

Record No. 5738, 5739

In the
Supreme Court of Appeals of Virginia
at Richmond

TERMINAL CARS, INCORPORATED

v.

MILDRED E. WAGNER

COLUMBUS MANNING

v.

MILDRED E. WAGNER

FROM THE COURT OF LAW AND CHANCERY OF THE
CITY OF NORFOLK

RULE 5:12 BRIEFS

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

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

HOWARD G. TURNER, Clerk.

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

AT RICHMOND.

Record No. 5738

MILDRED E. WAGNER, " Defendant in error.

From the Court of Law and Chancery of the City of Norfolk
J. Sydney Smith, Jr., Judge

Upon the petition of Terminal Cars, Incorporated, a writ of error and *supersedeas* is awarded it to a judgment rendered by the Court of Law and Chancery of the City of Norfolk on the 29th day of March, 1963, in a certain motion for judgment then therein depending, wherein Mildred E. Wagner was plaintiff and Charles Leavitt, Administrator, etc., the petitioner and others were defendants; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said Court of Law and Chancery in the penalty of seventy-five hundred dollars, with condition as the law directs.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5739

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 9th day of October, 1963.

COLUMBUS MANNING,

Plaintiff in error,

against

MILDRED E. WAGNER,

Defendant in error.

From the Court of Law and Chancery of the City of Norfolk
J. Sydney Smith, Jr., Judge

Upon the petition of Columbus Manning a writ of error and *supersedeas* is awarded him to a judgment rendered by the Court of Law and Chancery of the City of Norfolk on the 29th day of March, 1963, in a certain motion for judgment then therein depending, wherein Mildred E. Wagner was plaintiff and Charles Leavitt, Administrator, etc., the petitioner and others were defendants; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said Court of Law and Chancery in the penalty of seventy-five hundred dollars, with condition as the law directs.

RECORD

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page 31] INSTRUCTION P 1

The Court instructs the Jury that the maximum speed limit at the time and place of the collision involved herein was 25 miles per hour; and if you believe from the evidence that E. W. Nichols, taxi-cab driver was driving his vehicle in excess of this limit, then such party was guilty of negligence.

Granted J. S. S., Jr. X

page 32] INSTRUCTION P 2

The Court instructs the Jury that at the time and place of the collision involved herein, it was the duty of the defendant taxi-cab driver, E. W. Nichols, to exercise the highest degree of care:

1. To keep his vehicle under proper control;
2. To keep a proper lookout;
3. To operate his vehicle at a reasonable speed under all the circumstances having due regard to the width, surface and other conditions on the street then and there existing.

And if the Jury believe from the evidence that the defendant, E. W. Nichols, failed to exercise the highest degree of care in the performance of any one or more of the foregoing duties, then he was negligent; and if you further believe from the evidence that any such negligence was the sole proximate cause of the collision, then you should find for the plaintiff against the defendants Charles Leavitt, Administrator of the estate of E. W. Nichols, deceased and Terminal Cars, Incorporated.

Granted J. S. S., Jr. X

page 33] INSTRUCTION P 3

The Court instructs the Jury that every driver of a motor vehicle who intends to turn, or partly turn, from a direct line of travel, shall exercise reasonable care under the circumstances to first see that such movement can be made in safety, and whenever the operation of any other vehicle may be affected by such movement, shall give a signal plainly visible to the driver of such other vehicle of his intention to make

such movement. And if you believe from the evidence that the defendant, Columbus Manning, violated the foregoing duties, then you shall find the defendant, Columbus Manning guilty of negligence.

Granted J. S. S., Jr. X

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INSTRUCTION P 4

The Court instructs the Jury that the law of Virginia requires that at any intersection where traffic is restricted to one direction on one or more of the roadways, the driver of a vehicle intending to turn left at any such intersection, shall approach the intersection as nearly as practicable, in the extreme left-hand lane lawfully available to traffic moving in the direction of travel of such vehicle.

And if you believe from a preponderance of the evidence in this case that the defendant, Columbus Manning, violated this duty, then you shall find the defendant, Columbus Manning guilty of negligence.

Granted J. S. S., Jr. X

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INSTRUCTION P 5

The Court instructs the Jury that the law of Virginia requires that every person who operates a motor vehicle on the highway, shall have such motor vehicle equipped with a mirror so located as to reflect to the operator a view of the highway for a distance of not less than two hundred (200) feet to the rear of such vehicle, and if you believe from a preponderance of the evidence in this case that the defendant, Columbus Manning violated this duty, then you shall find him guilty of negligence.

Granted J. S. S., Jr. X

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INSTRUCTION P 6

The Court instructs the Jury that the plaintiff in this case is completely free from negligence, as a matter of law.

Granted J. S. S., Jr. X

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INSTRUCTION P 7

The Court instructs the Jury that at the time of the injury here complained of, the plaintiff was a passenger in a vehicle belonging to the defendant Terminal Cars, Incorporated, which was a common carrier, and that the said defendant owed the plaintiff the utmost care, diligence and foresight in the operation and management of the vehicle in which the passenger was riding, and that this duty must be performed by the driver of said taxicab; if, therefore, you believe from the evidence that at the time of this accident, the driver of the taxicab in question failed in any respect to manage and operate the same with the utmost care, diligence and foresight, and that such failure proximately contributed to the accident, then you will find for the plaintiff against the defendants Charles Leavitt, Administrator of the estate of E. W. Nichols, deceased and Terminal Cars, Incorporated.

Granted J. S. S., Jr. X

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INSTRUCTION P 8

The Court instructs the Jury that if you believe from a preponderance of the evidence in this case that the combined slight negligence of the taxi-cab driver, E. W. Nichols and the ordinary negligence of the defendant, Columbus Manning, efficiently contributed to cause the accident, then your verdict shall be for the plaintiff against all defendants.

Granted J. S. S., Jr.

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INSTRUCTION P 9

The Court instructs the Jury that if you believe from a preponderance of the evidence that your verdict should be in favor of the plaintiff, then it is proper for you to consider that one who negligently inflicts a personal injury on another is responsible for all the ill effects which, considering the condition of health in which the plaintiff was when she received the injury, naturally and necessarily follows such injury.

Therefore, the defendant's liability is in no way lessened or affected by reason of the fact that the injuries would not have resulted had the plaintiff been in good health, or that they were aggravated and rendered more difficult to cure by

reason of the fact that she was not in good health. In other words, where the presence of a pre-existing physical condition aggravates and prolongs the injury, and correspondingly increases the damages, such increased or added damages may be properly recovered.

Granted J. S. S., Jr.

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INSTRUCTION P 10

The Court instructs the Jury that if from the evidence and the other instructions of the Court, you find your verdict in favor of the plaintiff, then in assessing the damages to which she is entitled, you may take into consideration any of the following which you believe from the evidence to have resulted from the collision:

1. Any bodily injuries sustained and the extent and duration thereof;

2. Any effect of any such injuries upon her health according to its degree and probable duration;

3. Any physical pain and mental anguish suffered by her in the past, and any which may be reasonably expected to be suffered by her in the future;

4. Any disfigurement resulting to her.

5. Any doctors, and medical expenses incurred in the past and any that may reasonably be expected to occur in the future;

and from these as proven by the evidence your verdict should be for such sum as will fully and fairly compensate the plaintiff for the damages sustained by her as a result of the collision, not to exceed the sum sued for in the Motion for Judgment.

Granted J. S. S., Jr.

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INSTRUCTION A

The Court instructs the Jury that if they believe from the evidence that the defendant cab driver, without negligence on his part, was confronted with a sudden emergency, then he was not required to exercise the same good judgment in such sudden emergency as would have been required of him in the absence of such sudden emergency; and the defendant cab

driver and Terminal Cars, Inc. cannot be held liable for any error in judgment on his part in such sudden emergency if you believe from the evidence that he exercised such judgment as a person of ordinary prudence exercising the highest degree of care, would have exercised in the same or similar circumstances.

Granted J. S. S., Jr. X

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INSTRUCTION B

The court instructs the jury that every driver of a motor vehicle who intends to turn, or partly turn, from a direct line of travel, shall exercise reasonable care under the circumstances to first see that such movement can be made in safety, and whenever the operation of any other vehicle may be affected by such movement, shall give a signal plainly visible to the driver of such other vehicle of his intention to make such movement.

And if you further believe from the evidence that the defendant, Columbus Manning, violated any of the foregoing duties and that such violation was the sole proximate cause of the collision, then you shall return your verdict in favor of the defendants, Terminal Cars, Incorporated and Charles W. Leavitt, administrator of the Estate of E. W. Nichols, deceased; if however, you find that such violation, if any, was a proximate or contributing cause of the collision but not the sole proximate cause, then you may find your verdict against the defendant, Columbus Manning, and such other defendants as you may find guilty of any negligence which proximately caused or contributed to the accident.

Granted J. S. S., Jr. X

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INSTRUCTION C

The court instructs the jury that no person shall operate a motor vehicle upon a highway which is not equipped with a mirror so located as to reflect to the operator a view of the highway for a distance of not less than two hundred feet to the rear of such vehicle. And the duty of the operator of a motor vehicle to exercise reasonable care to keep a proper lookout is not limited to looking forward, but requires the operator to exercise reasonable care to look in any direction

for vehicles, persons or conditions which should affect his driving.

And if you believe from the evidence that the defendant, Columbus Manning, under all the circumstances existing at the time, failed to exercise reasonable care to keep a proper lookout for the conditions existing behind him, then he was negligent, and if you further believe that any such negligence was the sole proximate cause of the collision, then you shall return your verdict in favor of Terminal Cars, Incorporated and Charles Leavitt, Administrator of the estate of E. W. Nichols deceased, and against the defendant, Columbus Manning.

Granted J. S. S., Jr.

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INSTRUCTION D

The Court instructs the Jury that damages are not presumed nor may they be based upon speculation, but must be proven; and the burden is on the plaintiff to prove by a preponderance of the evidence each item and element of damage claimed, and unless such item or element thus claimed is proven by a preponderance of the evidence, the plaintiff cannot recover therefor.

And if the Jury are uncertain as to whether any particular element of damages claimed was caused by the collision, or if it appears just as probable that any injury or element of damage complained of resulted from a cause other than the collision as that it did, then the plaintiff cannot recover therefor.

Granted J. S. S., Jr.

page 45]

INSTRUCTION E

The court instructs the jury that whenever any highway has been divided into clearly marked lanes for traffic, a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver of such vehicle in the exercise of reasonable care first ascertains that such movement can be made with safety. And if you believe from the evidence that the highway in this case was so marked and that the defendant, Columbus Manning, violated the foregoing duty and that such violation was the

sole proximate cause of the collision, then you shall return your verdict solely against the defendant, Columbus Manning.

Granted J. S. S., Jr. X

page 46]

INSTRUCTION V

The Court instructs the Jury that it was the duty of the driver of the taxicab to exercise the highest degree of care in keeping a proper lookout and keeping his vehicle under proper control. If you believe from the evidence that he failed in either or both of these duties, and that such failure was the sole proximate cause of the accident, the plaintiff cannot recover from the defendant Columbus Manning and your verdict must be in his favor.

Granted J. S. S., Jr. X

page 47]

INSTRUCTION W

The Court instructs the Jury that if you believe from the evidence the defendant Columbus Manning gave a proper signal of his intention to make a left turn, and that the driver of the taxicab saw, or in the exercise of the highest degree of care, ought to have seen the signal, but notwithstanding this, thereafter attempted to overtake and pass by the left side of the truck, then the taxicab driver was guilty of negligence.

If you further believe from the evidence that this negligence was the sole proximate cause of the accident, the plaintiff cannot recover from the defendant Columbus Manning and your verdict must be in his favor.

Granted J. S. S., Jr. X

page 48]

INSTRUCTION X

The Court instructs the Jury that it was the duty of the driver of the taxicab to exercise the highest degree of care in refraining from operating his vehicle at a speed no greater than that which was reasonable and proper under the circumstances and traffic conditions then existing.

If you believe from the evidence that he failed in his duty in this regard and that such failure was the sole proximate

cause of the accident, the plaintiff cannot recover from the defendant Columbus Manning and your verdict must be in his favor.

Granted J. S. S., Jr. X

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INSTRUCTION Y

The Court instructs the Jury that if you believe from the evidence the defendant Columbus Manning exercised ordinary care in the operation of his vehicle, the plaintiff cannot recover from him and your verdict must be in his favor.

Granted J. S. S., Jr. X

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page 51]

In the Court of Law and Chancery of the City of Norfolk,
on the 29th day of March, 1963.

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ORDER

This day came again the parties, the plaintiff, in person and by counsel, and came as well the defendants, Charles H. Leavitt, Administrator of the Estate of E. W. Nichols, Terminal Cars, Incorporated and Columbus Manning, by counsel, and pursuant to adjournment came again the jury, to-wit: Chauncey L. Brant, Henry D. Cook, Percy D. Halstead, Jr., Betty Kiger, K. A. Malmgren, Garland R. Russell and Drewey T. Sawyer, who, now having heard all the evidence and argument of counsel, returned a verdict in the following words and figures, "We the Jury find for the Plaintiff against all defendants and fix her damages at \$6,000.00."

Thereupon the defendants, by counsel moved the Court to set aside the verdict of the jury and grant the defendants a new trial, upon the grounds that the said verdict is contrary to the law and the evidence, which motion after having been fully heard and maturely considered by the Court, is overruled, to which action of the Court, the defendants, by counsel, duly excepted.

Whereupon it is considered by the Court that the said plaintiff recover of and have judgment against the said defendants,

Charles H. Leavitt, Administrator of the Estate of E. W. Nichols, deceased, Terminal Cars, Incorporated and Columbus Manning, in the sum of Six Thousand Dollars (\$6,-
page 52] 000.00), with interest thereon to be computed after the rate of six per centum per annum from the 29th day of March, 1963, until paid together with her costs about her suit herein expended.

To all of which action of the Court, the defendants, by counsel, duly excepted.

* * * * *

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

* * * * *

Now comes the defendant Columbus Manning, and gives notice of his intention to appeal from the final judgment of the Court of Law and Chancery of the City of Norfolk, Virginia, in the above styled action, and further, of his intention to seek a writ of error in the Supreme Court of Appeals of Virginia in this matter.

For his assignments of error, he states as follows:

1. The Court erred in granting Instruction P-3.
2. The Court erred in granting Instruction P-5.
3. The Court erred in granting Instruction P-6.
4. The Court erred in granting Instruction B.
5. The Court erred in granting Instruction C.
- page 54] 6. The Court erred in granting Instruction E.
7. The Court erred in refusing to set aside the verdict and award a new trial.

COLUMBUS MANNING
By E. PRYOR WORMINGTON
Of Counsel

Court of Law and Chancery Filed 4-17-63.

By L. M. CALVERT, D. C.

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

Now comes the defendants, Charles Leavitt, Administrator of the Estate of E. W. Nichols and Terminal Cars, Incorporated and gives notice of their intention to appeal from the final judgment of the Court of Law and Chancery of the City of Norfolk, Virginia, in the above styled action, and further, of their intention to seek a writ of error in the Supreme Court of Appeals of Virginia in this matter.

For their assignments of error, the defendants jointly state as follows:

1. The court erred in granting Instruction P-1.
2. The court erred in granting Instruction P-2.
3. The court erred in granting Instruction P-7.
4. The court erred in granting Instruction P-8.
5. The court erred in granting Instruction V.
6. The court erred in granting Instruction W.
7. The court erred in granting Instruction X.
8. The court erred in granting Instruction Y.
9. The court erred in refusing to set aside the verdict and award a new trial.

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CHARLES LEAVITT, administrator
of the Estate E. W. Nichols, deceased,
and TERMINAL CARS,
INCORPORATED,

By FRED STANT
Of Counsel

Filed in the Clerk's Office the 26 day of April, 1963.

W. L. PRIEUR, JR., Clerk
L. M. CALVERT, D. C.

* * * * *

page 4]

Norfolk, Virginia, March 28, 1963

(The reporter was sworn; a jury was examined on voir dire, empaneled and sworn; and the witnesses were sworn and excluded on motion by Mr. Wormington. At this time

Columbus Manning

there was a conference between counsel and the Court in chambers and the style of the case was amended to: *Mildred E. Wagner, Plaintiff, vs Charles Leavitt, Administrator of the Estate of E. W. Nichols, Deceased; Terminal Cars, Incorporated; and Columbus Manning, Defendants.* The following then occurred in the courtroom, in the absence of the jury:)

The Court: Louis Kaplan died during the pendency of this action, the name being Louis Kaplan trading as Virginia Bag Company, and while the case has been revived as to him, it has not been matured as to this defendant, and therefore is not being heard on this day as to the Estate of Louis Kaplan, trading as Virginia Bag Company.

(Opening statements were then made by counsel to the jury, and the following evidence was introduced:)

Mr. Amato: Your Honor, we wish to call Manning as an adverse witness.

COLUMBUS MANNING,
a defendant, called by the plaintiff as an adverse witness, and having been first duly sworn, testified as follows:

Examined by Mr. Amato:

Q. Would you turn to the jury and state your
page 5] name and your address?

A. My name is Columbus Manning; 801 Marshall Avenue.

Q. Is that in the City of Norfolk?

A. Norfolk, Virginia.

Q. Columbus, what is your occupation?

A. I am a warehouseman. I also drive the truck.

Q. Sir?

A. I am hired as a warehouseman.

By The Court:

Q. Your last answer was that you are a warehouseman, but you said you also drive a truck?

A. Drive a truck.

The Court. Speak up so we can hear you. Speak loudly.

Columbus Manning

By Mr. Amato:

Q. On March 24 of last year by whom were you employed?

A. Virginia Bag Company.

Q. In what capacity were you employed?

A. I don't understand what you mean.

Q. What did you do for them then, in March of last year?

By The Court:

Q. What were your duties?

page 6] A. Well, work around the warehouse; some-time I drove a truck.

By Mr. Amato:

Q. I see. Now, were you driving one of the Virginia Bag Company trucks on March 24, 1961? That was a Saturday, about 2:00 o'clock or 2:30 that afternoon?

A. That is right.

Q. And did you have permission from the Virginia Bag Company to use the truck that day?

A. I keep it.

Mr. Wormington: Objection, Your Honor. Just a moment. That is not an issue in this case.

The Court: The Court overrules the objection.

Mr. Wormington: Note my exception.

By Mr. Amato:

Q. Did you?

The Court: Answer the question.

A. I keeps the truck at all times.

By Mr. Amato:

Q. Sir?

A. I keeps the truck at all times.

Q. You mean you can use it any time you want to?

A. Only in emergency.

Q. Sir?

A. On emergency, something like that.

Q. I don't understand.

page 7] The Court: On emergencies.

Columbus Manning

By Mr. Amato:

Q. You are only supposed to use it on emergency, is that what you mean?

Mr. Wormington: If Your Honor please, I must note my continuing objection to this. We are not dealing with any question here; there is no denial by Manning of the operation of the truck involved in this accident.

The Court: All right.

Mr. Wormington: And the status of the background of it.

The Court: I will ask the jury to retire to the jury room, please.

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

The Court: What is the relevancy of the question, Mr. Amato?

Mr. Amato: We were wondering as to —

The Court: The Virginia Bag Company is not a defendant, and therefore the question of agency is not before the Court, is it? That is the basis of your objection?

Mr. Wormington: Yes, sir, Your Honor, it is.
page 8] The Court: Mr. Amato was not in chambers

when we went into all that and I think we discussed the fact that Louis Kaplan, trading as Virginia Bag Company, being deceased and the action not having matured as to him, the Virginia Bag Company is not a party.

Mr. Amato: I will withdraw it.

The Court: Do you want me to instruct the jury to disregard it?

Mr. Amato: All right.

Mr. Wormington: Thank you.

(The following occurred in the presence of the jury:)

The Court: Members of the jury, the Court instructs you to disregard that last question and answer; also the question and answer before that as to whether or not this witness had permission from the Virginia Bag Company to use the truck. It is not material to the issue before you at this time.

By Mr. Amato:

Q. All right, Manning, on that particular day had you

Columbus Manning

driven on Franklin Avenue?

A. I don't understand what you mean.

Q. Well, the time of this —

The Court: Let me stop you a minute. Will
page 9] counsel approach the bench a moment?

(There was a conference at the bench between counsel and the Court, after which the following occurred:)

The Court: Members of the jury, the interruption was at the instance of the Court because a doctor is here to testify and it is the rule of the Court where possible — and counsel cooperates very fully with the Court — to attempt to suggest to doctors when it will be convenient for them to come, and endeavor to call them promptly when they do come. Counsel have agreed that this witness may return to his seat temporarily and his examination be interrupted purely as a matter of convenience to the doctor. So you may go back to your seat (addressing the witness) and Dr. Pole will now testify.

(The testimony of Dr. W. Clarke Pole was given at this time.)

page 10] COLUMBUS MANNING,
resumed the stand and testified as follows:

By Mr. Amato:

Q. Manning, we had to interrupt our examination of you to accommodate the doctor in this case. I was asking you, and I think the last question I asked you was: Prior to getting on Llewellyn Avenue, what street had you been on?

A. You want the route from the hospital?

Q. Sir?

A. You want the route from the hospital that I taken?

Q. No, not specially. I say prior to getting on Llewellyn Avenue, what street had you just been on?

A. I come off Olney Road, turned off Olney Road into Moran Avenue; on down to Franklin, and come on across to Llewellyn.

Q. Do you remember how Franklin comes into Llewellyn Avenue? Does it go all the way across Llewellyn?

A. No.

Columbus Manning

Q. All right. Then, if you are going north on Llewellyn Avenue — and that is the way you went?

A. That is the way I was going.

Q. You came in, then, from the left?

A. That is right.

page 11] Q. Now, how does Franklin Avenue run? Does it run at right angles? Do you know what I mean by right angles, across Llewellyn Avenue? If you look at this board here, and use this as Llewellyn Avenue (indicating) and this end is closed off; and you came from Franklin this way, right?

A. That is right.

Q. Now, does Franklin Avenue run —

A. Just on one side; the other side now —

By The Court:

Q. You were going east, were you not?

A. That is right.

The Court: You were going east. That (the witness had indicated) was west.

By Mr. Amato:

Q. When you came out of Franklin Avenue, then, did Franklin Avenue run at right angles across Llewellyn or did it come in at an angle?

A. Well, I think it come in perfectly straight, I think now; I am not definitely sure.

Q. You are not sure of that. And then when you turned from Franklin into Llewellyn to go north, what lane were you in?

A. I pulled all the way over in the right lane.

page 12] Q. You went in this lane on this side (indicating)?

A. That is right.

Q. Is Llewellyn Avenue divided by any lines at all?

A. It have a center line in it.

Q. Is it a solid line?

A. A solid line.

Q. Was there a traffic light at Franklin Avenue and Llewellyn?

A. No.

Q. Then, as you approached from Franklin into Llewellyn, what did you do before you entered Llewellyn?

Columbus Manning

A. There is a stop sign there; I stopped.

Q. Sir?

A. There is a stop sign; I stopped.

Q. You stopped at that corner?

A. And looked to my right.

Q. And you looked to your right?

A. Yes.

Q. What did you see?

A. Nothing at all. The road was clear.

Q. How far down the road could you see in?

A. From Franklin?

Q. Yes.

page 13] A. I could see all the way back down to Olney Road.

Q. That is what? One block or two blocks or several blocks?

A. Well, these, there is short blocks come in there, I don't know how they call them.

Q. Is it more than one block between Franklin and Olney Road?

A. There is more than one.

Q. How far would it be, approximately, then?

A. Approximately, it will take pretty close to two blocks, I can imagine, now.

Q. About two full blocks?

A. Short.

Q. Two short blocks. For those two short blocks, then, you looked to your right and there wasn't a vehicle on Llewellyn Avenue?

A. There wasn't a vehicle on Llewellyn Avenue.

Q. So then you turned to go north on Llewellyn Avenue?

A. That is right.

Q. And got in the righthand lane?

A. That is right.

Q. Do you have a rear view mirror on this truck?

page 14] A. I do.

Q. Is it inside or on the outside?

A. Outside.

Q. And can you see pretty well with that?

A. You can see perfect.

Q. As you started then along north, on through Llewellyn Avenue, did you — you planned to turn at the next short block to make a lefthand turn again, didn't you?

A. Westover Avenue.

Q. Would you be making a lefthand turn?

Columbus Manning

A. A left turn.

Q. From the righthand lane?

A. That is right.

Q. When you turned from Franklin into Llewellyn, why didn't you immediately get into the lefthand lane?

A. Well, in the lefthand lane I couldn't turn into Westover because it is a narrow street; it is a oneway street and cars are parked on both sides; and, driving a truck, you have to give yourself plenty of room to get in; you can't get in there from the left side with a truck, not in Westover.

Q. I don't quite understand you. You mean there was traffic parked?

A. On both sides.

page 15] Q. On Franklin?

A. I — on Westover; I was turning Westover.

Q. I am not talking about that. I am talking about as you came from Franklin Avenue into Llewellyn Avenue. You turned from Franklin into Llewellyn?

A. That is right.

Q. And you intended to make a lefthand turn at the next street, which was Westover?

A. That is right.

Q. Why didn't you, when you turned from Franklin to Llewellyn, why didn't you immediately get into the lefthand lane?

A. Well —

Mr. Wormington: He just answered the question, I thought.

Mr. Amato: I don't think he has.

The Court: I don't think he perhaps understood his answer and wants to make it clear.

Mr. Wormington: All right.

By Mr. Amato:

Q. Sir?

A. I pulled over in the righthand lane because Westover Avenue is a narrow street; if I had stayed in the left lane I couldn't have turned off Llewellyn into Westover. Cars is parked on both sides, and I had to give myself,
page 16] with a truck, plenty of room to turn in.

Q. Now, between Franklin and Westover, that is a short block, too?

Columbus Manning

A. Short block, that is right.

Q. And just after you turned from Franklin into Llewellyn, when did you put the signal light on?

A. Well, a little better than halfway the block I put my signal on and start riding the line; I was straddling the white line.

Q. Could you tell us, Columbus, approximately — I know you can't do it exactly — could you tell us how long that distance would be between Franklin and Westover?

A. Well, I wouldn't approximately tell you that; I don't know.

Q. In feet, maybe?

A. I couldn't tell you that.

Q. Is it as much as half of a regular city block, or a third of a regular city block, a fourth?

A. I don't know.

Q. Could you tell us in lengths of your truck how much distance it would be between Franklin and Westover?

A. No, sir.

Q. Well, where was your truck, then, when you first gave any signal? You say you gave a signal.

page 17] A. Just a little better than halfway the block.

Q. A little bit better —

A. I pulled on my signal and then I pulled over the white line; my front wheel was riding the white line, straddling it.

Q. You mean, then, that you went up Llewellyn Avenue on the righthand lane —

A. That is right.

Q. — and about halfway of the block you put the wheels of your truck into the lefthand lane?

A. That is right.

Q. And put your signal light on?

A. My signal was on.

Q. Before you did that, did you look in your mirror?

A. I looked in my back mirror.

Q. What did you see?

A. I didn't see anything behind me at all unless he was mighty close up behind me. An automobile can get behind a truck and get right up behind him and you cannot see them out of those mirrors.

Q. Tell the jury what you mean by "get up right behind."

A. If an automobile is riding the tail end of your truck and you are looking out your side mirror, he is

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page 18] so close up under you and until you cannot see the car behind you.

Q. Well, then, as you were driving along Llewellyn Avenue, with this outside mirror that you had, actually you couldn't see all the traffic that was there on Llewellyn Avenue, could you?

A. I could see far enough back.

Q. Sir?

A. I could see far enough down the road to be on the safe side.

Q. But you couldn't see vehicles that were right up on your truck?

A. Right up on your truck you cannot see them.

Q. So you couldn't see all the traffic that was on Llewellyn Avenue?

A. Not if he was right up on my truck, I couldn't.

Q. And you don't know whether he was on you or not, do you?

A. That I don't.

Q. Sir?

A. No, sir, I don't.

Q. So you made a turn, then, from the righthand lane of traffic into the lefthand lane of traffic?

page 19] A. I pulled over on the line; I rode, I straddled the line for quite a piece.

Q. What do you mean by "quite a piece?"

A. Well, just a little better than halfway the block. You know what a block is.

Q. That is what I asked you but you say you don't know how long it is.

A. I don't know how long a block is but I traveled quite a distance.

Q. You continued, straddled partway over that line, with your signal light on and still looking in the mirror, did you?

A. I couldn't look in the mirror at all times for I had to watch where I was driving at.

Q. Did you look in the mirror any more after you first looked?

A. Just before I got ready to turn I did glance out the mirror.

Q. Before you got ready to turn or as —

A. Just as I got ready to turn, just as I got ready to turn in.

Q. You looked in your mirror?

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A. I glanced out the mirror.

Q. What did you see?

A. But I did not see the car.

page 20] Q. You did not see the car?

A. No, sir.

Q. It was there then, wasn't it? When did you first see it?

Mr. Wormington: Let him answer you. You asked a question.

Mr. Amato: I will withdraw that.

By Mr. Amato:

Q. When did you first see this taxicab?

A. Well, as I pulled in, was turning in Westover Avenue, he hit his brakes and horn; I hit mine and kind of straightened back up. So I stopped; he stopped, which his car was about four or five feet on the tail end of my truck. He gets out.

Q. Well, stop there just a minute. I don't mean to interrupt you there. You said you first saw him when he hit his brakes and his horn?

A. That is right.

Q. And where had you seen him then? Where was his vehicle then with respect to your truck?

A. About four or five feet behind the tail end of my truck.

Q. Behind the tail —

A. Behind, that is right, yes, sir.

page 21] Q. And did he stop instantly? Did he stop when you saw him? When you saw him was he stopped or was he moving?

A. Well, the car was gradually moving on because I stopped, myself. After he blowed his horn, the brake hollered, I couldn't be looking back and looking where I was going at the same time; so by the time I stopped, looked back and saw him, he was stopped, too.

Q. How fast were you going up Llewellyn Avenue after you turned from Franklin to Westover?

A. Well, I will say around 10 or something like that.

Q. About 10 miles an hour?

A. That is right.

Q. Was the window down in your cab?

A. Yes, sir.

Q. On your side?

A. On my side; both sides.

Q. Both sides? Was anyone else in the truck with you?

Columbus Manning

A. (The witness shook his head)

Q. And did you make a turn there?

A. (Reply inaudible)

The Court: He didn't answer that, did he?

The Witness: I said "No, sir."

The Court: Say it loud so I can hear you.

page 22] The Witness: O. K.

By Mr. Amato:

Q. There was no one else in the truck with you?

A. No, sir.

Q. When you first saw this cab, you heard the brakes and the horn, and did your truck continue to turn into Westover?

A. No.

Q. Where did you stop?

A. I straightened up. I stopped, too, but I cut back to my right.

Q. Yes. You didn't stop then, preparatory to making that turn; you simply cut back to the right?

A. Yes, I cut back out, but I stopped.

Q. Then did you have some conversation with the driver of the cab?

A. Well, he gets out, asks me did I have a driver's permit. I asked him didn't he see my signal light on that I was going to make a left turn.

Q. Wait a minute. Don't let's go too fast.

Mr. Wormington: If Your Honor please, he asked for the conversation and then stops him.

By Mr. Amato:

Q. He asked you if you had a driver's license?

A. That is right.

page 23] Q. Did you answer that?

A. No, I didn't answer it. I asked him didn't he see my signal light on that I was making a left turn.

Q. And what did he say?

A. He didn't do anything but dropped his head, and so then I pulled on off. He didn't say anything and I didn't say anything because neither one of us didn't have no collision or nothing.

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Q. Did he ask you to pull over out of the traffic so he could get your name and address?

A. No, he did not.

Q. You deny that?

A. He did not ask me that.

Q. Well now, Columbus, you had intended to turn into Westover, and after you had this conversation with the driver of the cab you said he asked you if you had a license, a driver's license, and you asked him "Didn't you see my signal light, or taillight" why did you then —

Mr. Wormington: If Your Honor please, he didn't say anything about taillight.

Mr. Amato: Signal light, correction.

By Mr. Amato:

Q. Why didn't you continue then on to Westover Avenue?

A. I couldn't.

page 24] Q. Why couldn't you?

A. I couldn't have made the turn then. I had got too close up on the other side of the intersection, I couldn't turn in. After I straightened back up, with his brakes and horn, well, I couldn't make my turn in then, I had to circle around the block.

Q. You mean after you heard his brakes and horn you continued on past Westover Avenue?

A. I didn't pass it.

Q. But you got so far —

A. I got so far that I couldn't turn in.

Q. Did you say that there were cars parked on both sides?

A. Both sides of Westover Avenue.

Q. Of Westover Avenue?

A. That is right.

Q. Wide enough for a truck to get through?

A. A truck can squeeze through, with cars on both sides.

Q. In other words, it was just an opening wide enough —

A. Just opening —

Q. — wide enough for your truck to squeeze in?

A. That is right, that is right.

page 25] Q. You knew that as you were going up Llewellyn Avenue?

A. That is right.

Columbus Manning

Q. You were paying attention to how you were going to get in that tight squeeze?

A. Yes, sir.

Mr. Amato: All right. That is all.

Mr. Wormington: Go back up; Mr. Stant wants to ask you questions.

CROSS EXAMINATION

By Mr. Stant:

Q. Whom were you going to visit on Westover?

A. Just some friends.

Q. What is the name of the friends?

A. Well now, I don't know them by name; by nicknames.

Q. Where do they live on Westover?

A. 213.

Q. You were turning left off Llewellyn to get to 213?

A. That is right.

Q. Had you been there before?

page 26]

A. Once.

Q. Well then, you were not really familiar with it?

A. No, sir, I wasn't really familiar with it.

Q. And you were looking for Westover Avenue as you came down Llewellyn, weren't you?

A. I knowed where it was at.

Q. Did you know it was the next street after you pass Franklin?

A. I come out of Franklin.

Q. I say did you know that it was the very next street after Franklin?

A. No, sir, I didn't.

Q. You did not, did you? And actually you were looking for Westover as you came down the street, correct? You were looking for a sign that said "Westover," were you not?

A. That is right, that is right; that is right, that is right.

Q. As you came on down the street you saw the sign saying "Westover" and you knew that was where you were going to turn in?

A. That is right.

Q. How far down the street were you able to see this sign saying "Westover?"

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page 27] A. As I say, a little better than halfway the block.

Q. Then for the first time you made up your mind that that is where you were going to have to turn, correct?

A. No, I knew I was going to turn in there all the time.

Q. You knew you were going to turn in there if that street proved to be Westover, correct?

A. That is right.

Q. And when you finally saw that it was Westover, at that time you began to execute your lefthand turn to get into Westover, isn't that right?

A. That is right.

Q. Now, prior to starting to execute this lefthand turn to move into Westover, you had never seen a cab back of you?

A. No, sir, I hadn't.

Q. Isn't that correct?

A. That is correct.

Q. And you are stating that you had been riding in the middle of the road?

Mr. Wormington: When?

A. I didn't say I was riding in the middle of the road.

page 28] By Mr. Stant:

Q. When did you say you were riding in the middle of the road?

A. I said little better than halfway the block.

Q. All right. When you got halfway of the road and then halfway of the block and you began to ride the middle of the road, after that you started to make your turn into Westover, didn't you?

A. That is right.

Q. At no time did you ever see a car as you were making this turn, isn't that correct?

A. No, I did not see it; I did not.

Q. What?

A. I did not see it.

Q. Now, when you make a turn with your truck and you know you can't turn from the lefthand lane, you as a truck driver know that cars do pass you on the left side on streets like Llewellyn, don't you?

A. That is right.

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Q. So did you stop your truck before you began your turn into Westover?

A. No, I did not.

Q. You did not. Now, even though you further knew that you had a blind side on that truck, you had a point where you can't see a car back of you because of the
page 29] very nature of your mirror; you didn't stop your car, did you, before you began your turn?

A. No, I did not stop.

Q. All right. Now, the first indication you had that this cab was there was his action in blowing his horn to stop your turn?

A. That is right.

Q. And when you heard the horn blow you immediately turned your truck to the right to avoid the accident?

A. I threw on brakes and cut back to the right to avoid it is right.

Q. And by reason of this notification there was no accident?

A. No accident.

Q. Now, when you looked out and you saw this cab back of your truck, I want you to detail to this jury its position. Where was it relative to your truck and to the curb of the street?

A. I don't quite understand you on that question now.

Q. Give me the location, the position of the car when you first saw it in back of the truck.

A. Well, he was to the left of the curbing about four or five feet in the back of my truck.

page 30] Q. All right. Now, see if I am right on this. He was four or five feet from the curb?

The Court: Which curb?

A. No, I said in back of my truck. I say he was over to the left curb.

By Mr. Stant:

Q. You said at first — I think we can get the reporter to read it if you want — you said he was four or five feet to the left of the curb?

A. In back of my truck.

Q. And in back of your truck, is that what you —

A. No, I say he was four or five feet in back of my truck. He was over to the left of the curb.

Q. All right. When you say to the left of the curb, how

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far was he from the curb?

A. Well, he was right up against the curbing.

Q. Had he gone up on the curb?

A. He couldn't because there was trees there.

Q. So he had not gone up on the curb at all?

A. No, sir. He couldn't go up on the curb at all unless he would have hit a tree.

Q. At that point his car was stopped and your truck was stopped?

A. That is right.

page 31] Q. Now, Mr. Nichols then got out of the cab and came up to your truck, is that correct?

A. That is right.

Q. And you all had a discussion. Did he at that time ask you for your name or anything like that?

A. No, he did not.

Q. And you drove away then, after you and he — he had asked you if you had a driver's license and you had asked him "Did you see my signal," that is all was said, then you drove away?

A. That was all was said.

Q. One time you said you could see "perfect" with your rear view mirror. You didn't mean that totally, did you?

A. I thought I explained it to you. I said I could see out of my rear view perfect if a car wasn't too close up behind me.

Q. You are aware of the fact, then, that if a car is close behind you, you can't see?

A. That is right.

Q. How do you do, then, when you get ready to make a turn and you know of this inherent deficiency in this mirror and you know you can't see to the rear, what do you do to protect —

A. Give signals.

page 32] Q. Give signals?

A. That is right.

Q. Well now, if a car is running on your left side as you attempt to make the turn don't you look back again?

A. If a car is on the left side?

Q. Yes.

A. Yes, that is right.

Q. And in this case you never saw a car out there?

A. No, I did not see it.

Q. Can you look, yourself, back with your head, in back of the truck?

A. They have got boards back there.

Columbus Manning

Q. Boarded in? You can't see out of the back end, you have to go by the mirror? You have got to look in the mirror first?

A. The mirror.

Mr. Stant: I have no other questions.

RE-DIRECT EXAMINATION

By Mr. Amato:

Q. What is the tonnage of this truck?
page 33] A. Ton and a half.

Q. How wide would that be at the body part?
A. I don't know exactly how wide that truck are. I couldn't tell you how wide it is. It is just as wide as any ordinary truck on the highway.

Q. How high is it boarded up?

A. Four feet.

Q. Both sides of it boarded in? Is the top of it closed in, too?

A. No, sir. The top is not closed in; it is open top.

Q. Is the back part of the body boarded in, too?

A. The tail end?

Q. Yes.

A. Don't have no tailgates in it.

Q. So it is wide open at the tail end?

A. That is right.

Q. Actually, you could look through that — did you have a rear glass in the truck, too, or open glass?

The Court: Cab.

By Mr. Amato:

Q. The cab, rather.

A. That part is closed in.

Q. Sir?
page 34] A. That part is closed in.

Q. Of the cab?

A. You mean the back glass of the cab?

Q. Yes.

A. Well, the body on the truck has that part closed in. The body of the truck is closed in; you can't see out of that glass.

Q. If this were the rear glass in the cab of the truck where you drive, the boarded part is right up to that?

Mildred E. Wagner

A. That is right, that is right.

Q. Four and a half feet high? Is that higher then the top of the cab?

A. That is higher than the top of the cab.

Q. So the boarded part comes up above the cab?

A. That is right.

Q. So you can't see through this glass in the cab at all?

A. No, you can't see through there, can't see through there.

Mr. Amato: That is all.

Mr. Wormington: Come down.

page 35] Mr. Breit: We would like to call for the statement of the cab driver. We discussed it in chambers.

Mr. Stant: I shall be glad to put it in at this time.

Mr. Wormington: If Your Honor please, I think it should be then dictated, if it goes in at this time. I don't object to its going in now.

Mr. Stant: Do you want to bring Mr. Sowder in?

The Court: So you can cross-examine.

Mr. Wormington: That was my point. I don't object to the introduction.

Mr. Breit: In that case we will withdraw it at this time. I would rather he be called as someone else's witness. Call Mr. Wagner, please.

page 49] AFTERNOON SESSION

(Met pursuant to the morning *session*, with the same parties present as heretofore noted.) (The next witness was Dr. J. M. Schoenfeld, and after his testimony the following occurred:)

MILDRED E. WAGNER,
the plaintiff, having been first duly sworn, testified as follows:

Examined By Mr. Amato:

Q. What is your name?

A. Mildred E. Wagner.

Mildred E. Wagner

Q. Now, you have got to speak a little louder so the last gentleman in the jury box can hear you.

A. Mildred E. Wagner.

Q. Have you ever been in court before?

A. No, I haven't.

Q. You have got to speak slowly and loudly and distinctly enough so everybody in the jury, the Court and counsel can hear you. Let's try again. What is your name?

A. All right. Mildred E. Wagner.

The Court: I suggest that you stand over by counsel.

Mr. Amato: All right, Your Honor.

page 50] By Mr. Amato:

Q. What is your address, Mrs. Wagner?

A. 1001 Gates Avenue.

Q. In the City of Norfolk?

A. Norfolk.

Q. And how old are you, ma'am?

A. Fifty-one.

Q. Now, were you involved in an automobile accident on March 24, 1962, about 2:30 or 2:45 in the afternoon?

A. About 2:45, yes.

Q. And what type of vehicle were you riding in?

A. A Terminal cab.

Q. Is that one of those that was described as a checker cab, too?

A. I don't know about that.

Q. It was operated by Terminal —

A. Terminal —

Q. — Cars?

A. Terminal Cars, yes.

Q. I see. And the driver of that cab, did you know him?

A. No.

The Court: You said "Did you" or "Do you"
page 51] know him?

By Mr. Amato:

Q. Had you previously ridden in the same cab with the same driver?

A. I probably had but I don't remember as to his name or anything.

Mildred E. Wagner

Q. All right. Now, what street were you traveling on or had you been traveling on just shortly before this accident?

A. Well, I took the cab at Freemason and Granby Street, at the cab stand; and he proceeded down Boush to Olney and then turned off Olney into Llewellyn Avenue.

Q. And then you went north on Llewellyn Avenue?

A. North on Llewellyn.

Q. That is a one-way street, is it not?

A. Yes.

Q. Do you drive a car?

A. Yes, sir.

Q. How long have you been driving an automobile?

A. I would say about 18 years.

Q. As you were driving along Llewellyn Avenue, you were in this cab, could you tell the Court and jury the approximate speed of that vehicle?

A. Well, I would judge from my own experience
page 52] that it was around 30 miles an hour.

Q. Do you know what the speed limit is in that area?

A. 25, I believe.

Q. In what lane or what side of Llewellyn Avenue was this cab proceeding on?

A. He continued the whole length that we went, on the left lane — in the left lane.

Q. In the left lane?

A. Yes.

Q. Tell the Court and jury when was the first time that you saw this truck that was operated by Columbus Manning, and the position of that truck when you first saw it and what attracted your attention to it.

A. I didn't see except the top of the truck after I was thrown into the floor. I saw the cab part of the car — truck, at about a 45-degree angle in front of the cab.

Q. You say you did not see the truck until after you were thrown on the floor?

A. No.

Q. Now, how were you thrown on the floor? You will have to describe this to us.

A. Only when the driver slammed on the brakes —

Q. The driver of what?

page 53] A. — suddenly. The driver of the cab, and the truck, too. You could hear the brakes screeching.

Mildred E. Wagner

Q. Did the brakes of the cab in which you were riding screech?

A. No. They were just so sudden that he hit the curbing and I was thrown completely out of the seat because there is such a wide area between the seat that I was on and the front seat. And I —

Q. When he applied his brakes, you say the cab, the wheel hit the curbing; what was the movement or your body then or what happened to your body?

A. I went down this way (indicating). I caught this left leg under the — my shoes caught under and so did the shin part of my leg underneath the seat.

By The Court:

Q. Which seat?

A. The front, the driver's seat.

By Mr. Amato:

Q. Yes?

A. And I caught the shoulder and the neck underneath the seat which I had been sitting on and it twisted me in that position like that.

Q. Well, was that a sudden movement when you —

A. I went completely out like that, very suddenly; I didn't know what had happened.

page 54] Q. When the cab stopped, did it stop gradually?
Was it a gradual stop of the cab?

A. No, not very gradual.

Q. What was it?

A. Well, as I say, it was so sudden that it just — I slid out before I knew what had happened.

Q. Well, at the moment then of the impact did you hear any conversation between the driver of the cab and the driver of the other truck? You say you saw just the top of the truck?

A. First he glanced back to see —

Q. Who is "he" now? You can't say —

A. The driver of the cab glanced back and saw me there and he jumped out of the — his side of the door.

Q. You said he saw you there; where was that?

A. On the floor.

Q. All right. What did the cab driver do?

A. Well, he — I think he was frightened. I heard him —

Q. What did he do or say to you?

Mildred E. Wagner

A. He — I don't remember that whether he said anything to me or not. All I know is he got out of the cab and he went around the front of the cab to the truck and he asked the — I heard him say to the truck driver to drive around on — to Westover so he could get his number and
page 55] name. And he gave him some argument that I couldn't make out.

Q. You say "he" gave him some argument?

A. The driver of the truck.

Q. What did he say? Could you tell what he was saying?

A. He said "I didn't hit you, did I?" And that — with that he apparently drove off because the cab driver came immediately back to me and opened the door and pried my shoe loose from underneath the seat.

Q. You mean that while this conversation —

A. I couldn't get up.

Q. That you were still —

A. I was. So I never saw the complete truck, I only saw the cab part of it.

Q. Mrs. Wagner, prior to stopping did the cab slow down, before the brakes were slammed on?

A. No.

Q. Prior to the stopping or when the brakes were applied as you have described, did the cab driver yell out or call out anything to you or warn you in any way?

A. Well, I — no; no.

Q. What?

A. No.

page 56] Q. Could you tell after you got up out of the seat, where the cab was with respect to the highway, what part of the road it was in, after you got up off the floor?

A. Well, from the position of where I could see the top, it was about —

Q. I am talking about the cab now. Where was the cab you were riding in?

A. Oh, the cab? The distance from the corner, or the curb?

A. Curbing or any part of the street.

A. It was right up against the curb.

Q. Could you tell from where you were lying on the floor — you saw the cab of the truck — could you tell what position in the roadway that was?

A. Well, it was in the right lane, slanted across the right fender of the taxi.

Mildred E. Wagner

By The Court:

Q. In which direction are you pointing?

A. Going north; both of them were going north.

By Mr. Amato:

Q. Was the truck headed to the right or left from where you were looking at it?

A. To the left lane in front of the cab.

Q. All right then. After that where did the cab driver take you?

page 57] A. Well, at first he asked me if — if I needed emergency treatment. Well, I could move my leg and I thought that it was just a skin and I would be all right. And I was terribly shaken up. So I said “I would like to go home.” And — but he went by the office to see if he could talk to the manager.

By The Court:

Q. What office?

A. The Terminal office. And he was not there. It was a Saturday afternoon. And he came out with a pad and asked me to sign my name and address for further use, you know, if anything came up, which I didn't know what he meant. But, anyway, I went on home. I paid him the cab fare and I went on upstairs. And I felt very faint.

By Mr. Amato:

Q. When did you first experience any feeling or sensation of pain?

A. Well, that night began stiffening up on me.

Q. What? Describe then to the Court and jury what you felt.

A. Well, I felt a complete twist of the spine, that is all. And all up in the neck area. And I had a violent headache, which I stayed in bed Sunday and part of Monday. And

I talked to Dr. Schoenfeld and I saw him the
page 58] following morning.

Q. Now then, you saw Dr. Schoenfeld. He was your family physician?

A. That is true, yes.

Q. And did he examine you?

A. Yes.

Mildred E. Wagner

Q. And was anything given by him, a prescription, after that first visit?

A. Yes. He gave me some medication to help me sleep and also to relieve the soreness and discomfort in my neck.

Q. Let me ask you very briefly, then, about this. It has been brought out in the evidence that you had, some time prior to this accident, a mishap of a fall and you had broken the twelfth dorsal vertebra in your back?

A. That is true.

Q. That was when?

A. That was in June of '61.

Q. Of '61?

A. That is true.

Q. And you had been treated by a doctor in Roanoke and left there after some two weeks and came back to Norfolk?

A. True.

page 59] Q. And after you came back to Norfolk who treated you here?

A. Dr. Schoenfeld.

Q. And it has been represented in the evidence that you wore —

Mr. Wormington: If Your Honor please —

Mr. Amato: I am trying to save time.

Mr. Wormington: Yes, and I haven't objected up to now.

Mr. Amato: Very well; I will ask her.

By Mr. Amato:

Q. What was prescribed for use and wear by you when you left Roanoke, after treatment by a doctor there?

A. Well, Dr. Varner, who is the chief orthopedic surgeon up there in the Roanoke Memorial Hospital, would not even allow me to sit up, and he insisted that I have the brace before he would ever let me put my feet on the floor.

Q. What kind of brace was that?

A. Well, I don't know the name of it but it came completely up, with metal braces in between, right underneath the shoulder blades.

Q. All right.

A. Not up to the neck but up underneath —

Q. Were you wearing that brace in March 1962
page 60] when you were injured in this cab?

A. No; no.

Q. How long prior to that time had you ceased wearing it?

Mildred E. Wagner

A. Well, let's see. In '61 I wore it that — June, July and August. I think it was September, the latter part of August or the first of September that he told me to discontinue wearing it and to wear a tight girdle.

Q. That was in 1961, then?

A. Yes.

Q. I see. And did you wear it any more from August or September 1961 to the day of this accident, March 1962?

A. No; no, sir.

Q. Now, on the day of this accident, March 1962, had you been having any problems or any pain in the region of the back that you had fractured the vertebra?

A. The lower back?

Q. Yes.

A. Well, only if I tried to do things that I was used to doing and wasn't supposed to do. In other words, things around the house that you usually do.

Q. I see.

A. There were many things I couldn't do.

page 61]

Q. Had you prior to March 1962 had any problem or difficulty or injury as to your neck?

A. No.

Q. You had not?

A. (The witness shook her head)

Q. And had you, prior to March 1962, had any difficulty or problem with headaches other than the usual or normal ones that people have?

A. No, sir.

Q. Without going into each and every visit that you were obliged to make to see Dr. Schoenfeld, what was the general course of your treatment and the way that you felt from March 1962 on until about the present time?

A. I don't understand that.

Q. Well, how did you progress in the treatment that Dr. Schoenfeld was giving you, after this taxicab accident?

A. Oh, with his treatment. Well, I thought I was progressing, you know, getting better; I really did. And I would have frequent headaches but not as severe as they were. I think I was generally getting better.

Q. What has happened now, then?

A. Well, like I say, if there is any particular strain on it I do notice a difference. Other than that I do think I am generally better, much better.

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page 62] Q. What do you mean by "if there is any particular strain" you have problems?

A. Well, I mean certain motions, or if I try to pick up anything, which I don't if I can avoid it.

Q. Well, what are you able or not able to do around your house that you could do before March 1962? What aren't you able to do now that you could do before this accident, this taxicab accident?

A. Well, put any strain of any weight on my arms in particular that causes any pull or strain on the neck — between the shoulders, right up in here (indicating).

Q. Can you describe something that you can't —

A. Well, anything that you might pick up in your normal housework around the house. If I try to pick up anything that is the least bit heavy; everyday things like we will say putting a contour sheet on a bed. *it* is a terrible strain.

Q. What about the other household chores?

A. Well, I do most of them myself.

Q. And can you do waxing?

A. No, sir. I can't do any scrubbing or waxing.

Q. Well, had you gotten to be able to do those before this March accident, the accident of March 1962?

A. Well, my husband came home and helped at night, which was not a very good thing for him to do, but
page 63] he did — or have to do, I should say.

Q. Well now, you say you had a problem with a headache the night of this particular accident. What has been your problem since the accident with headaches?

A. Well, they seem to become more frequent. Stiffness in the neck was — it was harder to turn it.

Q. And how frequent were they?

A. Well, practically every day for a long while. When I got the ultrasonic treatments, it seemed to relieve it to a great extent.

Q. When did they start to improve, if they did improve at all, or drop off to stop having these headaches?

A. Well, I think as I got the ultrasonic treatments, that in itself helped a great deal.

Q. Are you having any headaches now, about the present time, that —

A. Well, not as severe, no, but some, yes.

Q. What do you mean by "some," now?

A. Well, as I say, they are not severe.

Q. How often do you have them?

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A. But they are right in the back of the neck, the ones I have. They are not in the front like you get from eye strain or anything.

Q. How often do you have those?

page 64] A. Well, frequently.

Q. Could you tell us how frequently?

A. Well, I usually take a BC or two each day or Anacin or something like that.

Q. Well, I mean as much as the last 30 or 60 days how often would you have them?

A. Well, it is very few days that go by that I can't say that I don't take Anacin or Bufferin or BC or something like that.

Q. And that is what you are taking now —

A. Yes.

Q. — for the relief of these headaches?

A. A-hum.

Q. Now, prior to this accident you had had some problem, had you not, with the thyroid and you had had an operation for that?

A. Yes.

Q. And I think the doctor had treated you for some degree of nervousness, had he not?

A. Well, it did cause me to be extremely nervous. I had lost a great deal of weight.

Q. Then, as of March 1962 what was your condition as to nervousness or malnutrition or —

A. You mean immediately after the operation?

Q. No. I meant before this accident.

page 65] A. Oh.

Q. What was your condition as to nervousness?

A. Well, I think it was generally better, much better.

Q. Was there any change then, after the accident?

A. Yes, it was. I felt extremely nervous. Because I — I felt all tensed up in the back of my neck. It felt tight and like it was being pulled in some manner, which I —

Q. Did the doctor give you anything for that, Mrs. Wagner?

A. Yes.

Q. What did he give you? Do you know what he gave you?

A. Well, he gave me the tranquilizer and, as I say, something to sleep at night. And I told him I preferred not taking any strong medicine for pain if I could avoid that. And so, as I say, I take Anacin or Bufferin or something of that sort, and usually it is adequate, which I am pleased about.

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Q. Well now, are you having any problem, then, with your low back at all?

A. Not very much. It gets higher; but not anything like it was in the beginning.
page 66] Q. You mean the beginning of what now?

A. Well, even after this accident it was naturally twisted and it was terribly sore, but it is better.

Q. Well, you say "this accident." It became sore after the accident?

A. Yes, but the main twist I think was actually in the upper neck where I caught it under the seat.

Q. Where did you feel that soreness? We are speaking now of after March. When did you feel that more? Often or regularly or otherwise?

A. Well, there were days when it was much worse than others. Now, I can't say. I go for two or three days and it wouldn't be quite so bad. Other days, they would be — almost every day for awhile. Then Dr. Schoenfeld would give me the treatment of the ultrasonic and it would become better.

Q. Did you have injections for the —

A. Yes.

Q. Muscle relaxant?

A. (The witness nodded)

Q. The doctor prescribed for some injury to your leg, Mrs. Wagner. How long did that give you any difficulty?

A. Well, it was sore, of course, and it had the
page 67] abrasions which you can still see the scars if you choose to look; but they are much better now and it doesn't bother me now. But I have kept the scars that long.

Q. It isn't clear to me. From the time of the fall when you injured your back until say the day before this taxicab accident, you say you had improved?

A. Yes, sir.

Q. To what extent was your improvement and what were you permitted and able to do about the house that a wife normally does?

A. Well, just about everything that I had —

Q. Tell us what.

A. Well, the usual cleaning and things of that sort.

Q. Did you have a servant to help you around the house?

A. No, sir, I did not. I could not do any scrubbing of floors.

Q. What?

A. I didn't do the scrubbing of floors or anything. Between my husband and I we managed to get things pretty well.

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Q. Were you able to do everything else about the house, then?

A. Yes, sir.

page 68] Q. And now what is your position? What can't you do that you could do immediately before this accident?

A. Well, I do pretty much the same except I do have a colored girl to come in and help to do the heavy — heavy things such as changing the beds and lifting the mattresses and scrubbing, things of that sort.

Q. Before this accident could you change the beds?

A. No, sir, I could not. As I say, my husband helped me with that when he got home.

Q. I am talking about before the accident.

A. No.

Mr. Wormington: If Your Honor please, he has asked that twice. He is trying to get a different answer.

Mr. Amato: I am not trying to get a different answer.

The Court: Have you answered it? If not, do so.

Mr. Stant: She has answered it twice.

The Witness: Yes, I have answered it, I believe.

The Court: All right. What is the next question?

page 69] By Mr. Amato:

Q. Mrs. Wagner, is this a bill for your X-rays, Drs. Eley, Wallace, Cocke and Wood?

A. \$40 I believe; yes, sir.

Mr. Amato: Any objection to this?

The Court: P-1.

(The bill referred to was marked P-1 for the plaintiff.)

Mr. Amato: We offer this in evidence, marked Plaintiff's Exhibit 1.

By Mr. Amato:

Q. Now, can you give us any reasonable estimate as to the cost of the drugs and medicines which you have taken that have been prescribed for you and taken by you since this March 1962 accident which you were in?

A. I couldn't give the exact amount.

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Q. Could you give us an approximate amount, a reasonably approximate amount?

A. Well, a portion of it was around \$90; and then there have been some since that time.

Q. Well, can you —

A. I am not referring to any of the medication at the doctor's office, though. I am speaking of prescriptions.

Q. I am speaking of drug prescriptions.

page 70] A. That is true.

Q. Were they at least \$90?

A. I believe so. I think he has them there. They were sent in, itemized.

Q. Itemized?

A. Yes.

CROSS EXAMINATION

By Mr. Stant:

Q. Mrs. Wagner, the day in question you caught this cab at Freemason and Granby, is that correct?

A. That is right.

Q. When was the last time you had driven an automobile prior to this date?

A. Well, that is a little hard to answer.

Q. Well, was it within a month, two months?

A. Oh, no.

Q. Five months? A year?

A. No. I am sure it wasn't because my husband uses the car for work and I don't have it during the day.

Q. Well —

page 71] A. It could have been a week; it could have been two days.

Q. All right, fine. Now, Mrs. Wagner, you were in a checker cab, a cab that has a great deal of space between the front seat and the back seat?

A. That is true.

Q. And this is a large cab, is it not?

A. Well, yes, as far as the distance, yes.

Q. Now, you were sitting back there as you turned down Olney Road and then went on Llewellyn, and were you paying any particular attention to what was ahead of you?

A. There was moving traffic ahead, yes.

Q. I understand that. Now, were you paying attention to that moving traffic?

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A. It seemed to be going all along at a normal rate of speed I would say.

Q. Pardon?

A. I said that was what I would think.

Q. You all were moving along at a normal —

A. Well, I mean by that, it was all going. I didn't see anybody rushing by.

Q. All right. And you all were not rushing, were you?

A. Well, no, we weren't rushing.

Q. All right. As you turned off Olney Road
page 72] onto Llewellyn, how far was it from Olney Road to the place where the accident occurred?

A. I would say that it was about a car's length from the very corner of Westover Avenue on Llewellyn.

Q. How far is that if you can tell me in feet, approximately?

A. Well, what is a car's length? I don't know.

Q. From Olney Road to Westover.

A. I don't know; how many blocks is it? I don't know myself.

Q. Well, Mrs. Wagner, as you proceeded down Llewellyn, when did you first notice a truck in front of you?

A. I didn't.

Q. You never noticed?

A. There was no truck in front of us.

Q. All right. Did you ever notice a truck to your right?

A. No, sir.

Q. You did not. Now, the first thing you knew was the cab driver applying brakes?

A. Right.

Q. At that point how many carlengths did it take him to stop the car if you are able to say?

page 73] A. Well, that is a little hard for me to say. I was on the floor.

Q. You don't have any idea?

A. Well, I don't know. I can't swear to the length of distance it took to stop.

Q. All right. If you can't remember those things, what do you remember concerning coming down Llewellyn?

A. I know that he stayed in the left lane of traffic from Olney Road until he stopped at the scene of the accident.

Q. Do you remember whether or not this is a gearshift cab or is it a cab that they press a button or hydromatic type, do you know?

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A. Well, I couldn't even see that; I couldn't see that from the back.

(At this point there was a brief interruption, after which the following occurred:)

By Mr. Stant:

Q. Mrs. Wagner, as you came down Llewellyn, do you have any distinct remembrance coming down Llewellyn any cars passing you all or anything like that?

A. Well, yes. I think several cars passed in the right lane.

Q. In the right lane?

page 74] A. Yes.

Q. Now, with these cars passing the cab in the right lane, and the cab being in the left lane, how are you able to judge the speed of the cab, Mrs. Wagner?

A. I am only judging it, by not seeing the speedometer — I will be honest about it — it was only from — from the way he stopped and from my own previous experience in driving, myself.

Q. Well, you are sitting in this cab and, obviously, you were not paying a great deal of attention; and I want to pin down, if I can, what you base your judgment on as to the speed of this cab. You say other cars passed you in the right lane, correct?

A. Well, they were all moving along. I don't say that they passed us, exactly. They were moving along.

Q. Mrs. Wagner, didn't you just a minute ago tell me that two or three cars passed you in the right lane?

A. No; you said that. I didn't say that.

Q. You said they did, did you not?

A. We were all moving in the same direction.

Q. Well, was the cab moving past anybody else, Mrs. Wagner? Were you all passing anybody?

A. I wasn't paying that much attention to all of the right lane traffic; I was looking also ahead.

page 75] Q. Mrs. Wagner, if cars were running on the righthand side, somewhere they had to pass you all to get past the truck that finally turned in front of you, didn't they?

A. Of course.

Q. And when you slid in the floor, there were no cars to the right of you, there was only this truck that cut across in front of you?

A. Well, I say it happened so quickly.

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Q. Now, up until that time you had no criticism of the manner in which the cab driver was driving, did you?

A. Seemed to be all right.

Q. He was proceeding in a normal manner, was he not?

A. Yes, except that if you wanted to be picky about the speed limit, I think he was going more than 25 miles an hour.

Q. You think he was?

A. Yes, I do.

Q. But you don't know that, do you?

A. I didn't see the speedometer.

Q. All right. And you never cautioned him, did you, Mrs. Wagner? You never told him he was going fast or anything like that, did you?

A. No, I didn't.

page 76] Q. All right. And you have ridden with that cab company on many occasions because you used Terminal cabs, isn't that correct?

A. I used them for quite awhile, yes.

Q. And I believe this driver himself had driven you on other occasions?

A. I think he has.

Mr. Breit: Objection, if Your Honor please. It is immaterial how well the cabs handle themselves on previous occasions. What happened on this day is all that is material.

Mr. Stant: We are getting into that, Mr. Breit.

By Mr. Stant:

Q. Now, Mrs. Wagner, you state that you came off the seat and at that time your leg was somewhat bruised. Your head or your body didn't hit the front part of the cab, did it?

A. No. My neck was hooked under the seat, the rear seat. My head was up like that, up underneath here.

Q. Isn't it about three and a half feet between the seat of the cab and the front of the driver's seat, Mrs. Wagner?

A. I expect it is.

page 77] Q. And actually two or three grown people could lie down in that space, couldn't they, very easily?

A. I don't know about that.

Q. Now, Mrs. Wagner, the driver offered to let a doctor check you over, and you refused at that time, did you not?

A. He asked me if I wanted to be taken to my doctor, or a

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doctor; and I told him I would wait and see my own doctor, that he was not in his office on Saturday afternoon.

Q. And I think you saw him three days later, which was on the 27th?

A. That is true.

Q. So that was Tuesday?

A. Yes, because that was a Saturday afternoon.

Q. But you saw him finally on Tuesday?

A. Yes, because I was so sore I couldn't move.

Q. Well, did you call him on Saturday or Sunday or Monday, Mrs. —

A. I called him on Monday and made the arrangements to go in Tuesday.

Q. You were never hospitalized as a result of this accident, were you?

A. No, sir.

page 78] Q. During the time that you have been convalescing, I think you saw Dr. Wickham Taylor, and you also saw Dr. Robert Gahagan, did you not?

A. Yes, but that was to check out any possibility of being anything else connected with the thyroid.

Q. I see. And these gentlemen found no physical evidence of any injury at that point, did they?

A. Well, naturally Dr. Gahagan didn't check me for my back. He was checking for the eyes.

Q. All right, Mrs. Wagner. Thank you.

By Mr. Wormington:

Q. Mrs. Wagner —

A. Yes.

Q. — as I understand it, at the time that this accident occurred or just before it, you were still having difficulty with your back but it was getting better, is that correct?

A. That is true.

Q. But you were having trouble with it?

A. Occasionally, yes; it was bothering me.

Q. Now —

A. But not in the neck area.

Q. No, I meant the back.

A. Yes.

page 79] Q. From the broken bone in your back. Now, having gotten better, I take it — to go backwards in time; and I am speaking now about your broken

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back — it was obviously worse earlier; it had gotten better from a worse condition, is that correct?

A. That is true.

Q. I am just working backwards, so to speak. Did this injury to your back down here, the broken bone, cause you as much difficulty and trouble as the sprain that you had later as a result of this automobile accident?

A. Well, they were two different effects, if I may explain.

Q. Go right ahead, explain; give any explanation you see fit. I am interested primarily in the question of severity of symptoms. Admittedly, the symptoms may have been different.

A. Well, of course the broken bone was terribly painful, and having to wear the brace was terribly uncomfortable, especially during the hot months. However, it was improved a great deal when this other happened. And it did give me severe headaches and neck strain, and that is the difference.

Q. Yes, ma'am. Well now, as far as just from the standpoint of general discomfort, did the automobile accident injury cause you more discomfort or less than the broken back?

page 80] A. You mean in its entirety?

Q. Yes, ma'am.

A. Well, I think it twisted my whole back, yes, sir.

Q. No, that wasn't what I asked you. I asked you if in its entirety whether the sprain of your back caused you as much, more, or less discomfort altogether than your broken back?

A. I think it was more persistent for a longer period of time, yes, sir, with the headaches.

Q. It did cause you more discomfort, then?

A. For a longer period, yes.

Q. And so a sprain of your back has in the long run given you more difficulty than the broken bone in your back?

Mr. Breit: That —

A. I didn't say that. I didn't say that at all.

The Court: Let her answer. She said she didn't say it.

By Mr. Wormington:

Q. All right. You say you didn't say that. What is your answer?

A. Will you reword it, then, please?

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- Q. You didn't understand?
- page 81] A. Would you reword the question, please?
- Q. No, ma'am. If you don't understand the question, I shall be glad to repeat it.
- A. I thought I did.
- Q. I shall be glad for you to answer it if you can.

The Court: You made a statement which she denied. That cancels it, I would say.

Mr. Wormington: But she started to explain it, sir, then asked me to rephrase it.

The Witness: Well, I thought I may have misunderstood you.

By Mr. Wormington:

Q. Now, you were still having some problems with your back as a result of the fracture of your back before this automobile accident?

A. Well, naturally.

Q. Is that correct? And it restricted your activities to a certain extent?

A. Yes.

Q. And you were given a list of activities that you could or could not do?

A. That is true.

Q. And, as I recall it, in answer to Mr. Amato's question, that list of restricted activities was substantially the same after the automobile accident as it was before?

page 82]

A. Yes.

Mr. Wormington: That is all.

RE-DIRECT EXAMINATION

By Mr. Amato:

Q. From January 1962 until March 1962 were you having any definite problems with your back?

A. No, sir.

Q. And after March 1962 did you resume wearing that back brace again?

A. Yes, sir, at the doctor's suggestion I did for awhile.

Q. How long did you wear it?

A. Only off and on.

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Q. For how long?

A. Well, I would say for about two weeks, for a certain period during the day.

Q. Did you —

A. And then I would have to — I would have to lay down, get off my feet.

page 83] Q. Why did you have to do that?

A. Just to take any pressure off and relieve the neck pressure. It was only complete relaxation that he wanted me to have. While I was up trying to do anything, I was required to wear the brace again.

The Court: Do you have any more questions?

Mr. Amato: That is all.

Mr. Breit: The plaintiff rests.

The Court: Take a short recess, again. Go in the jury room, members of the jury.

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

Mr. Breit: We would like to replace the plaintiff on the stand to testify that she was examined by Dr. Hollins at the request of the defendant. I had no idea that he was not being called by you.

Mr. Stant: Can you also then state that you subpoenaed him and did not see fit to call him?

Mr. Breit: I subpoenaed him for the simple
page 84] reason that you had not.

The Court: You all talk that over. You were arguing about whether to recall the plaintiff. The plaintiff had summoned Dr. Hollins. The record speaks for itself. It can be brought out.

Mr. Amato: I want to ask the plaintiff another question in reference to that.

Mr. Stant: I am going to ask if they subpoenaed him, too.

(At this point there was an off-the-record discussion, after which the following occurred:)

Mr. Amato: Come back up here (addressing the plaintiff). We want to ask her the question in the record.

Mr. Breit: We can probably handle it by a statement of

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offer of proof. If Your Honor please, we would like to recall the plaintiff. It is our intention to offer to prove that this lady was examined by a physician, Dr. George Hollins, at the request of and at the expense of the defendant Terminal Cars, Inc., and the defendant Nichols, and that the doctor was in the courtroom and was discharged by the plaintiff earlier in the morning when the plaintiff felt that there was
page 85] no need to corroborate the plaintiff's own doctors.

And we intended to comment on the fact that the defendant, having hired the physician and having attacked the credibility of our doctors, then failed to put this doctor on to contradict the testimony of the plaintiff's doctors, and by their failure so to do we submit we have a right to argue to the jury that the testimony of Dr. Hollins would have been adverse to the defendant that hired him.

Mr. Stant: There is a very simple answer to that. He was hired to make certain findings. He stated the same thing that Dr. Pole stated, that there was no evidence of any permanent injuries. And at that point we never subpoenaed the doctor, brought him here to court and had him to put on the stand; and they decided they did not want to do it.

The Court: Gentlemen, if the doctor was examining pursuant to the rules of court under an independent medical examination and filed a report under the law, that is admissible in evidence, is it not?

page 86] Mr. Breit: I don't believe he did that, if Your Honor please. I think in this case the defendant requested the examination and we voluntarily gave it to them.

Mr. Wormington: If Your Honor please, may I make a very brief statement? I just simply want the record to show the position of the defendant Columbus Manning, which informally has been stated before and that is that on the behalf of that defendant we did not participate in the examination of or the calling of Dr. Hollins as a witness in any way, shape or form. We submit that we, in effect, are insulated from the controversy.

The Court: Let me get the rule. You (addressing the plaintiff who was on the witness stand) may keep your seat for a moment.

If the independent medical examination was made pursuant to order of court, under the rules the written report shall not be admitted in evidence unless offered by the party who submitted to the examination; but, conversely, the party who submitted to the examination may offer it in evidence if they see

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fit to do so, pursuant to the rules of court. It is my understanding that while not following strictly in accordance with the rules of court in having the court to order it, counsel agreed to it informally rather than require the procedure of having the court order requiring it. Was that what was done?

Mr. Breit: Yes.

Mr. Stant: No order was ever entered.

The Court: It was by agreement?

Mr. Stant: Just by agreement of counsel. Nothing was filed formally with this court. We are under no duty under those conditions to do anything.

Mr. Breit: Our position is that they are not under a duty necessarily to call a witness that is adverse, but that we have a right to comment on the fact that a witness available to them, who apparently was paid by them —

The Court: I think the Court will change the opinion expressed in chambers and will permit you to ask the plaintiff that question, and note your exception.

Mr. Stant: You are going to allow them to comment on our not calling the doctor when they subpoenaed him and had him here?

Mr. Breit: You may answer that in your own argument, if you wish.

Mr. Stant: No, I want the Court to rule on it, not let you argue that in your final argument.

The Court: I don't think that there is any more obligation or duty upon the defendant to call the doctor than upon the plaintiff, but I am going to permit the plaintiff's counsel to ask the plaintiff if she was examined by the doctor and comment on the fact that the result of his examination was not made available, that he was not called by you, in other words. Yes, I will permit that. You may comment on the fact that the plaintiff had the doctor here and did not call him.

Mr. Stant: The plaintiff subpoenaed him, didn't see fit to call him.

Mr. Amato: He is your doctor.

Mr. Stant: He is not my doctor.

Mr. Amato: You employed him for the purpose of examining the plaintiff.

Mr. Stant: Just for the purpose of examination. I can submit you some law on it. There is no duty at all unless through the rule of this Court we agree that the doctor will

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go, and be placed in a position where he will file with the Court his report. Then that becomes a subject for the Court.

But in this instance you are saying to me that if I
page 89] have this lady examined by four doctors and none of them finds anything wrong with her, anything germane to the case, you can comment and say that these doctors would be adverse to my position. I know Your Honor does not feel that is the law.

The Court: I think that the medical report which you say would corroborate the other doctors ought to be used as if it were —

Mr. Stant: I am perfectly willing to put this report in.

The Court: All right. Then the Court rules that the procedure followed by counsel, while it was not strictly in accordance with the rules of court, was intended to supplement that procedure and make that report available if desired. Counsel has offered to permit it to be done, so the Court will allow that report to be used if desired. Now, that eliminates the question of the failure to make the doctor available. His report is available. In fact, gentlemen, it has always been my understanding that generally when counsel agree on an independent medical examination without having a formal order entered, that is a matter of convenience but it is still intended to be in conformity with that rule, and that the medical
page 90] report is available if counsel want it. That has certainly been my informal understanding. It has been done, to my knowledge, by both of you.

Mr. Stant: I am willing to do it now.

The Court: That is the ruling of the Court now. You may proceed exactly as if the independent medical examination had been made pursuant to the rules of court. It is available. It is offered by counsel and may be used as such, and you may ask her if it is a fact that she went to the doctor, and then use the report.

Mr. Amato: Your Honor, then we should like to withdraw her and not put the question to her.

The Court: All right.

Mr. Breit: Save our exception.

The Court: Note your exception to the Court's ruling in all of its various rulings.

Mr. Stant: I am going to leave this in.

Mr. Amato: Is that in the evidence?

Mr. Breit: No. It can only be admitted on our approval.

Mr. Wormington: As I understand it, Your Honor —

James L. Sowder

The Court: I am not going to put this report in the record.

page 91] Mr. Wormington: Your Honor, possibly to save future discussion, since the jury is out: Am I to understand that these gentlemen also are not going to comment in closing argument on that proposition?

The Court: Correct.

Mr. Amato: No.

The Court: You have been offered the opportunity to use the medical report. You have refused it. Dr. Hollins is not in the case.

Mr. Amato: We note exception to the Court's ruling.

The Court: I think you have tendered the report and offered to allow opposing counsel to use it, but I don't think it is a part of the record.

Mr. Breit: May we have just a moment, Your Honor, to read it? (Counsel examining it) All right, sir. We are ready to proceed.

The Court: Bring the jury in.

(The following occurred in the presence of the jury:)

page 92] JAMES L. SOWDER,
called as a witness on behalf of the defendants Charles Leavitt, Administrator, and Terminal Cars, Inc., and having been first duly sworn, testified as follows:

Examined By Mr. Stant:

Q. What is your full name?

A. James Louis Sowder.

Q. Mr. Sowder, by whom were you employed?

A. Liberty Mutual Insurance Company.

Q. On April 23, 1962, at approximately 2:30 P.M., at 901 West 21st Street, in Norfolk, Virginia, did you interview Mr. Ernest William Nichols concerning an accident that occurred on March 24, 1962?

A. Yes, I did.

Q. Do you have the tape of that interview on your machine?

A. I have it available where I could put it on the machine, yes, sir.

Q. Is this transcription of it (indicating) a correct and proper transcription of the interview?

A. Yes, sir. That is the original copy.

James L. Sowder

Mr. Stant: At this time, Your Honor, I should like to read the questions and have Mr. Sowder read the answers.

The Court: Any objection to that procedure?
page 93] Mr. Wormington: If Your Honor please, I understood we were going just to introduce it into evidence. I don't have any objection.

The Court: It is my recollection that it would be treated like any other statement; the witness was to refer to it and either read it or have it to refresh his memory as to the contents.

Mr. Stant: It would be just questions and answers, Your Honor.

The Court: I think the proper procedure is to let the witness do it himself, unless counsel prefer to have it handled in any other way.

Mr. Breit: I agree with the Court.

The Court: That was the ruling in chambers, that he was to use it like any other written statement of any other investigator or anybody else who takes the statement; he refers to it and reads it.

By Mr. Stant:

Q. Read it to the jury, please.

The Court: With the understanding that when he reads it he is giving it as his testimony based upon the writing which he refers to.

Mr. Stant: All right.

A. This is James L. Sowder, at 901 West 21st Street, Norfolk, Virginia, interviewing Mr. Ernest William
page 94] Nichols on April 23, 1962, at 2:30 P.M.; this interview concerning an accident that occurred on March 24, 1962.

(The statement, which the Court ruled would not go to the jury, was then read by the witness to the jury, after which the following occurred:)

Mr. Stant: Your Honor, we offer that.

The Court: Marked Exhibit D-1 for the record.

(The statement referred to was marked D-1 for the defendants Charles Leavitt, Administrator, and Terminal Cars, Inc.)

James L. Sowder

Mr. Stant: Your Honor, that is all our evidence.

The Court: Do you wish to cross-examine the witness, gentlemen?

Mr. Wormington: I have no questions.

Mr. Breit: May I see that report for just a second, if Your Honor please? (Examining Exhibit D-1.) No questions.

The Court: You (addressing witness) are excused. You may leave if you wish.

page 95] The Court: Does either defendant have any more evidence?

Mr. Wormington: If Your Honor please, Manning has already testified. He was our only witness. We rest, too.

The Court: Does the plaintiff have any more evidence?

Mr. Breit: No.

(The Court recessed after warning the jury not to discuss the case and directing them to return at 10:30 A.M. the following day, March 29, 1963.)

page 96] Norfolk, Virginia, March 29, 1963,
at 10:30 A.M.

(Met pursuant to adjournment of the preceding day, with the same parties present as heretofore noted. The Court read the instructions to the jury, exceptions to which are noted below by counsel as follows:)

Mr. Breit: The plaintiff objects and excepts to the Court's granting of Instruction A on the grounds that there was no evidence of a sudden emergency in this case; that from the physical facts it was impossible for the cab driver to fail to see the action of the defendant Manning prior to the slamming on of brakes.

Mr. Stant: The defendants Charles Leavitt, Administrator, and Terminal Cars, Inc., object and except to the Court's granting Instruction P-1, on the grounds that there is no competent evidence to go to the jury that the taxicab driver was driving in excess of the speed limit.

The defendants Charles Leavitt, Administrator, and Terminal Cars, Inc., object and except to the granting of Instruction P-2 on the grounds that there was no evidence
page 97] of improper control, no evidence of improper

lookout, and there was no evidence that the cab exceeded a reasonable speed under the circumstances.

The defendants Charles Leavitt, Administrator, and Terminal Cars, Inc., object and except to the Court's granting Instructions P-3, P-4 and P-5 on the grounds that a correct instruction would have included the use of the words "should" or "must" in place of the word "may."

The defendants Charles Leavitt, Administrator, and Terminal Cars, Inc., object and except to the Court's granting Instruction P-7 on the grounds that it repeats and emphasizes the language of Instruction P-2 which had already correctly stated the law.

The defendants Charles Leavitt, Administrator, and Terminal Cars, Inc., object and except to the Court's granting Instruction P-8 on the grounds that there is no distinction between a negligence that would make the cab driver's actions cause for compensation and any negligence of the driver of the truck that would make the driver of the truck liable for compensatory damage. In other words, attempting to apportion degrees of negligence destroys the idea of
page 98] a contributing cause. And the law in the State is that any negligence that proximately causes or contributes to an accident is such negligence as will allow a verdict against the party guilty of such negligence.

The defendants Charles Leavitt, Administrator, and Terminal Cars, Inc., object and except to the Court's granting Instruction P-9 on the grounds that there was no evidence that established any degree of pain and suffering superimposed on old injuries.

The defendants Charles Leavitt, Administrator, and Terminal Cars, Inc., object and except to the Court's granting Instruction V on the grounds that there was no evidence that the cab driver failed to keep a proper lookout or keep his vehicle under proper control.

The defendants Charles Leavitt, Administrator, and Terminal Cars, Inc., object and except to the Court's granting Instruction W on the grounds that there was no evidence that the taxicab driver saw or in the exercise of the highest degree of care should have seen a signal, because the driver of the truck testified that he never saw the cab. If he never saw the cab, his time for putting on the turn signal could not be correctly known.

page 99] The defendants Charles Leavitt, Administrator, and Terminal Cars, Inc., object and except to the Court's granting Instruction X on the grounds that there is

no evidence that the cab driver exceeded a reasonable speed under the circumstances.

Mr. Wormington: The defendant Columbus Manning objects and excepts to the action of the Court in granting Instruction P-3 on the grounds that there was no evidence from any of the witnesses that a proper signal was not given by the defendant Manning. The testimony of the plaintiff made no mention of a signal; the testimony of the taxi driver Nichols was completely negative in respect to the signal, its presence or its absence; and the entirely credible testimony of Manning was that he had given a proper signal at a point when he was approximately one-half a block from the point of his turn. Therefore, the jury should not have been instructed on the premise that he had failed to give such a signal.

The defendant Columbus Manning objects and excepts to the action of the Court in granting Instruction P-5 on the grounds that this instruction is based on a lack of proper equipment rather than on the proper use of such equipment.
page 100] The defendant Manning testified that he had a rear view mirror which functioned perfectly and enabled him to see behind him considerably further than 200 feet, and there is no evidence that such a mirror was not on the vehicle. Therefore, the principle attempted to be espoused by this instruction was improperly embodied in it, in that the question involved was one of a lack of proper lookout through the use of the mirror rather than the question of whether or not the mirror was on the truck.

The defendant Columbus Manning objects and excepts to the action of the Court in granting Instruction P-6 on the grounds that this was a gratuitous statement to the effect that the plaintiff was free from contributory negligence when there was no issue presented in the case alleging to the contrary. Therefore, to the extent that this isolated factor, not an issue, was told to the jury it was therefore prejudicial.

The defendant Columbus Manning objects and excepts to the action of the Court in granting Instruction P-10 on the grounds that Subparagraph 4 referring to the element of any disfigurement resulting to the plaintiff, was not a proper element of damage in that there was no
page 101] evidence of any disfigurement to the plaintiff.

The defendant Columbus Manning objects and excepts to the action of the Court in granting Instruction C on the grounds as set forth relating to the alleged error in granting Instruction P-5, and to the further ground that Instruction C is practically duplicated by Instruction P-5 and

therefore unduly emphasizes this point, to the prejudice of the defendant Manning. Over and above the original objections to either individual instruction, the Court should have granted only one of these two instructions, and not two of them based on the identical point with almost exactly the same language.

The defendant Columbus Manning objects and excepts to the action of the Court in granting Instruction B on the identical grounds as expressed for the exception to Instruction C, including the duplication, in this instance Instruction B being a duplication of Instruction P-3.

The defendant Columbus Manning objects and excepts to the action of the Court in granting Instruction A on the ground that there is no evidence to justify the granting of a sudden emergency instruction in regard to the defendant
page 102] cab driver, since there was no evidence to rebut the evidence that he was traveling at a speed in excess of the speed limit and to that extent would be negligent as a matter of law. Therefore, necessarily, any sudden emergency arising on his part would be partially, at least, as a result of his own negligence.

The defendant Columbus Manning objects and excepts to the action of the Court in granting Instruction E on the grounds that while the abstract statement of law contained therein is correct, it is not applicable to this case. The issue in this case is whether or not the plaintiff made a proper or an improper turn at the intersection, and not whether or not he shifted from one lane to another prior to making the turn or in fact at any time. The only evidence relating to his shifting lanes was his own statement that he had done so approximately a half a block before reaching the scene of the accident, and there is no evidence that this was in any way causally related to the accident which occurred approximately a half a block further on. The question involved in this case was the type of turn which he made at the intersection and not any movement by way of shifting lanes at any time
page 103] prior to commencing his turn. The authority for this is the recently decided case of Dugroo against Garrett.

(Closing arguments were then made by counsel to the jury, and the jury retired to consider their verdict.)

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EXHIBIT D-1

page 1]

J. S. S. JR.

This is James L. Sowder at 901 West 21st Street, Norfolk, Virginia interviewing Mr. Ernest William Nichols on April 23, 1962 at 2:30 p.m. This interview concerns an accident that occurred on March 24, 1962.

Q. Would you state your full name please?

A. Ernest William Nichols.

Q. What is your address?

A. 354 Ward Avenue, Norfolk, Va.

Q. How old are you?

A. 53.

Q. Do you realize I am recording this interview?

A. I do.

Q. And, have you given me your permission to record this interview?

A. I have.

Q. How long have you lived at your present address?

A. Approximately 28 years.

Q. For whom are you employed?

A. Terminal Cars, Inc.

Q. What is your occupation?

A. Taxi driver.

Q. And how long have you been in this employment?

A. About a year and a half.

Q. For how long have you been a licensed driver?

A. 35 years or more.

Q. And how long have you been a licensed chauffeur?

A. Approximately a year and a half.

Q. Do you recall the incident of a woman falling from her seat while riding in your taxi?

A. Yes, I *Do*.

Q. Do you recall the date of this incident?

A. March 24, 1962.

Q. At what time did this happen?

A. 2:45 p.m.

Q. Do you recall the passenger's name?

A. Mrs. Mildred E. *Wagnor*, 1001 Gates Avenue.

Q. Has this person been a passenger in your cab before this date?

A. Yes, she has.

Q. Do you recall where you picked up Mildred *Wagnor* prior to this accident?

A. Freemason stand which is at Freemason & Granby Street.

Q. And what was your Destination?

A. Gates Avenue, 1001.

page 2 } Q. Would you *discribe* in your own words what happened?

A. I was traveling north on Llewellyn Avenue in the left lane to make a left turn into Princess Anne Road. This truck was traveling in the right lane in that intersection of West-over and Llewellyn the truck attempted to make a left turn causing me to put on brakes suddenly and throwing the woman off of the rear seat.

Q. When did you first see this truck prior to the accident?

A. I saw the truck all the time but I didn't know it was going to try to make a turn in front of me.

Q. Uh, in relations to where you were traveling, where was the truck, was it in front or behind you?

A. Oh, it was just a little in front of me. Not too much, we were almost parallel. He was just far enough ahead of me to give him a chance to attempt to turn.

Q. Would you describe this Llewellyn Avenue as to whether it is one-way of two-way street?

A. Llewellyn Avenue at 2:45 p.m. is one-way north bound two lane traffic.

Q. Do you know whether this truck gave any signals prior to the attempt to make a left turn from the right hand lane?

A. If he gave any signal whatsoever, I did not see them.

Q. Do you know uh who the driver of this truck was?

A. No, I got out and asked him to pull to the side and give me his name and address and he said that he did not hit me so he did not have to stop so he straightened his truck up and continued on north on Llewellyn Avenue.

Q. What information did you get from him, or what description did you get of the truck?

A. I got the license number from the truck as he was pulling away and just a partial description of the truck.

Q. Would you describe the truck?

A. It had a stake body on it to the best of my knowledge and it was painted blue.

Q. What make of truck was this?

A. Well, I wasn't in front of the truck so I couldn't possibly suggest or identify the make of it.

Q. Would you describe the driver of the truck?

A. The driver of the truck was a colored man.

Q. How far did this truck maneuver into his left turn?

A. He didn't maneuver far into his left turn because we

both come to a stop just before we had any accident.

Q. You would say then, he was as far as the left hand lane as you face north? He was to the left hand lane, was he not?

A. He was more than half way in the left lane making a turn yes because he had *froced* me to stop suddenly and go close to the curb as possible.

Q. Was *he* his front into the left hand lane or was his left half of his vehicle in the left lane.

A. I would say less than half of his vehicle was in the left hand lane. I would say approximately 10 feet of it was in part of the left lane.

page 3] Q. What part of his truck was in the left lane?

A. Front part.

Q. Did your vehicle leave any skid marks as you attempted to stop?

A. I did not get out and see if it were any skid marks. I know I applied the brakes quite suddenly in able for me to stop to keep from hitting him.

Q. Did you say a moment ago that you cut your vehicle to the left as far as you could?

A. Yes, It was just a narrow street so I didn't have much a chance to cut it left much but I did pull it close to the curb as possible and stopped quick as possible.

Q. Would you tell me what happened to your passenger when you did this?

A. She, it threw her in the floor off of the rear seat.

Q. Was she your only customer?

A. She was the only passenger in the cab at that time.

Q. And, uh I wonder if you have uh driven this passenger before in your taxi?

A. At least once before I remember and maybe more. She is a customer of ours.

Q. At the time of this incident, do you know whether or not this Mildred *Wagnor* was intoxicated?

A. No, she was not intoxicated.

Q. Do you know of any *witnessed* to this accident?

A. I do not, only Mrs. *Wagnor*.

Q. Could you tell me how you secured the additional information you have about the driver and the identification of the truck that uh attempted to make a left turn in front of you?

A. Mr. Brown, our bookkeeper, from the license number, got the name of the owner and the other information.

Q. Mr. Nichols, this is the end of record no. 1. Would you please not discuss the accident while I stop the recorder and turn the disc over to side 2?

This is a continuation of the interview by James L. Sowder with Mr. Ernest William Nichols at 901 West 21st Street, Norfolk, Virginia on April 23, 1962.

Q. Mr. Nichols, do you agree that we have not discussed this accident while I was changing the recorder?

A. Yes, we discussed nothing.

Q. Mr. Nichols, would you uh tell me if you had any other information about this truck or driver besides its license number?

A. I do not, other than what our bookkeeper got from the license number.

Q. Would you tell me the comments made by your passenger following this accident?

A. Well, I ask Mrs. *Wagnor* if she wanted to go to her personal doctor or the hospital, and she said no she hoped it would not be serious enough for that.

Q. Would you describe the injuries that were apparent?

A. Yes, she had a little skinned on her shin but she said that she wasn't worried about that, that was only a surface skin. She was worried about her back because she had been having trouble with it.

page 4] Q. Mr. Nichols, have you uh anything that you wish to add to this interview that has not been covered already?

A. No, I think that is all I wish to say about it. That is all there is to say.

Q. Uh, I wish to ask if the police were called?

A. The police were not called I, after I discharged my passenger, I went to the office and reported it with the supervisor. And at that time I didn't know if there was any damage to the lady or not and I didn't know for sometime after.

Q. Mr. Nichols, have you answered all of my questions?

A. Well, I think I have.

Q. Is there anything that you doubt whether you have understood or not specifically?

A. No, I think I have understood all of your questions.

Q. Have all of your answers been the truth.

A. All of my answers have been the truth.

Q. Thank you Mr. Nichols, and with your permission I will turn off the recorder.

A Copy—Teste:

H. G. TURNER, Clerk.

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