how long it takes a car to slow down.

Q. In other words, you were attempting to keep your left hand on the wheel and use your right hand to wipe off the windshield, and have your right foot on the brake to slow it down?

A. No, sir, I didn't put the brake on then.

Q. When did you put the brake on?

A. I didn't put the brake on until she bumped off and come back on.

Q. I misunderstood you. I thought you said you put the brake on before that?

A. I didn't put the brakes on to wipe the windshield off. I put the brakes on after she come back on.

Q. Running as you say steadily, you had your left hand on the wheel, and you were wiping the windshield with your right hand. Could you wipe it all the way across?

A. No, sir.

Q. Just right in front of you?

page 104 } A. Yes, sir.

Q. You had your right foot on the accelerator?

A. Yes, sir.

Q. You were trying to keep your eyes ahead of you?

A. Yes, sir.

Q. Was there any other traffic on the highway?

A. No, sir, I didn't see any.

Q. Was there ample room for you to drive on the concrete?

A. Sure.

Q. Now, Mr. McCoy, when you were in the act of wiping this windshield, and when you had your left hand on the wheel, when you felt the car, the right side of the car leave the highway, what did you do that instant?

A. I put both hands on the wheel to ease her back up on the road. As I did she made a slip, and the first thing that popped in my mind was, "stop". I applied the brakes right at once and made a left-hand swing.



*C. G. McCoy.*

Q. It really did get out of control at that instant?

A. She went right on around. I done all I could to it.

Q. There was nothing you could do while it was swinging?

A. No, sir.

Q. In other words, it was out of control?

A. Yes.

Q. After you had wiped the windshield the first time where did you put the handkerchief?

page 105 } A. Back alongside of me on the seat.

Q. What model car was it, Mr. McCoy?

A. A '39 Chevrolet.

Q. How long had it been in use?

A. Well, about seven months, I guess, six or seven months.

Q. How much do you drive a car a month?

A. A month?

Q. Yes.

A. I don't know.

Q. Well, you did drive it 44 miles a day?

A. Yes. That is only one week out of a month.

Q. How much do you drive it in addition? Does anybody else use that car?

A. The car belongs to my son, and he uses it Saturday nights and Sundays.

Q. How about the time during the week?

A. She stays in the garage. He works in Newport News and he don't take the car with him.

Q. How wide is the hard surface of the highway at the point of the accident?

A. I don't know, but I would judge between 16 and 18 feet. I never measured it.

Q. How wide are the shoulders?

page 106 } A. Around 10 feet, I should judge. I never measured those. I just know by looking at them.

Q. Is the road perfectly straight at the scene of the accident?

A. Yes, sir.

Q. For what distance ahead of you could you see?

A. From where the accident occurred?

Q. Yes.

A. Well, it was around about a mile from Bellville, I should say.

Q. You knew at the time of the accident it was raining, of course, you knew the road was wet and slippery?

A. Yes.

Q. And with that knowledge you took your right hand off

*C. G. McCoy.*

the wheel to wipe the windshield without stopping or without slowing your speed?

A. That is what happened.

### RE-DIRECT EXAMINATION.

By Mr. Stephens:

Q. To get into Battery Park or Rescue you have to use a private automobile?

A. Yes, sir.

Q. Is there any public transportation of any kind there?

A. No, sir.

Q. Something was said a little while ago about Mr. Bloxom's work at the Dunn Marine Railway. Do you know page 107 } whether or not of your own knowledge Mr. Bloxom has had a chance to return to his job since he recovered from this injury?

A. Yes, sir.

Q. Will you tell us what that was, what you know about it?

A. The boss asked me to go and see him and ask him would he come back in the spring to help him out.

Q. What response, if any, did you get?

A. Mr. Bloxom told me he didn't know what he would do yet, he didn't hardly know what he was going to do. He hated to quit his father, there was no one else to help him do that joining work there.

Q. He is working now for Bloxom Brothers, his father and brother, isn't he?

A. Yes.

Q. He at one time was a part owner in that business and worked for them?

A. I don't know. I couldn't tell you that.

Q. Well, they went under the name—the business went under the name of The Bloxom Brothers Boatbuilding Corporation?

A. I don't know who was the owner.

Q. He worked there before?

A. Yes, sir.

Q. Now, talking about driving these cars various weeks, you were driving yourself the week this thing page 108 } happened. Who drove whose car the week immediately preceding?

A. I think Mr. Bloxom had drove the week before.

Q. And you paid him on the same basis that he paid you?

A. The same basis.

*C. G. McCoy.*

Q. On the same basis as when he rode in the car that you operated?

A. Absolutely the same thing.

RE-CROSS EXAMINATION.

By Mr. Jacobs:

Q. You said that last spring, you mentioned this past spring—

A. Yes, sir.

Q. Mr. Dunn or Mr.—

A. Yes.

Q. Asked you to see Mr. Bloxom to find out whether he would come back and help them out?

A. Yes; along in April, I think it was.

Q. This accident occurred in June?

A. That was a year ago. I am talking about 1940 now.

Q. Last April, you mean two months ago?

A. Yes, sir.

page 109 } Defendants rest.

Testimony closed.

Note: The Court and counsel retired to the Judge's Chambers.

Mr. Gilman: The defendant renews his motion to strike plaintiff's evidence for the reason that he has not proved gross negligence nor ordinary negligence on the part of the defendant.

The Court: The motion is overruled.

Mr. Gilman: I except.

Note: The Court and counsel returned to the courtroom.

The Court: Gentlemen, for your guidance in this case the Court will give you certain instructions which are the law in this case so far as you are concerned. You are the judges of the facts. The Court is not. You will ob-  
page 110 } serve that every instruction given you by the court is predicated upon the word "if", and it is for you to decide whether you believe one thing or the other, and when the court tells you that if you believe such and such in such case, it is not an indication of what the court believes,

because the court cannot express to you what it believes. The court tells you if you believe the facts to show such and such a situation, then the law that is applicable to the case is such and such. If, on the contrary, you believe such and such to be the facts established by the proof and the evidence, then the law is such and such, so every instruction is predicated upon "if".

page 111 } Note: The court instructed the jury as follows:

*Plaintiff's Instruction P-2 (Granted):*

"The court instructs the jury that it is the duty of all persons who drive motor vehicles upon a public highway to keep such vehicles under reasonably proper control at all times, having due regard for the conditions of the highway, its width and surface; and the failure so to do is negligence and in this case if you believe from the evidence that the defendant C. G. McCoy immediately preceding or up to the time of the accident was operating his car in such a negligent way and manner that he did not have it under reasonably proper control and that such failure on his part was the proximate cause of the wreck and injuries to Mr. Bloxom, then you must find for the plaintiff, Walter E. Bloxom."

Mr. Gilman: The defendant excepts to the action of the court in granting Instruction P-2 for the reason that it is not supported by the evidence, there being no evidence of ordinary nor gross negligence, and it is not a proper statement of the law, it is confusing and misleading, and tells the jury that if the car was not under control, regardless of the cause, at the time of the wreck, the defendant would be liable, making one responsible for injuries resulting in  
page 112 } an accident, regardless of the cause.

*Plaintiff's Instruction P-3 (Granted):*

"The court instructs the jury that negligence consists of the lack of ordinary care; that is to say the absence of such care as men of ordinary prudence would use. Ordinary care is that degree of caution, attention and activity which is habitually employed by or may be reasonably expected from reasonably prudent persons in the situations of the respective parties under all the circumstances surrounding them at the time. Therefore if you should find that there was want of such ordinary care on the part of Mr. McCoy as a reason-

ably prudent man ought to use, and that such negligence or lack of ordinary care proximately caused the injuries sustained by Mr. Bloxom, then Mr. Bloxom is entitled to recover such damages as you shall find he is entitled to for the injuries sustained by reason of such negligence."

Mr. Gilman: The defendant excepts to the action of the court in granting Instruction P-3 on behalf of the plaintiff, for the reason that it is not a proper statement of the law, it is not supported by the evidence, is misleading and confusing.

page 113 } *Plaintiff's Instruction P-4 (Granted):*

"The court instructs the jury that if, under all the evidence and instructions of the court, you should find for the plaintiff, Mr. Bloxom, you should allow him such sum as you believe from the evidence will compensate him reasonably for the injuries received; and in estimating his damages you may take into consideration:

1. His mental and physical pain and suffering, if any, which has been the consequence of his injuries.

2. The reasonable value of his time already lost from his employment, if any, which was the consequence of his injuries.

3. The expenses, if any, incurred by him incidental to attempts to effect a cure or to lessen the amount of suffering and injury.

4. The bodily injury and disability sustained by him, if any."

Mr. Gilman: The defendant excepts to the action of the court in granting Instruction P-4 for the reason that it is not supported by the evidence.

*Plaintiff's Instruction P-5 (Granted):*

"The court instructs the jury that if you believe from the evidence that the plaintiff contributed towards the expenses incident to the operation of defendant's automobile page 114 } bile, then the plaintiff was not a guest of the defendant in a legal sense and the defendants owed to the plaintiff the duty of using reasonable care in carrying the plaintiff safely. And if you further believe from the evidence that the defendants failed to use reasonable care, or were guilty of negligence in the operation of the automobile

which proximately caused the injuries to the plaintiff, then your verdict should be in favor of the plaintiff.”

Mr. Gilman: The defendant excepts to the action of the court in granting Instruction P-5, for the reason that it is not a proper statement of the law, it is not supported by the evidence, it is in the abstract, and in part is a repetition of Instruction P-3.

*Defendant's Instruction 1 (Granted):*

“The court instructs the jury that a person who is required to act in a sudden emergency which is not occasioned by his negligence even if he acts unwisely, is not guilty of negligence in law, since in case of sudden and unexpected danger, necessitating an immediate decision as to which of two or more ways of escape will be resorted to, the law makes allowance for errors of judgment, even though it appears that the resulting accident could have been avoided if the party so placed had pursued a different course.”

Mr. Kanter: The plaintiff objects and excepts to the action of the court in granting Defendant's Instruction page 115 } 1 on sudden emergency on the ground that the evidence in this case discloses beyond peradventure that if there was any emergency at all that it was brought about by the defendant's own negligence, and the evidence failed to show any sudden emergency as contemplated by the Virginia decisions.

*Defendant's Instruction 2 (Granted):*

“The court instructs the jury that the basis of this action is negligence, and you cannot infer negligence on the part of the defendant from the mere happening of an accident. The law imposes on the plaintiff the duty of proving his case by a preponderance of all the evidence, and this burden rests upon him through the entire trial and applies at every stage thereof. And you cannot, under your oaths, find a verdict in favor of the plaintiff against the said defendant unless and until he has proved by a preponderance of all the evidence that the defendant was guilty of the negligence charged against them, and that such negligence was the proximate cause of the accident complained of.

If after hearing all the evidence you are uncertain as to whether the defendant was guilty of negligence, and it appears

equally as probable that he was not negligent as  
 page 116 } that he was, then the verdict must be for the de-  
 fendant."

*Defendant's Instruction 8 (Granted):*

"The court instructs the jury that the law does not undertake to hold someone liable for every accident, and in order for you to find for the plaintiff, it must be shown that the defendant was guilty of negligence which was the sole proximate cause of the injuries complained of. If it appears from the evidence that the defendant was guilty of no negligence, and that the plaintiff was guilty of no negligence, then the law considers an accident occurring under these circumstances an unavoidable accident, and under such circumstances the defendant cannot be held liable for injuries resulting therefrom."

*Plaintiff's Instruction P-1 (Refused):*

"The court instructs the jury that if you believe from the evidence that the defendant, C. G. McCoy, was not keeping a proper lookout ahead immediately before the accident in question and that his failure to do so was the direct and proximate cause of the injury sustained by the plaintiff, then you should find for the plaintiff."

*Defendant's Instruction 3 (Refused):*

"The court instructs the jury that since the plaintiff was  
 a guest in the automobile of the defendant Mc-  
 page 117 } Coy, the plaintiff is not entitled to recover against  
 McCoy upon the mere showing of ordinary or  
 simple negligence, or that the defendant violated some traffic  
 rule or law, or that McCoy failed to operate his car as a  
 reasonably prudent person would have operated it. The de-  
 fendant, McCoy, is presumed to be free from negligence of  
 any kind and to have operated his car with due care. And  
 the burden of proof is upon the plaintiff to prove not only  
 that the defendant, McCoy, was guilty of negligence, but also  
 that such negligence was gross, wanton or culpable; and in  
 order to constitute gross, wanton or culpable negligence it is  
 necessary that the plaintiff prove to the jury that the defend-  
 ant, McCoy was guilty of such absence of care for the safety  
 of the plaintiff as exhibits indifference to consequences."

*Defendant's Instruction #4 (Refused):*

"The court instructs the jury that in this case the plaintiff assumed the risk so far as any claim against McCoy is concerned of all accidents that may have happened by reason of mere forgetfulness, thoughtlessness, or other acts of simple negligence on the part of McCoy. And since the plaintiff was a guest of the defendant the plaintiff is not entitled to recover for the results of simple negligence on the part of the defendant."

*page 118 } Defendant's Instruction 5 (Refused):*

"The court instructs the jury that a mere failure to skillfully operate an automobile under all conditions, or mere failure to be alert and observant, or mere failure to act intelligently and operate an automobile at a low rate of speed may be a failure to do what an ordinarily prudent person would have done under the circumstances, and thus amount to simple negligence; but such lack of attention and diligence in itself or mere inadvertence, does not amount to gross, wanton or culpable negligence."

*Defendant's Instruction 6 (Refused):*

"The court instructs the jury that the burden of proving gross, wanton or culpable negligence is upon the plaintiff, and such gross, wanton or culpable negligence must be proven by affirmative evidence, which must show more than a probability of such gross, wanton or culpable negligence. A verdict for the plaintiff against McCoy cannot be found upon conjecture, but there must be affirmative and preponderating proof that the injury to the plaintiff was directly and proximately caused by gross, wanton or culpable negligence on the part of the defendant McCoy before the jury would be justified in finding a verdict against the defendant, McCoy."

*page 119 } Defendant's Instruction 7 (Refused):*

"The court instructs the jury that unless you believe by a greater weight of the evidence that the plaintiff exercised the degree of care he should have exercised, that is to say, the care which an ordinarily prudent person would use in the same place, under the same circumstances, you should find for the defendants, and this is true regardless of any negligence of the defendants."



*Defendant's Instruction 9 (Refused):*

“The court instructs the jury that if you believe from the evidence the plaintiff was a guest in the automobile of the defendant McCoy, the plaintiff is not entitled to recover against McCoy upon the mere showing of ordinary or simple negligence, or that the defendant violated some traffic rule or law, or that McCoy failed to operate his car as a reasonably prudent person would have operated it. The defendant, McCoy, is presumed to be free from negligence of any kind and to have operated his car with due care. And the burden of proof is upon the plaintiff to prove not only that the defendant, McCoy, was guilty of negligence, but also that such negligence was gross, wanton or culpable; and in order to constitute gross, wanton or culpable negligence it is necessary that the plaintiff prove to the jury that the defendant, McCoy was guilty of such absence of care for the safety of the plaintiff as exhibits indifference to consequences.”

*Defendant's Instruction 10 (Refused):*

“The court instructs the jury that in this case the plaintiff assumed the risk so far as any claim against McCoy is concerned of all accidents that may have happened by reason of mere forgetfulness, thoughtlessness, or other acts of simple negligence on the part of McCoy. And if you believe from the evidence that the plaintiff was a guest of the defendant the plaintiff is not entitled to recover for the results of simple negligence on the part of the defendant.”

Mr. Gilman: The defendant excepts to the action of the court in refusing to grant his Instructions numbers 3, 4, 5, 6, 9 and 10, which were offered under the theory that the plaintiff was a guest in the automobile of the defendant, and the principle of gratuitous transportation should apply, and these instructions are a proper statement of the law if this principle is applicable to the facts in this case; if not, it was a question for the jury, and the defendant submitted that theory of the case in Instruction 10, which the court refused, and to which action of the court defendant excepts.

page 121 } Note: Argument was made by Mr. Jacobs and Mr. Holladay on behalf of the plaintiff, and by Mr. Stephens and Mr. Gilman on behalf of the defendants.

The jury retired to consider its verdict.

Mr. Holladay: The plaintiff by counsel objects to the argument of counsel for the defendant insofar as he told the jury that any verdict which they rendered against Mr. McCoy in this case would have to be paid out of his own pocket, out of his own hard earned wages, counsel for defendant having knowledge at that time that the car was insured, having a liability insurance policy.

Mr. Stephens: Counsel for the defendant states that no objection was made to this argument at the time it was made, and that there is no evidence but that Mr. McCoy will have to pay the judgment out of his own pocket, and we insist that under the circumstances the argument was perfectly proper, counsel having no knowledge that the defendant had an insurance policy that would cover him in any event.

Mr. Holladay: Counsel for the plaintiff says further that as suggested by counsel for the defendant in his preceding statement that there was no evidence covering the subject, and that therefore the remarks of counsel were improper, and further that objection was not made during page 122 } the course of the argument due to the fact that any objection would obviously throw the insurance angle before the jury, which would have been improper and probably ground for a mistrial.

The Court: The alleged misstatement that counsel for the plaintiff excepted to made by counsel for defendant was not brought to the attention of the court until after the jury retired.

Note: The jury returned with the following verdict:

"We, the jury, find for the defendant and assess no damages against him. Elmer E. Davis, Foreman."

Note: Counsel for the plaintiff thereupon moved the court to set aside the verdict and grant him a new trial on the ground that the verdict was contrary to the law and the evidence, which motion was subsequently argued by counsel for the respective parties and overruled, to which ruling of the court the plaintiff, through counsel, then and there duly excepted.

page 123 } And, at another day, to-wit: On the 25th day of June, 1940, an order of this Court was entered in the words and figures following, to-wit:

This day came the plaintiff by counsel and asked leave to file an amended Notice of Motion for Judgment, which said Notice of Motion for Judgment is accordingly ordered filed.

And, on the same day, to-wit: On the 25th day of June, 1940, the following order of this Court was entered:

This day came the parties by their attorneys: thereupon came a Jury, to-wit: Henry Pacini, Elmer E. Davis, Earl H. Hanbury, Arthur Sawyer, H. L. Bondurant, C. Jordan Yeager and Geo. H. Weatherly, who were duly sworn the truth to speak upon the issue joined, and after fully *heard* the evidence and argument of counsel, retired to their room to consult of a verdict, and after some time returned into Court having found the following verdict, "We the Jury find for the defendant and assess no damages against him".

Thereupon the plaintiff moved the Court to set aside the verdict of the Jury in this case and grant a new trial, upon the ground that the same is contrary to the law and the evidence, the hearing of which motion is continued.

And at another day, to-wit: On the 19th day of July, 1940, the following order of this Court was entered:

This day came the parties by their attorneys and on motion of the defendants, it is ordered that this case be continued.

And at another day, to-wit: On the 13th day of August, 1940, the following order of this Court was entered:

page 124 } And, at another day, to-wit: On the 13th day  
of August, 1940, the following order of this Court  
was entered:

This day came again the attorney for the plaintiff, and the Court having fully heard the motion of the plaintiff to set aside the verdict of the Jury in this case and grant him a new trial, doth overrule same, to which action of the Court in overruling said motion, the plaintiff, by counsel, excepted.

Thereupon it is considered by the Court that the plaintiff take nothing by his suit, but for his false clamor be in mercy, etc., and that the defendants recover their costs by them in this behalf expended.

Thereupon the said plaintiff signifying a desire to apply to the Supreme Court of Appeals of Virginia, for a writ of

error and *supersedeas* to said judgment, and on motion of the plaintiff or someone for him entering into and acknowledging a bond in the penalty of Two Hundred Dollars, with good and sufficient surety to be approved by the Clerk, it is further ordered that execution be *expended* for the period of sixty (60) days from this date.

page 125 } JUDGE'S CERTIFICATE.

I, A. B. Carney, Judge of the Circuit Court of Norfolk County, Virginia, who presided over the foregoing trial of the case of Walter E. Bloxom v. Charles Goode McCoy and Charles Edward McCoy, in said Court, at Portsmouth, Virginia, on June 25, 1940, do certify that the foregoing is a true and correct copy and report of all the evidence, together with all the motions, objections and exceptions on the part of the respective parties, the action of the court in respect thereto, all the evidence, together with all the motions, objections, and exceptions on the part of the respective parties, the action of the court in respect thereto, all the instructions offered, amended, granted, and refused by the court, and the objections and exceptions thereto; and all other incidents of the said trial of the said cause, with the motions, objections, and exceptions of the respective parties as therein set forth.

As to the original exhibits introduced in evidence as shown by the foregoing report, to-wit: 1-P to 7-P, both inclusive, it is stipulated between counsel that since the same are not material, they are not to be made part of the record to be submitted to the Supreme Court of Appeals.

I do further certify that the attorney for the page 126 } defendants had reasonable notice, in writing, given by counsel for the plaintiff, of the time and place when the foregoing report of the testimony, exhibits, instructions, exceptions, and other incidents of the trial would be tendered and presented to the undersigned for signature and authentication, and that the said report was presented to me on the 4 day of October, 1940, within less than sixty days after the entry of the final judgment in said cause.

Given under my hand this 4 day of October, 1940.

A. B. CARNEY,  
Judge of the Circuit Court of Norfolk  
County, Virginia.

I, V. C. Randall, Clerk of the Circuit Court of Norfolk County, Virginia, do hereby certify that the foregoing is a copy and report of the testimony, the exhibits, instructions, exceptions, and other incidents of the trial of the case of Walter E. Bloxom *v.* Charles Goode McCoy and Charles Edward McCoy; and that the original thereof, and said copy, duly authenticated by the Judge of said court  
 page 127 } were lodged and filed with me as Clerk of the said court on the 4th day of October, 1940.

V. C. RANDALL,  
 Clerk of the Circuit Court of Norfolk  
 County, Virginia.  
 By A. W. SNOW, Deputy.

I, V. C. Randall, Clerk of the Circuit Court of Norfolk County, Virginia, do certify that the foregoing is a true transcript of the record in the case of Walter E. Bloxom *v.* Charles Goode McCoy and Charles Edward McCoy, lately pending in said court.

I further certify that the same was not made up and completed and delivered until the attorneys for the defendants received due notice thereof, and of the intention of the defendants to apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* to the judgment therein.

V. C. RANDALL,  
 Clerk of the Circuit Court of Norfolk  
 County, Virginia.  
 By A. W. SNOW, Deputy.

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Fee for copy of record \$18.50.

Teste:

V. C. RANDALL, Clerk.  
 By A. W. SNOW, D. C.

A Copy—Teste:

M. B. WATTS, C. C.

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