

IN THE
Supreme Court of Virginia

RECORD NO. 030892

247 LA 458

HOWELL RUSS,

Appellant,

v.

JAMES DESTIVAL,

Appellee.

JOINT APPENDIX

Edward L. Weiner, Esq.
Lawson D. Spivey III, Esq.
WEINER & ASSOCIATES
10605 Judicial Drive, Suite B6
Fairfax, Virginia 22030
Tel: (703) 273-9500

Counsel for Appellant

Julia B. Judkins
TRICHILO, BANCROFT, McGAVIN,
HORVATH & JUDKINS, P.C.
3920 University Drive
Fairfax, Virginia 22030-0022
(703) 385-1000

Counsel for Appellee

Table of Contents

Page Number

Motion for Judgment, filed 10/3/01	1
Excerpt from Transcript of Proceedings before the Honorable Leslie M. Alden on 1/27/03	5
Testimony of Howell Russ	6
Testimony of James Destival	94
Excerpt from Transcript of Proceedings before the Honorable Leslie M. Alden on 1/28/03	238
Jury Instruction Q	331
Jury Question	332
Jury Verdict, filed 1/28/03	333
Final Order, entered 1/28/03	334
Motion for Judgment N.O.V. and New Trial, filed 2/5/03	336
Memorandum of Points and Authorities in Support of Motion for Judgment N.O.V. and New Trial, filed 2/5/03	339
Response to Motion, filed 2/14/03	345
Memorandum of Points and Authorities in Opposition to Motion for Judgment N.O.V. and New Trial, with attachments, filed 2/14/03	346
Excerpt from Transcript of Proceedings before the Honorable Leslie M. Alden on 2/21/03	387
Order, entered 2/21/03	399
Notice of Appeal, filed 2/25/03	401
Notice of Filing Transcripts, filed 3/26/03	404

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FILED
CIVIL INTAKE

01 OCT 3 PM 3:56

HOWELL RUSS
Plaintiff,

JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

v.

LAW NO.:

198752

JAMES DESTIVAL
Defendant.

Serve at:
6036 Berwynd Road
Fairfax, VA 22030

MOTION FOR JUDGMENT

COMES NOW, the Plaintiff, **Howell Russ**, by counsel, and pursuant to rules of court moves for judgment against the Defendant, **James Destival**, on the grounds and in the amount as set forth below.

1. Jurisdiction is based upon Section 17-513 of the Code of Virginia, as amended.
2. The Plaintiff, **Howell Russ**, an adult citizen of the Commonwealth of Virginia, was the operator of a bicycle, proceeding westbound on a bike path adjacent to Braddock Road, which was struck by a vehicle being driven by the Defendant, on June 20, 2001, in Fairfax County, Virginia.
3. The Defendant, **James Destival**, is a citizen of the Commonwealth of Virginia and was operating the vehicle which struck the Plaintiff on June 20, 2001.

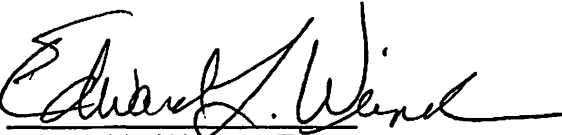
4. On June 20, 2001 at approximately 8:15 a.m., the Plaintiff was properly operating his bicycle westbound on a bike path adjacent to Braddock Road, with due care, across Prestwick Road at the intersection of Prestwick and Braddock Road.
5. At the aforementioned time, the Defendant, who had been driving his vehicle northbound on Prestwick Road, was stopped at the intersection of Prestwick and Braddock Road, and as the Plaintiff crossed in front of his vehicle, the Defendant drove forward, striking the Plaintiff on the left side of his bicycle and causing the Plaintiff to be thrown to the pavement.
6. The Defendant had a duty to operate his vehicle in a manner free from negligence and with due regard for the safety of others.
7. Notwithstanding the duties previously mentioned, the Defendant recklessly, carelessly and negligently operated his motor vehicle in that he failed to maintain a proper lookout for persons/conditions that would affect his motor vehicle operation and see what a reasonable person would have seen, failed to yield the right of way to the plaintiff who was crossing the road at an intersection, failed to maintain proper control of his vehicle, failed to apply brakes in time to avoid striking the Plaintiff's bicycle, failed to maintain a safe speed, and failed to obey all laws, regulations, etc., governing the operation of a motor vehicle in the Commonwealth of Virginia.

8. As the proximate result of said negligence, the Plaintiff has sustained severe and permanent injuries and will continue to suffer future pain, mental anguish and frustration.
9. The Plaintiff has expended and will continue to expend in the future undetermined sums for medical care and treatment, medicines, physical therapy and other protracted medical-related expenses, all of which were directly and proximately caused by the Defendant's negligence.

Wherefore, the Plaintiff, **Howell Russ** , demands judgment against the Defendant, **James Destival**, in amount of One Million Dollars (\$1,000,000.00) with pre-judgment interest from June 20, 2001, plus all other costs expended by the Plaintiff in this action and any such other relief as this Court deems just and proper.

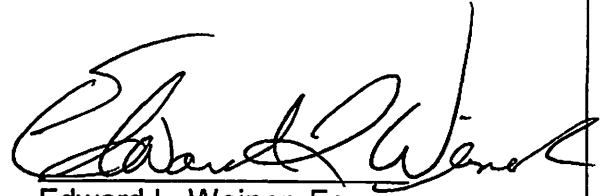
HOWELL RUSS
By Counsel

WEINER & ASSOCIATES

By: 
Edward L. Weiner, Esq.
10605 Judicial Drive/ Suite B6
Fairfax, Virginia 22030
(703) 273-9500

CERTIFICATE OF SERVICE

I hereby certify that on this 3 day of oct, 2001, I mailed a true copy of the foregoing Motion for Judgment, and Interrogatories, to the Defendant, James Destival, at 6036 Berwynd Road, Fairfax, VA 22030


Edward L. Weiner, Esq.

nnnn004

030897

V I R G I N I A

CLERK
SUPREME COURT OF VIRGINIA

RECEIVED
APR 21 2003
RICHMOND, VIRGINIA

FILED
2003 MAR 26
11:20
JOHN W. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

HOWELL RUSS,

Plaintiff

-v-

^{LAW}
In Chancery No. 198752

JAMES DESTIVAL,

Defendant.

Fairfax, Virginia
Monday, January 27, 2003

VOLUME I

The above-entitled matter came on for hearing, with a jury, before THE HONORABLE LESLIE M. ALDEN, a Judge in and for the Circuit Court of Fairfax County, in the courthouse, Fairfax, Virginia, pursuant to notice, beginning at 10:03 o'clock a.m., when there were present on behalf of the parties:



CASAMO & ASSOCIATES, Inc.
Court Reporting, Video Depositions, Trial Preparation/Presentation
Alexandria (703) 313-4800
Culpeper (540) 825-7482
www.casamo.com
ir m

1 * * *
high tech here, and it may not work.

2 Can everyone see that okay?

3 JUROR: Yes.

4 MR. WEINER: Thank you.

5 THE COURT: All right. Members
6 of the jury, welcome back.

7 Mr. Weiner, please call your
8 first witness.

9 MR. WEINER: Thank you, Your
10 Honor. May it please the Court, the
11 plaintiff, Howell Russ.

12 THE COURT: All right. Mr. Russ.

13 HOWELL RUSS
14 the plaintiff, called by counsel on his own
15 behalf and, having been first duly sworn by
16 the Clerk, was examined and testified, as
17 follows:

18 DIRECT EXAMINATION

19 BY MR. WEINER:

20 THE COURT: Go ahead, counsel.

21 BY MR. WEINER:

1 Q. Mr. Russ, of course, you've been
2 introduced to the jury, but for the benefit
3 of the transcript that is being made, would
4 you please state your full name.

5 A. Howell Russ.

6 Q. And what is your date of birth?

7 A. The 2nd of April 1961.

8 Q. That makes you how old?

9 A. Forty-one.

10 Q. And you are married?

11 A. Yes, I am.

12 Q. What is your wife's name?

13 A. Cheryl.

14 Q. And you have two children?

15 A. Yes.

16 Q. Would you tell the jury members
17 how old your children are and what their
18 names are.

19 A. Carter is four, and Mariel is
20 two.

21 Q. Howell, how are you employed?

1 A. I work at ICS in Germantown,
2 Maryland.

3 Q. And what is your occupation?

4 A. I'm a project manager for
5 software development projects.

6 Q. What is your educational
7 background?

8 A. I've got a high school diploma, a
9 bachelor's degree, and an M.B.A. from William
10 & Mary.

11 Q. How long have you been riding a
12 bicycle, Howell?

13 A. Since I was five.

14 Q. And this bicycle that sits in the
15 courtroom right now, how did you come to get
16 that bicycle?

17 A. My wife and I, before we got
18 married, came on a sale. There were two of
19 these bikes, and we purchased it as an
20 engagement gift to each other.

21 Q. How long ago was that?

1 A. That was eight years ago.

2 Q. Now, what is your address where
3 you currently reside?

4 A. 4902 Fieldwood Court in Fairfax.

5 Q. How far is that from the
6 courthouse?

7 A. It's real close to George Mason
8 University campus, maybe a mile and a half
9 from the courthouse.

10 Q. How long have you lived at that
11 address?

12 A. For three years, since 1999.

13 Q. Now, Howell, you have there a
14 schematic, a diagram. Can you just tell the
15 jury what is depicted in that diagram?

16 A. That's a diagram of the four
17 lanes of Braddock Road, and it shows the
18 intersection of Braddock with Prestwick
19 Drive.

20 Q. And let me take you back, if I
21 may, to the morning of June 20th, 2001.

1 Would you describe for the jury what
2 occurred, what kind of day it was, and what
3 you did that morning.

4 A. I got up. I looked out the
5 window. It was a beautiful day, very clear,
6 sunny, very temperate temperatures, a great
7 day for a bike ride. And that's the day --
8 that's the idea I had in my mind.

9 And I talked to my wife, and I
10 said, Hey, let's -- let me take Carter for a
11 bike ride in the new trailer we had just
12 purchased.

13 Q. Now, you had had the bicycle for
14 quite some time. How long had you had this
15 trailer?

16 A. I believe it was no more than a
17 few months. We had purchased it from some
18 friends of ours.

19 Q. What was involved in your
20 preparation of going on the bike ride?

21 A. Well, I got my bike out into the

1 driveway, and then I pulled the trailer out
2 into the driveway. And then the trailer at
3 that time attached to the bike with a clamp
4 that I would tighten and then put a safety
5 strap on the back of the bike, as well, in
6 case the clamp failed.

7 And then I put my bicycle helmet
8 on, and I put my bicycle helmet on my son,
9 and I strapped my son into the -- one of the
10 two seats in the trailer. And when he was
11 secure, I shut that mesh covering over there
12 to keep dust and gravel from hitting him.

13 Q. So both you and Carter had
14 helmets?

15 A. Correct.

16 Q. And what were you wearing in
17 terms of clothing?

18 A. I had a white T-shirt on, and I
19 had a blue pair of shorts on.

20 Q. Did your bike ride have any
21 particular destination?

1 A. No. I just wanted to spend some
2 special time with my son. I had been working
3 pretty intensely the couple of weeks before,
4 and I just wanted to spend some time with him
5 and ride until I was mildly tired and then
6 turn around and come back the way I came.

7 Q. So would you describe for the
8 jury your actual path of travel, starting out
9 of your driveway.

10 A. Okay. I exited my driveway. I
11 live on a cul-de-sac. I exited the
12 cul-de-sac and turning -- my cul-de-sac was
13 called Fieldwood Court. I turned left on
14 Fieldwood Drive. I came to the intersection
15 of Fieldwood Drive and Oakcrest Drive. I
16 turned right on Oakcrest. I came to the
17 intersection of Oakcrest and Shadow Valley
18 and turned left. And at the end of Shadow
19 Valley before it gets to Braddock Road, I
20 entered the bike path.

21 Q. All right. I show you this

1 County of Fairfax countywide trail plan. Are
2 the roads you just mentioned depicted on this
3 map?

4 A. Yes, they are.

5 Q. And, in particular, you mentioned
6 that you came out of Shadow Valley onto
7 Braddock.

8 A. Correct.

9 Q. And is that section where you
10 turn onto Braddock, does that have any
11 demarcations which can be found here in the
12 legend?

13 A. Like the bike path?

14 Q. Yes.

15 A. There's -- I'm sorry. There's a
16 bike path here, and it's marked with red
17 dots.

18 Q. Can you describe physically that
19 bike path?

20 A. When it enters the residential
21 streets, it has the cement aprons that taper

1 down to the level of the street. And then in
2 between the aprons, there are -- there's a
3 wide stretch of asphalt that makes up the
4 path. The resident goes by -- that
5 particular section goes by a residential
6 section.

7 Q. Now, as it goes along Braddock
8 Road, can you describe the topography of it?
9 Is it level? uphill? downhill?

10 A. It's uphill. It's uphill.

11 Q. From where you --

12 A. From where I was going all the
13 way up to Prestwick where it crests.

14 MR. WEINER: Your Honor, I
15 apologize. I don't have the exhibit number
16 on this.

17 THE COURT: Well, I'll take it up
18 at another time.

19 BY MR. WEINER:

20 Q. Howell, how many times had you
21 been biking that year, the spring of 2001?

1 A. It really wasn't that many.

2 Q. And how many times of the times
3 you had been biking did you have Carter in
4 this trailer?

5 A. If I'd ridden with the --
6 probably four or five times that year to
7 date, that year in June.

8 Q. And just for the clarity of the
9 record, this bicycle that we have in front of
10 us and the trailer, is that what you were
11 operating that day?

12 A. Yes.

13 Q. And we have a yellow handle bar
14 pack. Was that on there that morning?

15 A. Yes, it was.

16 Q. So this is the basic
17 configuration of what you were operating that
18 morning?

19 A. That's correct.

20 Q. Now I'm going to hand you four
21 photographs and ask you to identify those.

1 Use the number on the back.

2 A. This is Exhibit 8. This is a
3 photograph of the intersection of Prestwick
4 and Braddock Road. The photographer is
5 facing east, looking at the direction from
6 which I was coming. You see the four lanes
7 of Braddock, both westbound and eastbound,
8 and the two lanes of Prestwick.

9 Q. Now, let me ask you this: You
10 had lived in this house for how long at that
11 time?

12 A. I believe it was three years at
13 that time.

14 Q. Okay. So you were very familiar
15 with that section of Braddock Road?

16 A. I'd been there several times,
17 yes.

18 Q. You're talking about the bike
19 path?

20 A. Yes.

21 Q. Now, what about Prestwick Drive?

1 A. I've ridden to the end of
2 Prestwick Drive several times, as well.

3 Q. Can you describe Prestwick Drive?

4 A. It's a long street that goes back
5 into a very nice neighborhood, very quiet
6 neighborhood. It's the only way in and out
7 of that neighborhood. I believe the speed
8 limit on Prestwick is 25. I'm guessing,
9 but --

10 Q. Lines on the street?

11 A. No, no lines on the street,
12 except for that spot.

13 Q. Continue.

14 A. This is a photograph, Exhibit 9.
15 This is -- the photographer is facing west,
16 looking across Prestwick. You can see
17 Braddock Road here and Prestwick there.

18 Q. Please continue.

19 A. Okay. Exhibit 12, this is a
20 picture of the same intersection from the
21 point of view of facing across Prestwick --

1 across Braddock from Prestwick. So this --
2 the photographer was facing north at this
3 point.

4 Q. The photographer would have been
5 on Prestwick Drive?

6 A. Right. This is Exhibit 10. This
7 is a slightly similar view facing east down
8 Braddock Road, looking from across Prestwick
9 Drive, and you can see the bike path very
10 clearly for a very long stretch of bike path.

11 Q. Howell, if you would now describe
12 for the jury what you observed when you
13 started peddling westbound up the hill on
14 Braddock Road.

15 A. Well, I observed the hill, and I
16 remember thinking about, Wow, it's a hill.
17 As I came in this area where the bike is
18 about right now, that's when I first saw
19 Mr. Destival. It's fairly far back here. I
20 saw him come to a stop in this vicinity, but
21 he did not block the bike path route.

1 I continued to ride the bike path
2 west, searching in all directions. I've got
3 my son in the back of this trailer, and I
4 don't want anything to happen to him,
5 obviously.

6 Q. Let me stop you there. At this
7 time your son, Carter, is three years old?

8 A. He's three.

9 Q. And how much does he weigh?

10 A. He weighs between 30 and 40
11 pounds at this point. He's a big
12 three-year-old.

13 Q. Thank you. You can continue.

14 A. So I continued to ride slowly up
15 this hill on the bike path. Mr. Destival
16 remained stopped, doesn't move. And I get to
17 the intersection at that point.

18 Q. About how long did you observe
19 the Destival vehicle stopped?

20 A. It's hard to say in terms of
21 time, but it was -- this whole event happened

1 quickly, but it was a major part of the
2 event. I saw him stopped from the point -- I
3 was way back -- there's a -- I'm sorry.
4 There's a photograph that shows a utility
5 pole that I can reference the place and
6 pinpoint it for the jury.

7 Q. I'll hand you what's been marked
8 as Exhibit 10.

9 A. This utility pole here, which is
10 fairly far back, is when I first saw
11 Mr. Destival come to a stop at that
12 intersection.

13 Q. What type of vehicle was he in?

14 A. It was a beige-colored sedan.

15 Q. And what else were you able to
16 notice about the vehicle or the driver?

17 A. I noticed at that point, at that
18 position where I first saw Mr. Destival, I
19 saw his head turn in my direction.
20 Mr. Destival wears glasses, and I could see
21 the reflection of the glasses from behind --

from where he was. Behind his window on the other side of the driver's side was lighter, so I could see that he was pointing his head directly at me, and he did so several times while I'm riding up that hill.

Q. How many times did you see him look in your direction?

A. It was multiple times. He was obviously checking traffic, and I was obviously checking traffic. I may have missed a few times when he saw me because I was checking the vicinity, as well.

Q. What occurred as you began to cross Prestwick Drive?

A. Well, as I approached, Mr. Destival remained stopped, no inclination to move. And I moved into the intersection and crossed my front tire at the curb. And I recall there's a little seam in the curb, and I remember putting my wheel on that seam to minimize the bumps to my son. At that point,

CASAMO & ASSOCIATES, Inc.

Court Reporting, Video Depositions, Trial Preparation/Presentation

Alexandria (703) 313-4800

Culpeper (540) 825-7482

www.casamo.com

.com

1 I'm also checking around the entire scene for
2 safety for myself and my son.

3 As I got to the point in
4 reference to Mr. Destival's car where -- his
5 car didn't have a hood ornament, but that's
6 the point where my hip was -- I noticed that
7 his car was accelerating at me very rapidly.

8 Q. Now, let me stop you there.

9 A. Okay.

10 Q. You said you saw the Destival
11 vehicle stopped; is that correct?

12 A. (Nods head.)

13 THE COURT: You need to answer
14 out loud.

15 THE WITNESS: Oh, yes, ma'am.
16 Yes.

17 BY MR. WEINER:

18 Q. Howell, let me ask you this:
19 Have you ever testified before in court?

20 A. No.

21 Q. Are you a little nervous right

1 now?

2 A. Just a little bit.

3 Q. Okay. I'll speak clearly and
4 slowly. I want to ask you this question:
5 Did you see the Destival vehicle come to the
6 stop, or was it already there when it came
7 into your view?

8 A. I saw Mr. Destival's car come to
9 a stop and stay there and not move.

10 Q. From how far down did you see it
11 approach the intersection?

12 A. It was at that utility pole,
13 which I've walked off, you know, the 85- to
14 90-pace point.

15 Q. That's where you were, but what
16 I'm asking you is, did you see the Destival
17 vehicle from before this line coming down
18 Prestwick Drive?

19 A. No, I didn't. He just came to a
20 stop beyond that white line, but not in the
21 path of the bike path.

1 Q. How far before the stop sign did
2 you see the Destival vehicle in motion?

3 A. It wasn't that far because that
4 embankment cuts off the view. I just saw a
5 car come through the stop sign and stop
6 before the closest edge of the bike path.

7 Q. You were telling us what happened
8 when you were in front of the Destival
9 vehicle.

10 A. When I noticed that he was
11 accelerating towards me, I let out a yell. I
12 didn't really know what to do at that point.
13 My state of mind was focused on what's
14 happening to my son at that point.

15 I recall putting my hands on the
16 hood of the car and trying to do anything I
17 could to stop the car, futilely. I remember
18 being in the air. I remember trying to flail
19 and actually swing back to my son to see if
20 there was -- you know, lots of desperate
21 things go through your mind in a moment like

1 this, I found out.

2 And then the next thing, I
3 realized I was on the pavement on the
4 driver's side of the car.

5 Q. Where was -- all right. You're
6 on the ground. What happens next?

7 A. I try to get up and get to my son
8 as quickly as I could. I got up, and I fell.
9 I didn't really fully comprehend why. And I
10 just crawled back to my son, who was
11 hysterically crying. And I remember
12 thinking, Thank God he's crying because he's
13 still alive.

14 Q. What happened next?

15 A. My son was struggling to get out
16 of the trailer. He was still crying like I'd
17 never seen him cry before.

18 I was worried about getting him
19 out of the trailer in case he had been
20 injured or had any broken bones, but he was
21 struggling so much with the straps on the

1 trailer. I started to fumble with the
2 straps, but I'm disoriented at this point.

3 Mr. Destival was out of his car
4 now. He helped me get Carter out of the
5 trailer. I think I just rolled over and held
6 Carter in my lap, and Carter clung to me, and
7 he -- it was as if he was in a cold sweat.

8 Q. So that the jury is oriented, if
9 this is the alignment of the bike and the
10 trailer, from which side does the Destival
11 vehicle come at you?

12 A. The Destival vehicle would be
13 coming from this direction.

14 Q. From where the court reporter is?

15 A. Where the court reporter is.

16 Q. Where does your bike end up?

17 A. My bike ends up slightly to the
18 left but still fairly dead in front of
19 Mr. Destival's car. I remember when the car
20 was accelerating and starting to hit my leg
21 and my bike, the front wheel started -- I

1 remember seeing it bend under the car, and at
2 that point is when I feel that I had my hands
3 on the hood and toppled over the front of the
4 car.

5 Q. What did Mr. Destival say to you?

6 A. He asked if there was anything he
7 could do, and he also admitted that this was
8 his fault, and was there -- he asked me
9 repetitively, was there anything he could do
10 for us.

11 Q. And, in fact, what did he do for
12 you?

13 A. I remember having trouble getting
14 words together, and I knew I just wanted to
15 get my son home at this point, and my wife
16 was at home with our other child. And,
17 Mr. Destival, I don't know if he dialed my
18 phone number for me or whether I dialed it,
19 but we got a phone call connected to my wife,
20 and I asked my wife to come pick us up.

21 Q. Now, he didn't know your

1 telephone number, did he?

2 A. I had to have told him the
3 telephone number.

4 Q. And how long did it take your
5 wife to get there?

6 A. She was there surprisingly fast.
7 Obviously, she was very concerned, as well.

8 Q. What happened when your wife
9 arrived?

10 A. My wife went right to Carter,
11 naturally. She got him into the pickup truck
12 with the car seat. Mr. Destival and my wife,
13 I remember, helped each other get the bike
14 and the trailer into the back of the pickup
15 truck. And my wife helped me into the
16 passenger side and up the step and into the
17 car, and we went home.

18 Q. Tell the jury what happened when
19 you got home.

20 A. The first thing I did was get my
21 wife to help me out of the car. We got into

1 a lawn chair that happened to be in the
2 driveway at that point. We grabbed a cooler.
3 My wife got a cooler and got a bag of ice
4 that we had in the freezer and some water,
5 and we iced down my foot as fast as we could
6 because it hurt pretty badly at this point.

7 Q. At some point in time did you
8 decide that the ice pack wasn't going to
9 resolve the problem with your foot?

10 A. Well, the whole reason for the
11 ice pack was really just to keep the swelling
12 down. I knew that much about first aid. And
13 my wife needed some time to get the kids
14 situated with a neighbor so that she could
15 take me to the emergency room, but we made
16 the decision to go to the emergency room in
17 the car ride from the scene.

18 Q. What emergency room did you go
19 to?

20 A. We went to the one right down
21 here on 123, that Inova urgent care place.

1 Q. And what treatment did you
2 receive at the emergency room?

3 A. They got me in pretty quick. The
4 nurse did the normal check-in process of
5 temperature, blood pressure, that kind of
6 thing. They gave me some more ice for my
7 foot and got me to x-ray fairly quickly. I
8 remember there were a few x-ray films taken.
9 And then they took me back to the emergency
10 room where my bed was and where the doctor
11 was to review the x-rays and look at my foot.

12 Q. And you were examined by a
13 Dr. George Jastrzebski?

14 A. Yes.

15 Q. And what examination did
16 Dr. Jastrzebski do?

17 A. He confirmed that my foot was
18 very badly broken, and he instructed me to go
19 see an orthopedist.

20 Q. Did you leave the emergency room
21 with any equipment, having had any

1 treatment --

2 A. I remember I was put in a splint,
3 tied on with an ace bandage. And I was given
4 some crutches, and I believe I exited the
5 emergency room in a wheelchair holding my
6 crutches. And we got into the car and called
7 the orthopedic surgeon.

8 Q. When were you first seen by an
9 orthopedic surgeon?

10 A. Probably about 45 minutes after
11 we left the emergency room.

12 Q. Who did you see?

13 A. Dr. Danaceau in Arlington.

14 Q. What did Dr. Danaceau's
15 examination entail?

16 A. He confirmed the ER doctor's
17 diagnosis, I guess. My foot was badly
18 broken. My understanding was that I had
19 broken the keystone of my arch. This was a
20 very critical bone in my foot.

21 MS. JUDKINS: Your Honor, I'm

1 going to object to any hearsay. We've had a
2 little leeway here, but I object to him --
3 the doctors are going to be here to testify.

4 THE COURT: All right. The
5 objection is sustained. Please direct the
6 witness's attention.

7 MR. WEINER: Thank you.

8 BY MR. WEINER:

9 Q. Howell, please don't tell us at
10 this point what the doctors told you. You
11 can tell us what your understanding of your
12 foot's condition was.

13 A. Okay. My understanding of my
14 condition of my foot was that it had
15 essentially been crushed as it --

16 MS. JUDKINS: Your Honor, his
17 understanding is not --

18 THE COURT: The objection is
19 sustained. Let's move on, Mr. Weiner.

20 MR. WEINER: Thank you.

21 BY MR. WEINER:

1 Q. You saw Dr. Danaceau. Where was
2 that?

3 A. That was at his office next to
4 Arlington Hospital.

5 Q. Did he order any additional
6 x-rays be done?

7 A. He put me -- he did -- he took
8 x-rays, his own x-rays, plus reviewed the
9 ones that I'd brought with me, plus he
10 ordered a CAT scan of the foot. And he
11 reviewed all of that, and he examined my
12 foot.

13 Q. And where was the CAT scan done?

14 A. The CAT scan was done right next
15 door at Arlington Hospital that afternoon.

16 Q. So you were at his office, then
17 sent to Arlington Hospital, and then went
18 back to his office?

19 A. Yes.

20 Q. That's all in one day?

21 A. Yes.

1 Q. What was your condition when you
2 left Dr. Danaceau's office?

3 A. My foot was broken and in a boot
4 cast, and I left on crutches.

5 Q. And what was Dr. Danaceau's --
6 what did he tell you had to be done?

7 MS. JUDKINS: Your Honor --

8 MR. WEINER: I'll withdraw the
9 question.

10 BY MR. WEINER:

11 Q. You say you left in a boot cast
12 and crutches.

13 A. Yes.

14 Q. I'll show you what's been marked
15 as Exhibit 15.

16 A. Yes.

17 Q. Does that depict the type of
18 cast --

19 A. This is my --

20 Q. -- we're speaking of?

21 A. These are my legs, and this is

1 the boot cast that I had on my foot, and this
2 is one of my crutches. I guess there's the
3 other one.

4 Q. This is all on June 20th, 2001?

5 A. Correct.

6 Q. There came a point in time when
7 you sought an additional medical opinion, did
8 you not?

9 A. Yes. I --

10 Q. Who did you see?

11 A. I didn't see anybody in this
12 instance. I called my father, who's a
13 retired orthopedic surgeon, and asked him
14 what I thought he should do and came to the
15 conclusion that I needed to go get a second
16 opinion.

17 Q. And who did you -- did you, in
18 fact, get a second opinion?

19 A. Yes, I did.

20 Q. Who did you see?

21 A. Paul Cooper at Georgetown foot

1 and ankle clinic.

2 Q. When did you come under the care
3 of Dr. Cooper?

4 A. It was hard to get an appointment
5 with him, and my foot was stable at this
6 point. So I think it was about six days. I
7 believe I saw him on the 26th of June, which
8 was the following Tuesday.

9 Q. That's six days from the
10 accident?

11 A. Right.

12 Q. How were you getting around those
13 six days?

14 A. I'm not. I'm not. I'm in my
15 basement. And the only trips I'm making is
16 to the bathroom that's 20 feet away, either
17 by crawling or using my crutches.

18 Q. Were you having any problems with
19 your other foot at this time?

20 A. Yeah. I had -- I had sustained
21 some kind of injury to my left foot at the

1 scene, as well. We were primarily focusing
2 on the right foot on the day of the incident,
3 but as I started to crutch around more on my
4 left foot, I noticed that the top of my foot
5 was in a lot of pain. And I had my father,
6 who had made the trip up from Virginia Beach
7 at this point to stay with us, I had him take
8 a look at my foot.

9 Q. So six days goes by, and then you
10 get in to see Dr. Paul Cooper.

11 A. Right.

12 Q. As a result of Dr. Cooper's
13 examination, what happens next?

14 A. I was scheduled for surgery the
15 following day and was in the hospital
16 overnight after that surgery.

17 Q. Could you describe to the jury as
18 best you recall -- well, let me ask you this:
19 Was that done under general anesthesia?

20 A. Yes, it was.

21 Q. And you stayed overnight in the

1 hospital?

2 A. Correct.

3 Q. When you are released from the
4 hospital, what's the condition of your foot
5 at that point?

6 A. I've had my foot cut open; two
7 screws put into the largest pieces of bone
8 that were still left to hold them together.
9 My foot's been sewn up, and I have -- I also
10 have four pins in my -- the side of my foot
11 holding on a piece of equipment that they
12 called an external fixator that -- my
13 understanding, the reason that was necessary
14 is that it had to stretch out my foot so --

15 MS. JUDKINS: Your Honor, I
16 object to his telling --

17 THE COURT: The objection is
18 sustained. Please direct the witness's
19 attention.

20 MR. WEINER: Thank you, Your
21 Honor.

1 BY MR. WEINER:

2 Q. Mr. Russ, I'm going to just show
3 you what has been marked as Exhibits 13 and
4 14. Would you tell the jury what's depicted
5 in those photographs.

6 A. This is my foot. This is the
7 incision on the top of my foot. This is the
8 black external fixator. You can't see the
9 four pins that are stuck into the bones of my
10 foot, but it's attached to those.

11 Q. And 14?

12 A. 14 is a side view of what my foot
13 looked like with the external fixator
14 applied.

15 Q. When you leave the hospital, is
16 this appliance attached to you?

17 A. Yes. It's attached to the bones
18 inside my foot.

19 Q. And it's attached by -- how is it
20 attached?

21 A. There's four pins that are

1 drilled into my foot bones, the good ones,
2 and then the external fixator has clamps on
3 it, and the clamps are tightened down around
4 those four pins. And then once that
5 procedure has been done, then I -- they turn
6 the knob in the middle, and it stretches out
7 your bones.

8 Q. How long were you getting around
9 with this appliance coming out of your foot?

10 A. I guess I should say I'm -- my
11 travel is contained to my basement. I lie on
12 a couch and elevate my foot so that it
13 doesn't throb at this point. And I'm down
14 there for eight weeks.

15 I do make -- you know, my wife
16 got me out a couple of times, a few times,
17 just to get me out of the house, a major
18 ordeal. Every time I bumped that -- one of
19 those pins or that external fixator, I would
20 feel it in my bone, in all four bones
21 wherever that's attached.

1 If I fall and slip and naturally
2 try to catch myself with my bad foot, not
3 that I meant to, but I'd damage that
4 attachment. And that happened once, and the
5 pins started to bleed. You know, if I slip
6 with my crutches.

7 So I stay in my basement, and I
8 pretty much make phone calls and go to the
9 bathroom 20 feet away.

10 Q. So how are you managing to work?

11 A. Very poorly. At that point in
12 time, I was a partner in a start-up firm, and
13 I was the primary rainmaker for that firm.
14 And this was not good for that business.

15 Q. I'll show you what's -- this
16 device, is that what's depicted in that
17 photograph?

18 A. Yes. The device -- my right foot
19 would be here, and this inserted into my --
20 through my skin and into my bones. And this
21 device in the middle would tension it so that

1 the bones would be spread out to allow the
2 bone that was injured to heal as best it
3 could.

4 Q. Now, this was attached to your
5 foot by four screws?

6 A. Correct. And those are those
7 screws.

8 Q. You have other screws in your
9 foot; is that correct?

10 A. I have two screws in my navicular
11 bone, yes.

12 Q. And that was what the surgical
13 procedure involved; is that correct?

14 A. Yes. All of this was done in
15 that same surgical procedure.

16 Q. These four screws are out. What
17 about the other two screws?

18 A. They are still in my foot.

19 Q. What is your understanding with
20 regard to those two screws?

21 MS. JUDKINS: Well, Your Honor,

1 his understanding can only be based on
2 somebody who's not here to testify. I
3 object; hearsay.

4 THE COURT: The objection is
5 sustained.

6 BY MR. WEINER:

7 Q. How many months after the
8 accident, Mr. Russ, are we now?

9 A. I think we're almost at 18.

10 Q. Are those two screws still in
11 your foot?

12 A. Yes, they are.

13 Q. We were talking about work. Are
14 you -- and I'm sorry. I don't think I asked
15 you. How long were you like this with this
16 external fixator?

17 A. Eight weeks.

18 Q. So that gets us -- this happened
19 June --

20 A. The end of June.

21 Q. -- 27th, they put this in?

1 A. So we're in August when -- the
2 end of August is when that got taken out, I
3 believe.

4 Q. When that is taken out, where
5 does that occur?

6 A. Back at Georgetown, Dr. Cooper,
7 more general anesthesia.

8 Q. Another surgical procedure?

9 A. Another surgical procedure.

10 Q. This time you don't have to stay
11 overnight, though?

12 A. No. That was an outpatient.

13 Q. During this time, can you put any
14 weight on your foot whatsoever?

15 A. No.

16 Q. Can you drive?

17 A. No.

18 Q. After they take it out, can you
19 walk on the foot?

20 A. No. They told me not to for -- I
21 believe it was -- well, it was several weeks.

1 And I'm in this -- back in that black boot
2 cast now.

3 Q. So after eight weeks like this,
4 now you're back to this black boot cast?

5 A. Yes.

6 Q. How long do you remain in that
7 after the surgery?

8 A. It was several -- it was several
9 months because I had to start weightbearing
10 on it. I believe it was four months.

11 Q. What's the progression with
12 the -- how are you doing with the crutches?

13 A. Well, I'm doing better now. I
14 mean, I've had lots of practice on them. I'm
15 starting -- at first, they said no weight on
16 the foot. And then after a period of a few
17 weeks, they said I could rest my heel on the
18 floor and do that until it, you know, started
19 throbbing. I mean, I'm still in a lot of
20 pain here.

21 And then as weeks go by and as

1 the progress is going along favorably, I'm
2 putting more and more -- I'm instructed to
3 put more and more weight on my foot until the
4 point where I -- at the end of that 12 weeks,
5 I think, was the -- when I didn't have to use
6 the crutches, but I still had to keep it
7 splinted.

8 Q. I'm checking my notes here. I
9 want to bring you back. While you're in this
10 external fixator, you said you were
11 progressing. Did your recovery have any
12 setbacks?

13 A. Yeah. After -- I guess it was a
14 week or two after the surgery. I started to
15 get a sharp pain in my calf, and this went on
16 for the better part of an afternoon to the
17 point where I called the emergency room.

18 And they thought I had a blood
19 clot resulting from, you know, the stuff they
20 had stirred up at the surgery and said, Come
21 right in. And I was tested for this blood

1 clot, which thankfully I didn't have. That
2 would have been serious.

3 The second instance, because of
4 the surgery, they -- I developed gout in my
5 right foot because of the tissue getting
6 churned up -- my left foot. So at this point
7 I'm not really able to crutch or walk on my
8 left foot at all. So now I'm going to the
9 bathroom crawling.

10 Q. Now, had you ever had gout
11 before?

12 A. No.

13 Q. Were there any other problems
14 that you endured while recovering?

15 A. There was a time when -- I think
16 I mentioned before -- where I had a pretty
17 serious fall. We didn't go into the
18 emergency room, but I believe we called the
19 doctor because I had fallen on that external
20 fixator device, and the pins had gotten
21 jostled to the point where I was bleeding

1 pretty badly out of the pin holes.

2 Q. How did you fall?

3 A. My crutches slipped on a wet
4 tile.

5 Q. What was involved in the care and
6 maintenance of having this contraption?

7 A. Well, my wife needed -- I
8 couldn't do this myself. My wife needed to
9 clean those pin holes twice a day every day
10 with hydrogen peroxide and some antibiotic
11 ointment. Frequently, there would be a
12 yellow discharge coming out of those pin
13 sites which had to be scraped off.

14 Q. Are you able to be of any help
15 with the kids during this period of time?

16 A. No. My wife has another child
17 now. She has three kids now, me and her two
18 other children.

19 Q. So when is it that you are
20 finally -- that you get out of the walker
21 boot and able to walk at all?

1 A. I think we're into October now.

2 Q. And is that the first time you're
3 able to drive, as well?

4 A. Yes, yes. And I can get around
5 with a cane, and I can -- as long as I'm
6 conservative with my walking, I can get back
7 and forth from my office to the car.

8 Q. When was it that you start with
9 physical therapy?

10 A. I believe I started in December,
11 and I continued through, I believe, February
12 with physical therapy.

13 Q. Would you tell the members of the
14 jury what's involved in your physical
15 therapy.

16 A. Well, at this point my ankle is
17 very stiff because it's been immobilized
18 since June, and we've got to get the range of
19 motion back into the -- and the movement back
20 into that ankle so that I can walk again and
21 support my own weight.

1 So the first part of the physical
2 therapy process was about measuring where I
3 was at with my ability to move my foot and
4 then trying to do as much stretching of it as
5 I could without overdoing it.

6 Q. And where is the physical
7 therapy?

8 A. I went to the HealthSouth
9 facility over in Fair Oaks, right across from
10 Fair Oaks mall.

11 Q. How many times a week are you
12 going?

13 A. I'm going three times a week.

14 Q. And how was that impacting on
15 your work?

16 A. Well, it usually would take me
17 about two and a half hours in the morning.
18 I'd try to start it in the morning as early
19 as I could. They didn't open until 8.

20 So I'd get in there early, and
21 then I'd get out, after I had finished all my

1 exercises, probably between 10 and 11 that
2 day. So I'm going into work when it's
3 lunchtime three days a week, which my
4 partners weren't happy about either.

5 Q. How is all this impacting your
6 employment?

7 A. My partners are taking over the
8 firm where I was the lead delivery guy and
9 business developer, which, you know, thank
10 God they did. They made some decisions that
11 I didn't agree with, and I wasn't there to do
12 anything about it.

13 Q. Did this impact your income?

14 MS. JUDKINS: Your Honor, if we
15 could approach the bench.

16 (Whereupon, the following
17 discussion was held at the bench.)

18 MS. JUDKINS: Your Honor, they've
19 made no lost wage claim. It's in their
20 answers to --

21 THE COURT: All right. The

1 objection is sustained.

2 MR. WEINER: We were not putting
3 in any number.

4 THE COURT: The objection is
5 sustained.

6 MR. WEINER: All right. Thank
7 you, Your Honor.

8 (Whereupon, the following
9 proceedings occurred in the presence of the
10 jury.)

11 THE COURT: Go ahead, Mr. Weiner.

12 MR. WEINER: Thank you, Judge.

13 BY MR. WEINER:

14 Q. What type of stresses did this
15 put on your employment?

16 MS. JUDKINS: Same objection.

17 THE COURT: The objection is
18 sustained. Let's move on to another area.

19 BY MR. WEINER:

20 Q. Mr. Russ, are you still at the
21 same employment you were?

1 A. No.

2 Q. With regard to your physical
3 therapy, when you leave physical therapy, how
4 are you feeling?

5 A. My foot is more sore than it was
6 when I went in there.

7 Q. What types of things are they
8 doing to you there?

9 A. Well, we're -- I want to say "we"
10 because, you know, I may have overdid it, as
11 well. But what we're trying to do is allow
12 my right foot to bend the way it used to,
13 just like my left foot, and it doesn't. It
14 only bends a fraction of degrees that -- so
15 we're trying to push that much -- we're doing
16 stretching exercises, aggressive stretching
17 exercises.

18 Q. When do you finish with physical
19 therapy?

20 A. I believe it was in February.

21 Q. And now we're in February of

1 2002?

2 A. Correct.

3 Q. When you leave physical therapy
4 in February of 2002, do you have the same
5 mobility in your right foot as you do in your
6 left foot?

7 A. No.

8 Q. How would you describe your
9 walking at that point?

10 A. I'm -- I'm thankful to be
11 walking. I'm walking very cautiously. I'd
12 been advised by -- I understood it was bad
13 for me to maintain any kind of limp, so try
14 to walk as normally as I could. My foot's in
15 pain. My foot's still in pain.

16 Q. In fact, did you put yourself on
17 a walking program at some point in time?

18 A. Yes, I did. This was in March,
19 and I pushed it probably too much.

20 Q. How far were you able to walk?

21 A. I was able to push myself to walk

1 about four miles a day.

2 Q. How would you feel after walking
3 four miles?

4 A. I'd have to ice my foot down.

5 Q. Why did you do that?

6 A. I thought it would make me feel
7 better. I thought it would help me heal
8 faster. I didn't want to -- I didn't want to
9 curl up in a ball and let this overcome what
10 I wanted to do with my life.

11 Q. There came a point in time that
12 you stopped that?

13 A. Yes, when I told Dr. Cooper what
14 I was doing, and he instructed me to stop
15 immediately, which I did.

16 Q. The last -- well, let me ask you
17 this: What special devices -- you're done
18 with crutches. You're done with the external
19 fixator. You're out of the cast boot that
20 straps on. What type of special devices do
21 you still need to use today?

1 A. I need to use custom-made foot
2 orthotics for the rest of my life.

3 Q. And can you describe that, in
4 case any of the members of the jury are not
5 familiar with the term "orthotics"?

6 A. It's basically like the
7 Dr. Scholl's kind of thing you can buy at the
8 grocery store, but these are custom-made.
9 They've got various levels of different
10 materials in there to provide a very firm
11 foundation for my foot and really support my
12 arch. They're pretty expensive.

13 Q. You say they're custom-made.
14 Where do you get these?

15 A. I get mine done at Richey &
16 Company in McLean because the orthotic tech
17 that works for Dr. Cooper comes out of that
18 shop, so he does the orthotics.

19 Q. Who fixes the orthotics?

20 A. The same -- the orthotic tech.

21 Q. Where is that done?

1 A. We do it at the store, at Richey
2 & Company in McLean. Basically, they take
3 foam impression molds of my feet, and then
4 they've got to custom-make one of these
5 orthotic pads for each of my feet. I can't
6 just do one. I've got to do both.

7 Q. And how much does a pair of
8 orthotics cost?

9 A. \$305.

10 Q. What about your shoes, are you
11 required to wear special shoes?

12 A. I've got to wear special shoes
13 that can accommodate these orthotics. And my
14 shoes are made by a company in San Antonio
15 named SAS, and my shoes cost \$180.

16 Q. Howell, as you mentioned, we're
17 now 18 months since the time of this
18 accident. What physical limitations do you
19 have today?

20 A. Well, everything's a choice. I
21 can use my foot or not. I can live as normal

1 a life as I want or not, but there's a price.
2 What limits me specifically is walking on any
3 kind of uneven surface.

4 So I can't cut the grass. My
5 wife cuts the grass. I can't run and play
6 with my children in the back yard. I have to
7 walk behind them and watch every mound of
8 dirt in the yard.

9 I can't climb a ladder because my
10 arch doesn't support my foot on a ladder. My
11 wife and I are both avid gardeners, and I
12 can't dig with a shovel anymore. I can't put
13 my right foot on the shovel to push it, and I
14 can't put my left foot on the shovel to push
15 it because I can't stand up on my right foot
16 by myself and use a shovel.

17 Q. Now, you just mentioned mowing
18 the lawn. Is that something you did before?

19 A. Yes.

20 Q. Your wife does it now?

21 A. Yes.

1 Q. How do you feel about that?

2 A. I feel humiliated. I mean, what
3 do my neighbors think? What's my wife -- I
4 mean, my wife tells me what she thinks about
5 having to cut the grass, but --

6 Q. With regard to your physical
7 limitations at work, how is your injury
8 affecting your workday?

9 A. My job is fairly sedentary. So
10 as long as I'm being careful when I get up
11 and making sure my foot is stretched a little
12 bit and I don't take a bad step, I'm in
13 decent shape when I'm in the office.

14 My job now, I'm traveling about
15 40 percent. I'm responsible for accounts in
16 Philadelphia, Tampa, Boston, and Arlington
17 and Silver Spring. So for the cities I have
18 to fly to, I don't look forward to airports
19 anymore carrying my luggage.

20 Q. Howell, what are your concerns
21 regarding -- aside from your foot? Let's

1 talk for a moment. You had another health
2 crisis in the past two years. What was that?

3 A. I had a growth inside my skull
4 that needed to be removed.

5 Q. And that was taken care of?

6 A. Yes. They think they were able
7 to remove the whole tumor. The outcome was,
8 I lost control of my eyelid and my ability to
9 move my eyelid. The reason you can see my
10 eyelid blink now is because I have a spring
11 implant in there that pushes my eyelid down.

12 The right side of my face is
13 paralyzed, and I'm completely deaf in my
14 right ear. And I need to use these drops to
15 lubricate my eye from time to time, which
16 you've probably seen.

17 Q. Now that that surgery has been
18 done, are there any medications that you're
19 taking for that condition?

20 A. No. There's no -- we're out of
21 the woods on the tumor. I'm expecting a very

1 long life.

2 Q. So aside from the residual
3 effects of that surgery and your foot, how
4 are you doing?

5 A. I'm doing well. I -- I have
6 depression. I medicate the depression. You
7 know, I move on.

8 MR. WEINER: Just one moment, the
9 Court's indulgence.

10 THE COURT: All right.

11 BY MR. WEINER:

12 Q. Howell, in these photographs
13 there is depicted a scar on the top of your
14 foot. How does that look in comparison to
15 the photographs?

16 A. It's not as red as it was. It's
17 still there.

18 Q. Do you have any scheduled
19 appointments with Dr. Cooper coming up?

20 A. I believe we're on a six-month
21 cycle of checking up. And I'm getting

1 increased pain in my foot. You know, I -- I
2 don't need to be a doctor to know my foot's
3 getting worse.

4 The symptoms that I've described
5 to Dr. Cooper, he said are arthritic. I want
6 to -- I want to be able to walk on my foot,
7 and I don't want to have my ankle fused, the
8 bones in my ankle fused together. That's
9 what I'm scared of right now.

10 Q. What about the screws that remain
11 in your foot?

12 A. They're another concern. You
13 know, I'm not getting any younger. My bones
14 aren't getting any more dense. What happens
15 if that screw starts to work loose or the
16 head of it pops out into the joint and starts
17 tearing up the inside of my joint so that I
18 can't articulate my foot anymore. Those are
19 concerns of mine.

20 MR. WEINER: Thank you, Howell.

21 Your Honor, I will be moving into

1 evidence all these exhibits.

2 THE COURT: All right. I'll take
3 it up at another time.

4 Cross-examine.

5 CROSS EXAMINATION

6 BY MS. JUDKINS:

7 Q. Mr. Russ, you suffered from
8 depression before this accident ever
9 happened; correct?

10 A. Yes, uh-huh.

11 Q. You were under the care of a
12 psychiatrist more than ten years ago; right?

13 A. Right.

14 Q. And on medication for that
15 condition; correct?

16 A. Correct.

17 Q. So you're not telling the ladies
18 and gentlemen of the jury that depression is
19 related to this incident that brings us here
20 today?

21 A. Well, am I allowed to tell you

1 what my psychiatrist most recently said?

2 MS. JUDKINS: Well, Your Honor,
3 since he never identified any psychiatrist,
4 I'd object to that.

5 THE COURT: All right. Ask
6 another question if you have one.

7 BY MS. JUDKINS:

8 Q. How many years have you been
9 under the care of a psychiatrist?

10 A. There was the major depression I
11 had about ten years ago, and I was under the
12 care of a psychiatrist, Dr. Durr, for three
13 years, and I started going back to a
14 psychiatrist in October.

15 Q. This job that you had as of June
16 of 2001, you only started that job January
17 2001; right?

18 A. I believe it was February.

19 Q. February 2001. And it was in
20 December of 2001 that you were diagnosed with
21 a brain tumor; right?

1 A. Yes.

2 Q. And you had to have three
3 surgeries for that; correct?

4 A. Yes, uh-huh.

5 Q. Out of state, in California;
6 right?

7 A. Uh-huh.

8 Q. And that involved lengthy
9 recuperation; correct?

10 A. Correct.

11 Q. And the walking regime that you
12 talked about, the going out and walking four
13 miles a day, that was after the surgery on
14 your brain tumor because you were having
15 balance difficulties; correct?

16 A. They -- I wasn't having balance
17 difficulties. They -- the doctors
18 recommended that I walk because it was
19 helpful to the bone healing up and any
20 recalibration of the balance that needed to
21 happen.

1 Q. As a result of the tumor; right?

2 A. Yes.

3 Q. Okay. Now, you also have a
4 history of a fracture in your low back;
5 right?

6 A. It's a congenital defect, yes.

7 Q. Did you not fracture your low
8 back playing football in high school?

9 A. I did, but it was -- I can't
10 pronounce the medical term, but it's because
11 of that congenital defect.

12 Q. And your father has treated you
13 on and off over the years for that condition,
14 has he not?

15 A. Yes, he has.

16 Q. In fact, you went to the
17 emergency room in August of 2002 after you
18 had biked all day the day before with your
19 child carrier; right?

20 A. Uh-huh.

21 Q. Correct?

1 A. Right.

2 Q. And you were having back pain;
3 right?

4 A. Tell me -- refresh my memory.
5 What did you just say the date was?

6 MS. JUDKINS: I can show him
7 what's been identified as Defendant's Exhibit
8 3.

9 THE COURT: Well, he's asking if
10 you can refresh his recollection as to the
11 date.

12 MS. JUDKINS: Right, and I'd like
13 to show him.

14 MR. SPIVEY: Your Honor, we have
15 an objection to this exhibit.

16 THE COURT: Well, can you refresh
17 his recollection as to the date?

18 MS. JUDKINS: For this reason
19 only, can I show him the --

20 THE COURT: Just give him a date.

21 MS. JUDKINS: August 19th, 2002.

1 THE WITNESS: Yeah, it was for
2 back pain, but it wasn't the back pain from
3 the L5 lumbar vertebrae. I was diagnosed
4 with that back pain as having kidney stones
5 as a result of my elevated uric acid levels,
6 which was -- were related to the gout.

7 BY MS. JUDKINS:

8 Q. And you did spend the day before
9 riding your bike, pulling the carrier;
10 correct?

11 A. Yeah. I chose to do that that
12 day.

13 Q. And you actually have ridden your
14 bike more since June of 2001?

15 A. I have because the doctors have
16 recommended that bike riding is an excellent
17 therapy for my foot.

18 Q. And you were diagnosed with gout;
19 correct?

20 A. Correct.

21 Q. And one of the ways you've

1 managed the gout -- really the way you have
2 managed it is your diet. You were told not
3 to eat as much red meat; correct?

4 A. Well, I was told a lot of things,
5 but, I mean, I've minimized -- I've done
6 everything I could to minimize my habits that
7 didn't contribute to a healthy life for my
8 foot or my tumor or -- and I also lost a lot
9 of weight to reduce the weight on my foot. I
10 mean, I don't want to -- I feel I'm doing
11 everything I can to make this a less bad
12 situation.

13 Q. With regard, specifically, to the
14 gout, Mr. Russ, isn't it true that you manage
15 that with your diet?

16 A. That was one of the ways, yes.

17 Q. And you did admit that you ate a
18 lot of red meat before; right?

19 A. Yes.

20 Q. And you don't anymore; correct?

21 A. No.

1 Q. Okay. Now, the photographs that
2 have been introduced of the scene of the
3 accident, these were taken two to three days
4 after the accident when you were at the
5 scene; right?

6 A. I'm not -- I'm not exactly sure
7 of the date, but it was taken as close to the
8 accident date as we could manage.

9 Q. You and your lawyer; right?

10 A. Yes.

11 Q. You and your lawyer went to the
12 scene within days of the accident --

13 A. Yes.

14 Q. -- when the photographs were
15 taken; correct?

16 A. Correct.

17 Q. And among the photographs that
18 were taken -- let me show you Defendant's
19 Exhibits 1B and 1C.

20 MS. JUDKINS: If I could approach
21 the witness, Your Honor.

1 THE COURT: All right.

2 BY MS. JUDKINS:

3 Q. Among the photographs that were
4 taken were those two; correct?

5 A. I don't -- I don't recall.

6 Q. Do you recall seeing vehicles,
7 other vehicles in the intersection where this
8 accident occurred, just as those vehicles are
9 placed, beyond the stop line?

10 A. Let -- let me help you out. I've
11 seen vehicles pull beyond that stop sign,
12 yes, on several occasions when I've been in
13 that vicinity.

14 Q. Because in order to make a turn
15 onto Braddock Road from that particular
16 street, Prestwick Drive, one must pull beyond
17 the white stop line because you can't see?

18 A. The only -- the only way I
19 could -- the only thing I can talk to is the
20 turns I've made heading north on Prestwick
21 this way, and they've been while I've been on

1 my bike. And I've just been making this
2 right turn that way. I've never done it in a
3 car, so I can't speak to your question.

4 Q. You can't speak to whether or not
5 you can see to the right or the left when
6 you're stopped on Prestwick Drive?

7 A. I've never done it in a car.

8 Q. All right. What about that day
9 when you went out there to take photographs?
10 Is that something you noticed when you were
11 standing in the intersection?

12 A. I noticed the embankments, yes.

13 Q. To the right and to the left;
14 correct?

15 A. There's embankments on both
16 sides, yes, ma'am.

17 Q. And there's two lanes of travel,
18 east and west Braddock Road; right? The
19 diagram shows that.

20 A. Yes, ma'am.

21 Q. Forty-five-mile-an-hour speed

1 limit?

2 A. That --

3 Q. Road curves? In either direction
4 there's a curve in the road, is there not, as
5 it approaches that hilltop?

6 A. I'm not sure.

7 Q. Is there also a hill coming the
8 other side? Traffic coming eastbound, is
9 there a hill?

10 A. There is a hill.

11 Q. And you admit that with regard to
12 this particular trailer that you had on the
13 bicycle, isn't it true that you testified in
14 deposition you had only owned it one to three
15 months before this accident?

16 A. Right, it was a short time
17 before --

18 Q. And you had only -- I'm sorry.
19 Pardon me?

20 A. It was a short time before this
21 particular ride.

1 Q. And you had only ridden with your
2 child actually in that trailer maybe two to
3 three times before?

4 A. That's -- to the best of my
5 recollection, yes.

6 Q. And you had never owned a child
7 carrier before?

8 A. Not of this type, no.

9 Q. Of any type?

10 A. I had the child seats that would
11 sit on the back.

12 Q. Okay.

13 A. I think that black --

14 Q. Not a separate carrier?

15 A. -- rack --

16 Q. Right.

17 A. -- was for that.

18 Q. Okay. And when you were 85 to 90
19 paces away -- and would you agree -- you
20 paced this off? That's where you came up
21 with 85 to 90 paces; right?

1 A. Yes, ma'am.

2 Q. Is that about two to three feet
3 per pace?

4 A. Yes.

5 Q. Approximately?

6 A. Approximately, yes, ma'am.

7 Q. So from that far back is when you
8 first saw the defendant's car; right?

9 A. When I first saw the defendant's
10 car and when I first saw the defendant turn
11 his head towards me.

12 Q. In your direction, in your
13 direction he was turning his head towards
14 you?

15 A. Correct.

16 Q. All right. You don't know
17 whether he happened to be checking for
18 traffic coming from the right, do you?

19 A. I can't speak to whatever he was
20 checking for.

21 Q. You do not know whether he ever

1 saw you at all?

2 MR. WEINER: Objection, Your
3 Honor. I mean, how could he --

4 THE COURT: The objection is
5 sustained.

6 MR. WEINER: Thank you.

7 BY MS. JUDKINS:

8 Q. You never made eye contact with
9 Mr. Destival, did you?

10 A. I never saw the pupils of his
11 eyes, but I did see the reflection of his
12 glasses pointing in my direction, yes, ma'am.

13 Q. And you, as you continued to move
14 up Braddock Road along that path, you never
15 stopped when you got to the end of the path
16 before entering Prestwick Drive, did you?

17 A. No, ma'am, because I was moving
18 so slowly, and I had -- if I had moved any
19 more slowly, I would have fallen off my bike.

20 Q. Well, you were going as fast as
21 possibly ten miles an hour, were you not?

1 A. It was way closer to the three
2 end of that range, ma'am.

3 Q. You did give an estimate, though,
4 in your deposition of three to ten miles an
5 hour; correct?

6 A. Yes, ma'am, yes, ma'am.

7 Q. And you were moving?

8 A. I was moving.

9 Q. And you didn't stop?

10 A. I did not stop.

11 Q. You could have stopped? Nothing
12 to stop you; right?

13 A. Why would I?

14 Q. Well, why wouldn't you have
15 stopped to make sure Mr. Destival had seen
16 you, Mr. Russ? Would that have been a good
17 reason to stop?

18 A. I didn't -- I didn't feel like I
19 was putting my son in any kind of jeopardy.
20 That car was stopped.

21 Q. Why didn't you stop to see

1 whether or not traffic had cleared for him to
2 make his left turn?

3 A. I had the right-of-way.

4 Q. You think?

5 THE COURT: Well, please don't
6 argue with the witness.

7 MS. JUDKINS: Okay. All right.

8 THE COURT: Any other questions?

9 BY MS. JUDKINS:

10 Q. So you assumed that you could go
11 without stopping?

12 A. I -- I checked the intersection
13 and assessed it to be safe for myself and my
14 son to enter the intersection, and I believe
15 I had the right-of-way. And Mr. Destival's
16 car was not blocking the path of the bike
17 path.

18 Q. Mr. Destival's car was in the
19 general vicinity where both of these two
20 vehicles in Defendant's Exhibit 1B and C were
21 located?

1 A. No, ma'am, no, ma'am. These
2 vehicles are much closer to Braddock Road
3 than Mr. Destival's car was.

4 Q. Then you were aware as you
5 approached that Mr. Destival was waiting to
6 turn left onto Braddock Road; right?

7 A. I had no idea what
8 Mr. Destival -- which way he was going to
9 turn. I knew he was stopped at that -- he
10 was stopped where he stopped his car.

11 Q. And he was stopped where he
12 stopped his car at least 160 to -- over 200
13 feet before you ever reached the
14 intersection; correct?

15 A. Yes, ma'am. The traffic on
16 Braddock Road was very heavy. It was rush
17 hour in the morning. And frequently, you
18 know, at least at my neighborhood and often
19 back to Mr. Destival's neighborhood, the
20 traffic will be bumper to bumper and stopped
21 waiting for the 123 and Braddock Road light

1 to change.

2 Q. It wasn't bumper to bumper that
3 morning, though, was it?

4 A. The cars' bumpers were not
5 touching each other, no, ma'am.

6 Q. They were moving at the speed
7 limit?

8 A. When the light would change, they
9 would move.

10 Q. All right. And you saw cars
11 moving up and down that morning, as you were
12 driving up the bike path, going about 40, 45
13 miles an hour, did you not?

14 A. Yes, ma'am. I'm -- I'm sorry.
15 When the light would turn green and the
16 traffic would go, it would come to speed.
17 When the light would turn red, the traffic
18 would stop and back up, and that was
19 happening intermittently.

20 Q. Let me ask you to look at page 28
21 of your deposition.

1 MS. JUDKINS: If I could approach
2 the witness.

3 THE COURT: Well, actually,
4 Ms. Judkins, if you're at a stopping place --

5 MS. JUDKINS: Oh, okay.

6 THE COURT: -- let's go ahead and
7 take our lunch recess at this time.

8 MS. JUDKINS: All right.

9 THE COURT: You may step down,
10 sir.

11 THE WITNESS: Thank you.

12 THE COURT: Members of the jury,
13 let's go ahead and take our lunch break.
14 We'll break until 2 o'clock. If you would go
15 with the deputy, he'll direct you from here.

16 (Whereupon, the following
17 proceedings occurred outside the presence of
18 the jury.)

19 THE COURT: All right.
20 Mr. Weiner, other than your video expert, how
21 many other witnesses do you expect to call?

1 MR. WEINER: One.

2 THE COURT: All right. And,
3 Ms. Judkins, how many witnesses do you expect
4 to call?

5 MS. JUDKINS: One.

6 THE COURT: Have you-all
7 exchanged instructions?

8 MS. JUDKINS: We have.

9 MR. WEINER: We have. I have a
10 couple of additional ones. For the most
11 part, we have.

12 THE COURT: All right. Do each
13 of you have a set that you can hand up to me?

14 MR. WEINER: Yes.

15 We didn't offer those yet, did
16 we?

17 MR. SPIVEY: No.

18 THE COURT: Oh.

19 MR. WEINER: We just have to --

20 THE COURT: Well, then, will you
21 do it over the break, and hand them up before

1 we resume this afternoon.

2 MR. WEINER: It will just take a
3 moment.

4 THE COURT: All right. We'll
5 break until 2.

6 (Whereupon, the hearing was
7 adjourned for lunch at 1:02 o'clock p.m., to
8 be resumed at 2:00 o'clock p.m., this same
9 day.)

10 THE COURT: All right. Counsel,
11 can you-all hand me up your instructions?
12 And is there anything else we need to take up
13 outside the presence of the jury?

14 MS. JUDKINS: I have gone through
15 the plaintiff's instructions, and I know
16 which ones -- I told him which ones I don't
17 have an objection to.

18 THE COURT: Okay. All right.
19 Thank you.

20 All right. Anything else before
21 we bring the jury in?

1 MR. WEINER: No.

2 MS. JUDKINS: No.

3 THE COURT: All right. I'll ask
4 the deputy to bring the jury in.

5 Mr. Russ, if you would resume the
6 stand, sir.

7 (Whereupon, the following
8 proceedings occurred in the presence of the
9 jury.)

10 THE COURT: All right. Members
11 of the jury, welcome back.

12 All right. Go ahead,
13 Ms. Judkins.

14 MS. JUDKINS: If I could hand the
15 witness a copy of the transcript from his
16 discovery deposition, which was May 15th,
17 2002.

18 THE COURT: All right.

19 MS. JUDKINS: Thank you.

20 BY MS. JUDKINS:

21 Q. Mr. Russ, directing your

1 attention to page 28 of your deposition, to
2 the --

3 A. Yes, ma'am.

4 Q. Okay. Do you remember my taking
5 your deposition before a court reporter
6 somewhat like this woman here?

7 A. Yes, ma'am.

8 Q. Okay. And when I asked you the
9 question on page 28 at line 4, Tell me how
10 the accident happened, you answered the
11 question for me starting from the point when
12 you got on the bike path; correct?

13 A. Yes.

14 Q. Now, in reviewing your answer
15 here today to yourself, would you agree with
16 me that during the entire course of the
17 answer you gave at your deposition, you
18 testified under oath that you only saw
19 Mr. Destival's face turn toward you in your
20 direction one time as you approached up the
21 hill?

1 A. No, ma'am, no, ma'am.

2 Q. Would you review your answer?

3 A. I have reviewed my answer. What
4 part would you like me to review of my
5 answer?

6 Q. Line 22, I noticed that
7 Mr. Destival had his face turned towards me,
8 much like you are looking at me?

9 A. Yes, ma'am.

10 Q. And then you went through the
11 rest of your trip up the hill; correct?

12 A. Uh-huh.

13 Q. And nowhere throughout the rest
14 of the answer did you ever state that
15 Mr. Destival looked more than once towards
16 you?

17 A. No. If you reference page 29,
18 line 17, you asked me repetitively -- this
19 was your question: Okay. When you first saw
20 Mr. Destival's car, first saw it, what was he
21 doing?

1 And I answered, Pulling through a
2 stop sign and stopping after the stop sign.

3 Q. I'm asking you about the question
4 where I said, Tell me how the accident
5 happened. And you went through the whole
6 scenario from the time you went on the bike
7 path to when the impact happened; correct?
8 On page 28 to 29. That whole answer you
9 gave; right?

10 A. Yes, ma'am.

11 Q. And isn't it true that in that
12 answer at that deposition, you testified that
13 Mr. Destival looked towards you once?

14 A. No, that's not -- that's not --

15 Q. That's not what this says?

16 A. It's not what it says, and it's
17 not what I meant.

18 Q. All right. Well, that's two
19 different things. Is it true that your
20 answer is this, then: I entered the bike
21 path at the intersection of Shadow Valley and

1 Braddock and proceeded up the hill. There is
2 a utility pole about 85 or 90 of my paces
3 back from the curb of Prestwick, and at that
4 point is when I saw Mr. Destival's car roll
5 through the stop sign and stop just before
6 the end of the bike path.

7 A. Right.

8 Q. I proceeded up the hill with
9 caution and observed traffic on Braddock,
10 which was heavy, and I continued to observe
11 Mr. Destival's car, which was stopped. I
12 proceeded through that 85- to 90-pace area
13 continuously checking Braddock Road traffic,
14 traffic turning right off Braddock into
15 Prestwick, if any, and Mr. Destival's stopped
16 car.

17 I noticed that Mr. Destival had
18 his face turned towards me, much like you are
19 looking at me, and proceeded up that hill.
20 And then when I got to the -- about ready to
21 enter the intersection of Braddock and

1 Prestwick, I checked traffic again. It was
2 very heavy. And I checked Mr. Destival's car
3 was stopped and was not making any
4 inclination towards moving, and I proceeded
5 into the intersection.

6 As my hip was in the middle of
7 Mr. Destival's hood, approximately where a
8 hood ornament would be, if you will, I
9 noticed the traffic had momentarily cleared,
10 and I immediately checked again Mr. Destival,
11 who at this point was starting to accelerate
12 towards me. I let out a yell.

13 Right?

14 A. Yes, ma'am.

15 Q. Isn't it true that during the
16 entire course of this testimony, you
17 reference Mr. Destival looking towards you
18 one time, as you were proceeding up the hill?

19 A. That was the first time that I
20 looked and checked Mr. Destival. As I was
21 proceeding up the hill, I was checking

1 continuously.

2 Q. When you actually left the bike
3 path --

4 A. I said -- I said --

5 Q. I'm sorry.

6 A. -- I proceeded through the 80- to
7 90-pace area continuously. This is page 28,
8 line 19. I proceeded through that 85- to
9 90-pace area, which is starting back here
10 where that utility pole is and going up the
11 bike path slowly. I've got my child in the
12 trailer. I'm not winning any speed records
13 here.

14 THE COURT: Mr. Russ, you have to
15 just respond to questions.

16 Okay. What's the question,
17 Ms. Judkins?

18 BY MS. JUDKINS:

19 Q. As you left the bike path and
20 entered the road, Prestwick Drive, before you
21 got into the road, you actually looked on the

1 pavement where you were traversing your
2 bicycle because you didn't want to bump the
3 trailer; right?

4 A. Right.

5 Q. So you were looking -- you know
6 exactly where you entered Prestwick because
7 you were watching the concrete portion of
8 it --

9 A. I saw the -- I saw the seam in
10 the concrete. I looked at Mr. Destival's
11 car. He was still stopped. I looked at -- I
12 was continuously checking. I had my son in
13 the trailer, for Pete's sake.

14 Q. You were looking down at the
15 pavement for a portion of the time as you
16 entered the roadway; correct?

17 A. A portion measured in multiple
18 sections of milliseconds, yes, ma'am.

19 MS. JUDKINS: I don't have any
20 further questions.

21 THE COURT: All right. Any

1 redirect?

2 MR. WEINER: The Court's
3 indulgence.

4 THE COURT: All right.

5 Mr. Russ --

6 MR. WEINER: Just one.

7 REDIRECT EXAMINATION

8 BY MR. WEINER:

9 Q. Ms. Judkins' question to you was
10 when you first saw the Destival vehicle;
11 correct?

12 A. Correct.

13 Q. And that was even before what is
14 depicted on this diagram. You were -- the
15 pointer was shaking, but you were pointing
16 down here. That was purposefully --

17 A. Right.

18 Q. -- because that's even before you
19 get -- this is a driveway.

20 THE COURT: All right. Do you
21 have a question, Mr. Weiner?

1 MR. WEINER: Yes.

2 BY MR. WEINER:

3 Q. Had you not been struck by the
4 Destival vehicle, where would you have gone?

5 A. I would have continued west and
6 picked up where the bike path rejoined the
7 sidewalk at Prestwick, staying parallel to
8 Braddock Road.

9 MR. WEINER: I have no further
10 questions.

11 THE COURT: All right. Thank
12 you, sir. You may step down.

13 All right. Mr. Weiner, please
14 call your next witness.

15 MR. WEINER: Your Honor, my next
16 witness will be Dr. George Jastrzebski.

17 THE COURT: All right.
18 Dr. Jastrzebski.

19 GEORGE JASTRZEBSKI, M.D.
20 a witness, called by counsel on behalf of the
21 Plaintiff and, having been first duly sworn



CASAMO & ASSOCIATES, Inc.
Court Reporting, Video Depositions, Trial Preparation/Presentation
Alexandria (703) 313-4800
Culpeper (540) 825-7482
www.casamo.com
.com

1 * * *
2 the defendant, called by counsel on his own
3 behalf and, having been first duly sworn by
4 the Clerk, was examined and testified, as
5 follows:

6 DIRECT EXAMINATION

7 BY MS. JUDKINS:

8 THE COURT: Go ahead, counsel.

9 BY MS. JUDKINS:

10 Q. Would you state your name,
11 please.

12 A. Jim Destival.

13 Q. What is your age?

14 A. Fifty-eight.

15 Q. Where do you live?

16 A. I live at 6036 Berwynd Road.

17 Q. Is that in the Breckenridge
18 subdivision?

19 A. Yes, it is.

20 Q. For how long have you lived
21 there?

22 A. Since 1994.

1 Q. And with whom do you live there?

2 A. My wife and my daughter.

3 Q. And where did you work in 2001?

4 A. I worked for Getronics Government
5 Solutions.

6 Q. Doing what?

7 A. My job was to manage all of the
8 Department of Defense and NASA contracts for
9 Getronics Government Solutions.

10 Q. On June 20th, 2001, was it a
11 weekday?

12 A. It was on a Wednesday morning.

13 Q. Were you going to work when this
14 incident happened?

15 A. Yes, I was.

16 Q. Where were your offices located?

17 A. Our offices at that time were
18 located in Tysons.

19 Q. What was your normal route of
20 travel?

21 A. Normally, I would go out of

1 Berwynd. I would take a left on Prestwick.
2 I would go down to Braddock. I would take a
3 left on Braddock and go to Shirley Gate and
4 go over and go in 66.

5 Q. Was that what you intended to do
6 that day?

7 A. Yes.

8 Q. About how long did that commute
9 usually take you?

10 A. Normally, it was about a
11 40-minute drive.

12 Q. Now, did you have any meetings
13 scheduled that morning?

14 A. No.

15 Q. What time of the day did this
16 incident occur?

17 A. I left the house at 7:30, so it
18 must have been about 7:45.

19 Q. How long does it take you to get
20 from your house to where this intersection
21 is?

1 A. Probably five to ten minutes.

2 Q. And what time did you anticipate
3 getting to work that morning?

4 A. I always get to work usually
5 between 8 and 8:30.

6 Q. Were you worried about being late
7 at all that day?

8 A. No.

9 Q. What kind of car were you
10 driving?

11 A. I still have the same car. It's
12 a 1993 Nissan 245.

13 Q. Was there any damage to your car
14 as a result of this incident?

15 A. No.

16 Q. Did you come out of your street
17 that day and make a left on Prestwick?

18 A. Yes, ma'am.

19 Q. Tell the ladies and gentlemen of
20 the jury what you did as you approached
21 Prestwick.

1 A. As I took a left onto Prestwick,
2 I followed the road down to the end. I
3 stopped at -- made a complete stop at the
4 stop line, which is the white line.

5 From there, you have some
6 obstructions both on your right and the left,
7 curvature of the -- of the earth comes down.
8 It's predominantly on the left side, but it's
9 also true of the right side. So it's very
10 difficult to see cars coming either way.

11 On Braddock, cars from the right
12 come around a corner and then come up a hill.
13 So you can't pick them up until about the top
14 of the hill on the right. On the left, they
15 take a turn to the right as they come up a
16 hill, and it's -- you have to be real careful
17 when you're merging onto Braddock from there.

18 What normally happens is you
19 watch for an opening in traffic, and you
20 proceed on to the intersection in between,
21 and then you wait for cars on the right, and

1 then you merge into the traffic.

2 Q. Is there a median there?

3 A. Yes.

4 Q. And is it wide enough for a car?

5 A. Yes.

6 Q. When you stopped that morning at
7 the stop sign on Braddock, were there any
8 vehicles ahead of you?

9 A. No.

10 Q. Anybody in the median?

11 A. No.

12 Q. How about anyone behind you?

13 A. No.

14 Q. What did you do then after you
15 stopped at the stop line?

16 A. I stopped at the stop sign, and I
17 saw that there was a lot of traffic. So I
18 eased up so I was within about six, eight
19 foot of Braddock, so I could get a better
20 view of the traffic from the right and the
21 left.

1 I looked at the left. There were
2 several cars coming. We estimated 15 to 20
3 cars were coming. I looked at the right.
4 There was still a lot of traffic. And there
5 was no one in front of me.

6 I kept looking like that until
7 there was an opening on the left. I looked
8 to the right. And there was nothing in the
9 center section. And after the cars had gone
10 by on the left, I merged into the road.

11 As soon as I started out, I heard
12 an extended, Ohhhhhhhhhhhhh, and it went on
13 for quite some time. And then there was a
14 large thud on the right front corner of my
15 car.

16 Q. What did you do then?

17 A. Well, I immediately stopped as
18 soon as I heard the "oh," and I saw an
19 individual falling over on the right, in
20 front of my right front fender. I put it
21 into park. I went around to the front of the

1 car.

2 And Mr. Russ was astride the
3 bicycle, and the bicycle and everything was
4 on this right-hand side. Probably the lower
5 two or three inches of the front wheel were
6 under my car. The back wheel and the trailer
7 were both to the right of my vehicle.

8 Q. Were they impacted at all by your
9 vehicle?

10 A. No.

11 Q. Was the carrier upright?

12 A. The carrier was upright.

13 Q. And was there any damage to the
14 rear wheel of the plaintiff's bicycle that
15 you saw at all?

16 A. No. I did not see any damage to
17 the -- except for the front wheel.

18 Q. Okay. And where did you see the
19 plaintiff after the accident?

20 A. Well, when I went around to the
21 front, the plaintiff was astride his bicycle.

1 He was laying on his right-hand side. He
2 asked me if I would back the vehicle up so
3 that he could get up. So I went back into
4 the vehicle and backed it up.

5 And then he proceeded to get up.
6 He was hopping around. I went over, and the
7 child was crying. He wanted to help the
8 child. I went over and unbuckled the safety
9 belt for the child. I picked him up, and I
10 gave it to Mr. Russ. And he sat down on the
11 curb and tried to comfort his child.

12 Q. Then what happened?

13 A. Then I don't remember if I
14 volunteered or if he asked, but -- for a cell
15 phone. So I gave him the cell phone. I
16 can't remember if he called or I called, but
17 he called his wife.

18 Q. Where did you have the cell
19 phone?

20 A. I can't remember if I had it on
21 me or in the car.

1 Q. And what did you hear him say to
2 his wife?

3 A. He told his wife that he was in
4 an accident, that he had hit a car on
5 Prestwick and Braddock, and that he wanted
6 her to come pick him up.

7 Q. Describe for the ladies and
8 gentlemen of the jury how far your car had
9 moved when the impact occurred, from where
10 you had stopped waiting to merge to where the
11 impact occurred.

12 A. The car had only gone one to two
13 foot, somewhere in there. I just had gotten
14 started, and then I put the brake on.

15 Q. And any other conversation with
16 Mr. Russ there at the scene before his wife
17 came?

18 A. We exchanged names and telephone
19 numbers. I asked him if I could call him
20 that evening to see if everybody was all
21 right.

1 From what I saw, you know, the
2 child obviously was upset and crying, but
3 there wasn't any physical damage done to the
4 child. Mr. Russ was hopping on his -- his
5 left foot, I guess, but I didn't see any
6 other damage.

7 Q. Did he say, yes, you could call
8 him that night?

9 A. I can't remember if he said yes
10 or if he didn't say anything.

11 Q. Did you ever tell Mr. Russ at the
12 scene or any other time that this accident
13 was your fault?

14 A. No.

15 Q. You've heard him testify to that
16 earlier in the trial?

17 A. Yes.

18 Q. Did he ever accuse you of running
19 into him at the scene?

20 A. We didn't talk about it.

21 Q. And no police came?

1 A. No police came.

2 Q. Describe to the jury the
3 topography, the mounds of dirt or earth,
4 whatever you want to call them, to the right
5 and the left that you see as you approach
6 that stop sign and stop at the sign before
7 moving up to get a better view. What does it
8 look like?

9 A. Well, from the -- I've always
10 considered it a sidewalk, but it comes over
11 right next to the road. From there, on the
12 left side, they go up probably about a
13 40-degree angle on the left, and they go up
14 eight, ten foot. And on the right, they go
15 up but not quite as quickly. There's still a
16 mound on the right, as well.

17 Q. Now, how far -- at that stop line
18 when you stop there, how far to the left can
19 you see before moving up?

20 A. You see the cars as they're
21 coming up on top of the hill.

1 Q. I'm sorry. Pardon me?

2 A. You see the cars when they're
3 coming up on top of the hill. I would assume
4 that would be maybe a hundred yards, 80 to
5 100 yards.

6 Q. And the speed limit on Braddock
7 is what?

8 A. Speed limit on Braddock is 45,
9 but in that area, there's people that exceed
10 that limit frequently.

11 Q. I'm going to ask you to look at
12 some photographs, if you will.

13 MS. JUDKINS: Well, let me ask if
14 I could approach the witness to look at the
15 photographs.

16 THE COURT: All right.

17 BY MS. JUDKINS:

18 Q. Mr. Destival, looking at
19 Defendant's Exhibit 1A, what does that show?

20 A. That shows the intersection as
21 looking at it from the sidewalk and the bike

1 path looking into the intersection.

2 Q. And looking in which direction?

3 A. This would be west.

4 Q. Now, is that the distance you can
5 see when you're stopped at the stop sign?

6 A. No.

7 MS. JUDKINS: I'd like to move
8 the introduction of Defendant's Exhibit 1A.

9 MR. WEINER: No objection.

10 THE COURT: All right. It will
11 be received.

12 BY MS. JUDKINS:

13 Q. Defendant's Exhibit 1B, which
14 direction is that looking?

15 A. That's looking in the same
16 direction.

17 Q. And from where?

18 A. From further down the bike path
19 or sidewalk.

20 Q. From the direction the plaintiff
21 was riding his bike that morning?

1 A. Yes.

2 Q. Now, is there a vehicle shown in
3 the intersection there?

4 A. Yes, there is.

5 Q. Is that similar to where your
6 vehicle was on the day of this incident?

7 A. Similar. I probably wasn't quite
8 that far up. I was about six to eight foot,
9 but right in there, yes.

10 Q. Six to eight foot from where?

11 A. From the Braddock Road itself.

12 Q. That's where you were?

13 A. Yes.

14 Q. Okay.

15 MS. JUDKINS: And I move the
16 introduction of Defendant's Exhibit 1B.

17 THE COURT: I'll take it up at
18 another time.

19 MS. JUDKINS: That's this one.

20 MR. WEINER: Yes. Based on his
21 testimony --

1 THE COURT: I'll take it up at
2 another time. Let's move on.

3 BY MS. JUDKINS:

4 Q. And Defendant's Exhibit 1C, what
5 does that show?

6 A. That's the same, looking at it
7 from the same direction, looking west,
8 looking at the intersection.

9 Q. Is this a different vehicle in
10 the intersection at this point?

11 A. Yes, ma'am.

12 Q. Is this vehicle located similar
13 to where you were located on that day?

14 A. Probably just a little bit
15 forward of where I was, but, yes.

16 Q. Now, in the years that you've
17 lived there and driven through this
18 intersection, has every vehicle that had to
19 make a left turn done this, gone beyond the
20 white stop line?

21 A. Almost everybody that I --

1 MR. WEINER: Objection, Your
2 Honor.

3 THE COURT: The objection is
4 sustained.

5 MS. JUDKINS: All right. I move
6 the introduction of Exhibit 1C.

7 THE COURT: All right. I'll take
8 it up at another time.

9 BY MS. JUDKINS:

10 Q. If you would look at 1D, what
11 does that depict?

12 A. 1D would be looking from
13 Prestwick to looking west on Braddock.

14 Q. Is this looking toward the
15 direction you intended to turn that day?

16 A. Yes, ma'am.

17 Q. Did you have a turn signal on?

18 A. I believe so, yes.

19 Q. For how long? From the time
20 when?

21 A. Well, probably from the

1 stoplight. I usually --

2 Q. During the time you were sitting
3 there waiting to make your left turn, any
4 vehicles behind you at all?

5 A. No.

6 Q. Does this vehicle (sic), 1D, show
7 the mound of earth to the left?

8 A. Yes, it does.

9 Q. Have you measured that, how high
10 up?

11 A. I've estimated it.

12 Q. What is your estimate of how high
13 a slope that is?

14 A. I looked at probably about a
15 40-degree angle.

16 Q. Now, 1E, can you tell the ladies
17 and gentlemen of the jury what Defendant's
18 Exhibit 1E shows?

19 A. 1E is looking west again, but
20 from a slightly closer to Braddock view.

21 Q. Okay. And, again, is this

1 looking in the direction that you intended to
2 turn?

3 A. Yes, ma'am.

4 Q. And Defendant's Exhibit 1F, what
5 does that show?

6 A. Same picture only it's down a
7 little closer to Braddock than the previous
8 picture.

9 Q. What about Defendant's Exhibit
10 1K, what does that show?

11 A. 1K would be looking east on
12 Braddock from Prestwick.

13 Q. Does this show any earth located
14 to your right?

15 A. Yes. There was a -- again, there
16 was a mound on both sides, which obstructs
17 the view.

18 Q. What about Defendant's Exhibit
19 1H, could you tell the jury what that shows.

20 A. That, again, looks east from
21 Prestwick onto Braddock. That's further down

1 Prestwick.

2 Q. Could you take a look at 1J.
3 It's actually the last photograph, 1J. Is
4 that shown from across the street?

5 A. Yes. That's looking into the
6 Breckenridge development.

7 MS. JUDKINS: I'd move the
8 admission of Defendant's Exhibits 1D, E, F,
9 K, H, and J.

10 MR. WEINER: We don't have any
11 objection to those.

12 THE COURT: All right. They'll
13 be received.

14 The deputy can retrieve them and
15 hand them to the clerk.

16 MS. JUDKINS: Oh, thank you.

17 BY MS. JUDKINS:

18 Q. What is across the street, the
19 other side of Prestwick on Braddock Road? Is
20 there anything over there?

21 A. I've never been over there. I

1 know there's an open road that goes back in
2 there maybe about 20 yards, and it goes
3 behind some big mounds, but I'm not exactly
4 sure what's over there.

5 Q. Have you marked off to where that
6 first utility pole is on Braddock Road in the
7 direction from which the plaintiff was
8 coming?

9 A. Yes. I -- from the curb, where
10 the sidewalk hits the curb there on
11 Prestwick, I walked down 85 paces, which made
12 it even with the wood pole. That's the
13 utility pole that's down there. It's about
14 85 paces.

15 Q. Now, from that distance when you
16 were looking up Braddock Road toward
17 Prestwick, could you see any stopped vehicle
18 at the stop line?

19 A. No. What, in fact, I had done
20 was I parked my vehicle one foot back from
21 the solid white line and looked -- and walked

1 down to the pole and looked back. And you
2 cannot see any vehicle at all at 85 paces.

3 MS. JUDKINS: I'd like to
4 approach the bench because there's one area
5 of questioning I'd like to go into.

6 THE COURT: Well, you can go
7 ahead and ask him whatever you want to ask
8 him.

9 MS. JUDKINS: Okay.

10 MR. WEINER: Your Honor, I want
11 to object and actually ask that the last
12 question be struck.

13 THE COURT: Well, the motion is
14 denied.

15 MR. WEINER: Thank you, Your
16 Honor.

17 THE COURT: What's the next
18 question?

19 MS. JUDKINS: My next question
20 was going to be, Your Honor, to Mr. Destival,
21 has that white stop line changed --

1 THE COURT: The objection is
2 sustained.

3 MS. JUDKINS: Well, if I could --
4 that's why I wanted to approach --

5 THE COURT: The objection is
6 sustained. Let's move on.

7 MS. JUDKINS: Okay. Your Honor,
8 the only issue is an instruction; right?

9 THE COURT: Ms. Judkins.

10 BY MS. JUDKINS:

11 Q. And did you call Mr. Russ that
12 evening to see how they were doing?

13 A. Yes, I did.

14 Q. What did he say?

15 A. He said the child was all right,
16 and he had contacted his insurance company,
17 and he was having --

18 MR. WEINER: Your Honor, I'm
19 going to object.

20 THE COURT: The objection is
21 sustained. The witness's answer is stricken,

1 and the jury is instructed to disregard it.

2 Any other questions, Ms. Judkins?

3 BY MS. JUDKINS:

4 Q. Was there room behind your
5 vehicle for the plaintiff to have ridden his
6 bicycle had he chosen to do so?

7 A. He could have, yes.

8 Q. Did you ever see the plaintiff
9 that morning coming toward you at any time?

10 A. No.

11 Q. Where were you looking in the 20,
12 30 seconds before the impact?

13 A. I was looking at the cars coming
14 from the right and the cars coming from the
15 left and looking straight ahead to make sure
16 that there was space if I went there.

17 MS. JUDKINS: I don't have any
18 further questions.

19 THE COURT: Cross-examine.

20 CROSS EXAMINATION

21 BY MR. SPIVEY:

1 Q. Good afternoon, Mr. Destival.

2 So is it safe to say,

3 Mr. Destival, the first time you saw Mr. Russ
4 was after you got out of your car?

5 A. Except for him falling over to
6 the right, which is -- yes.

7 Q. Okay. So you're claiming today
8 that you actually saw Mr. Russ fall over the
9 hood of your car; is that correct?

10 A. He didn't fall over the hood. He
11 fell over to the right.

12 Q. He fell to the right?

13 A. Yes.

14 Q. So he would have fallen
15 towards --

16 A. Bicycle and car was here. The
17 bicycle hit here, and he went over to the
18 right.

19 Q. Oh, okay. To his right side?

20 A. Yes.

21 Q. Okay. And you saw that?

1 A. Yes.

2 Q. Did you actually see Mr. Russ on
3 his bicycle at any time as you were
4 approaching the intersection of Prestwick and
5 Braddock Road?

6 A. No.

7 Q. Did you ever see Mr. Russ on his
8 bicycle as you were waiting for an opening to
9 develop in traffic on eastbound Braddock
10 Road?

11 A. No.

12 Q. Did you actually see Mr. Russ on
13 his bicycle hit your car?

14 A. No. I saw him after the thud.

15 Q. Okay. So would it be safe to
16 say, then, that the only time that -- when
17 you first saw Mr. Russ, it was after the
18 collision?

19 A. Yes.

20 Q. Now, at the time of this
21 accident -- I know Ms. Judkins had asked

1 you -- you were very familiar with this
2 particular intersection; is that correct?

3 A. Yes.

4 MR. SPIVEY: And, Your Honor, if
5 I may grab one of the -- the large diagram of
6 the intersection.

7 THE COURT: All right.

8 MR. SPIVEY: I'm not sure what
9 exhibit number it's been marked. I'm looking
10 for an exhibit marker on it.

11 Can you see this, Mr. Destival --

12 THE WITNESS: Yes.

13 MR. SPIVEY: -- if I place it
14 right here?

15 THE COURT: That's going to fall,
16 Mr. Spivey.

17 MR. SPIVEY: Sorry about that.

18 BY MR. SPIVEY:

19 Q. Okay. Mr. Destival, to jump
20 back, you were very familiar with this
21 intersection at the time of the accident; is

1 that correct?

2 A. Yes.

3 Q. Now, could you point out to the
4 jury what your intended course of travel was
5 as you were stopped there waiting for an
6 opening in traffic to develop?

7 A. My total approach was to approach
8 from here and then go over and go that way.
9 Because of the traffic coming from the left
10 and the traffic coming from the right --

11 Q. I'll get to that in just a
12 moment.

13 A. Okay.

14 Q. So it would be safe to say, then,
15 for the jury, if we were going to show them,
16 you were intending to drive left --

17 A. Yes.

18 Q. -- on westbound Braddock Road; is
19 that correct?

20 A. Yes.

21 Q. So the first thing you had to

1 deal with were these two lanes of traffic
2 here on eastbound Braddock Road; is that
3 correct?

4 A. Right.

5 Q. Okay. And this traffic is coming
6 towards you?

7 A. Yes.

8 Q. Then you were going to go to the
9 median; is that correct?

10 A. When I looked and there was an
11 opening coming from the right, but there were
12 still cars coming from the left, so at that
13 point I was going to move to the intersection
14 here in the middle --

15 Q. Could you point that out to the
16 jury where you were going?

17 A. Space in between, right in here.

18 Q. And, also, for clarification of
19 the jury, to what side of your body is the
20 eastbound traffic on Braddock Road
21 approaching from?

1 A. Eastbound approaching me from the
2 right -- east, coming from the east, so
3 eastbound would be coming from my left.

4 Q. From your left side. And that's
5 the direction you were looking for the
6 opening to develop in the traffic, was to
7 your left?

8 A. I was looking at all of it,
9 but --

10 Q. But -- Well, let me back up. You
11 were looking for an opening in the eastbound
12 lane --

13 A. I was looking --

14 Q. -- to develop; correct?

15 A. I was looking to make that -- to
16 make that turn, so I was watching the right
17 and watching the left and watching the middle
18 to see if I could do that. In the end, those
19 cars had passed, leaving an opening on the
20 left, and at that point I decided to go into
21 the median and wait for the cars on the right

1 to go.

2 Q. It would be safe to say,
3 Mr. Destival, that you first had to have an
4 opening in the immediate lanes of travel to
5 get to the median; correct?

6 A. That's right.

7 Q. So you were looking for an
8 opening to develop in those eastbound lanes;
9 is that correct?

10 A. Yes.

11 Q. Okay. And you, in fact, did see
12 an opening?

13 A. Yes.

14 Q. And it was approaching your
15 position; is that correct?

16 A. Correct.

17 Q. And was it your intention you had
18 to time that opening reaching your stopped
19 position before you could drive to the
20 median?

21 A. Well, there were no -- when the

1 last of the group of cars went, there were no
2 other cars coming up. So there was an
3 opening there, and so I was moving forward.

4 Q. Okay. So to answer my question,
5 you were waiting for an opening to arrive
6 adjacent to your stopped position before you
7 drove to the median?

8 A. Yes.

9 Q. Okay. And to what side of your
10 body was that opening in traffic approaching
11 you from?

12 A. The opening was approaching me
13 from my left.

14 Q. Okay. And you were looking that
15 way, at least part of the time?

16 A. Part of the time.

17 Q. Okay. Now, you mention that you
18 pulled beyond the white stop line because you
19 felt that you could see traffic coming
20 better; is that correct?

21 A. Yes.

1 Q. And, specifically, so you could
2 see the traffic coming better from the left
3 on eastbound Braddock Road?

4 A. Both -- both ways, yeah.

5 Q. So you could see traffic coming
6 better from this side?

7 A. From both ways.

8 Q. From both ways.

9 A. There's a hill on both sides. So
10 when you move up, you get a better view of
11 both directions.

12 Q. You mention that there's
13 obstructions in this area; is that correct?

14 A. Yes.

15 Q. Is there an obstruction to the
16 left?

17 A. The obstruction is the mound of
18 dirt and some of this lawn.

19 Q. How about to the right?

20 A. Same thing is true.

21 Q. Could you see the sidewalk -- or

1 excuse me. Could you see that there was a
2 bike path to the right of Prestwick Drive?

3 A. Yes.

4 Q. You could see that. So I take it
5 when you pulled beyond the white stop line,
6 you weren't pulling up there so that you
7 could see the sidewalk better?

8 A. I was pulling up there so I could
9 get a better view of the traffic --

10 Q. The traffic.

11 A. -- so I could know what to do.

12 Q. Correct. So you weren't pulling
13 up closer to Braddock Road so you could see
14 the sidewalk better there?

15 A. Not intentionally, no.

16 Q. Now, I think you've mentioned the
17 traffic that morning was heavy.

18 A. Yes.

19 Q. It was traveling at a good rate
20 of speed?

21 A. Yes.

1 Q. Okay.

2 MR. SPIVEY: I'd like to grab
3 that stack of photographs that's --

4 THE COURT: All right.

5 MR. SPIVEY: -- there by Your
6 Honor.

7 Can everyone on the jury see this
8 clearly?

9 All right. Can you see that?

10 BY MR. SPIVEY:

11 Q. I'd like for you, Mr. Destival,
12 to take a look at that photograph. What
13 direction is this photograph looking in?

14 A. It's looking to the west.

15 Q. Okay. Would that be to the left
16 side of your body?

17 A. Yes.

18 Q. Okay. Now, if you were stopped
19 at that position, could you see traffic
20 coming from your left?

21 A. Yes, coming right there.

1 Q. Okay.

2 A. That might be a car right there
3 right now.

4 Q. So, in other words -- correct. I
5 mean, if you were stopped at the stop sign,
6 you could see traffic?

7 A. This is -- this is ahead of the
8 stoplight -- stop sign.

9 Q. Okay. Well, let me ask it this
10 way. If you were stopped behind the stop
11 line, as you claim you were, could you see
12 traffic coming from the left side on
13 eastbound Braddock Road?

14 A. If you stop at the white line
15 that was there at the time, you have a lot
16 less of visibility than you do if you move
17 up.

18 Q. But you could see cars coming
19 from eastbound Braddock Road; correct?

20 A. Yes.

21 Q. Okay. So when you were pulling

1 forward, it was so that you could see more
2 clearly, you felt?

3 A. Yes.

4 Q. Okay. Let me show you another
5 photograph. Can you describe to the jury
6 what this photograph is depicting?

7 A. It's a view from Prestwick
8 looking east on Braddock.

9 Q. Okay. Now --

10 A. At a -- and I might add, at a --

11 Q. Elevated?

12 A. Yeah, elevated view of that.

13 Q. Now, as you were approaching the
14 intersection of Prestwick and Braddock Drive,
15 how much of the bike path to the right side
16 of Prestwick could you actually see as you
17 were approaching? Could you give me an
18 estimate?

19 A. I think that you can normally see
20 just a little bit past that drive there.

21 Q. Which would be how far?

1 A. Maybe -- as far as the sidewalk
2 itself seeing, you could probably see that --

3 Q. I'm asking your vantage point.

4 A. -- forty -- forty -- well, my
5 vantage point. As far as seeing the
6 sidewalk, you could probably see it out there
7 about 40 to 50 paces.

8 Q. Forty to 50 paces, which would --

9 A. From the sidewalk.

10 Q. -- be, what, about 40 or 50
11 yards?

12 A. Yes, something like that.

13 Q. Okay. And there wasn't anything
14 obstructing your view to the right as you
15 were stopped waiting to cross the traffic
16 lanes; correct?

17 A. No.

18 Q. Okay. Now, when you first saw
19 Mr. Russ on the bicycle, he was lying on
20 Prestwick Road; isn't that correct?

21 A. The first time I saw him was when

1 he was falling over to the right. And then
2 when I got in front of the car, he was
3 astride the bicycle laying on his right side.

4 Q. And he was on Prestwick?

5 A. He was on Prestwick. He had --
6 he was not into Braddock.

7 Q. And the bicycle was lying on its
8 right side still between his legs?

9 A. Yes.

10 Q. Okay. Now, I would like to give
11 you a copy of your deposition.

12 MR. SPIVEY: I've got a copy for
13 you if you need it.

14 BY MR. SPIVEY:

15 Q. Do you recall having your
16 deposition taken on May 15th --

17 A. Yes, I do.

18 Q. -- 2002? And were you sworn
19 under oath to tell the truth at that
20 deposition?

21 A. Yes, I was.

1 Q. And what was this deposition in
2 regards to?

3 A. The --

4 Q. The case?

5 A. The case we're hearing today.

6 Q. And you testified fully and
7 accurately to the best of your knowledge?

8 A. Yes, sir.

9 Q. I'd like to refer you to page 20.
10 And I'm going to read from lines 5 -- I'm
11 going to read to line 5, and then I'll ask
12 you what your answer was.

13 THE COURT: Well, why don't you
14 ask him the question today that you would
15 like him to answer today.

16 MR. SPIVEY: Okay.

17 BY MR. SPIVEY:

18 Q. You're claiming that you saw
19 Mr. Russ falling across the hood of your car;
20 is that correct?

21 A. No, I didn't. I saw him --

1 THE COURT: Well, we recall what
2 he said. What's the question?

3 MR. SPIVEY: Your Honor, what I
4 would like to read is the question and have
5 him respond as to the answer in the
6 transcript.

7 MS. JUDKINS: If he's trying to
8 impeach my client, I object to the form..
9 He's not doing it properly.

10 THE COURT: Sustained.

11 BY MR. SPIVEY:

12 Q. Mr. Destival, you mentioned that
13 there was no damage to your vehicle?

14 A. Yes.

15 Q. And not a scratch? You did
16 inspect your vehicle; is that correct?

17 A. I looked at it, yes. In fact,
18 there was a -- there was a USAA investigator
19 that looked at --

20 MR. SPIVEY: Your Honor, I move
21 to strike the last sentence.

1 THE COURT: The objection is
2 sustained. The testimony is stricken. The
3 jury is instructed to disregard it.

4 Any other questions, Mr. Spivey?

5 MR. SPIVEY: Just a few follow-up
6 questions.

7 BY MR. SPIVEY:

8 Q. Mr. Destival, you spoke with
9 Mr. Russ at some point after the accident; is
10 that correct?

11 A. Yeah. We didn't --

12 Q. Did he indicate --

13 A. -- do an awful lot of discussing,
14 but, yes.

15 Q. Did he indicate to you his
16 physical condition at that time?

17 A. I don't remember that, no, but he
18 was hopping on one leg.

19 Q. But everything appeared to be
20 fine?

21 A. Yes.

1 Q. Okay.

2 MR. WEINER: Court's indulgence.

3 THE COURT: All right.

4 MR. WEINER: Would the Court
5 allow me to follow up, Your Honor?

6 MS. JUDKINS: No, Your Honor, I
7 object.

8 THE COURT: The objection is
9 sustained.

10 BY MR. SPIVEY:

11 Q. Mr. Destival, you mentioned that
12 you could see approximately 40 to 50 yards
13 the sidewalk as it ran adjacent to Braddock
14 Road; is that correct?

15 A. Yeah. You could see a little bit
16 past the driveway there.

17 Q. Okay. Now, that's the actual
18 sidewalk or bike path, we'll call it. How
19 far could you see a person?

20 A. I don't -- I never had a person
21 there, so I don't know how.

1 Q. But you would agree a person
2 stands a little taller than the sidewalk?

3 A. Yes.

4 Q. Okay. Mr. Destival, I have a
5 document I would like to show you. Do you
6 recognize this document?

7 A. Yes.

8 Q. What is it?

9 A. When I got to the office that
10 morning, I jotted down a note on the
11 experience that I had in case something were
12 to -- you know, I had to refer to it later or
13 come up.

14 Q. Okay. Could you read the first
15 paragraph.

16 A. At approximately 0745, I was
17 driving to work and stopped at the
18 intersection with Braddock Road. I looked
19 both ways and straight ahead. Cars were
20 coming from the right and left, and there
21 were -- there was no car in the median

1 between the lanes.

2 After about 20 cars passed from
3 the left, I saw an opening; looked left,
4 right, and straight ahead to ensure the
5 median was open and moved forward. Within
6 one to three feet, I collided with a bicycle
7 that came out of the right. I assume it was
8 on the sidewalk. The bicycle had a trailer
9 and a small child.

10 There was no damage to my car. I
11 believe the bicycle front wheel ran into the
12 front of my car. The front wheel of the bike
13 was twisted, but I did not see any other
14 damage. The child was crying but did not
15 appear hurt. The father was limping because
16 of a bad right foot.

17 Q. Mr. Destival, you mentioned that
18 you assumed the bike was on the sidewalk?

19 THE COURT: Well, he just told us
20 what he said. What's the question?

21 BY MR. SPIVEY:

1 Q. That's because you did see the
2 bike on the sidewalk; is that correct?

3 A. That's correct.

4 MR. SPIVEY: Your Honor, I would
5 like to go ahead and introduce this document
6 into evidence.

7 MS. JUDKINS: No objection, Your
8 Honor.

9 THE COURT: All right. It will
10 be received.

11 BY MR. SPIVEY:

12 Q. And to finish up, when Mr. Russ
13 was about 80 yards away, you never saw him;
14 is that correct?

15 A. No.

16 Q. When he was about 40 yards away,
17 you never saw him; is that correct?

18 A. Correct.

19 Q. And when he was about five yards
20 away from the intersection, you never saw
21 him?

1 A. No.

2 Q. And when he was entering into
3 Prestwick Drive, you never saw him?

4 A. No.

5 MR. SPIVEY: Thank you.

6 THE COURT: All right. Redirect.

7 MS. JUDKINS: Again, Your Honor,
8 based on his cross examination, I want to
9 bring up that evidence that we discussed
10 pretrial.

11 THE COURT: I have ruled,
12 Ms. Judkins.

13 REDIRECT EXAMINATION

14 BY MS. JUDKINS:

15 Q. Would you have ever attempted to
16 make a left or a right turn from where you
17 were stopped behind the white stop line on
18 Prestwick Drive first, staying from that
19 position? Would you have ever attempted to
20 do so?

21 MR. SPIVEY: Objection, Your

1 Honor --

2 THE COURT: The objection is
3 overruled. The witness can answer.

4 THE WITNESS: Not during rush
5 hour traffic, no.

6 BY MS. JUDKINS:

7 Q. Why not?

8 A. There was -- there was usually
9 cars coming there all the time.

10 Q. This photograph that plaintiff's
11 attorney asked you about, is that taken from
12 behind this white stop line?

13 A. No. That's taken standing up on
14 a hill overlooking everything.

15 MS. JUDKINS: All right. I don't
16 have any further questions.

17 THE COURT: All right. Thank
18 you, sir. You may step down. Have a seat
19 with your counsel.

20 You can just leave everything
21 right there.

1 MS. JUDKINS: I have two portions
2 of the plaintiff's deposition to read in
3 substantive evidence in my case, Your Honor,
4 under the rules.

5 THE COURT: All right. Are you
6 going to do that now?

7 MS. JUDKINS: I was thinking of
8 it, yes.

9 THE COURT: All right. Members
10 of the jury, what counsel is going to do is
11 read some testimony that Mr. Russ has
12 previously given. The rules of court permit
13 her to do this. You should take it just as
14 if Mr. Russ were testifying here from the
15 courtroom.

16 And, Ms. Judkins, please just
17 identify the question and the answer.

18 MS. JUDKINS: Yes, ma'am.

19 Page 34, line 22, the question
20 that I asked: Did you ever stop at any
21 portion along the bike path or this concrete

1 apron shown in your Deposition Exhibit No. 2
2 before entering the roadway?

3 Answer: No, ma'am.

4 Question: How fast would you say
5 you were moving on your bicycle when you
6 entered the roadway?

7 Answer: I was proceeding
8 cautiously. I was maintaining balance on my
9 bicycle.

10 Question: Do you know how fast
11 you were moving?

12 Answer: Approximately between
13 three and ten miles an hour.

14 The other portion I would like to
15 read is on page 38, beginning at line 1.

16 Question: Tell me everything you
17 and Mr. Destival talked about at the scene
18 before your wife came.

19 Answer: Mr. Destival was very
20 helpful. He asked me several times if there
21 was anything I could do or anything he could

1 do for us. I was disoriented at this point.
2 I really don't know what to ask -- I really
3 didn't know what to ask for, and I think I
4 mentioned that to him, other than, did he
5 have a cell phone, and, could he help me
6 unbuckle my son from the bike trailer,
7 because I was fumbling at that point.

8 And then my wife arrived. I
9 asked him or he offered -- I'm not sure -- to
10 help get the equipment into the back of the
11 truck. But our conversation was minimal.

12 Question: Anything else you can
13 recall him saying to you at the scene at all?

14 Answer: He said he wanted to
15 understand what the -- he was legitimately
16 concerned about our welfare, and that he
17 would call that evening for updates. And I
18 said, Great, and we exchanged contact
19 information.

20 Question: Anything else you
21 discussed with Mr. Destival at the scene?

1 Answer: No, not that I recall.

2 And that concludes the reading of
3 the plaintiff's deposition. There are two
4 photographs the Court has not yet ruled upon,
5 and it's B and C, Defendant's 1B and C, that
6 we've moved to introduce.

7 THE COURT: All right. Any other
8 evidence that the defendant wants to offer
9 today?

10 MS. JUDKINS: No, ma'am.

11 THE COURT: All right.
12 Mr. Weiner, any rebuttal evidence?

13 MR. WEINER: Yes, Your Honor. We
14 have -- if the Court will give me one moment.
15 There was -- Mr. Russ addressed that exact
16 question which was asked of him. I just need
17 to put my hands on it.

18 We offer page 95, the same
19 deposition of Mr. Howell Russ.

20 THE COURT: All right. So my
21 instruction to the jury will be the same.



1 submitted. * * *

2 I also have those two other cases
3 for you and for Mr. Weiner --

4 THE COURT: All right. You can
5 hand them up.

6 MS. JUDKINS: -- Lucas versus
7 Craft and Marshall versus Shaw.

8 THE COURT: All right. Let's go
9 ahead and see if we can resolve the
10 instructions. We begin with the plaintiff's
11 instructions.

12 Does everyone have them?

13 MR. WEINER: Just one second.

14 MS. JUDKINS: I might need my
15 book back, that Virginia Jury -- sorry.

16 THE COURT: Oh, I meant to give
17 it back to you.

18 All right. Plaintiff's
19 instruction 1 is granted.

20 MS. JUDKINS: The only objection
21 I would note to the instructions is to

1 preserve my motion to strike. I agree that
2 the instructions are a correct statement of
3 the law that we discuss, but I don't agree
4 the issue should go to jury.

5 THE COURT: All right. All
6 right. Instruction 2 is granted, but I'm
7 going to change it slightly just to say, in
8 each instance where the jury is told who has
9 the burden of proof, I'm going to add that
10 it's the burden of proof by a preponderance
11 of the evidence.

12 Instruction 3 is duplicative.
13 It's denied. Instruction 4 is granted.
14 Instruction 5 is granted. Instruction 6 is
15 granted. Instruction 7 is granted.
16 Instruction 8 --

17 MS. JUDKINS: That's one I had
18 noted an objection to.

19 THE COURT: All right.

20 MS. JUDKINS: Each of them have a
21 duty to keep a proper lookout. The model

1 defines a driver's duty to keep a proper
2 lookout and says persons, vehicles, or
3 conditions. It doesn't specifically say
4 bicyclists. So I think it has an undue
5 emphasis to say he had a particular special
6 duty to keep a lookout for the plaintiff.

7 I agree that each party had a
8 proper lookout, but the way that the cases
9 from which the instruction was taken --
10 there's no statute from which that
11 instruction was taken, but the cases all say
12 persons, which includes, because of the other
13 instruction, pedestrians.

14 That's my objection. Otherwise,
15 I don't have one.

16 THE COURT: All right.

17 MR. WEINER: Your Honor, the
18 evidence is --

19 THE COURT: And what's the source
20 of 8, instruction 8?

21 MR. WEINER: *Virginia Model Jury*

1 Instructions, 10.02.

2 MS. JUDKINS: Zero, zero two
3 zero.

4 MR. WEINER: Zero two zero.

5 THE COURT: Well, why can't we
6 just say that -- eliminate the word
7 "bicyclist" and say, Look in all directions
8 for persons or conditions that would affect
9 his driving?

10 MS. JUDKINS: Vehicles, too.

11 MR. WEINER: Because of the facts
12 of the case, Your Honor. This is a
13 designated bicycle path. The evidence is
14 that the defendant lived there for years,
15 crossed it daily --

16 THE COURT: I recall the
17 evidence.

18 MR. WEINER: -- and that's what
19 there was to see.

20 MS. JUDKINS: It's also missing
21 the language "vehicles." I mean, he has a

1 duty to look for vehicles, too, which is what
2 my client is saying he did do.

3 So my objection is that they
4 substituted "bicyclists" for "vehicles." I
5 think "persons" covers that, but I -- it's
6 got to have "vehicles" in there, too, because
7 he also has a duty to be on the lookout for
8 that.

9 MR. WEINER: If you want to add
10 "vehicles," that's fine. But this case,
11 we're crossing a bicycle path. He didn't see
12 the bicycle. He admitted that. He didn't
13 see it when it was 80 yards, 60 yards, 20
14 yards, and the bicycle was there. He had a
15 duty to see it. That makes the jury
16 instruction fit the case.

17 MS. JUDKINS: No, I object. He's
18 the same as a pedestrian, persons or
19 conditions. He didn't cross the bicycle
20 path. That's just what Mr. Weiner
21 represented to you. No.

1 THE COURT: Well, I'll give an
2 instruction that says vehicles, persons, or
3 conditions. And if you want to -- do you
4 have one, Ms. Judkins?

5 MS. JUDKINS: Pardon?

6 THE COURT: Do you have one that
7 says that?

8 MS. JUDKINS: I think I had one
9 that was kind of generic that says --

10 THE COURT: All right. Well, I'm
11 going to --

12 MS. JUDKINS: I'll bring one that
13 says that.

14 THE COURT: All right.

15 MS. JUDKINS: I have one that's
16 kind of generic, but I'll bring one that says
17 vehicles, persons, and conditions tomorrow
18 morning.

19 THE COURT: All right.
20 Plaintiff's 9 is granted. Plaintiff's 10,
21 what's the source of this one, Mr. Weiner?

1 MR. WEINER: *Virginia Model Jury*
2 *Instructions*, 14.030, as modified pursuant to
3 Virginia code 46.2-904.

4 MS. JUDKINS: I do object to this
5 instruction.

6 THE COURT: 14.0 --

7 MR. WEINER: -- 30.

8 THE COURT: All right. And the
9 objection?

10 MS. JUDKINS: It's all those
11 cases I gave to you. This plaintiff is
12 arguing that he had the right-of-way, even
13 though Mr. Destival reached the intersection
14 and actually entered it by going across that
15 stop line before the plaintiff ever got
16 there. Plaintiff is yards -- 150 feet to 200
17 feet away, and yet he argues he had the
18 right-of-way.

19 That's why all of these
20 instructions -- you're not going to find
21 many, if any, cases where a pedestrian or

1 bicyclist was hit while crossing in front of
2 a vehicle that was already stopped in the
3 intersection.

4 What these cases say, starting
5 with Lucas versus Craft, is -- and it's about
6 jury instructions, whether they were correct
7 and whether they were not correct. And they
8 start with an interpretation of the statute.

9 The first instruction, starting
10 with Lucas versus Craft at 161 Virginia 228,
11 predecessor statute with the same language in
12 here, is -- and the defendant, I believe,
13 objected to this instruction because it told
14 the jury, starting on page 4 of the Lexis
15 copy or whatever it was I copied it from --
16 plaintiff's instruction was, The Court
17 instructs the jury that if you find from the
18 evidence that Iola Craft, the plaintiff,
19 started across Boush Street at the
20 intersection of York before the truck of the
21 defendant reached the intersection of Boush

1 and York, you are instructed she had the
2 right-of-way.

3 The Supreme Court said that's a
4 proper instruction, and they went through a
5 discussion of the law. Yes, she should have
6 been given that instruction.

7 The next case, Marshall versus
8 Shaw, same issue comes up, same language,
9 instruction B that was refused. The Court
10 refused an instruction, and the plaintiff was
11 appealing saying, If you find from the
12 evidence that Aida B. Marshall Struthers, the
13 deceased pedestrian, started across
14 Washington Street at the intersection of
15 Wilkes Street before the car of the
16 defendant, Peggy Ann Shaw, reached the
17 intersection, you are instructed she, the
18 pedestrian, had the right-of-way.

19 The next case is -- and the
20 Supreme Court said that was a proper
21 instruction. It should have been granted

1 because that's the law. And it makes sense.
2 Otherwise, every pedestrian in Fairfax County
3 is always going to have the right-of-way no
4 matter where they are when another car
5 reached the intersection.

6 And if you look at the statute --

7 THE COURT: So the right-of-way
8 depends on who gets there first?

9 MS. JUDKINS: The right-of-way is
10 created when the pedestrian -- this is an
11 uncontrolled traffic light -- when the
12 pedestrian is there first or has entered the
13 intersection before the car got there or they
14 get there at the same time.

15 I would agree that if they get
16 there at the same time, then the pedestrian's
17 right-of-way is there. But it makes no sense
18 to say -- and the statute is written in the
19 present form, pedestrian crossing. And
20 that's what -- Lucas says that, Marshall
21 versus Shaw, Burks versus Webb, same

1 instructions, same issue.

2 All of these plaintiffs argued
3 they had the right-of-way, and the
4 instructions that were given back in those
5 days, because they got there first or they
6 were already there when the defendant came.

7 And you know how these accidents
8 happened? These people were exercising their
9 right-of-way, actually crossing, and the car
10 was approaching. And they assumed the car
11 would stop, and the car didn't.

12 Now, in this case, plaintiff from
13 85 to 90 paces times three, however many
14 yards -- I need my calculator, but however
15 many hundreds of feet that is, he assumes
16 he's got the right-of-way when my client is
17 already up there past the white stop line
18 really already in the intersection. No. I
19 argue neither one has the right-of-way at
20 that point.

21 They either have -- I didn't ask

1 for an instruction my client had the
2 right-of-way. He doesn't have the
3 right-of-way at that point because it doesn't
4 fit with the law as the Supreme Court of
5 Virginia has always applied it with this
6 statute, this pedestrian statute.

7 That's my argument to you that
8 this instruction is not applicable. It
9 doesn't say, like these other ones have said,
10 If you believe from the evidence the
11 plaintiff was in the intersection or reached
12 the intersection or had entered the
13 intersection before the defendant got there,
14 he had the right-of-way.

15 THE COURT: All right.

16 Mr. Weiner.

17 MR. WEINER: Yes. Your Honor, if
18 Ms. Judkins' argument prevails, that means
19 that Mr. Russ, who had no stop sign -- and
20 it's incorrect for her to say that this was
21 an uncontrolled intersection. Mr. Destival

1 was stopped at a stop sign. The point where .
2 Mr. Russ entered Prestwick Drive is a
3 statutory crosswalk. He started and he has a
4 right to finish crossing Prestwick road by
5 the most direct means. 904 clearly speaks to
6 that.

7 THE COURT: All right. Now,
8 which section of that statute?

9 MR. WEINER: I'm sorry.
10 46.2-904 -- one, two, three -- fourth
11 paragraph, a person riding a bicycle.

12 THE COURT: Okay.

13 MR. WEINER: Then if we look to
14 46.2-100, that tells us it's a crosswalk. He
15 absolutely had the right-of-way. It would be
16 a whole different story if he saw the car
17 coming, but it had never stopped. Then he
18 may not be right in making that assumption,
19 but the car was stopped.

20 THE COURT: So you're saying that
21 the bicycle should be treated no differently

1 than cross traffic?

2 MR. WEINER: The bicycle should
3 be treated no different than a pedestrian.

4 THE COURT: No, than any other
5 traffic approaching from the west?

6 MR. WEINER: Well, I think a
7 pedestrian has the higher right-of-way. But
8 in either case, Your Honor, he wasn't
9 blocking the crosswalk. He was stopped. And
10 we have our jury instructions saying that, in
11 fact, Mr. Russ had the right to assume the
12 car would remain stopped.

13 That's what stop signs are all
14 about. You have to stay stopped until it's
15 safe to go.

16 THE COURT: All right.
17 Ms. Judkins, why isn't that the correct
18 analysis?

19 MS. JUDKINS: Because these cases
20 that I've cited to you are at intersections,
21 some of which have stop signs, some of which

1 have stoplights. This had a stop -- my
2 client wasn't at the stop sign. Remember?
3 He was beyond the stop sign.

4 He had pulled into what
5 classifies as the intersection under the
6 motor vehicle statutes. He was already in
7 the intersection.

8 His client does not have a
9 right-of-way for all time and all places.
10 And that's what you would be saying is, from
11 the time he's down at the bottom of that hill
12 and sees the car up there move into the
13 intersection, move into it -- there's no
14 dispute my client did stop initially at the
15 stop sign and the white stop line. My client
16 did do that, and he couldn't have seen it
17 from that far. Then --

18 MR. WEINER: That's not true.

19 MS. JUDKINS: I thought --

20 THE COURT: Well, don't
21 interrupt.

1 MS. JUDKINS: Oh. Well, I didn't
2 think there was any dispute about that, but,
3 anyway, whatever.

4 So my client is in the
5 intersection, in the intersection, long
6 before the plaintiff ever gets there. These
7 cases where they are given the
8 right-of-way -- it's just like the analysis
9 with cars. It's just like the analysis with
10 cars. Right-of-way isn't always absolutely
11 only by statute.

12 THE COURT: All right. Well,
13 let's take a situation just like it is with
14 cars. Just because a car has entered an
15 intersection, as your client did in this
16 case, if he doesn't have the right-of-way,
17 which he doesn't, for the cross traffic, he
18 can't enter into the intersection thereby
19 forcing the cross traffic to stop and let him
20 in.

21 MS. JUDKINS: No, he can't.

1 THE COURT: Well, how is the
2 bicycle in this case any different really
3 than that?

4 MS. JUDKINS: Well, when this
5 accident happened, actually he could have
6 entered the intersection. The way was clear,
7 from my client's testimony, to go. He was
8 entitled to go.

9 THE COURT: Well, that's a
10 separate question.

11 MS. JUDKINS: Well, it may be,
12 but it isn't. The plaintiff doesn't have the
13 right-of-way starting 85 to 90 paces back.
14 If he had reached the intersection --

15 THE COURT: Well, no, he
16 doesn't -- obviously, he doesn't have the
17 right-of-way 89 paces back. But the question
18 is, at the time that they're both there --
19 maybe who got there first is relevant; I
20 don't know -- but how do they legally
21 determine who goes first?

1 MS. JUDKINS: Once they -- once
2 my client's there first?

3 THE COURT: Once they're both
4 there.

5 MS. JUDKINS: Okay. Well, if
6 they both arrived at the same time, I'd say
7 the pedestrian has the right-of-way or the
8 bicyclist because of the statute. But
9 because they didn't, because my client was
10 there first and actually moved beyond the
11 stop sign and entered what statutorily
12 classifies as the intersection, the plaintiff
13 didn't have a right-of-way anymore.

14 THE COURT: All right.

15 MS. JUDKINS: Now, whether or not
16 he has a duty to wait for my client to see if
17 he's going to go, has a duty at least to
18 stop, he -- what this instruction will tell
19 him is that he had the right to absolutely
20 proceed under the circumstances and, that, he
21 did not.

1 THE COURT: Well, we can agree
2 that if Mr. Russ had been in a car traveling
3 down the highway, he would have had the
4 right-of-way over your client?

5 MS. JUDKINS: Yes, but there
6 would also -- there wasn't anything
7 intersecting at this point. It wasn't
8 like -- Mr. Russ is coming up the bicycle
9 path, and there's clearly a road he's got to
10 cross. It's different than the cars coming
11 on Braddock Road. Braddock Road, there isn't
12 any road -- Braddock Road doesn't have a stop
13 sign, doesn't have a stoplight, doesn't have
14 any intersecting road that it has a duty to
15 stop at.

16 THE COURT: Oh, no -- yes, it
17 does.

18 MS. JUDKINS: Well --

19 THE COURT: There's a big
20 intersection right there that's
21 uncontrolled --

1 MS. JUDKINS: Yes, but --

2 THE COURT: -- except by the stop
3 sign.

4 MS. JUDKINS: And the law in
5 Virginia is pedestrians and cars are equal
6 except as modified by statute.

7 THE COURT: Well, where do bikes
8 fall in that continuum? That's what I'm
9 trying to figure out.

10 MS. JUDKINS: Well, it's not
11 crystal clear, but because of the part of the
12 statute that says they are to be treated --
13 now, remember, Mr. Weiner argued to you this
14 was like a crosswalk.

15 Now, the statute differentiates.
16 There is a crosswalk situation, and then
17 there's the prolongation of the sidewalk.
18 He's not in a crosswalk. He doesn't have
19 that effect. He's got -- he's at an
20 intersection.

21 Because the rights of the

1 vehicles and pedestrians are equal unless the
2 statute modifies it, you got to go to the
3 statute. Then I say to you, okay, you have
4 to go to where the Supreme Court of Virginia
5 has interpreted the statute. And they've
6 always said the right-of-way exists when the
7 plaintiff has entered the intersection and is
8 crossing --

9 THE COURT: All right. Let me
10 back up.

11 46.2-904 -- and it's a
12 penultimate paragraph -- seems to say that a
13 person on a bicycle has the same rights and
14 duties as a pedestrian.

15 MS. JUDKINS: Yes, it does.

16 THE COURT: And a pedestrian has
17 the same rights and duties as a car. Do we
18 agree?

19 MS. JUDKINS: Yes, I guess. Yes,
20 except where modified. I mean, there's
21 certain statutes that talk about it. There

1 are cases that say that in dealing with
2 pedestrians, the duties -- as to who has a
3 right-of-way absent the statute, it's equal.
4 Neither has a right-of-way over the other.
5 The Supreme Court of Virginia has said that.

6 As to who has a right-of-way
7 absent a statute, it is equal. And that's
8 so -- that's what's so important. I'm not
9 sure you can just say, they all have the same
10 duties as cars. You can't do that under
11 these circumstances. I don't think Mr. Russ
12 has the same rights as a vehicle traveling on
13 Braddock Road. He would if he'd been on the
14 road on his bicycle.

15 THE COURT: Well, this is not a
16 crosswalk.

17 MS. JUDKINS: No.

18 THE COURT: I agree with you
19 there. Is it a sidewalk?

20 MS. JUDKINS: It's a general use
21 trail. It's actually a bike trail, is what

1 Mr. Weiner's evidence shows.

2 THE COURT: And what is the
3 definition of a bike trail?

4 MS. JUDKINS: I don't know.

5 THE COURT: What's the definition
6 of a sidewalk?

7 MR. WEINER: I would --

8 THE COURT: Neither --

9 MR. WEINER: 46.2-100, I think is
10 what we have here.

11 THE COURT: Well, what --

12 MR. WEINER: 46.2-100 defines
13 "crosswalk."

14 MS. JUDKINS: Defines
15 "crosswalk"? Let's see.

16 MR. WEINER: It also defines
17 "intersection," and Ms. Judkins is just wrong
18 when she says that he entered the
19 intersection. He did not.

20 THE COURT: All right.

21 MS. JUDKINS: Actually,

1 "intersection" is defined in the statute,
2 too: The area embraced within the
3 prolongation or connection of the lateral
4 curb lines or, if none, then the lateral
5 boundary lines of the roadways of two
6 highways.

7 This is within the intersection
8 because it's embraced within the prolongation
9 of those two -- whatever you want to call it,
10 sidewalks. I don't care what you call them.
11 Walks, crosswalk, it is embraced in that.

12 Otherwise, plaintiff isn't
13 crossing at the intersection. Isn't
14 plaintiff crossing at the intersection? I
15 think he's alleging he did.

16 I think the cases are extremely
17 important in reading what the Supreme Court
18 historically has recognized as -- the first
19 premise is the right-of-way is equal unless
20 the statute applies, and we know there is a
21 statute we have to look at here.

1 THE COURT: But how does the
2 statute change the right-of-way here?

3 MS. JUDKINS: The statute -- then
4 they've applied it.

5 THE COURT: How does the statute
6 change the equality here?

7 MS. JUDKINS: Okay. It says, If
8 you believe from the evidence that the
9 plaintiff had entered the intersection before
10 the defendant arrived at the intersection,
11 you must find the pedestrian had the
12 right-of-way. That's how it changed. The
13 Court instructs the jury, If you find from
14 the evidence --

15 THE COURT: Wait a minute. Wait
16 a minute. Now you're treating pedestrians
17 differently than vehicles, and I'm trying to
18 figure out why you're doing that.

19 MS. JUDKINS: Because of the
20 statute, because of the statute and the
21 cases.

1 THE COURT: Well, I don't know
2 that you can look at these old cases and this
3 new statute and say that they are talking
4 about the same thing.

5 MS. JUDKINS: Oh, they recite the
6 statute. It's almost exact. It hasn't
7 changed in substance from when these cases --

8 THE COURT: 46.2-904?

9 MS. JUDKINS: Yes. If you look
10 at the statute they cite on page 5, they talk
11 about --

12 THE COURT: Well, wait. Which
13 case are you on, again?

14 MS. JUDKINS: The first one is
15 Lucas versus Craft. The statute was
16 substantially similar then and in all these
17 cases. I didn't pull out a case where the
18 statute wasn't in existence or was radically
19 different. I couldn't extrapolate from those
20 cases. I'm not even aware of any such case.

21 But in this case, pedestrians are

1 different to the extent that the Virginia
2 legislature has modified it by statute. The
3 assumption was before they were all treated
4 the same.

5 If you look at the statute -- and
6 then I've looked at -- the only way I could
7 look at it is, how has the Supreme Court ever
8 interpreted this or a substantially similar
9 statute? And they've interpreted it as,
10 uniformly in all of these cases, approving
11 the instructions. If the evidence is that
12 the pedestrian -- remember, there's another
13 part of the statute that says bicyclists are
14 like pedestrians if they are on the
15 sidewalk -- started across the street at the
16 intersection before the truck of the
17 defendant reached the intersection, you are
18 instructed she had the right-of-way over the
19 said truck.

20 The obvious inference being, if
21 she hasn't before the other truck is there or

1 has entered the intersection, she doesn't
2 have the right-of-way. My client was already
3 there. You don't have a case -- you're not
4 going to find a case where they gave the
5 plaintiff the right-of-way, pedestrian,
6 bicyclist, anybody, where my client was in
7 the position he was. It's always when the
8 other guy was approaching.

9 THE COURT: Except when it's a
10 car. When it's a car, then he just -- he
11 can't wrest the right-of-way away from the
12 cross traffic.

13 MS. JUDKINS: No, nor did he.
14 No, no. That's -- okay. I think -- I guess
15 I see what you're saying. Why is -- oh, I
16 see.

17 It's because of the statutes.
18 Pedestrians do have different rights and
19 duties depending upon where they are
20 crossing, when they are crossing. There are
21 cases that talk about if you cross between

1 intersections, you have a higher degree of
2 vigilance.

3 Yes, the legislature has carved
4 out pedestrians' rights and duties different
5 from motor vehicles in a certain number of
6 these statutes. And it's dealt with in one
7 of those -- in that section 904 and
8 surrounding sections.

9 And then there are cases,
10 naturally, that interpret these statutory
11 sections and when the pedestrian has the
12 right-of-way. I argue that under those cases
13 interpreting those statutes, he doesn't have
14 the right-of-way here on this day.

15 Neither had the right-of-way at
16 best, basically. They each had duties to
17 exercise ordinary care.

18 MR. WEINER: Your Honor, I think
19 924, 46.2-924, resolves the issue.

20 MS. JUDKINS: All right. And
21 this is the same statute, similar language,

1 that the Court interpreted in Marshall versus
2 Shaw. That statute was, the driver of any
3 vehicle upon a highway within a business or
4 residence district shall yield the
5 right-of-way to a pedestrian crossing such
6 highway within any clearly marked crosswalk
7 or any regular pedestrian crossing including
8 the prolongation of the lateral boundary
9 lines of the adjacent sidewalk, blah, blah,
10 blah. No pedestrian --

11 MR. WEINER: Blah, blah, blah,
12 read it.

13 MS. JUDKINS: Well --

14 MR. WEINER: The intersection --

15 MS. JUDKINS: I mean, it's there
16 on page 6. The end of the block except at
17 intersections where the movement of traffic
18 is regulated by traffic officers or traffic
19 direction devices. Now, this does not --

20 THE COURT: A stop sign is a
21 traffic direction device, isn't it?

1 MS. JUDKINS: The cases --
2 actually, the cases interpreting this are
3 talking about little pedestrian walk signs or
4 traffic lights, not a stop sign, because many
5 of these cases I've cited to you are
6 accidents that happened at an intersection
7 controlled by a stop sign or someone turning
8 off of a street where he had a stop sign.
9 We're talking about a traffic light, traffic
10 direction devices, not a stop sign.

11 I disagree with Mr. Weiner's
12 interpretation of this because this is the --
13 in this case, Marshall versus Shaw, this is
14 the same statute the Court was interpreting
15 that the plaintiff had to have been entering
16 the intersection or crossing. The exact
17 language is on page 4.

18 It's hard to argue this out of
19 context if you haven't read the cases, and I
20 realize I just handed them up to you. But
21 that the plaintiff was started across the

1 street at the intersection before. The other
2 guy was turning from a street that had a stop
3 sign.

4 THE COURT: Where are you?

5 MS. JUDKINS: Let me see.

6 This -- let me see. In one of these cases,
7 she was struck -- in Shaw -- at the
8 intersection of Washington and Wilkes Street
9 in the city of Alexandria.

10 MR. WEINER: Where are you,
11 Julia?

12 MS. JUDKINS: Yes.

13 MR. WEINER: Where are you
14 reading from?

15 MS. JUDKINS: I'm reading on page
16 2 of where -- in Shaw.

17 THE COURT: Page 2 of the Lexis
18 printout?

19 MS. JUDKINS: Yes, yes. I'm not
20 sure I have the right case. You know,
21 honestly, from this, I can't tell in Shaw

1 whether that person had a stop sign. Let me
2 find the one where he had a stop sign. He
3 was making a left turn.

4 THE COURT: All right.

5 Mr. Weiner, you said 46.2-924 answers the
6 question. Which section?

7 MR. WEINER: Three, section 3.
8 And I would argue 2 and 3. They both do it.

9 MS. JUDKINS: In the case of
10 Arney versus Bogstad, B-O-G-S-T-A-D, that
11 accident happened at an intersection
12 controlled by a traffic light, a traffic
13 light. And the Supreme Court of Virginia
14 said that this instruction, which had been
15 refused by the trial court, should have been
16 granted: The Court instructs -- what
17 happened is, the pedestrian was -- entered --
18 tried to cross -- started to cross the street
19 when the light for the traffic approaching,
20 the car or truck approaching, was red. Okay?

21 The pedestrian starts in to

1 cross. It turns green for the guy coming,
2 and he just keeps going and hits the
3 pedestrian. The Supreme Court of Virginia
4 said that --

5 THE COURT: Where are you?

6 MS. JUDKINS: On page 2 of the
7 Arney versus Bogstad opinion, this
8 instruction tendered by the plaintiff: If
9 they find from the evidence that Bobby Arney
10 started across the intersection when the
11 traffic light was red for southbound traffic
12 and before the automobile of the defendant
13 reached the intersection and the light
14 changed from red to green, then they should
15 find he had the right-of-way, the pedestrian.
16 All right?

17 So that's a stop -- let me find
18 the one that involved the stop sign.

19 MR. WEINER: A stop sign's always
20 red.

21 MS. JUDKINS: The stop sign means

1 he's stopped until -- but he could go because
2 the traffic had cleared. It doesn't mean
3 that the pedestrian had the right-of-way, and
4 he always had to be on the lookout for the
5 possibility a pedestrian would come and not
6 stop.

7 That's what you have here. You
8 don't have a case that fits squarely with any
9 of the facts of most of the reported cases.
10 So --

11 THE COURT: Well, but the
12 pedestrian -- see, what I keep coming back to
13 is the cross traffic didn't have to stop.
14 Why did the pedestrian have to stop?

15 MS. JUDKINS: The cross
16 traffic --

17 THE COURT: The cross traffic has
18 no stop sign. The pedestrian's got no stop
19 sign.

20 MS. JUDKINS: Well, the
21 pedestrian has statutory duties that say

1 that -- no, the pedestrian doesn't, but there
2 are statutory duties that say they have to
3 keep a proper lookout. They can't exercise
4 their right-of-way approaching. They can
5 cross an intersection. It doesn't mean they
6 can just walk along and keep crossing without
7 looking when traffic is dangerously close or
8 near, like my client was already there.

9 So under that extrapolating,
10 pedestrians have a right-of-way everywhere.

11 THE COURT: Well, they may.

12 MS. JUDKINS: Not in Virginia,
13 they don't. Maybe in California, but not in
14 Virginia.

15 I mean, I can only argue the
16 statutes as interpreted by the Court, the
17 Supreme Court, and they have said -- and let
18 me find the one with the stop sign because
19 there was a vehicle turning left from a stop
20 sign.

21 THE COURT: So your position is

1 that because Mr. Destival was in the
2 intersection, then he had the right-of-way
3 over whatever right-of-way the pedestrian
4 might have had?

5 MS. JUDKINS: No, I'm not
6 actually saying that at this point. I didn't
7 ask -- I'm saying that the statutory
8 presumption that the pedestrian had the
9 right-of-way doesn't apply, and you go back
10 to the common law that said all rights are
11 equal. This is what the Supreme Court has
12 said. If there's --

13 THE COURT: Well, 46.2-924 seems
14 to say all rights aren't equal.

15 MS. JUDKINS: And it speaks in
16 the present tense, crossing. And that's why
17 the Supreme Court of Virginia has said in all
18 these cases, when they approved this
19 instruction or told the trial court they
20 should have given the pedestrian the
21 right-of-way, it's because the evidence

1 showed the pedestrian had started across the
2 street before the car got there.

3 THE COURT: All right. Look at
4 46.2-924, the last paragraph of subsection B:
5 Pedestrians crossing highways at
6 intersections shall at all times have the
7 right-of-way over vehicles making turns into
8 the highways being crossed by the
9 pedestrians.

10 MS. JUDKINS: That doesn't apply
11 here because Mr. Russ was not crossing
12 Braddock Road.

13 THE COURT: True, but what it
14 suggests is that it doesn't really matter who
15 started crossing first. The pedestrian has
16 the right-of-way.

17 MS. JUDKINS: Well, actually, you
18 see --

19 THE COURT: And that's kind of
20 what we've got here.

21 MS. JUDKINS: See, I argue to you

1 the Supreme Court has said over and over
2 again that the rights of the vehicle and --
3 of the driver and the pedestrian are equal
4 unless the statute comes into play, and the
5 cases interpreting the statute have said they
6 give the pedestrian the right-of-way if
7 they're in the intersection first.

8 THE COURT: All right. So you're
9 relying, then, on the part of 46.2-924 that
10 says, No pedestrian shall enter or cross an
11 intersection in disregard of approaching
12 traffic?

13 MS. JUDKINS: And I'm relying on
14 the way the Court has interpreted this
15 statute and its predecessor on specific
16 facts. That's only part of what I'm relying
17 on. I'm relying on that, but the way the
18 Court has always interpreted it is not that
19 there's a blanket presumption that
20 pedestrians have the right-of-way at
21 intersections.

1 Pedestrians and vehicles'
2 right-of-way are equal unless. And then when
3 they've given the right-of-way to the
4 pedestrians, it's because the pedestrian was
5 at the intersection or in the intersection
6 first when the approaching vehicle came upon
7 them.

8 That's the way I'm interpreting
9 it because of the presumption that their
10 right-of-way is equal. They give it to the
11 pedestrian under certain circumstances, but
12 not under all circumstances, not all. Now,
13 some states do, but not Virginia.

14 And the present tense -- and this
15 paragraph flat-out doesn't apply because he
16 wasn't crossing Braddock Road and my client
17 wasn't turning into the street he was
18 crossing. He was crossing right in front of
19 my client.

20 But I'm not sure you can actually
21 decide that without reading the -- I haven't

1 really given you an opportunity to read the
2 cases, but there are -- you have to start
3 with the presumption that no one has a
4 favored right-of-way. It's equal.

5 Forget the -- if there's no
6 statute, plaintiff wouldn't have a
7 right-of-way no matter when he got to the
8 intersection, if there was no statute.
9 Plaintiff would have the same as the vehicle.
10 They have equal right-of-way.

11 Plaintiff doesn't have the same
12 duties as the car on Braddock, not according
13 to the Virginia Supreme Court and the other
14 cases. And I'll find it. If I have to stay
15 here, I'll find it.

16 THE COURT: And why not?

17 MS. JUDKINS: Because the Supreme
18 Court of Virginia says that, common law, the
19 pedestrians and the vehicles, there is no
20 right-of-way. One has no right-of-way over
21 the other.

1 THE COURT: Well, but in this
2 intersection of Braddock and Prestwick, the
3 east-west traffic has the right-of-way, and
4 Mr. Russ was east-west traffic.

5 MS. JUDKINS: Well, perhaps, but
6 Virginia, the Supreme Court, has never
7 recognized that pedestrians have all the same
8 duties or rights as the cars. They've dealt
9 with pedestrians separately, and they always
10 have.

11 Here we go. Let's see. I have
12 to find the case for you, and I have it of
13 the 50,000 cases I have, where it says that
14 absent the applicability of the statute,
15 their rights-of-way -- neither has a
16 right-of-way over the other. You can't look
17 at the pedestrian in the same way you look at
18 the vehicle because the Court has never done
19 so in applying the common law.

20 And then you have to go to the
21 statute. I mean, I just never -- I mean, I

1 will find it if you want to take a break
2 because I didn't come prepared to argue what
3 it was before the statute applied. I didn't
4 know necessarily that that would be a
5 particular issue, but I have got the cases
6 somewhere.

7 THE COURT: Okay. Well, why
8 don't we go on. Let's see what other
9 instructions have these same arguments
10 attached to them.

11 Let's see, that was plaintiff's
12 10. Is your position the same with respect
13 to plaintiff's 11?

14 MS. JUDKINS: Well, this
15 instruction, if you look at it from the
16 model, has to do with -- he's changed
17 bicyclist from vehicle. This is a motor --
18 this is a vehicle-to-vehicle instruction. It
19 has nothing to do with a bicyclist or
20 pedestrian.

21 THE COURT: And what's the model

1 cite here, Mr. Weiner?

2 MS. JUDKINS: He's got 10.270.

3 MR. WEINER: 10.270.

4 MS. JUDKINS: And, also, then,
5 this brings up the issue that he is arguing
6 that my client should have stayed stopped at
7 that clearly marked stop line, which is the
8 whole point of my trying to introduce that
9 other evidence that it had been changed.

10 But if you read the -- if you
11 read the instruction, the model, the back --
12 it cites to a very specific statute, motor
13 vehicle statute, and it has to do with
14 vehicle to vehicle, not pedestrian or
15 bicyclist.

16 THE COURT: Well, if pedestrians
17 and vehicles are treated the same way, why
18 wouldn't 10.270 apply?

19 MS. JUDKINS: The authority for
20 this is a particular motor vehicle statute,
21 which I -- let me get the instruction.

1 That's the only authority for that
2 instruction, is a provision of the motor
3 vehicle code.

4 THE COURT: The yielding of
5 right-of-way at a stop sign. Well, why
6 doesn't the rule about yielding the
7 right-of-way at a stop sign apply to a
8 pedestrian?

9 MS. JUDKINS: It does if the
10 pedestrian gets there first or they reach at
11 the same time, but not if the pedestrian
12 isn't there yet.

13 THE COURT: Well, we keep coming
14 back to the same conundrum. If Mr. Destival
15 has to yield to a car coming down Braddock
16 Road, and a car coming down Braddock Road is
17 treated the same way as a pedestrian coming
18 down Braddock Road, why doesn't he have to
19 yield to a pedestrian?

20 MS. JUDKINS: A pedestrian is not
21 treated the same way as a car coming down

1 Braddock Road because --

2 THE COURT: But I thought
3 46.2-904 said it was.

4 MS. JUDKINS: That's -- let me --
5 with this particular instruction, 2.70 (sic),
6 this particular instruction, he's changed it
7 radically. A driver facing a stop sign at an
8 intersection has a duty to stop at a clearly
9 marked stop line before entering the
10 crosswalk on the near side of the
11 intersection at the point nearest the
12 intersecting road where he would have a view
13 of approaching traffic on that road. Before
14 proceeding, the driver also has a duty to
15 yield the right-of-way to any approaching
16 vehicle.

17 That's what it says, and it cites
18 46.2-821. That statute has nothing to do
19 with the plaintiff and a pedestrian. And he
20 cannot change that statute and say, as he's
21 done here, that we had a duty to yield to a

1 bicyclist coming up the bike path. No.

2 If you look at the statute,
3 46.2-821 -- the statute 821, Before
4 proceeding, he shall yield the right-of-way
5 to the driver of any vehicle approaching on
6 such other highway from either direction.
7 That's what it says.

8 That's because Virginia common
9 law has not always treated pedestrians
10 exactly the same as vehicles. The argument
11 that vehicles and pedestrians are the same
12 goes to their right-of-way. Neither has a
13 right-of-way over the other at common law
14 except where the legislature has modified it
15 by statute.

16 It doesn't mean that pedestrians
17 are under the same rules of all motor
18 vehicles or that they have the same rights as
19 motor vehicles. There is no authority for
20 that argument.

21 In Lucas versus Craft, the

1 Supreme Court did, in interpreting the
2 statute at issue, say that the pedestrian has
3 a superior right to cross from one side of
4 the street to the other at intersections
5 where there's neither traffic lights nor
6 traffic officers when they reach -- when she
7 reaches there first.

8 THE COURT: Which case are you in
9 now?

10 MS. JUDKINS: In Lucas versus
11 Craft. I'm trying to find the case that says
12 the basic thing you start from is that
13 neither has the right-of-way over the other,
14 and then you determine whether or not the
15 pedestrian does get a right-of-way.

16 Okay. Here's the case that talks
17 about who has a right-of-way. In Brown
18 versus Arthur at 202 Virginia 624, and it's
19 cited in the annotations for 46.2-923, A
20 motorist or pedestrian in traveling along a
21 portion of a highway prescribed for the use

1 of each of them has no right-of-way over the
2 other except as provided by statute. In the
3 absence of such a statutory provision, the
4 rights of motorists and pedestrians are equal
5 and their duties are mutual and reciprocal.

6 So then you go to the statutes,
7 and we know what the statutes are. Then I go
8 to the cases that I argue to you state that
9 that right-of-way exists for the pedestrian
10 when they are either at the intersection when
11 the vehicle gets there or they've already
12 entered it when the vehicle gets there, not
13 necessarily under the facts of this case
14 where my client has stopped and then moved
15 into the intersection, also, also.

16 That's the difference here. And
17 I don't think -- I don't think it's correct
18 to say that absent the statute, the
19 pedestrian has all the rights of the vehicles
20 that are traveling on Braddock Road.

21 That's not what the Supreme Court

1 has said. They've always said pedestrians
2 and motorists have no right-of-way over the
3 other, but there's nowhere does it say that
4 pedestrians have the same rights and duties
5 as motor vehicles.

6 THE COURT: Where in the
7 annotations did you --

8 MS. JUDKINS: Right-of-way, it's
9 on page 397 of the Virginia code, volume 7.
10 It says, Right-of-way as between motorist and
11 pedestrian.

12 THE COURT: Okay. That's Brown
13 v. Arthur?

14 MS. JUDKINS: Right. And right
15 below that, Schutte versus Brockwell, 214
16 Virginia, no right-of-way over the other
17 except as provided by statute.

18 THE COURT: All right. And then
19 you say 46.2-924 doesn't give this plaintiff
20 a right-of-way because the defendant was in
21 the intersection first?

1 MS. JUDKINS: Had arrived at and
2 had actually gone beyond the stop sign and
3 entered the -- what qualifies statutorily as
4 the intersection before the plaintiff got
5 there.

6 The right-of-way when the -- the
7 Supreme Court, if you read these cases, even
8 in the case with the traffic light, has been
9 when the person has entered the intersection
10 first. In a crosswalk, they entered it
11 before the vehicle got there.

12 Not in a case where somebody has
13 come to the stop sign, started to enter it,
14 whatever, and under the -- under these
15 circumstances, I don't think you can find as
16 a matter of law the plaintiff had the
17 right-of-way, which is what you'd have to do
18 to grant this instruction, basically. He
19 didn't have the right-of-way.

20 MR. WEINER: Your Honor, 46.2-924
21 and its annotations clearly say, on page 400

1 of my volume, Pedestrian has superior
2 right-of-way at intersections. That's
3 bolded, and then there's numerous cases under
4 that section. The next bolded section says,
5 Hence, the driver must exercise a greater
6 degree of vigilance.

7 And I might agree that if
8 Mr. Russ said he saw the Destival vehicle
9 moving and he stepped in front of it,
10 different ball game. The evidence, the
11 uncontroverted evidence, was the Destival
12 vehicle was stopped. It was not impeding the
13 crosswalk. And Mr. Russ did have the
14 superior right at that intersection in that
15 statutory crosswalk.

16 And I think to find otherwise
17 means a stop sign has no meaning at all.
18 Once he's stopped, he can go because he
19 stopped first. He has to remain stopped.
20 That's what a stop sign is.

21 And I ask you to read the

1 annotations in 46.2-924.

2 THE COURT: Well -- but why isn't
3 this a situation where Mr. Destival was
4 approaching traffic? He was, quote,
5 approaching traffic in this intersection.
6 And as he was -- and he was doing that. He
7 had that status of approaching traffic before
8 Mr. Russ arrived at the intersection.

9 MR. WEINER: Because he was not
10 approaching. He was stopped. He was
11 stopped, and that's why --

12 THE COURT: Well, but he was
13 still approaching traffic. He was still in
14 the intersection. He was still preparing to
15 negotiate a turn.

16 MR. WEINER: Well, I think that
17 is absolutely answered by -- by, as you
18 pointed out, the last paragraph -- the last
19 two paragraphs of 46.2-924, starting with,
20 The drivers of vehicles entering, crossing,
21 or turning at intersections shall stop if

1 necessary.

2 THE COURT: But that's only --

3 MR. WEINER: And that's not even
4 with a stop sign. We have the added -- we
5 have the added thing of a stop sign here.

6 Because this section even speaks
7 to intersections where it's just at the end
8 of a block, as long as the speed limit is 35
9 miles an hour or less, with no stop sign.
10 Here we have a stop sign.

11 THE COURT: Well, what does that
12 next-to-last paragraph mean, then,
13 Ms. Judkins, in 46.2-924?

14 MS. JUDKINS: And that was
15 interpreted by the Court, too, if you find
16 from the evidence that the pedestrian was
17 there before the car got there, before the
18 car of the defendant reached the
19 intersection, before.

20 In our case, no, you don't have
21 just my client stopped at a stop sign. You

1 have from the plaintiff's own evidence, he'd
2 gone beyond the stop sign and had actually
3 entered the intersection. That is something
4 you have to take into consideration. He
5 wasn't stopped at a stop sign.

6 Be that as it may, all of these
7 cases I gave you, they said in one form or
8 another, the Court instructs them, that if
9 the plaintiff started across the street at
10 the intersection before the truck or before
11 the vehicle, before whoever it was got there,
12 then she had the right-of-way over the truck.
13 Then she had the right-of-way.

14 That is logical. Because under
15 our facts, neither party had the
16 right-of-way. Neither party had the
17 right-of-way.

18 If Mr. Russ had come to that
19 intersection and stopped, my client
20 approached, stopped at the stop line, then
21 Mr. Russ would have had the right-of-way, but

1 that's not the facts of the case. My client
2 entered the intersection way before he got
3 there. He hadn't entered the intersection,
4 the plaintiff, before my client got there.

5 That's what triggers the
6 right-of-way for the plaintiff under all of
7 these cases. I mean, I can find no other
8 authority. I didn't make it up. I can find
9 no other authority for it.

10 THE COURT: So -- but in each of
11 the cases that you've handed up, the
12 pedestrian was already crossing?

13 MS. JUDKINS: That's what the --
14 yes. That's what the pedestrian's evidence
15 was, I was crossing; I was there entering it.

16 And they -- and the vehicle was
17 approaching. They thought they had enough
18 time to get by.

19 THE COURT: Well, so what really
20 is the issue there, though? I mean,
21 obviously, the pedestrian's already crossing.

1 MS. JUDKINS: The issue was, she
2 wanted an instruction that said she had the
3 right-of-way, just like the plaintiff wants
4 here. She wants -- she, he, he, he, in all
5 of these cases -- in some of the cases, the
6 defendant was appealing, saying, You
7 shouldn't have given that instruction that
8 the plaintiff had the right-of-way.

9 And the Court said, Look, it's a
10 proper instruction, if you believe from the
11 evidence the plaintiff had started across the
12 street, had entered the intersection.

13 In the other cases, the plaintiff
14 was appealing, saying, You didn't give me
15 this instruction. I was entitled to it.

16 And the Supreme Court said, Based
17 on the evidence, the plaintiff saying they
18 had started across, yes, you should have
19 given that instruction.

20 That's a correct statement of the
21 law, and then they go through a whole

1 analysis of the statute. That's my argument
2 to you.

3 Yes, she gets the right-of-way
4 regardless of whether there's a traffic
5 light, a stop sign, whatever, if she's
6 entered the intersection, but not when she --
7 he is away from the intersection, and my
8 client has entered the intersection already.
9 That's the difference here.

10 They want an instruction --
11 basically, they can argue that he had the
12 right-of-way, and that instruction is
13 improper. It doesn't say if you believe from
14 the evidence that the plaintiff started
15 across the street at the intersection before
16 the defendant's vehicle entered the
17 intersection. It doesn't say that. That's
18 the problem.

19 THE COURT: All right. Let's
20 look at plaintiff's 12.

21 MS. JUDKINS: All right, 12, from

1 Virginia Jury Instructions -- let's see -- is
2 the same -- the plaintiff has a right to
3 assume that a vehicle will remain stopped, to
4 assume that the defendant who had stopped did
5 so with the intention of giving traffic the
6 right-of-way, had the right to continue in
7 this assumption until, in the exercise of
8 ordinary care.

9 Again, we're talking -- you have
10 to distinguish motor vehicles to a certain
11 extent unless the statute applies. In this
12 case --

13 THE COURT: All right. What
14 about, though, the model instructions, 6.060?

15 MS. JUDKINS: 6.060. I don't
16 think in a case where there's no evidence the
17 defendant ever saw him that you can get this
18 instruction: The plaintiff has the right to
19 assume the defendant would use ordinary care.

20 THE COURT: Well, didn't the
21 defendant --

1 MS. JUDKINS: Each party --

2 THE COURT: -- have a duty to see
3 what was there to be seen?

4 MS. JUDKINS: If this is a mutual
5 instruction, I think it may be fair. Each
6 party had the right to assume the other would
7 exercise ordinary care.

8 But I don't think -- the
9 plaintiff, under these facts, has no right
10 to -- to assume what? He's already seen the
11 defendant go beyond the stop sign and pull
12 into the intersection, as defined in the
13 code.

14 And if this is trying to get
15 some -- I guess it's not really the last
16 clear chance instruction. He hasn't asked
17 for it. I didn't anticipate -- I'm not
18 really prepared to argue without going to
19 read the cases.

20 I'd like a chance to read the
21 cases on when the Court has affirmed it. I

1 don't think they've ever affirmed an
2 instruction like this under the facts of this
3 case, but I'd like to read it. There's no
4 statute.

5 MR. WEINER: Did we offer it?

6 MS. JUDKINS: No, it hasn't been
7 offered by the plaintiff.

8 THE COURT: Well, I know, but I'm
9 thinking of it as an alternative to
10 plaintiff's 12 or -- I mean, I kind of read
11 12 as -- or I was reading 12 as tantamount to
12 6.060.

13 I'm not inclined to give 12
14 because 12 is -- just comments on the
15 evidence. Who knows what anybody's intent
16 was?

17 MS. JUDKINS: I don't know that
18 he had the right to assume the defendant
19 would use -- what, would remain stopped where
20 he was in the intersection?

21 THE COURT: Well, I mean, I think

1 that's what the evidence would support, the
2 idea that the plaintiff thought the defendant
3 saw him and --

4 MR. WEINER: I tend to agree with
5 Your Honor. I think 6.060 would apply. The
6 plaintiff said, I saw him. He was stopped.
7 I saw him look in my direction on more than
8 one occasion.

9 I don't think it works both ways
10 because Mr. Destival says, I never saw him.

11 So how can he assume anything?

12 MS. JUDKINS: Well, you see,
13 this -- what it says in the comment here is
14 the plaintiff's failure to anticipate
15 negligence of the defendant. My argument is
16 that the plaintiff was negligent.

17 THE COURT: Well, and that's what
18 the jury will sort out.

19 MS. JUDKINS: But I just don't
20 see how -- I've got to read these cases,
21 though. Honestly, I can't -- since it was

1 never proffered by the plaintiff, you catch
2 me at a loss.

3 THE COURT: All right.

4 MS. JUDKINS: I want to read one
5 that's applicable.

6 THE COURT: Well, I'm --
7 plaintiff's 12 is denied.

8 Mr. Weiner, if you want to offer
9 6.060, then I'll hear Ms. Judkins' further
10 arguments on that tomorrow.

11 MR. WEINER: We do.

12 THE COURT: All right.
13 Plaintiff's 13.

14 MS. JUDKINS: Does not also have
15 a finding --

16 THE COURT: All right.

17 MS. JUDKINS: I mean, he has the
18 issues, but he doesn't have a finding.

19 THE COURT: 13 is denied. 14.

20 MS. JUDKINS: I have an issue on
21 No. 5, future medicals. There's been no

1 evidence of future medical expenses. And
2 property damage, no evidence of the amount of
3 any property damage.

4 MR. WEINER: Clearly, Mr. Russ's
5 testimony is that, I need orthotics. I need
6 special shoes. He testified to the cost of
7 them.

8 THE COURT: All right. What
9 about property damage?

10 MR. WEINER: With regard to
11 property damage, we'll be happy to withdraw
12 it on property damage.

13 MS. JUDKINS: The orthotics, I
14 mean, to say they're medical expenses, the
15 jury may speculate and think we're talking
16 about medical, doctors' expenses and things
17 like that. I didn't even think of the
18 orthotic devices and the shoes.

19 He's testified what he's paid and
20 what they cost, but I don't think there's any
21 medical evidence from a doctor saying he has

1 to continue to wear these the rest of his
2 life, and these are medical expenses.

3 MR. WEINER: There's also the
4 further testimony that he has a yearly
5 appointment, and the doctor said he's going
6 to be coming --

7 THE COURT: All right. I'm going
8 to white out paragraph 6 in jury instruction
9 14. And, otherwise, it will be granted over
10 objection.

11 All right. 15.

12 MS. JUDKINS: That's the life
13 expectancy table? I know part of the
14 doctor's testimony was edited on future
15 surgery and things like that. I'm not -- for
16 what purpose? Is he arguing that he has a
17 permanent injury and that he's going to have
18 this for the rest of his life, the scarring
19 or something like that?

20 MR. WEINER: The evidence is that
21 he has a scar, he's got screws in his foot,

1 and that he's --

2 MS. JUDKINS: All right. Yes,

3 I --

4 MR. WEINER: -- got progressing
5 arthritis.

6 THE COURT: All right. 15 is
7 granted over objection.

8 All right. Turning now to the
9 defendant's instructions --

10 MR. WEINER: Your Honor, there's
11 one matter that I took up before court of the
12 physics rule of feet traveled per minute.
13 I'd like the opportunity to prepare an
14 instruction.

15 THE COURT: All right. Now,
16 what's that being offered to prove? What
17 does that go to?

18 MR. WEINER: The amount of time
19 that Mr. Russ was in the visibility of
20 Mr. Destival.

21 THE COURT: Well, I think the

1 chart that you're referring to is a braking
2 distance chart.

3 MR. WEINER: Yes. And I did
4 refer to that, I think, when I brought it up.

5 THE COURT: Yes.

6 MR. WEINER: There's a stopping
7 distance chart.

8 THE COURT: And that's --

9 MR. WEINER: Now I'm asking the
10 Court to take judicial notice, and I did
11 before I released my witness, that it's a
12 rule of physics that an item traveling at six
13 miles an hour goes so many feet per second.

14 THE COURT: Oh, I see.

15 MR. WEINER: Seven miles an hour
16 goes so many feet per second.

17 MS. JUDKINS: But I don't think
18 it's proper to put that in the form of an
19 instruction to the Court. I mean, that's --
20 the tables that I thought he was talking
21 about were the braking and stopping distance

1 tables. I didn't really pay any attention
2 earlier when he said -- I mean, he can argue
3 it, I suppose, if it's a law of physics, but
4 I object to it going into an instruction.

5 THE COURT: What table are you
6 referring to? What's the statute?

7 MR. WEINER: Well, I did not have
8 a statute. I told the Court I was referring
9 on it taking judicial notice that this is a
10 law of physics, and that's what I was going
11 to have the gentleman who prepared the plat,
12 who is an accident reconstructionist, he was
13 going to testify to that fact.

14 THE COURT: All right. Tell me,
15 again, what the law of physics is.

16 MR. WEINER: That an item,
17 bicycle, anything, traveling four miles an
18 hour goes 5.86 feet per second; traveling at
19 five miles an hour goes at 7.33 feet per
20 second; at six miles an hour -- and I go up
21 to ten miles an hour.

1 THE COURT: Well, what's your
2 evidentiary basis for that, though? Mr. Russ
3 said he didn't know how fast he was going.

4 MR. WEINER: He said he was going
5 extremely slow. He guesstimated it between
6 three to ten miles per hour.

7 MS. JUDKINS: No, I object. I
8 object. I mean, if he wants to argue the law
9 of physics, but there's no definitive
10 evidence here of how fast he was going. If
11 he said --

12 THE COURT: Well, there really
13 isn't.

14 MS. JUDKINS: -- he was going 50
15 miles an hour --

16 MR. WEINER: Well, there's a
17 range.

18 THE COURT: Well, you know, three
19 to 20 is a range, too, but it's --

20 MR. WEINER: No, no, no. He
21 said, the testimony was --

1 THE COURT: Well, I know, but I
2 don't think that's a sufficient foundation
3 for that law of physics. Maybe three, I
4 mean, if you want to pick a number, we'll go
5 with a number, but I don't think you get to
6 pick something based on his supposition of
7 what he thought he was doing.

8 MR. WEINER: All right. Then I
9 would propose that we split the difference.
10 He said between three to ten. I'll pick 6.5.

11 THE COURT: Well, it's got to
12 have a foundation, Mr. Weiner.

13 MR. WEINER: His testimony, his
14 estimated speed.

15 THE COURT: Well, it's got to
16 have a reliable foundation.

17 MS. JUDKINS: How fast he
18 traveled that day and how many feet is really
19 approximate and speculative at this point
20 because he never put a definitive number on
21 it; in fact, changed the estimate from his

1 deposition. So I object. He could have been
2 traveling faster, based on the damage to the
3 bicycle.

4 THE COURT: Well, I conclude,
5 based on the evidence I heard, that he
6 doesn't know how fast he was traveling. And
7 so I just don't think there's been a factual
8 foundation that would support a recognition
9 of a law of physics.

10 MR. WEINER: Thank you, Your
11 Honor. My objection's noted.

12 THE COURT: All right. Let's
13 turn now to the defendant's instructions.

14 The first one I have is C. Now,
15 Ms. Judkins, why are you offering this? I
16 think it's very difficult to understand.

17 MS. JUDKINS: It can be
18 confusing, but it means something under
19 Virginia law.

20 THE COURT: What's it mean?

21 MS. JUDKINS: He didn't stop. He

1 didn't stop before he crossed the road. He
2 never verified. He had no eye contact with
3 the defendant.

4 THE COURT: Well, that's not
5 really disputed, though, so why are you
6 offering this?

7 MS. JUDKINS: That he's bound by
8 his own testimony that I want to argue to the
9 jury he was negligent. He didn't stop. He
10 didn't verify that the defendant had seen
11 him. The necessary inferences from them are
12 binding; that he didn't exercise due care,
13 ordinary care.

14 THE COURT: Well, I just think
15 you're ascribing a lot more meaning to this
16 instruction than any juror would ascribe to
17 it, but C is granted.

18 MR. WEINER: Can I be heard?

19 THE COURT: Go ahead.

20 MR. WEINER: Thank you. This
21 instruction does nothing but confuse the jury

1 because it talks about him relying on
2 evidence in conflict with his own testimony.
3 There is absolutely no conflict. He said, I
4 was going; I was going slowly; I never
5 stopped.

6 And if the jury finds that that's
7 negligent, then we lose, but this does
8 nothing but confuse the issues. I think less
9 instructions are better than more, and
10 this --

11 THE COURT: Well, Ms. Judkins,
12 what's the evidence in conflict with his own
13 testimony that he's relying on?

14 MS. JUDKINS: In conflict with
15 his own testimony? Oh, that he slowed down
16 almost to a -- might as well have been
17 stopped, he said. And I read into the
18 evidence the substantive portion of his
19 deposition that he didn't stop and that he
20 was going --

21 THE COURT: But that's his own

1 testimony.

2 MS. JUDKINS: Here at trial he
3 tried to say, Well, I might as well have been
4 stopped -- I think is the words he used -- I
5 was going so slow, and I think it's the lower
6 estimate of how I was traveling.

7 His own testimony, even the
8 substantive portion from his deposition,
9 shows he didn't exercise ordinary care for
10 his own safety. And I want to be able to
11 argue, he's bound by his words. He's bound
12 by the words in his deposition because it's
13 substantive evidence.

14 THE COURT: All right. C is
15 granted over objection.

16 D is granted. E is granted.

17 Is anybody going to mention an
18 amount sought or sued for?

19 MR. WEINER: Yes.

20 THE COURT: F is granted. H is
21 granted. I --

1 MS. JUDKINS: I think he may
2 have -- I didn't realize it. I and J, I'll
3 withdraw.

4 THE COURT: All right. I and J
5 are withdrawn. K is granted.

6 MS. JUDKINS: And I think L, he
7 already has a proximate cause, so I'll
8 withdraw L.

9 THE COURT: L, withdrawn. M is
10 granted. N is granted. O is granted. Q,
11 does this now implicate all of our prior
12 arguments, Q, R, and S?

13 MS. JUDKINS: Well, it's under
14 the pedestrian -- well, I'm not sure he has
15 an objection to Q. He's got the instruction
16 I didn't object to that says a bicyclist
17 doing certain things has the same rights and
18 duties as a pedestrian.

19 The only instruction in the model
20 talks about a pedestrian. So I just
21 substituted "pedestrian" for "bicyclist" in

1 saying he's got a duty to exercise ordinary
2 care to do these things.

3 And it follows the cases, too.
4 He's got a duty to keep a lookout. The one
5 that I drafted from Virginia Jury
6 Instructions is R because there's no lookout
7 instruction in the model for pedestrians.

8 THE COURT: Well, what's the
9 basis of your paren 3?

10 MS. JUDKINS: My what?

11 THE COURT: Your subsection 3 in
12 instruction Q.

13 MS. JUDKINS: Oh, to step or move
14 from his course into a place of safety if it
15 reasonably appears he's in danger of being
16 struck by a motor vehicle. Well, I don't
17 think he was looking when he went in front of
18 him. He said -- because there's evidence
19 that he was looking on the concrete.

20 I can argue to the jury that if
21 he'd been looking, he would have seen the gap

1 in traffic for Mr. Destival to proceed and
2 make his left-hand turn, and he would have
3 had time to stop without ever running into
4 his car. He wasn't looking. He was looking
5 where he was driving on the pavement so his
6 child --

7 THE COURT: Well, I'm not saying
8 that you can't argue that. I'm asking the
9 authority for the Court to instruct on
10 paragraph 3.

11 MS. JUDKINS: Oh, well, it's in
12 the instruction. I mean, it's in -- these
13 are all pedestrian/bicyclist duties, what
14 they're supposed to do.

15 THE COURT: Is Q a model?

16 MS. JUDKINS: Yes. And the
17 pedestrian has a continuing duty under the
18 cases --

19 THE COURT: Can you give me a
20 cite?

21 MS. JUDKINS: Oh, sorry, 14.000.

1 It's from the cases -- sorry. You have the
2 copy without the citations. I forgot. Yes,
3 R is not from the model, R or S.

4 MR. WEINER: The comment speaks
5 to this.

6 MS. JUDKINS: Under the cases,
7 the pedestrian has a continuing duty to look
8 even as they're crossing. They can't just
9 look once and then start to cross, and I
10 think that's where subsection 3 comes into.

11 THE COURT: Mr. Weiner.

12 MR. WEINER: The comment, Your
13 Honor, says that when the pedestrian is
14 crossing at a marked crosswalk, you are
15 directed to use 14.030.

16 THE COURT: Well, we don't have a
17 marked crosswalk here.

18 MR. WEINER: I argue, again, the
19 statute says this is a statutory crosswalk.
20 It is at the -- for three different reasons
21 it becomes one. It's at the end of a

1 block --

2 THE COURT: All right. What
3 about that argument, Ms. Judkins?

4 MS. JUDKINS: No, because the
5 pedestrian statute states very specifically
6 crosswalk or the end of prolongation. That's
7 what he's got, a prolongation.

8 THE COURT: Right.

9 MS. JUDKINS: A crosswalk is a
10 clearly marked thing.

11 THE COURT: Right. So --

12 MS. JUDKINS: He's arguing this
13 instruction doesn't apply at all?

14 THE COURT: So you're saying --
15 right. He's saying 14.030 applies.

16 MS. JUDKINS: And that's when you
17 get back to the cases. They have the
18 right-of-way if they've already entered the
19 intersection and started --

20 THE COURT: All right. I'm going
21 to have to think about that.

1 MS. JUDKINS: Yes. -- to cross.

2 They still have the duty to keep a proper
3 lookout. That doesn't eliminate 14.000.

4 This is the general duty of all pedestrians
5 regardless of whether they have the
6 right-of-way.

7 They have a duty to keep a
8 lookout for motor vehicles. The cases all
9 say that. They have a duty to refrain -- the
10 statute says, No pedestrian can enter an
11 intersection in disregard of approaching
12 traffic, regardless if they have the
13 right-of-way.

14 These are not exclusive duties.
15 These duties run together. These are general
16 duties of all pedestrians regardless of
17 whether they have the right-of-way.

18 Even if the pedestrian is in the
19 intersection and he had the right-of-way and
20 the guy runs a red light when he's in there,
21 if he can step out of the way to a place of

1 safety, he has a duty to do that. To say
2 that the duties under 14.000 don't apply if
3 the plaintiff has the right-of-way is wrong,
4 if you look at all the cases and you read the
5 statute.

6 THE COURT: All right.

7 MR. WEINER: Not if you read the
8 comment.

9 THE COURT: R, instruction --
10 well, the comment only has so much persuasive
11 ability.

12 Instruction R. Okay. This
13 implicates the old argument, right, R and S?

14 MS. JUDKINS: Well, R -- S -- R
15 is --

16 THE COURT: Let's take them up
17 separately. R.

18 MS. JUDKINS: Yes. R is -- the
19 model -- the code and the cases say the
20 pedestrian has a duty to keep a lookout.
21 Everybody has a duty to keep a proper

1 lookout. But there's no corresponding
2 instruction in the model that defines what
3 the pedestrian's duty for lookout is.

4 There is one in the motor vehicle
5 section for the driver, which is the one that
6 I'm going to go back and redraft and bring
7 tomorrow, the motor vehicle. They have --
8 this is what a duty is for a proper lookout.

9 But there is in the --

10 THE COURT: Well, why isn't the
11 duty to maintain a proper lookout the same
12 for Mr. Russ as it is for Mr. Destival?

13 MS. JUDKINS: Well, I think it
14 is.

15 THE COURT: Why is it any
16 different?

17 MS. JUDKINS: I don't think it
18 is. And you know what? I did draft a
19 general instruction trying to put them both
20 together because it seemed to me that
21 everybody has a duty to keep a proper

1 lookout.

2 So I drafted one that says, The
3 duty to keep a proper lookout requires one to
4 use ordinary care, to look in all directions
5 for vehicles, persons, or conditions that
6 would affect one's driving, riding, or
7 movement to see what a reasonable person
8 would have seen and to react as a reasonable
9 person would have acted to avoid a collision
10 under the circumstances.

11 THE COURT: Well, I mean, why
12 isn't that the most sensible instruction to
13 give in this case?

14 MS. JUDKINS: It would make sense
15 to me, but it's dealt with in different cases
16 that pedestrian instruction -- it basically
17 says the same thing.

18 This is actually language that
19 came from a lot of cases, No. R, if he fails
20 to see or heed traffic that is obvious and in
21 dangerous proximity, continues on its path.

1 I mean, that -- it's the only place there's a
2 specific lookout.

3 I don't object to proposing my
4 general lookout. But when I saw his -- here,
5 I'll give -- I have the original, T.

6 If I could approach.

7 MR. WEINER: Your Honor, in
8 reading the comments in the volume that
9 Ms. Judkins cites this from as authority, it
10 doesn't apply to this case.

11 THE COURT: How can T not apply
12 to this case?

13 MR. WEINER: I'm sorry. We're on
14 T?

15 THE COURT: Oh.

16 MS. JUDKINS: The combined
17 lookout instruction.

18 THE COURT: All right. Well,
19 then, let's --

20 MR. WEINER: I don't have T.

21 THE COURT: Okay. Let's back up

1 to R, then. Why does R not apply?

2 MR. WEINER: Well, in reading the
3 comments in the volume Ms. Judkins had, it
4 says that if you don't see what is there,
5 then it goes into, you should have seen what
6 is there to be seen. That's not the facts of
7 this case.

8 THE COURT: Well, let me say,
9 first of all -- okay, it's not -- I don't
10 think it is the facts of this case, but I
11 also think R is a comment. It's commenting
12 on different scenarios, and I -- it's denied.

13 MS. JUDKINS: Then I proffer T.
14 Because if you look at the model in lookout,
15 there is no statute. It's all based on
16 common law. And it says you really have to
17 adapt it to the facts of your particular
18 case.

19 I don't think that only the
20 plaintiff gets a lookout instruction against
21 my client and what that means. And even

1 though he has a statutory duty to keep a
2 proper lookout, that I don't get the same
3 instruction. It makes no sense.

4 You can't have form instructions
5 for every single fact of circumstances. I
6 think it's only fair to extrapolate from what
7 the courts have said on lookout and make a
8 combined instruction that applies to both of
9 them.

10 THE COURT: We're now looking at
11 plaintiff's T.

12 MS. JUDKINS: Defendant's T.

13 THE COURT: Sorry, defendant's T.
14 And I'm looking back among the plaintiff's
15 instructions.

16 MS. JUDKINS: Well, that's the
17 one I was supposed to redraft and say
18 vehicles, persons, or conditions.

19 THE COURT: Oh, okay.

20 MS. JUDKINS: Yes, the driver of
21 a motor vehicle.

1 THE COURT: All right. Well,
2 then, maybe T solves it?

3 MS. JUDKINS: It's everybody's
4 duty.

5 THE COURT: Yes. I'm looking
6 back now at plaintiff's 8.

7 MS. JUDKINS: And that's the one
8 I was going to redraft and bring back.

9 THE COURT: Well, I think T
10 covers it.

11 MS. JUDKINS: Right, okay. Then
12 I'll proffer T.

13 MR. WEINER: Your Honor, I --

14 THE COURT: Well, T is 8 revised.

15 MS. JUDKINS: Right.

16 MR. WEINER: And I think if we're
17 going to -- there were no people other than
18 the bicyclist. So I ask that persons,
19 bicyclists be -- and then it fits the facts
20 of the case, and that's why the model is so
21 fashioned with the parens. It should

1 correctly read, All directions for vehicles,
2 bicyclists, or conditions.

3 MS. JUDKINS: It could be
4 persons --

5 THE COURT: All right. 8 is
6 denied. T is granted.

7 MR. WEINER: May we go with T
8 with bicyclists? --

9 THE COURT: No.

10 MR. WEINER: -- because that's
11 what's in this case.

12 THE COURT: I'm going with T as
13 it was offered.

14 Now that leaves, finally, S.

15 MS. JUDKINS: Right.

16 THE COURT: And I think S is
17 argumentative. S is denied.

18 All right. So the only ones I
19 haven't ruled on, then, are Q and 10 and 11.

20 MS. JUDKINS: Right.

21 THE COURT: All right. Is there

1 anything else that we haven't resolved or
2 that needs to be taken up?

3 MS. JUDKINS: No.

4 THE COURT: Counsel, do you think
5 you need more than 15 minutes each side to
6 argue this case?

7 MR. WEINER: No, Your Honor.

8 MS. JUDKINS: No.

9 MR. WEINER: There is one point
10 in answer to your earlier question on the
11 issue of the intersection. I would defer to
12 Mr. Spivey.

13 MR. SPIVEY: Your Honor, just for
14 a moment, I ask for a clarification on the
15 intersection issue. If I may refer to the
16 diagram, looking at 46.2-100.

17 THE COURT: Deputy, can I ask you
18 to collect up these exhibits and remove
19 anything from the witness stand that may
20 still be there?

21 MR. SPIVEY: Your Honor, as I'm

1 reading the 46.2-100, "intersection" means --

2 THE COURT: All right. Let me
3 get there. All right.

4 MR. SPIVEY: It means the area
5 embraced within the prolongation or
6 connection of the lateral curb lines or --
7 and then it continues on. These being curb
8 lines extending across here, the intersection
9 would be in this area, according to the
10 definition.

11 THE COURT: Well, why are you
12 confining it to the first two lanes of the
13 highway?

14 MR. SPIVEY: Actually, I'm coming
15 across here, the prolongation of the lateral
16 curb lines.

17 THE COURT: Okay.

18 MR. SPIVEY: And the defendant's
19 own testimony, if I recall, was that he was
20 stopped six to eight feet from Braddock Road
21 and that our client was laying in Prestwick

1 Drive. So I guess the point I'm making here
2 is, he wasn't in the intersection.

3 THE COURT: Well, I think if he's
4 beyond the stop bar, he's in the
5 intersection.

6 MR. SPIVEY: So you would feel
7 that in this position here, even though he's
8 not reached the prolongation of this lateral
9 curb line, that he would be in the
10 intersection?

11 THE COURT: I think if he's
12 beyond the stop bar, he's in the
13 intersection.

14 MR. SPIVEY: Even if the stop bar
15 were, say, farther back?

16 THE COURT: Well, we're dealing
17 with the stop bar where it is, and he was
18 beyond it. He was in the intersection.

19 All right. Anything else anybody
20 wants to say or --

21 MS. JUDKINS: May we leave our

1 things here?

2 THE COURT: Yes, you can leave
3 everything here. I thought you were going to
4 say, May we leave? Yes, you may.

5 All right. Why don't we resume
6 tomorrow morning, then, at 9:30.

7 MS. JUDKINS: Okay.

8 THE COURT: All right. We'll be
9 in recess.

10 *****

11 (Whereupon, the above-entitled
12 hearing was adjourned at 5:56 o'clock p.m.,
13 to be resumed the next day.)

14 *****

15

16

17

18

19

20

CERTIFICATE OF REPORTER

CASAMO & ASSOCIATES, Inc.
Court Reporting, Video Depositions, Trial Preparation/Presentation
Alexandria (703) 313-4800
Culpeper (540) 825-7482
www.casamo.com
info@casamo.com

030892

V I R G I N I A

IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

HOWELL RUSS,

Plaintiff

-v-

In ~~chancery~~ ^{LAW} No. 98-32

JAMES DESTIVAL,

Defendant.

Fairfax, Virginia
Tuesday, January 28, 2003

VOLUME II

The above-entitled matter came on for hearing, with a jury, before THE HONORABLE LESLIE M. ALDEN, a Judge in and for the Circuit Court of Fairfax County, in the courthouse, Fairfax, Virginia, pursuant to notice, beginning at 9:38 o'clock a.m., when there were present on behalf of the parties:

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
APR 21 2003
FILED
JOSHUA FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA
03 MAR 26 AM 11:26
98-32

APPEARANCES:

On Behalf of the Plaintiff:

EDWARD L. WEINER, ESQUIRE
LAWSON SPIVEY, III, ESQUIRE

On Behalf of the Defendant:

JULIA B. JUDKINS, ESQUIRE

* * * * *

C O N T E N T SPAGE:

Proceedings.....3

1

P R O C E E D I N G S

2

(The court reporter was sworn.)

3

THE COURT: Good morning,

4

everyone.

5

Well, I wish I could tell

CASAMO & ASSOCIATES, Inc.*Court Reporting, Video Depositions, Trial Preparation/Presentation*

Alexandria (703) 313-4800

Culpeper (540) 825-7482

www.casamo.com

:om

1 everyone that I knew exactly what the right
2 answer was, but I've gone back and forth
3 about six times. Now, let me tell you where
4 I am, and then you can tell me where I'm
5 wrong.

6 All right. I've concluded that
7 when a bicycle's on a highway, it has the
8 same rights and duties as a vehicle under
9 46.2-800. When a bike is on a sidewalk or a
10 crosswalk, it has the same rights and duties
11 as a pedestrian under 46.2-904.
12 Unfortunately, I don't think that really
13 answers the question.

14 Now, Ms. Judkins, as I understand
15 your position, your position is these parties
16 had equal rights at best, or your client had
17 the superior right because he got there
18 first?

19 MS. JUDKINS: No, my position is
20 neither had a right-of-way over the other,
21 neither had a right-of-way over the other.

1 They each had a duty to exercise ordinary
2 care.

3 THE COURT: Well, doesn't
4 somebody have to have a right-of-way?

5 MS. JUDKINS: No, because --
6 actually, in those cases at the Virginia
7 Supreme Court in annotations and the ones we
8 discussed yesterday, they said -- let me find
9 it again, exactly the right case, because I
10 tried to organize them more efficiently last
11 night -- except in places where favored
12 positions are assigned by law, the rights of
13 pedestrians and motorists to use the highways
14 are equal and their duties are mutual and
15 reciprocal.

16 So they don't have to have the
17 right-of-way. Someone doesn't have to have
18 the right-of-way.

19 THE COURT: Well, except in this
20 case the driver had a stop sign, which meant
21 he didn't have the right-of-way.

1 MS. JUDKINS: Well, that's
2 interesting. The statute that says he has
3 the stop sign and what he has to do, from
4 which Mr. Weiner had modified an instruction,
5 the statute very clearly says, He shall yield
6 the right-of-way to the driver of any vehicle
7 approaching on such other highway from either
8 direction.

9 THE COURT: All right. So if
10 that's true, and that's what 46.2-821 says --

11 MS. JUDKINS: Right.

12 THE COURT: -- why would a
13 pedestrian -- or why would a person on a bike
14 who's on a sidewalk have a lesser right than
15 a person who's on a bike on the highway?

16 MS. JUDKINS: They do for some
17 reason because -- they do because the statute
18 says they do.

19 THE COURT: Well --

20 MS. JUDKINS: It's very clear.

21 THE COURT: -- the statute

1 doesn't say they do have a lesser right.

2 MS. JUDKINS: Mr. Russ, under
3 these circumstances, does not get substituted
4 in as a vehicle on the highway because,
5 according to that statute, he's not
6 approaching on the highway from either
7 direction.

8 You know why? If he had been on
9 the highway, he'd be negligent as a matter of
10 law in the direction he was traveling on the
11 highway. You can't go against oncoming
12 traffic like that. That's why the
13 distinction between if he'd been on his
14 bicycle on the highway, he doesn't have the
15 same right as a car because a car coming from
16 Mr. Destival's right in those lanes would
17 have been obviously violating the law, as
18 would Mr. Russ.

19 THE COURT: All right.

20 MS. JUDKINS: So he doesn't have
21 the right of a car under those circumstances.

1 And the rules of the road for vehicles apply
2 to him if he'd been on the highway, and then
3 he would have had to be going the other
4 direction or on the other side of the road
5 traveling with traffic --

6 THE COURT: All right.

7 MS. JUDKINS: -- and the accident
8 never would have happened.

9 THE COURT: Well, what if
10 Mr. Destival had been at a red light --

11 MS. JUDKINS: Right.

12 THE COURT: -- and Mr. Russ
13 stepped out?

14 MS. JUDKINS: Well, then, that
15 case -- there is a case that governs that.

16 THE COURT: Well, why is the stop
17 sign different from a red light?

18 MS. JUDKINS: Because the stop
19 sign says you have the duty to yield. He can
20 go at a certain point at a stop sign. He
21 doesn't have a duty to stay stopped at that

1 stop sign until something changes, like the
2 light.

3 When you're stopped at a red
4 light, you have a duty to stay stopped at
5 that red light until it changes. At a stop
6 sign, you can go when traffic has cleared to
7 allow you to go. That's the problem with
8 this case.

9 THE COURT: So you think the law
10 in Virginia is, a driver at a stop sign must
11 stop until there's no vehicular traffic but
12 is free to go even if there's pedestrian
13 traffic?

14 MS. JUDKINS: No. You know what?
15 I have to agree. I don't know that it's
16 clear. I couldn't find a case. I spent two
17 hours last night again going through trying
18 to find stop sign, pedestrian, right-of-way.
19 I couldn't find a case where the guy had been
20 at a stop sign. I could find the stoplight.
21 I could find the crosswalk. I could find the

1 intersection.

2 I don't think he can -- he's
3 somewhere in between. You can't say that
4 he's obligated to stay stopped at a stop sign
5 and assume that somebody's approaching and be
6 on the lookout for somebody who doesn't stop.

7 Now, a lot of difference in this
8 case is because Mr. Destival didn't stop, as
9 my client --

10 THE COURT: But did he have to
11 stop?

12 MS. JUDKINS: I think he did in
13 the exercise of ordinary care.

14 THE COURT: Well, but that's
15 different.

16 MR. WEINER: She just said
17 Destival.

18 MS. JUDKINS: I'm sorry.
19 Mr. Russ. I'm sorry.

20 THE COURT: Well, maybe in the
21 exercise of ordinary care he did. That, the

1 jury will determine. But is there some
2 matter of law that says he had to? And I
3 can't find anything that says he had to stop.

4 MS. JUDKINS: I think -- a law, a
5 statute, no, no, I can't find anything that
6 says he had to stop either.

7 THE COURT: There was no stop
8 sign there that said stop before entering
9 crosswalk.

10 MS. JUDKINS: That is an argument
11 on his failure to exercise ordinary care. I
12 don't have an instruction that said he had a
13 duty to stop, Mr. Russ.

14 The problem with saying --
15 because the law on the stop sign says he has
16 a duty to yield, he doesn't have to stay
17 stopped forever. There was, in fact, a
18 clearing, and he could have gone at that
19 point.

20 Was he negligent in failing to
21 keep a proper lookout? That's always been

1 their argument. Remember, yesterday they
2 stood up here and said, We're not arguing he
3 should have stayed at that white stop line.
4 We're arguing he didn't keep a proper
5 lookout.

6 And that's a violation of the
7 lookout duty, which is a failure to use
8 ordinary care, which is negligence, not a
9 violation of the statutory duty. They --
10 that -- the lawyer for the plaintiff, who
11 argued that yesterday when I was trying to
12 get you to reconsider that ruling, said, Oh,
13 no, no, no. We're not arguing that he didn't
14 stay stopped at the white stop line. We're
15 arguing he didn't keep a lookout.

16 So at this point you've got two
17 parties. I'm arguing the plaintiff didn't
18 keep a lookout. He's arguing my client
19 didn't keep a lookout.

20 He doesn't have like a red light.
21 You can't say it's the same as a red light.

1 It's obviously not exactly the same as an
2 intersection where there's nothing there. Is
3 it similar to where there's a crosswalk?
4 Maybe.

5 But, see, the -- there is no
6 evidence my client didn't stop at the stop
7 sign. Plaintiff never saw him or couldn't
8 see him at the point where the white stop
9 line was. The evidence -- the plaintiff only
10 saw him after the stop sign in the
11 intersection.

12 So that's my argument to you that
13 the -- my client didn't have a duty to stay
14 there under all circumstances until -- he had
15 a duty to stay there till traffic cleared.
16 Then he had a duty to keep a lookout, and
17 that's a jury issue on whether he kept a
18 lookout.

19 That's the only way you can put
20 them all together. I definitely think he
21 doesn't get an instruction that said my

1 client had a duty to stay stopped at the
2 white stop line.

3 And then I'm prepared to argue
4 the other instruction about plaintiff had the
5 right to assume the defendant would basically
6 exercise ordinary care.

7 That's the trouble. This case
8 doesn't fit any particular pattern. It's
9 somewhere in between. And that's why I say
10 you go back to the common law where it says
11 their rights are equal or reciprocal. No one
12 had a right or duty over the other. It's a
13 question of whether they kept a proper
14 lookout.

15 THE COURT: Well, the law seems
16 to be that a pedestrian who lawfully steps
17 into an intersection has the right-of-way,
18 unless, you know, he's not being careful.
19 Why didn't Mr. Russ -- why wasn't he lawfully
20 in the intersection? Unless he wasn't being
21 careful, which is a matter for the jury to

1 decide.

2 MS. JUDKINS: Because the cases
3 that interpret that also say, if he went into
4 the intersection before the other vehicle got
5 to the intersection.

6 THE COURT: Well --

7 MS. JUDKINS: Or in the case of a
8 red light, if he went into the intersection
9 when the light was red.

10 What you have here is my guy is
11 not really stopped at the stop sign anymore.
12 He's beyond that; started to enter the
13 intersection, but hadn't completely. And,
14 actually, when he rode into it, that's when
15 the clearing came and my client began to
16 move, and that's when they collided. So --

17 THE COURT: All right. Let me
18 see what Mr. Weiner wants to say.

19 MR. WEINER: I'll start with the
20 last thing she said. The evidence is that
21 Mr. Destival's vehicle was not blocking the

1 crosswalk. He says he was two feet back from
2 the crosswalk.

3 If I can use this.

4 THE COURT: Well, I think
5 everybody agreed he wasn't blocking the
6 crosswalk. He was beyond the line, but not
7 blocking the crosswalk.

8 MR. WEINER: Okay. So he's --

9 THE COURT: But he was still
10 stopped as he's required to be.

11 MR. WEINER: He was stopped, and
12 we know he stopped somewhere between the
13 line, the stop line, and the crosswalk. And
14 he says he stopped eight feet back from the
15 intersection. He says he's eight feet back
16 from Braddock Road.

17 So he's not in the intersection
18 as the intersection is defined by the code.
19 There's no way that the defendant's position
20 can be squared with 46.2-924: Drivers of
21 vehicles entering, crossing, or turning at

1 intersections shall change their course, slow
2 down, or stop, if necessary, to permit
3 pedestrians to cross such intersections
4 safely and expeditiously. Pedestrians
5 crossing highways at intersections shall at
6 all times have the right-of-way over vehicles
7 making turns into the highways being crossed
8 by the pedestrians.

9 He had the right-of-way. In
10 addition to all of that, Mr. Destival
11 still -- his driving was still controlled by
12 that stop sign. Your Honor, he doesn't --
13 because he's a foot in front of that line,
14 that doesn't mean he has fulfilled his duty
15 to stop.

16 THE COURT: I agree with that.

17 MR. WEINER: So you can't go
18 until it's clear. That's what the statute
19 says. That's what the stop sign statute
20 says, and he has the --

21 THE COURT: Well, what the

1 statute says is you can't go until vehicular
2 traffic is clear.

3 MR. WEINER: Well, pedestrians
4 even have a higher right-of-way than
5 vehicular traffic.

6 THE COURT: Well, but it's clear
7 that pedestrians can't walk out in front of
8 cars that are otherwise lawfully proceeding.

9 MR. WEINER: He wasn't
10 proceeding. He was stopped.

11 THE COURT: All right. Well,
12 let's go back to the -- let's go back to the
13 instructions that I'm still considering. The
14 first one is 10, instruction 10.

15 And, Ms. Judkins, tell me what
16 your objection is, again, to this.

17 MS. JUDKINS: My objection is,
18 again, to the cases that have interpreted
19 this or the predecessor, the right-of-way is
20 given to the pedestrian when they have
21 entered the intersection before the --

1 THE COURT: Before.

2 MS. JUDKINS: Right. That's my
3 objection to this instruction.

4 THE COURT: All right.
5 Mr. Weiner, do you want to respond to that?

6 MR. WEINER: Yes. I think it is
7 covered by the fourth paragraph of 904
8 wherein it states, A person riding a bicycle
9 on a sidewalk or across a roadway on a
10 crosswalk shall have all the rights and
11 duties of a pedestrian under the same
12 circumstances.

13 THE COURT: Okay.

14 MR. WEINER: I think that nails
15 it on the head, and I think we're absolutely
16 entitled to that instruction.

17 MS. JUDKINS: Well, I do have
18 another objection, and I think I argued this
19 yesterday. I'm a little confused.

20 It's not a complete recitation of
21 the statute, too. Here it talks about what

1 the right-of-way is when the statute says you
2 can't -- I suppose that in combination with
3 14.000. The whole statute says, okay, under
4 certain circumstances, which the cases have
5 said after the pedestrian -- if the
6 pedestrian is there first, has entered, or
7 whatever.

8 But the pedestrian can't -- just
9 as you added with Mr. Weiner when he was
10 arguing with you, well, that doesn't mean
11 they can walk in front of the car. That's in
12 the statute, too. That doesn't mean they can
13 disregard traffic.

14 So the instruction has to be a
15 complete statement of the law, and that's why
16 the Supreme Court has always said, If you
17 believe from the evidence the plaintiff
18 entered the intersection before the defendant
19 did or whatever.

20 So that's my objection to this.
21 Because I think if this instruction is given,

1 No. 10, he's going to argue, regardless of
2 the fact that my client was already there, at
3 least 150 feet from when the plaintiff -- and
4 he could just ride right in front of him.
5 That's what he's going to be able to argue,
6 and that's not a complete statement of the
7 law.

8 THE COURT: Well, but that's
9 certainly true if he'd been at a red light --

10 MS. JUDKINS: Well, yes, but he
11 wasn't at a red light.

12 THE COURT: -- and been sitting
13 there for 150 feet.

14 MS. JUDKINS: Well, that's true,
15 but he wasn't at a red light. So it's not
16 applicable. He wasn't at a red light.

17 MR. WEINER: He was at a stop
18 sign. And if he was a car, he certainly
19 would be able just to keep riding. The car
20 is at the stop sign.

21 Your Honor, she keeps trying to

1 paint this as if Mr. Russ saw the Destival
2 vehicle approaching a stop sign. I would
3 agree, he can't walk in front of a moving
4 car, but he saw the car come to a stop. It
5 rolled forward. It stopped again, and it
6 remained stopped for the remainder of the
7 yardage. Mr. Destival puts it at 40 yards.

8 THE COURT: All right. Let's go
9 to instruction 11. What was your cite for
10 this, Mr. Weiner?

11 MR. WEINER: 10.270, *Model Jury*
12 *Instructions.*

13 THE COURT: 10.27. All right.

14 MS. JUDKINS: Okay. My objection
15 is, if you look at that instruction and you
16 look at the back, it clearly cites 46.2-821,
17 and that -- this statute says only, The
18 driver of a vehicle approaching an
19 intersection on a highway. And then it talks
20 about clearly marked stop line, in the
21 absence of a stop line.

1 THE COURT: I agree with you on
2 this one. This is mimicking the stop sign
3 statute, which clearly applies to vehicular
4 traffic, and at this point the bike isn't
5 vehicular traffic.

6 All right. 11 is denied. Let's
7 look now at Q.

8 MR. WEINER: Please note our
9 objection.

10 THE COURT: Yes.

11 MR. WEINER: I just want to note,
12 if I could, with respect to the Court's
13 ruling, the -- Ms. Judkins refers to the
14 comments. It says -- the comments go on to
15 say that this instruction would also be
16 appropriate for a flashing red light, which
17 is the same as a stop sign. It's the stop
18 sign instruction.

19 MS. JUDKINS: That's because
20 under the motor vehicle code, a flashing red
21 light is treated like a stop sign. There is

1 another section that deals with --

2 MR. WEINER: What happened to the
3 stop sign here?

4 THE COURT: All right. Hold on.

5 Well, the comment to 10.270 says,
6 The instruction properly modified would be
7 appropriate for a flashing red light. What's
8 the appropriate modification?

9 MR. WEINER: Well, Your Honor, if
10 need be, modify it, but there's a stop sign.
11 Mr. Destival's vehicular operation was
12 controlled by a stop sign, and we are
13 entitled to a stop sign instruction in this
14 case.

15 MS. JUDKINS: He's not entitled
16 to basically bastardize the law that the
17 legislature has -- this is the law.
18 46.2-821, that's the statute. He's not
19 entitled to change that to say bicyclist. I
20 mean, he's changed the whole law. What he's
21 got is a lookout argument.

1 MR. WEINER: This --

2 THE COURT: It is denied.

3 MR. WEINER: Well, I would
4 like -- if need be, we can modify the
5 Virginia model jury instruction on stop sign,
6 No. 10.270, by -- has a duty to yield
7 right-of-way. We can end it there, if she
8 has a problem with the word "bicyclist.". I
9 think it's appropriate because that's what
10 was there to see.

11 THE COURT: Well, I'm not going
12 to do that, Mr. Weiner.

13 MR. WEINER: But is Your Honor
14 saying I don't get a stop sign instruction?

15 THE COURT: No.

16 MR. WEINER: Okay. How can we
17 modify it?

18 THE COURT: You can have an
19 instruction that mirrors the statute.
20 Someone who comes to a stop sign has the duty
21 to stop and yield to vehicular traffic.

1 MR. WEINER: Okay if I make that
2 in pen?

3 THE COURT: I'm seeing if the
4 clerk can pull it up.

5 MR. WEINER: Okay.

6 THE COURT: Ms. Judkins, I'm back
7 on plaintiff's 10.

8 MS. JUDKINS: Right. I think you
9 also have to rule on defendant's Q,
10 instruction Q, as well.

11 THE COURT: If a bicyclist is a
12 pedestrian under these facts, then why isn't
13 10 an appropriate instruction?

14 MS. JUDKINS: Because of all of
15 the cases interpreting this instruction.

16 THE COURT: Because they weren't
17 there first?

18 MS. JUDKINS: I don't know --
19 yes, the cases that say, If you believe from
20 the evidence that they entered the
21 intersection first, they were there as the

1 vehicle was approaching, that's when they
2 have the right-of-way. I don't know any
3 other way to argue it, honestly.

4 THE COURT: Well, why doesn't the
5 model make that distinction?

6 MS. JUDKINS: The model make that
7 distinction? Well, the model -- I don't
8 agree with every instruction in the model
9 jury book. Why doesn't it make the
10 distinction? It doesn't not make the
11 distinction. If you -- there's an absence of
12 information about that, which to me says
13 nothing.

14 I don't know why they don't make
15 that distinction. I don't know why. I only
16 know what the cases say. I don't like to
17 rely on just what the model says --

18 THE COURT: All right.

19 MS. JUDKINS: -- because it
20 doesn't always apply. I know what the cases
21 say.

1 THE COURT: All right.

2 MS. JUDKINS: It doesn't combine
3 them either. It doesn't mirror the statute
4 exactly either. Why it doesn't, I don't
5 know. Why doesn't it have everything in
6 there?

7 THE COURT: All right.
8 Mr. Weiner, we don't have 10.270 on the
9 computer. Do you want to mark up your 11,
10 and I'll consider that?

11 MS. JUDKINS: Well, it's got to
12 be a complete recitation, then, of what's in
13 the instruction because --

14 THE COURT: All right. I want to
15 go now to Q.

16 MS. JUDKINS: Q.

17 THE COURT: Instruction Q is the
18 same as 14.0 of the model. So, Mr. Weiner,
19 what's your objection to that?

20 MR. WEINER: Because it doesn't
21 fit the facts of the case, Your Honor.

1 THE COURT: No, I think it does
2 fit the facts of the case.

3 MR. WEINER: Well, there's no
4 question that he saw the car. No. 1, that's
5 not an issue.

6 THE COURT: Well, then one would
7 say, why did he go? --

8 MR. WEINER: Okay.

9 THE COURT: -- but that's up to
10 the jury to decide.

11 MR. WEINER: Well, but the facts
12 are that the car was not approaching. It was
13 stopped. There's a huge difference between
14 an approaching car and a stopped car.

15 THE COURT: Well, it says which
16 is close or approaching. This one was pretty
17 darn close. It was right there.

18 MR. WEINER: Your Honor, if we
19 accept Ms. Julia's interpretation of the
20 motor vehicle code, Mr. Russ would have had
21 to stop. Now we have both the bicycle

1 stopped and the car stopped. Who goes? I
2 mean, it doesn't work that way.

3 It doesn't square with 46.2-924.
4 It doesn't square with 46.2-904, and it
5 doesn't square with what you have to do at a
6 stop sign. The driver of the car had the
7 stop sign. Mr. Russ had no stop sign. He
8 did have the higher right-of-way. He had the
9 right-of-way.

10 And No. 3 on Q also doesn't apply
11 to this case. I argue vehemently instruction
12 Q does not fit the facts that this jury has
13 in front of them.

14 MS. JUDKINS: Judge, there's got
15 to be --

16 THE COURT: I've granted Q.

17 MS. JUDKINS: All right. Thanks.

18 THE COURT: I'm back on 10, and
19 I'm looking at the comment to 14.0 -- strike
20 that.

21 Mr. Weiner, is your 10 -- I'm

1 sorry. I've tossed out my sheet. The model
2 cite for instruction 10?

3 MR. WEINER: 14.03, pedestrian's
4 right-of-way at crossing an intersection.

5 THE COURT: Okay. The comment to
6 that model says, This instruction should not
7 be used in a case where traffic is controlled
8 by a traffic direction device. Isn't that
9 this instance?

10 MS. JUDKINS: Yes.

11 MR. WEINER: Well --

12 MS. JUDKINS: Plus it's not an
13 intersection.

14 MR. WEINER: -- but it says --

15 THE COURT: It is an
16 intersection.

17 MS. JUDKINS: When it's not more
18 than 35 miles an hour. This intersection,
19 one of the streets, the speed limit's 45
20 miles an hour.

21 MR. WEINER: It's the street that

1 Mr. Destival was on.

2 MS. JUDKINS: Actually, you
3 know --

4 THE COURT: Well, I don't know
5 about that.

6 MS. JUDKINS: Actually, you know,
7 the reason I think -- he could easily have
8 been hit by somebody making a right turn off
9 Braddock where the speed limit's 45 miles an
10 hour.

11 THE COURT: Well, that --

12 MS. JUDKINS: I know he wasn't,
13 but I think there's a reason that the speed
14 limit applies.

15 I still think you don't reach
16 that point under Arney versus Bogstad or any
17 of it because of when he entered it as
18 opposed to when my client was there.

19 MR. WEINER: Your Honor, we are
20 entitled to an instruction stating that
21 Mr. Russ had the right-of-way that began on

1 one side of Prestwick Drive. It continued
2 till he got across it. His testimony is that
3 he was halfway in front of the car. He
4 explicitly told the jury that if there was a
5 hood ornament, that's what hit my hip.

6 THE COURT: Well, I would be
7 inclined to grant an instruction that
8 mirrored 46.2-924, and I don't think 14.030
9 does. The instruction would say, The driver
10 of a vehicle shall yield right-of-way to a
11 pedestrian crossing at a clearly marked
12 crosswalk -- well, that's not -- at any
13 regular pedestrian crossing included in the
14 prolongation of the, blah, blah, blah.

15 But, you see, Ms. Judkins --

16 MR. WEINER: No. 3 also applies.

17 THE COURT: -- it goes on there
18 to say that the driver shall yield according
19 to the direction of the device. Here the
20 device said stop.

21 MS. JUDKINS: Well, but that is

1 talking about a traffic light. In the
2 Supreme Court of Virginia cases --

3 THE COURT: I don't -- where do
4 you see it's that narrowly construed?

5 MS. JUDKINS: Well, I've only
6 seen -- in the cases, in the cases where they
7 said in the event of a traffic light or a
8 walk signal, is what the Supreme Court of
9 Virginia has said that has meant.

10 In Arney versus Bogstad, in this
11 case there's a traffic control device. I
12 don't know that it's defined. Maybe it's
13 defined in the general definitions at the
14 beginning in section 100, traffic control
15 device. No.

16 THE COURT: Mr. Weiner, do you
17 have a computer with you?

18 MR. WEINER: Not with me, Your
19 Honor. My office is across the street.

20 MS. JUDKINS: Even in the case
21 where it's a stoplight, though, my same

1 argument goes back to, they gave them the
2 right-of-way even under this statute with a
3 stoplight as long as he entered it before the
4 stoplight had changed.

5 So it's got to -- he gets the
6 right-of-way if he's entered it before or if
7 he's entered the intersection before the
8 defendant's vehicle reached the intersection
9 or before the defendant's vehicle -- my
10 client, again, with a stop sign could go when
11 traffic cleared. So --

12 THE COURT: Well, except 924
13 seems to say that he's to yield in accordance
14 with the device to the pedestrians.

15 MS. JUDKINS: Well, traffic -- we
16 may have to find the traffic control devices.
17 I don't think traffic control devices is the
18 same as traffic control signs. There's got
19 to be a definition somewhere in the code
20 for --

21 THE COURT: Well, one would

1 think.

2 MS. JUDKINS: One would think.

3 THE COURT: But if you look at
4 46.2-830 -- it's hard for me to conclude that
5 a stop sign is not a traffic control device.

6 MS. JUDKINS: Under these facts,
7 though, what you have is, my client beginning
8 to go when the traffic cleared and he never
9 stopping and then entering the intersection
10 at the same time. How does he have the
11 right-of-way? It's not as though he stopped,
12 they were both stopped, and then he began to
13 cross, or my client was approaching and he
14 began to cross, which is where the Supreme
15 Court says he has the right-of-way.

16 You have a situation where you're
17 giving him the right-of-way even though he
18 came into the intersection after my client
19 began to move and entered the intersection.

20 THE COURT: Well, I understand
21 your argument.

1 MR. WEINER: Your Honor, the
2 Virginia Driver's Manual has numerous
3 references to when a driver must yield the
4 right-of-way to pedestrians, at crosswalks,
5 at intersections. It says, referring to
6 stopping, even without a stop sign, you must
7 stop before a crosswalk; at all stop signs, a
8 street that crosses over a sidewalk.

9 THE COURT: All right. But,
10 Mr. Weiner, you're not suggesting I instruct
11 the jury and the courts with the DMV
12 handbook, are you?

13 MR. WEINER: You're looking for
14 something, apparently, that I think is
15 answered by the code very clearly, but I
16 argue this by way of further illustration of
17 what Mr. Destival's duties were.

18 THE COURT: Well, I think we need
19 to make an instruction here, and I'm not
20 quite sure how to do it. Maybe the clerk can
21 type it up.

1 It would say, The driver of a
2 vehicle on a highway shall yield the
3 right-of-way to a pedestrian crossing such
4 highway at any regular pedestrian crossing
5 included in the prolongation of the lateral
6 boundary lines of the adjacent sidewalk.

7 MS. JUDKINS: It also has to
8 state no pedestrian shall enter or cross an
9 intersection in disregard.

10 MR. WEINER: Approaching is
11 approaching. Stopped is stopped.

12 THE COURT: Well, and the jury
13 can decide that. I agree with Ms. Judkins
14 they need to be instructed.

15 MR. WEINER: Your Honor, I also
16 want the record to be clear that Prestwick
17 Drive, which Mr. Russ was crossing, the
18 evidence is speed limit 25 miles an hour, and
19 it's at the end of a block, and there's a
20 stop sign. And so I think I'm entitled to
21 the second or the third paragraph of 46.2-924

1 as well as the continuation at the bottom of
2 the page.

3 MS. JUDKINS: This is where we
4 get into --

5 MR. WEINER: If I can finish,
6 Ms. Judkins.

7 MS. JUDKINS: I'm sorry. I
8 thought you were.

9 MR. WEINER: The other issue is,
10 I would ask that the jury instruction fit the
11 facts of the case. It is a matter of law
12 that the bicyclist has the same rights as a
13 pedestrian, so I think the jury instruction
14 should say bicyclist.

15 MS. JUDKINS: He's asking, I
16 assume, for the last paragraph on page 398 of
17 the code and the one above that. Clearly,
18 he's not entitled to, Pedestrians crossing
19 highways at intersections shall at all times
20 have the right-of-way over vehicles.

21 THE COURT: Right.

1 MS. JUDKINS: And the other one,
2 my client -- if you look at the cases, my
3 client was already there doing that, not
4 coming, approaching, and doing that. That's
5 the whole problem with this. This --

6 THE COURT: Well, I think whether
7 he was there or whether he was approaching or
8 what he was doing is an issue for the jury to
9 decide, who was doing what when.

10 MS. JUDKINS: But nothing tells
11 them the fact that my client was there first.
12 As the other instructions have said --

13 THE COURT: Well, they heard the
14 evidence. They know who got there first.

15 MS. JUDKINS: The other
16 instructions, the Supreme Court of Virginia
17 proves that if you believe that the plaintiff
18 was or had entered the intersection before
19 the defendant --

20 THE COURT: Well, I understand
21 that, but that really doesn't help in this

1 case. I don't think the law -- I don't think
2 that's the only law.

3 MS. JUDKINS: No.

4 THE COURT: Clearly, if the
5 pedestrian had gotten there first, we
6 wouldn't be here today.

7 MS. JUDKINS: It's just the
8 way -- I guess I have to see what it is
9 exactly you have in mind.

10 MR. WEINER: I just have to say
11 it again. The uncontroverted evidence is
12 that Mr. Destival was stopped --

13 THE COURT: Mr. Weiner, I recall
14 in excruciating detail the evidence. I need
15 your legal arguments.

16 MR. WEINER: Well, my legal
17 arguments have stated that this is not a case
18 where there was -- that Mr. Russ was faced
19 with approaching traffic. Approaching is
20 moving.

21 THE COURT: The jury will decide

1 whether the defendant was approaching or
2 whether he was already there. Or at an
3 intersection where the driver is approaching
4 on a highway where the speed limit is 35
5 miles an hour, or less where the movement of
6 traffic is regulated by a traffic control
7 device, the driver shall yield according to
8 the direction of the device. No pedestrian
9 shall enter or cross an intersection in
10 disregard of approaching traffic.

11 These are the responsibilities
12 set out in 46.2-924 as they apply in this
13 case.

14 MS. JUDKINS: Note my exception.

15 the COURT: Now, my remaining
16 question in response to Mr. Weiner's last
17 comment about telling the jury that
18 pedestrians and bicyclists are the same.

19 MS. JUDKINS: We have an
20 instruction to that effect.

21 THE COURT: Do we?

1 MS. JUDKINS: Yes, No. 9.

2 THE COURT: All right. This
3 instruction I'm going to call X, and I'll ask
4 the clerk to type it up. Instruction 10 is
5 denied.

6 All right. I think that's it,
7 then. No, that's not it.

8 Mr. Weiner, do you have another
9 copy of Instruction 2?

10 MR. WEINER: It was going to be
11 substituted. Frankly, I forgot what the --
12 was it the word "bicyclist" with 11?

13 THE COURT: No. The problem was,
14 this is the stop sign statute which deals
15 with vehicles. And we've put the same
16 standard in here for pedestrians, and I don't
17 know that that's correct.

18 MR. WEINER: Well, the statute
19 with stop signs --

20 THE COURT: So why don't you mark
21 up 11 in light of my ruling.

1 MS. JUDKINS: The only thing I'm
2 concerned about is if he's going to argue --
3 the lawyer represented to you yesterday they
4 were not arguing that my client's failure to
5 stay at that white stop line was the
6 negligence in this case, and that was the
7 reason they argued that evidence was
8 irrelevant.

9 So I'm not sure what he's going
10 to mark up and what it's going to say, but I
11 think at best it would have to say that a
12 driver facing a stop sign at an intersection
13 has a duty to stop at a clearly marked stop
14 line before entering the point nearest the
15 intersecting road where he would have a view
16 of approaching traffic on that road.

17 THE COURT: Well, the stop line
18 really isn't the issue here. It's the stop
19 sign that's the issue.

20 MS. JUDKINS: That's correct.

21 THE COURT: So why don't you just

1 mark up 11 to explain the duty of a driver
2 coming to a stop sign.

3 MR. WEINER: Well, there is a
4 crosswalk. He has a duty to stop before
5 entering the crosswalk.

6 THE COURT: Well, but he did do
7 that here, so that's not your beef here.

8 MR. WEINER: Well, and then it
9 goes on, before proceeding from that stopped
10 point, the driver also has the duty to yield
11 the right-of-way to any approaching -- I
12 think vehicle -- bicyclist fits this.

13 THE COURT: Well --

14 MR. WEINER: The Court has ruled
15 that you're saying it's --

16 THE COURT: You may be right, but
17 that's not what the statute says. The
18 statute says "vehicle."

19 MS. JUDKINS: I guess the best it
20 could say, then: A driver facing a stop sign
21 at an intersection has a duty to stop before

1 proceeding. The driver also has a duty --

2 MR. WEINER: This is what I would
3 propose, Your Honor.

4 MS. JUDKINS: -- to yield the
5 right-of-way.

6 MR. WEINER: If I could hand this
7 up.

8 THE COURT: Did Ms. Judkins see
9 it?

10 MR. WEINER: Oh, I'm sorry.

11 MS. JUDKINS: Did you mean to
12 take out "at a," to stop before entering the
13 crosswalk on the near side of the
14 intersection before?

15 MR. WEINER: That's fine.

16 MS. JUDKINS: All right. Let's
17 see. Well, at this point, see, there isn't
18 a -- what the statute says, The driver of a
19 vehicle approaching an intersection on a
20 highway controlled by a stop sign shall
21 immediately before entering such intersection

1 stop at a -- and then it talks about the
2 different things where they have to stop.

3 His beef is -- I don't have a
4 problem with it saying, shall stop before
5 entering the intersection and then yield the
6 right-of-way to any -- to yield the
7 right-of-way to the driver of any vehicle
8 approaching on such other highway from either
9 direction.

10 I don't have -- mirroring the
11 statute, I don't have a problem with. I'm
12 not sure -- but changing it around --

13 THE COURT: Well, Mr. Weiner, how
14 do you want it to read?

15 MR. WEINER: Well, first of all,
16 I think it's absurd to assume that a
17 pedestrian has less rights than a vehicle.

18 THE COURT: Well, I know all
19 that. I know that.

20 MR. WEINER: I think, as marked
21 up, stays as close to the model in keeping

1 with Your Honor's ruling.

2 MS. JUDKINS: The model -- it
3 also includes in the model, at the point
4 nearest the intersecting road where he would
5 have a view of approaching traffic on that
6 road. The model also has that language. So
7 maybe adding "or at the point." I think
8 everybody has to agree he's got to stop
9 before entering Braddock Road.

10 THE COURT: Or in the absence of
11 a marked crosswalk? Do we have a marked --
12 we didn't have a marked crosswalk?

13 MS. JUDKINS: No.

14 MR. WEINER: It's a statutory
15 crosswalk.

16 THE COURT: Deputy, would you
17 hand each one of these to each of them?

18 Well, but it's not a marked
19 crosswalk.

20 MS. JUDKINS: This is a
21 prolongation of the sidewalk, so whatever you

1 would call it.

2 THE COURT: How about if we
3 change this to say, The driver facing a stop
4 sign at an intersection has a duty to stop
5 before entering the crosswalk on the near
6 side of the intersection or, in the absence
7 of a marked crosswalk, stop at a point
8 nearest the intersecting roadway where the
9 driver has a view of approaching traffic on
10 the intersecting roadway; before proceeding,
11 the driver has a duty to yield the
12 right-of-way to any approaching vehicle?

13 MS. JUDKINS: Okay. I still note
14 an exception to the instruction, but I can
15 live with -- the language that you're
16 proposing is a complete statement of the
17 statute as opposed to partial.

18 THE COURT: All right. Well, as
19 we get going here, I'll ask the clerk to type
20 this up. We can let -- I mean, I'm not going
21 to hold the jury up. For your records,

1 you'll have a copy of what actually gets
2 given.

3 All right. Any other
4 instructions?

5 MS. JUDKINS: No, ma'am.

6 MR. WEINER: That's all we have,
7 Your Honor.

8 THE COURT: All right. I'll give
9 the instructions in this order: instruction
10 2, instruction 4, instruction 1, instruction
11 D, instruction E, instruction F, instruction
12 K, instruction C, instruction 5, instruction
13 6, instruction M, instruction 9, instruction
14 Q, instruction 7, instruction T, instruction
15 X, instruction 11, instruction U, instruction
16 N, instruction H, instruction 14, instruction
17 O, and instruction 15.

18 MR. SPIVEY: Your Honor, which
19 was the instruction that was next to last? I
20 didn't quite hear it.

21 THE COURT: The instruction O.

1 MR. SPIVEY: O. Thank you.

2 THE COURT: All right. Let's
3 take a five- or six-minute break, and then
4 we'll come back and address the jury.

5 MR. WEINER: Thank you, Your
6 Honor. And if I could assemble my
7 demonstrative things that I'd like to use in
8 closing?

9 MS. JUDKINS: I think I saw he
10 has an x-ray he wants to use in closing. I
11 don't object to --

12 MR. WEINER: It's the one that
13 Dr. Cooper referred to.

14 MS. JUDKINS: It's not admitted
15 as an exhibit. I object to the use of
16 anything that's not an exhibit that the jury
17 is going to take back with them as a closing
18 because he's not a doctor.

19 The doctor may have used it in
20 the course of his deposition to describe what
21 the x-ray shows, but I'm not in a position to

1 get up there while he's in his closing and
2 say, He's referring to this x-ray.

3 He's not the doctor. It's been
4 used in the terms of explaining the doctor's
5 testimony, but it's not an exhibit that the
6 jury is going to take back with them.

7 MR. WEINER: I'm not going to add
8 anything that the doctor didn't say. The
9 x-ray shows two screws in Mr. Russ's foot.

10 THE COURT: All right. The
11 objection is overruled.

12 Anything else that you intend to
13 use that may be objectionable?

14 MR. WEINER: I can run through
15 it. I'm going to use the photos. I want to
16 refer to the bicycle. I want to refer to the
17 diagram, the model of the foot, the x-rays.
18 And those are the things I'd like to point
19 out to the jury, and the bicycle path, which
20 is an exhibit.

21 MS. JUDKINS: It appears there

1 are only two things that he -- I don't object
2 to him using something that's actually been
3 introduced as an exhibit, but I do object to
4 those items which have not, such as the model
5 to the foot and the x-rays.

6 THE COURT: Well, haven't we
7 already seen the bike, Mr. Weiner?

8 MR. WEINER: Your Honor, I --
9 this was more than a bike. This was a child
10 trailer that was red, yellow, purple, and I
11 think it is --

12 THE COURT: The objection is
13 overruled.

14 Anything else?

15 MS. JUDKINS: No.

16 MR. WEINER: What about the model
17 foot?

18 THE COURT: You have 15 minutes;
19 right?

20 MR. WEINER: Well, I'm asking for
21 15 minutes and a five-minute rebuttal.

1 THE COURT: Well, it can be ten
2 and five, unless Ms. Judkins wants 20
3 minutes, too.

4 MR. WEINER: I don't think mine
5 should be controlled by what she wants. I'm
6 asking for 20 minutes in closing argument, 15
7 and five.

8 THE COURT: All right, 20 minutes
9 each side.

10 MR. WEINER: Thank you, Your
11 Honor.

12 (Whereupon, a brief recess was
13 taken.)

14 THE COURT: All right. Deputy,
15 would you see if Mr. Weiner is in the
16 hallway?

17 All right. Counsel, anything
18 else before we bring the jury back in?

19 MR. WEINER: No, Your Honor.

20 MS. JUDKINS: No, ma'am.

21 THE COURT: All right. I'll ask

1 the deputy to bring the jury in.

2 (Whereupon, the following
3 proceedings occurred in the presence of the
4 jury.)

5 THE COURT: Good morning, members
6 of the jury. Welcome back. Thank you for
7 coming back. I realize you didn't have much
8 choice in that. Nevertheless, we do
9 appreciate the fact that you are back today.

10 I apologize for the delay in
11 getting started this morning. There were a
12 few things I had to take up, which took me a
13 little longer than I expected, but I think
14 we're now ready to proceed.

15 The first thing that will happen
16 today is, I'll give you the instructions of
17 law that will govern your deliberations, and
18 then you'll hear the closing arguments from
19 the lawyers.

20 I'll tell you that you'll have
21 the jury instructions that I'm about to give

1 to you, you'll have them in writing to take
2 back to the jury room with you so that you
3 may refer to them as you deliberate, but
4 please listen carefully as I deliver them to
5 you now. I'll tell you, also, that I've
6 asked the lawyers to limit their comments to
7 you to 20 minutes each side.

8 Your verdict must be based on the
9 facts as you find them and on the law
10 contained in all of these instructions.

11 The issues in this case are, one,
12 was the defendant negligent? Two, if he was
13 negligent, was his negligence a proximate
14 cause of the accident? Three, if the
15 plaintiff is entitled to recover, what is the
16 amount of his damages? On these issues, the
17 plaintiff has the burden of proof by the
18 greater weight of the evidence.

19 Further issues in this case are,
20 four, was the plaintiff negligent? And,
21 five, if he was negligent, was his negligence

1 a proximate cause of the accident? On these
2 issues, the defendant has the burden of proof
3 by the greater weight of the evidence.

4 The greater weight of the
5 evidence is sometimes called a preponderance
6 of the evidence. It is that evidence which
7 you find more persuasive. The testimony of
8 one witness whom you believe can be the
9 greater weight of the evidence.

10 You are the judges of the facts,
11 the credibility of the witnesses, and the
12 weight of the evidence. You may consider the
13 appearance and manner of the witnesses on the
14 stand, their intelligence, their opportunity
15 for knowing the truth and for having observed
16 the things about which they testified, their
17 interest in the outcome of the case, their
18 bias, and, if any have been shown, their
19 prior inconsistent statements or whether they
20 have knowingly testified untruthfully as to
21 any material fact in the case.

1 You may not arbitrarily disregard
2 believable testimony of a witness. However,
3 after you have considered all the evidence in
4 the case, then you may accept or discard all
5 or part of the testimony of a witness as you
6 think proper.

7 You are entitled to use your
8 common sense in judging any testimony. From
9 these things and all the other circumstances
10 of the case, you may determine which
11 witnesses are more believable and weigh their
12 testimony accordingly.

13 Any fact that may be proved by
14 direct evidence may be proved by
15 circumstantial evidence. That is, you may
16 draw all reasonable and legitimate inferences
17 and deductions from the evidence.

18 If you believe from the evidence
19 that a party previously made a statement
20 inconsistent with his testimony at this
21 trial, that previous statement may be

1 considered by you as evidence that what the
2 party previously said is true.

3 The amount sued for or sought is
4 not evidence in this case. You should not
5 consider it as evidence in arriving at your
6 verdict. The fact that there was an accident
7 and that the plaintiff was injured does not
8 of itself entitle the plaintiff to recover.

9 When one of the parties testifies
10 unequivocally to facts within his own
11 knowledge, those statements of fact and the
12 necessary inferences from them are binding
13 upon him. He cannot rely on other evidence
14 in conflict with his own testimony to
15 strengthen his case. However, you must
16 consider his testimony as a whole, and you
17 must consider a statement made in one part of
18 his testimony in the light of any explanation
19 or clarification made elsewhere in his
20 testimony.

21 Negligence is the failure to use

1 ordinary care. Ordinary care is the care a
2 reasonable person would have used under the
3 circumstances of this case.

4 A proximate cause of an accident,
5 injury, or damage is cause which, in natural
6 and continuous sequence, produces the
7 accident, injury, or damage. It is a cause
8 without which the accident, injury, or damage
9 would not have occurred.

10 Contributory negligence is the
11 failure to act as a reasonable person would
12 have acted for his own safety under the
13 circumstances of this case.

14 A person riding a bicycle on a
15 sidewalk or across a roadway on a crosswalk
16 shall have all the rights and duties of a
17 pedestrian under the same circumstances.

18 A bicyclist has a duty to use
19 ordinary care when he is riding on or
20 crossing the hard surface of a highway: one,
21 to keep a lookout for motor vehicles; two, to

1 refrain from entering or crossing an
2 intersection or the hard surface of a roadway
3 in disregard of traffic which is close or
4 approaching in such a manner that a
5 reasonable person would not attempt to enter
6 or cross; and, three, to step or move from
7 his course into a place of safety if it
8 reasonably appears to him that he is in a
9 danger of being struck by a motor vehicle.
10 If a bicyclist fails to perform any one or
11 more of these duties, then he is negligent.

12 The driver of a vehicle has a
13 duty to use ordinary care to keep a proper
14 lookout. If a driver fails to perform this
15 duty, then he is negligent.

16 The duty to keep a proper lookout
17 requires one to use ordinary care to look in
18 all directions for vehicles, persons, or
19 conditions that would affect one's driving,
20 riding, or movement to see what a reasonable
21 person would have seen and to react as a

1 reasonable person would have acted to avoid a
2 collision under the circumstances.

3 The driver of a vehicle on a
4 highway shall yield the right-of-way to a
5 pedestrian crossing such highway at any
6 regular pedestrian crossing included in the
7 prolongation of the lateral boundary lines of
8 the adjacent sidewalk or at an intersection
9 where the driver is approaching on a highway
10 where the speed limit is 35 miles an hour or
11 less.

12 Where the movement of traffic is
13 regulated by a traffic control device, the
14 driver shall yield according to the direction
15 of the device.

16 No pedestrian shall enter or
17 cross an intersection in disregard of
18 approaching traffic.

19 A driver facing a stop sign at an
20 intersection has a duty to stop before
21 entering the crosswalk on the near side of

1 the intersection or, in the absence of a
2 marked crosswalk, stop at the point nearest
3 the intersecting roadway where the driver has
4 a view of approaching traffic on the
5 intersecting roadway. Before proceeding, the
6 driver also has a duty to yield the
7 right-of-way to any approaching vehicle. If
8 the driver fails to use ordinary care to
9 perform these duties, then he is negligent.

10 A person has the right to assume
11 that another will use ordinary care until he
12 realizes, or in the exercise of ordinary care
13 should realize, that another is not going to
14 do so.

15 If you find from the greater
16 weight of the evidence that both the
17 plaintiff and the defendant were negligent
18 and that their negligence proximately
19 contributed to the accident, you may not
20 compare the negligence of the parties. Any
21 negligence of the plaintiff which was a

1 proximate cause of the accident will bar the
2 plaintiff from recovering.

3 You shall find your verdict for
4 the plaintiff, Mr. Russ, if he has proved by
5 the greater weight of the evidence that, one,
6 the defendant, Mr. Destival, was negligent,
7 and, two, that Mr. Destival's negligence was
8 a proximate cause of the plaintiff's accident
9 and damages.

10 You shall find your verdict for
11 the defendant, Mr. Destival, if the plaintiff
12 failed to prove either or both of the two
13 elements above or if you find by the greater
14 weight of the evidence that the plaintiff was
15 contributorily negligent and that his
16 contributory negligence was a proximate cause
17 of the accident.

18 If you find your verdict for the
19 plaintiff, then in determining the damages to
20 which he is entitled, you shall consider any
21 of the following which you believe by the

1 greater weight of the evidence was caused by
2 the negligence of the defendant: one, any
3 bodily injuries the plaintiff sustained and
4 their effect on his health according to their
5 degree and probable duration; two, any
6 physical pain and mental anguish the
7 plaintiff suffered in the past and any that
8 he may be reasonably expected to suffer in
9 the future; three, any disfigurement or
10 deformity and any associated humiliation or
11 embarrassment; four, any inconvenience caused
12 in the past and any that probably will be
13 caused in the future; and, five, any medical
14 expenses incurred in the past and any that
15 probably will be caused in the future.

16 Your verdict shall be for such
17 sum as will fully and fairly compensate the
18 plaintiff for the damages sustained as a
19 result of the defendant's negligence.

20 The burden is on the plaintiff to
21 prove by the greater weight of the evidence

1 each item of damage he claims and to prove
2 that each item was caused by the defendant's
3 negligence.

4 Plaintiff is not required to
5 prove the exact amount of his damages, but he
6 must show sufficient facts and circumstances
7 to permit you to make a reasonable estimate
8 of each item. If the plaintiff fails to do
9 so, then he cannot recover for that item.

10 You should consider the life
11 expectancy figure of 34.2 years for Mr. Russ,
12 along with any other evidence relating to his
13 health, constitution, and habits in
14 determining his life expectancy.

15 All right. Mr. Weiner.

16 MR. WEINER: Thank you, Judge
17 Alden.

18 May it please the Court. Ladies
19 and gentlemen of the jury, we've now reached
20 the part of the trial called closing
21 argument, final argument. I will have an

1 opportunity to speak to you for the next few
2 minutes, and then the attorney for
3 Mr. Destival will speak to you, and I will
4 have one opportunity after that.

5 And I'd like to break this down
6 into two sections. First, the liability,
7 there's the negligence, and then the second
8 part is the damages, which you will have to
9 consider if you find negligence of
10 Mr. Destival.

11 This is the roadway.
12 Mr. Destival tells you that he thinks that he
13 could see -- his testimony was 40 to 50 yards
14 bare asphalt from where he was stopped.
15 That's what he estimates, 40 to 50 yards down
16 this bike path.

17 Ms. Judkins said that she would
18 estimate that that would take 20 to 30
19 seconds for a bicyclist to come that distance
20 from -- she marks it from this utility pole.
21 And you will have these pictures back with

1 you. You can look at these closer.

2 Twenty to 30 seconds. Now, I am
3 not going to burn up my time by standing here
4 and counting out 20 to 30 seconds. I trust
5 that most of you are licensed drivers. Even
6 if you're not, you've all driven in a car.
7 There are not many times when we have 20 to
8 30 seconds to see what is there to be seen.

9 He says he can see 20 -- I'm
10 sorry -- 40 to 50 yards of bare asphalt.
11 What would be the viewing distance of a
12 bicycle? And so that the record's clear,
13 this yellow pack was there. That baby
14 trailer, bright red, yellow on top, purple,
15 that was there to be seen. I argue to you
16 that that isn't even much further than 40 to
17 50 yards.

18 It is unconscionable that
19 Mr. Destival sits there and says, I never saw
20 it. I never saw it when it was 50 yards
21 away. I never saw him when he was peddling

1 40 yards away. I never saw him when he was
2 30. I never saw -- I never saw this person,
3 almost 300 pounds, up on top of this bicycle
4 seat with his helmet, with these colors,
5 broad daylight, broad daylight.

6 I challenge Ms. Judkins to tell
7 you as soon as she gets up here why
8 Mr. Destival didn't see him. I want her to
9 tell us all why he didn't see.

10 Now, I want to concede, we have a
11 weak spot in our case. It would be very
12 nice -- and Ms. Judkins made a point of this.
13 Mr. Russ never called the police. He just
14 didn't. He was so happy that his child was
15 alive and not hurt. He told me, All I wanted
16 to do was get home.

17 That's all he wanted to do. That
18 was a mistake. He should have called the
19 police. It would have been very nice to have
20 an investigator come here today and tell you
21 what he saw and what was said immediately

1 after that accident.

2 I suggest to you, you have to be
3 the investigators. And when you look at the
4 facts of this case, sometimes it's the
5 nuances that really in and of themselves,
6 they might be trite. They might be very
7 small points, but I suggest to you that they
8 shed light on something.

9 And this is where you also have
10 to bring in some human nature. Mr. Destival
11 would have you believe that he is going to
12 work on a course he travels every workday --
13 and even if it's not a workday, to leave his
14 home and go to any area, he has to come out
15 of Prestwick Drive, only way in and out.

16 He tells you that he very
17 dutifully, because he is so careful and he
18 knows this is a bad intersection -- that's
19 what he told you. He told you, you have to
20 be real careful at this intersection.

21 He tells you he comes up to this

1 line and stops, stops dead, and then he rolls
2 forward to a point before the crosswalk; puts
3 himself some eight feet before Braddock Road
4 because he's being so careful that he wants
5 to see better. He wants to see better.

6 Now, ladies and gentlemen, we are
7 not saying that just because he came past the
8 stop sign, that makes -- the line, that makes
9 him negligent. I say, We have all done that.
10 And just stopping a few feet beyond this
11 line, no one gets hurt.

12 Mr. Russ told you, he didn't stop
13 twice. He came down Prestwick Drive, and he
14 stopped. He knows where he's going to stop.
15 He does it every day.

16 Do you think this man on his way
17 to work made an absolutely meaningless stop?
18 Just to be a good, safe driver, he stopped
19 here and then went forward and stopped again?
20 It's a nuance, but I think it sheds light.

21 Is that what you do when you're

1 running your -- at an intersection you know
2 very well right next to your house? He
3 didn't make two stops. He did exactly what
4 Mr. Russ said he did, one stop there.

5 There's one other thing I want to
6 point out to you. Again, a small point in
7 and of itself, but I think it sheds light.

8 Mr. Destival tells you that after
9 the impact, Mr. Russ did not go in the air,
10 over his hood, and come to rest on the driver
11 side of the Destival vehicle. He says that
12 didn't happen.

13 He tells you that after the
14 impact, Mr. Russ is lying with the bicycle
15 still between his legs on his right side.
16 And I've got the mental picture of that
17 show -- if you remember *Laugh-In*, there was a
18 guy who rode a tricycle and just went over on
19 his right side.

20 It didn't happen that way. And
21 the way you know that it didn't happen that

1 way is not only common sense, but
2 Dr. Jastrzebski came here and he told you the
3 history that was documented.

4 Does a man, within an hour after
5 being in the accident, lie to the emergency
6 room staff trying to help him when they ask
7 him, What happened? And he says, I was hit
8 by a car, and I went flying over the hood.

9 Did he make that up in that one
10 hour? No. No. It happened the way this man
11 said it happened. He wasn't lying on the
12 road with a bicycle still between his legs.

13 He remembers that very well. It
14 was the most horrifying moment of his life.
15 He tells you, I hit the road after being in
16 the air. I was on the driver's side of the
17 Destival vehicle, and I got up because I'm
18 getting to my son, Carter.

19 And he falls. He doesn't really
20 understand why he fell. He just knows he
21 can't walk. He doesn't really care. Now

1 he's crawling to his son.

2 That is what happened. It's a
3 small point, but why does Mr. Destival say,
4 He didn't go in the air over my hood?

5 I have absolutely no doubt that
6 when Ms. Judkins gets up here, she is going
7 to spin a yarn of clouds and confusion.
8 She's going to tell you that this accident
9 happened because this man did something that
10 was unreasonable. He didn't exercise
11 ordinary care. She will not be able to point
12 to one single statute that he violated.

13 I submit to you that he acted as
14 an ordinary, prudent person. Would it have
15 been better if he was the ultra, ultra,
16 paranoid, concerned person who says, Oh, no,
17 even though I don't have a stop sign, even
18 though that car is stopped, even though I've
19 seen the man look at me more than once --
20 Mr. Destival doesn't deny he looked to the
21 right. He says it. He didn't make that up.

1 Destival did look to the right.

2 But she still wants him to bring
3 his bicycle to a stop. It would have been
4 nice. Believe me, he wishes he did. But
5 that's not ordinary care. That would be well
6 beyond what ordinary care -- what the law
7 says you need to do. He had the
8 right-of-way. You just heard the law.
9 You'll have the law to go back with you in
10 the jury room.

11 The uncontradicted evidence,
12 there is no question that Mr. Destival looked
13 to his right in the direction of Howell Russ.
14 It is uncontradicted that he didn't see
15 Howell Russ at any point until after the
16 impact.

17 How do they get around that? How
18 do you not see this coming from here at, at
19 most -- Mr. Russ tries his best to be honest:
20 I don't know my speed. He gives an estimate
21 between three and ten miles an hour. He is

1 tugging his 30-pound child up this hill. I
2 know that in this picture it does not look
3 uphill, but Mr. Destival doesn't deny that
4 this is, in fact, a slight uphill grade.

5 Ladies and gentlemen, I will have
6 one short opportunity to speak to you again,
7 but I would like to move now to the issue of
8 damages.

9 You were read the jury
10 instructions. There are basically five
11 categories which the law tells you, you must
12 consider in deriving a verdict. I'm not
13 going to read them again to you, but I am
14 asking you to look at each and every one of
15 them when you decide what is an appropriate
16 amount.

17 It might be crass to talk about
18 money. And I assure you the only reason
19 Mr. Russ is asking you for a money verdict is
20 because he can't ask you for anything else.
21 He can't ask you to do magic. He can't ask

1 MS. JUDKINS: You know, this
2 isn't a TV show or a movie. And I probably
3 am not going to be as flamboyant and as
4 dramatic as Mr. Weiner. That's just not my
5 personality. And I don't have a lot of
6 expensive exhibits.

7 And I don't have to explain
8 anything to him or his client. He's trying
9 to eliminate the burden of proof requirement
10 here.

11 You have to use your common
12 sense. Why didn't my client see his client?
13 His own evidence shows -- and the one thing
14 he should have anticipated is, my client was
15 looking to the left to see if he could get
16 out to the median.

17 During the great point of this
18 whole exercise, you are not to be swayed by
19 the dramatics of the attorney, any sympathy
20 toward the plaintiff because he has an
21 injury, any speculation that in the future it

1 may get worse. It may not.

2 What you have to be guided by is,
3 No. 1, your common sense; second, the law;
4 and, third, the facts. He was negligent, the
5 plaintiff. Yes, that is my argument to you.
6 That's what I told you in opening statement.

7 Fortunately, in this life,
8 everyone has a duty to exercise ordinary care
9 for their own safety. If you go back and
10 find for Mr. Russ, based on Mr. Weiner's
11 argument, you are saying Mr. Russ had no duty
12 that day. He didn't have to do anything that
13 day. He could just ride down that sidewalk,
14 right in front of a car, without making sure
15 the driver had seen him under the facts and
16 circumstances of this case.

17 Mr. Weiner said to you, What can
18 she point to, meaning myself, that Mr. Russ
19 had to do? Well, the Judge read it to you.

20 First of all, if the plaintiff
21 was negligent, failed to use ordinary care --

1 which negligence can be proved by his own
2 evidence, mind you. Because the defendant
3 has the burden of proof doesn't mean we have
4 to bring in an independent witness or some
5 other exhibit and say, See, he was negligent.

6 You look at the accumulation of
7 all the evidence. You're not supposed to be
8 the investigators to go out and find out how
9 this accident really happened. He's supposed
10 to prove to you how this accident really
11 happened.

12 All of the evidence -- what does
13 the bicyclist have to do? Keep a lookout for
14 motor vehicles. Everybody's got a duty to
15 keep a proper lookout.

16 The Judge has given you an
17 instruction that told you what that meant.
18 You have a duty to be aware of what's going
19 on around you, to see what a reasonable
20 person would see, to react as a reasonable
21 person would react under the circumstances.

1 You've got to -- the bicyclist
2 has to refrain -- means not go -- from
3 entering or crossing an intersection or the
4 hard surface of a highway in disregard to
5 traffic which is close or approaching in such
6 a manner that a reasonable person would not
7 attempt to enter or cross and to step or
8 move, if he's entered it, to step or move
9 from a place of safety.

10 Would a reasonable person,
11 pulling their child, mind you, on a trailer,
12 who saw a car -- and now Mr. Weiner wants you
13 to infer from no evidence that my client
14 never stopped at the white stop line, even
15 though the evidence shows the plaintiff and
16 my client could not have seen each other from
17 the position where that white stop line was,
18 could not have seen each other because of the
19 topography.

20 Mr. Weiner wants you to speculate
21 he never stopped at all. All right. The

1 plaintiff assumes that. That makes him even
2 more negligent. He sees a guy -- up ahead of
3 him, he sees a guy that appears beyond the
4 stop sign and the white stop line, and he
5 assumes he never stopped at all.

6 He has no idea which direction my
7 client is going to go, right or left, no
8 idea. This is rush hour traffic, Braddock
9 Road, four-lane highway. The speed limit is
10 45 miles an hour with cars going either way,
11 and they go faster. We know that. Use your
12 common sense.

13 My client said, Yeah, when you're
14 at that intersection, you've got to really
15 pay attention for vehicles. And that's what
16 the instruction says, when he's at the stop
17 sign, he's got a duty to stop, and he can
18 pull up here to where he can see. He's got a
19 duty to yield to a vehicle, not a bicycle,
20 the instruction says. Read that instruction
21 when you go back there, to a vehicle.

1 My client, what is he paying
2 attention to? What would you be paying
3 attention to? When he stops at the stop
4 line, he can't see the plaintiff. When he
5 gets up there, he determines, Okay, I'm going
6 to have to go to the median. It's clear.

7 Where do you think he was looking
8 after that? To the left. He said that:
9 Yeah, I was probably looking to the left.

10 Now, if you were on the bicycle
11 on the sidewalk riding up that and you saw
12 this car do this -- and, remember, in his
13 deposition, I asked him this and read the
14 whole answer. When he was deposed, he only
15 said he saw Mr. Destival look in his
16 direction one time, at the beginning when he
17 was coming up that hill.

18 Say you were up on that bicycle
19 riding up there, pulling your child, would
20 you have just ridden right out in front of
21 that car without looking? At that point you

1 can see which direction Mr. Destival is
2 looking before you ever leave the apron, ever
3 leave that sidewalk.

4 Any fool could have looked and
5 seen where Mr. Destival was looking. Why
6 didn't Mr. Destival see Mr. Russ? Because he
7 was looking to the left. And guess what?
8 The traffic had cleared.

9 So if Mr. Russ had stopped,
10 stopped, before riding in front of my client
11 at as much as ten miles an hour or as little
12 as three -- who cares? -- if he had stopped,
13 he would have seen the traffic was clear and
14 Mr. Destival might go. He would have seen
15 Mr. Destival was looking to the left and not
16 at him. He could have verified whether or
17 not Mr. Destival had seen him. The accident
18 never would have happened.

19 What in natural, continuous
20 sequence produced the accident? Proximate
21 cause doesn't mean approximately, maybe. It

1 means, what in natural, continuous sequence
2 produced the accident? It was Mr. Russ
3 riding in front of him without making sure it
4 was safe.

5 What did Mr. Russ say when I
6 asked him if he could have stopped?
7 Especially with your child behind you,
8 wouldn't you stop just to make sure the other
9 guy had seen you? If he had, it never would
10 have happened. And Mr. Weiner just said to
11 you, He wishes he had stopped that day. Yes,
12 he wishes. Yeah, the whole thing never would
13 have happened.

14 Who was in the best position to
15 avoid the accident? Under all these
16 instructions, that clearly makes him
17 negligent. You don't even have to reach the
18 question of whether my client was also
19 negligent. It doesn't matter because each of
20 them had a duty that day, each of them.

21 He didn't keep any of his duties,

1 didn't do anything, except assume my client
2 had seen him, or, as he said yesterday from
3 the witness stand, Hey, I have the
4 right-of-way. I can go.

5 Oh, yeah. And would you if it
6 wasn't safe? No, you cannot go if it's not
7 safe to do so.

8 That's what the accumulation of
9 these instructions tells the world. And that
10 is what the law should be and is. Because if
11 you can avoid an injury to yourself, you have
12 to try and avoid the injury to yourself. And
13 then you can't come in and say, I want
14 \$450,000.

15 He has offered no -- nothing, no
16 explanation, as to why he didn't take any of
17 these precautionary measures or exercise
18 ordinary care, the care a reasonable person
19 would have exercised that day.

20 Remember, my client -- and then
21 he said yesterday, Well, Mr. Destival

1 admitted he was at fault. Well, I read you
2 his first answer in the deposition where I
3 asked him in detail. Later on he
4 volunteered, Oh, by the way, your client said
5 he was at fault.

6 You're going to see my client
7 went back to his office and wrote out this
8 statement that day, everything that happened.
9 He never said to this guy, I'm at fault. He
10 heard him say to his wife, I ran into a car.

11 And if you look at the bicycle --
12 yes, my client says he ran into him. Look at
13 that tire. And he says, He didn't fly over
14 the hood. Did you hear any evidence from
15 anybody that Mr. Russ had any injury to the
16 left side of his body?

17 If this bicycle were in the
18 middle of my client's car and got hit,
19 there'd be some damage to something other
20 than the front tire, and there'd have been
21 some damage to his left leg. Mr. Destival

1 (sic) tried to tell you yesterday, My left
2 foot, there was something the matter with it.
3 Uh-uh. The emergency room doctor, nothing
4 except some minor abrasions on the right
5 ankle.

6 That is consistent with him --
7 right there is where the impact is to the
8 front right of my client's car, meaning when
9 Mr. Russ started into that intersection --
10 he's looking at the pavement, remember, to
11 make sure his son isn't bumped around. He's
12 looking for the seam in the concrete, so he's
13 obviously not looking at Mr. Destival. And
14 that part runs right into the right front
15 when Mr. Destival starts to go when the
16 traffic cleared.

17 No injury to the left side of his
18 body at all. If he had flown over the hood
19 of that car, if the impact had been that
20 severe, and if it had been in the middle of
21 his bike, he'd have something to the left

1 side of his body. He'd have something on his
2 left leg.

3 You'll see what my client wrote
4 down. Why did he do that? Well, Mr. Russ
5 wasn't so injured that within two or three
6 days of this accident, he and his lawyer
7 couldn't go back to the scene and take
8 photographs.

9 Because of the possibility of a
10 lawsuit, he wrote it all down. He wrote down
11 exactly what happened. And that is
12 consistent with what he testified to
13 yesterday, exactly what he wrote down.

14 I ask you to go back and follow
15 the Judge's instructions. I'm arguing the
16 same thing I said to you yesterday; that I
17 think when you've heard all the evidence,
18 you'll hear the plaintiff didn't stop, didn't
19 really look, didn't ascertain that
20 Mr. Destival had seen him.

21 He didn't comply with his duties

1 under these circumstances. If he had, he
2 would never have crossed when he did. He
3 didn't even attempt to go around him. All he
4 had to do was stop, and it never would have
5 happened.

6 Thank you.

7 THE COURT: All right. Thank
8 you, Ms. Judkins.

9 Mr. Weiner, you have one minute.

10 MR. WEINER: Look at the damage
11 to this bike. Is this a wheel that went into
12 a car? She said none of the rest of the bike
13 was damaged.

14 He told you -- the doctor told
15 you there were mild abrasions all over his
16 body. He didn't care about that. And right
17 after this accident, he didn't even care
18 about himself. He told you that.

19 That man had the stop sign.
20 Howell Russ had no stop sign. If you believe
21 her theory of the case, even though you

1 approach an intersection and the car is
2 stopped -- it's not approaching, ladies and
3 gentlemen. It is a stopped car.

4 Ms. Judkins says, You still have
5 to stop. Yes, he wishes he had stopped. He
6 wishes he went to work that morning and not
7 enjoyed a beautiful June morning with his
8 son.

9 THE COURT: All right.

10 Mr. Weiner, your time is up.

11 All right. Members of the jury,
12 the case is now submitted to you for your
13 decision. The very first thing you should do
14 when you retire to the jury room is select a
15 jury leader and then begin your
16 deliberations.

17 In a moment, I'll send back three
18 things to you. I'll send back the
19 instructions that I delivered to you earlier
20 today. I'll send back all the exhibits which
21 were received into evidence, and I'll send

1 I want to gather all of the
2 exhibits, too, so we can all be sure that
3 everything that's supposed to be there is
4 there.

5 All right. Are all of the
6 exhibits in order?

7 MS. JUDKINS: Yes, ma'am. It
8 does appear so.

9 MR. WEINER: Yes, Your Honor.

10 THE COURT: All right. Then I'll
11 ask the deputy to take back to the jury the
12 exhibits, the instructions, and the verdict
13 form.

14 Counsel, will you-all remain in
15 the vicinity?

16 MS. JUDKINS: Yes, ma'am.

17 MR. WEINER: Yes, Your Honor.

18 THE COURT: All right. Then
19 we'll be in recess until we've heard
20 something from the jury.

21 (Whereupon, a recess was taken.)

1 THE COURT: All right. Counsel,
2 the jury has sent out what, I guess, could be
3 called a question. The statement is this:
4 Plaintiff's testimony regarding whether he
5 ever came to a stop prior to entering the
6 intersection.

7 MS. JUDKINS: Oh, it sounds like
8 they want a copy of the plaintiff's
9 testimony, a -- well, we know what the answer
10 to that is. We don't give transcriptions
11 of --

12 THE COURT: Well, I propose
13 responding by saying that the jury must rely
14 on its collective recollection of the
15 evidence.

16 MR. WEINER: I believe that's the
17 correct response.

18 THE COURT: All right. I've
19 indicated that on the same sheet of paper,
20 and I'll ask the deputy to take that back to
21 the jury. And then we'll be in recess until

1 we've heard something.

2 (Whereupon, a recess was taken.)

3 THE COURT: All right. Counsel,
4 the deputy advises me the jury has reached a
5 verdict, so I'll ask the deputy to bring the
6 jury in.

7 (Whereupon, the following
8 proceedings occurred in the presence of the
9 jury.)

10 THE CLERK: Members of the jury,
11 have you reached a verdict?

12 JURORS: Yes. We have.

13 THE CLERK: And is your verdict
14 unanimous?

15 JURORS: Yes. Yes, it is.

16 THE CLERK: We, the jury, on the
17 issue drawn on the case of Howell Russ,
18 plaintiff, versus James Destival, defendant,
19 find our verdict in favor of the defendant,
20 signed, the foreperson.

21 THE COURT: All right. Are there

1 any motions at this time?

2 MR. WEINER: Your Honor, we would
3 be making a motion. We would ask that the
4 jury be polled at this time.

5 THE COURT: All right. I'll ask
6 the clerk to poll the jury.

7 THE CLERK: Ladies and gentlemen
8 of the jury, when I call your name, please
9 answer, if this is your verdict, yes, and if
10 it's not your verdict, no.

11 Irene Henry.

12 JUROR HENRY: Yes.

13 THE CLERK: Michael Baldwin.

14 JUROR BALDWIN: Yes.

15 THE CLERK: Jeffrey Light.

16 JUROR LIGHT: Yes.

17 THE CLERK: Darlene Peebles.

18 JUROR PEEBLES: Yes.

19 THE CLERK: Clyde Delancey.

20 JUROR DELANCEY: Yes.

21 THE CLERK: Craig Cole.

INSTRUCTION Q

A bicyclist has a duty to use ordinary care when he is riding on or crossing the hard surface of a highway:

- (1) to keep a lookout for motor vehicles;
- (2) to refrain from entering or crossing an intersection or the hard surface of a highway in disregard of traffic which is close or approaching in such a manner that a reasonable person would not attempt to enter or cross; and
- (3) to step or move from his course into a place of safety if it reasonably appears to him that he is in danger of being struck by a motor vehicle.

If a bicyclist fails to perform any one or more of these duties, then he is negligent.

A handwritten signature in black ink, appearing to be 'G. R.' or similar, located in the bottom right corner of the page.

PLAINTIFF'S TESTIMONY REGARDING WHETHER HE EVER
CAME TO A STOP PRIOR TO ~~CROSSING~~ ENTERING
THE INTERSECTION.

The jury must rely on its
collective recollection of the evidence.

J. Alden

FAIRFAX COUNTY CIRCUIT COURT

JURY VERDICT

AT LAW # 198752

We, the Jury, on the issue joined in the case of HOWELL RUSS, Plaintiff, versus JAMES DESTIVAL, Defendant, find our verdict in favor of the Plaintiff and assess his damages in the amount of

_____.
_____ With Interest from _____ (Date).
_____ Without Interest.

DATE: _____

FOREPERSON

We, the Jury, on the issue joined in the case of HOWELL RUSS, Plaintiff, versus JAMES DESTIVAL, Defendant, find our verdict in favor of the Defendant.

DATE: 1/26/03

Craig Cole
FOREPERSON

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

HOWELL RUSS,
Plaintiff,

) LAW NO. 198752
)

VERSUS)

JAMES DESTIVAL,
Defendant.)

FINAL ORDER

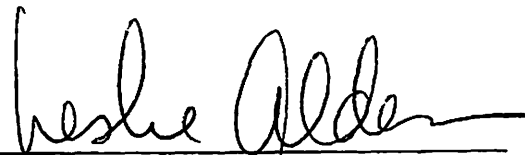
JURY TRIAL

This cause came on for trial upon the pleadings filed by the parties herein and,
Upon consideration of the evidence presented, the argument of counsel, the rulings of the Court and the
verdict of the jury, it is,

ADJUDGED, and ORDERED that judgment be and is hereby entered in favor of the Defendant.


AND THIS CAUSE IS ENDED

Entered on January 28, 2003.



JUDGE LESLIE M. ALDEN

I ask for this: regarding jury verdict, any exceptions or objections previously noted
during the trial are hereby waived.



Julia Judkins, Counsel for Defendant

Seen and :


Edward L. Weiner, Counsel for Plaintiff


Lawson D. Spivey, III, Co-Counsel for Plaintiff


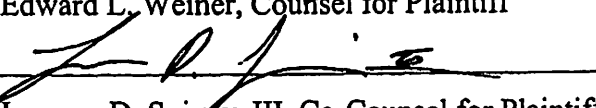
SUSPENDING ORDER

It is **ORDERED** that the Final Order be suspended for fourteen (14) days from this date so that the parties may submit an agreed Amended Final Order, if they should desire. This tolls the running of the twenty-one (21) day provision in Rule 1:1, thus allowing a total of thirty-five (35) days for entry of an Amended Final Order.

Entered on January 28, 2003.



JUDGE LESLIE M. ALDEN


Julia Judkins, Counsel for Defendant
Edward L. Weiner, Counsel for Plaintiff
Lawson D. Spivey, III, Co-Counsel for Plaintiff

FILED
JUN 15 1993
JUN 15 5 PM 2:21
CLERK, CIRCUIT COURT
FAIRFAX, VA

FEB - 5 PM 2:21
 COUNTY OF FAIRFAX
 JUDGE C. FREY
 CLERK, CIRCUIT COURT
 FAIRFAX, VA

)
)
)
)
)
)
)
)
)
)

Law No.: 198752

)
)
)
)
)
)

)

)

)

)

-)


3. As a matter of law, the Defendant failed to yield the right of way and/or maintain a proper lookout.

4. Jury Instruction Q, submitted to the jury over Plaintiff's objection, was both inapplicable to the facts and a incorrect statement of the law, by stating that a pedestrian shall refrain from crossing an intersection in disregard of traffic which is close or approaching in such a manner that a reasonable person would not attempt to cross. Further, the instruction conflicts with Instruction X (which was intended to track Va. Code §46.2-924).

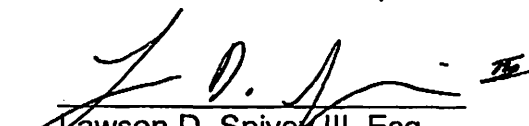
5. Evidence that the stop line on Prestwick Drive was subsequently moved sometime after the date in question was improperly submitted to the jury. Counsel for the Defendant specifically asked the Plaintiff concerning the changing of the line and the Defendant specifically referenced the old line, despite two previous rulings and a cautionary instruction to the contrary.

WHEREFORE, Plaintiff requests that this Court vacate the jury's verdict and enter judgment for the Plaintiff, to remand this matter to a jury on the issue of damages only, or in the alternative, to grant a new trial.

Respectfully Submitted,
HOWELL RUSS, by Counsel:



Edward L. Weiner, Esq.




Lawson D. Spivey III, Esq.

10605 Judicial Drive, Suite B6
Fairfax, VA 22030
Tel.: (703) 273-9500

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of February, 2003, I faxed and mailed via first class mail, postage prepaid, a true copy of the foregoing Motion for Judgment N.O.V. / New Trial to counsel for the Defendant James Destival:

Julia B. Judkins, Esq.
3920 University Drive
Fairfax, Virginia 22030-0022
Fax: (703) 385-1555



Lawson D. Spivey III, Esq.

VIRGINIA

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

FILED
03 FEB -5 PM 2:21
JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

HOWELL RUSS,

Plaintiff,

v.

JAMES DESTIVAL

Defendant.

Law No.: 198752

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION
FOR JUDGMENT N.O.V./ NEW TRIAL**

COMES NOW, the Plaintiff, by Counsel, and in support of his Motion for Judgment N.O.V. and/or New Trial, states as follows:

1. Defendant was negligent as a matter of law:

The evidence is undisputed that the Plaintiff was struck by the Defendant while crossing in a crosswalk, at an intersection. Va. Code §46.2-924 provides that the driver of a vehicle shall yield the right of way to any pedestrian crossing such highway at any regular pedestrian crossing included in the prolongation of the lateral boundary lines of the adjacent sidewalk at the end of a block; or at any intersection where the legal maximum speed does not exceed thirty-five miles per hour. The evidence is further undisputed that a stop sign controlled vehicular traffic on Prestwick Drive entering Braddock Road. Va. Code §46.2-24 further provides that at intersections or crosswalks where the movement of traffic is being regulated by traffic control devices the driver shall yield according to the

direction of the traffic control device. As a matter of law the Defendant violated Va. Code §46.2-924 by failing to yield the right of way.

The Defendant was negligent as a matter of law by failing to maintain a proper lookout. The duty to keep a lookout requires not only the physical act of looking, but reasonably prudent action to avoid the danger which an effective lookout would disclose. Via v. Badanes, et. al., 189 Va. 44, 52, 52 S.E.2d 174, 178 (1949). In the present case, it was undisputed that the Defendant had no visual obstructions to see the bike path on his right to a distance of thirty yards to the right. The Plaintiff was struck while in front of Defendant's car, while in a crosswalk. The Defendant admitted that he did not see the Plaintiff until after he heard the collision. The Defendant had a duty to see what was in front of his car under these circumstances, and so violated that duty when he struck the Plaintiff crossing Preswick Drive, in front of his car, while in the crosswalk.

2. Plaintiff Howell Russ could not be found contributorily negligent as a matter of law:

At the time the Plaintiff was struck by the Defendant's vehicle, he was crossing Prestwick Drive in a crosswalk. The testimony is undisputed that at the time of the Plaintiff's preparing to enter the crosswalk, the Defendant's car was stopped. The Defendant's vehicle remained stopped until the Plaintiff was in front of the Defendant's car.

The pedestrian's (or bicyclist's) right of way does not begin at any particular point in the intersection nor does it end at any particular point. Lucas

v. Craft, 161 Va. 228, 170 S.E. 836 (1933). It begins on one side of the street and extends until the pedestrian has negotiated the crossing. Id. at 235. It is impossible, without nullifying the statute, to divide this right of way into different stages at the intersection, yielding the right of way to the pedestrian at one point in the intersection and denying it at another, all at the time of negotiating the one crossing. Id. At the moment Plaintiff entered the crosswalk the Plaintiff had the right of way. This right of way extended across Prestwick drive to the other side. As Plaintiff crossed in front of Defendant's car he still had the right of way.

Counsel for the Defendant argued to the jury at closing argument that the Plaintiff should have stopped prior to entering the crosswalk. The Plaintiff was not struck by the Defendant as he proceeded into the crosswalk, he was struck after he was in the crosswalk and had the right of way. To hold to the contrary, would nullify the right of way afforded to pedestrians crossing at intersections under Va. Code §46.2-924.

3. The jury was incorrectly instructed regarding the duties of a pedestrian:

Counsel for the Defendant introduced Instruction Q, over Plaintiff's objection, to explain the general duties of a pedestrian/ bicyclist. Instruction Q, which purports to be a modification of Model Instruction No. 14.000, was actually modified to be an incorrect statement of law. Paragraph (2) of Model instruction should read that a pedestrian/ bicyclist has a duty, ". . . to refrain from entering or crossing an intersection or the hard surface of a highway in disregard of traffic

approaching in such a manner that a reasonable person would not attempt to enter or cross . . .". Instruction Q, as offered, states that a pedestrian/ bicyclist has a duty to refrain from entering or crossing an intersection in disregard of, ". . . traffic which *is close or* approaching. . .".

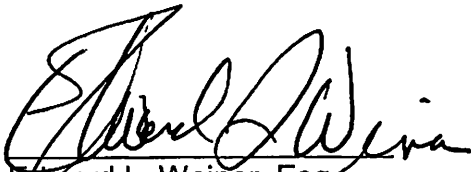
In *Tolson v. Reeves*, the Plaintiff offered a jury instruction regarding a pedestrian's right of way (then Va. Code §46-244). *Tolston v. Reeves*, 200 Va. 179, 104 S.E.2d 754 (1958). The instruction stated that a pedestrian's right of way extended from one side of the street to the other and that it did not begin or end at any particular point. The Court held that this instruction was an incorrect statement of the law, noting that the instruction, taken from the language of *Lucas v. Craft*, 161 Va. 228, 235, 170 S.E. 836, 838, left out the fact that it applied only at intersections. Id. at 182. The Court concluded that the jury could have taken this instruction to mean that the plaintiff had the right of way whether he was crossing within the intersection or beyond the intersection. Id.

In the present case, the jury could have easily taken this instruction to mean that if traffic is stopped at a stop sign and it is close to a crosswalk, then the pedestrian should refrain from entering or crossing the crosswalk, if a reasonable person would not attempt to enter or cross. This construction, as mentioned previously in this motion, nullifies Va. Code §46.2-924. Under such an analysis a pedestrian does not have a right of way at an intersection when traffic is stopped at a stop sign which happens to be close to the crosswalk. Model Instruction No. 14.000 and the cases from which it is based all deal with traffic which is approaching an intersection or between intersections, not traffic


which is stopped at a stop sign near a crosswalk and was clearly inapplicable to the facts of this case. See, Cofield v. Nuckles, 239 Va. 186, 387 S.E.2d 493 (1990) (pedestrian struck between intersections by oncoming van traveling in a curb lane); Hopson v. Goolsby, 196 Va. 832, 86 S.E.2d 149 (1955) (pedestrian crossing not at intersection struck by oncoming vehicle); Carson v. LeBlanc, 245 Va. 135, 427 S.E.2d 189 (1993) (15 yr. old pedestrian struck while crossing a highway by an oncoming car); Straughan v. Nash, 215 Va. 627, 212 S.E.2d 280 (1975) (pedestrian struck while crossing roadway at night, near an intersection, by an oncoming vehicle).

WHEREFORE, Plaintiff requests that this Court vacate the verdict of the jury and enter judgment for the Plaintiff, remanding this matter to a jury on the issue of damages alone, or in the alternative, grant a new trial.

Respectfully Submitted,
HOWELL RUSS, by Counsel:



Edward L. Weiner, Esq.



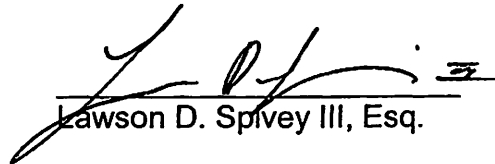
Lawson D. Spivey III, Esq.

10605 Judicial Drive, Suite B6
Fairfax, VA 22030
Tel.: (703) 273-9500
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of February, 2003, I faxed and mailed via first class mail, postage prepaid, a true copy of the foregoing Memorandum of Points and Authorities to counsel for the Defendant James Destival:

Julia B. Judkins, Esq.
3920 University Drive
Fairfax, Virginia 22030-0022
Fax: (703) 385-1555



Lawson D. Spivey III, Esq.

VIRGINIA:

FILED
IN THE CIRCUIT COURT OF FAIRFAX COUNTY

HOWELL RUSS

Plaintiff,

v.

JAMES DESTIVAL

Defendant.

2003 FEB 14 PM 3:53

CLERK OF COURT

Chancery No. 198752

RESPONSE TO MOTION

Moving party: Plaintiff

Responding party: Defendant

Title of Motion to which the Response is filed: Plaintiff's Motion for Judgment N.O.V. and New Trial

Date to be heard (Friday): February 21, 2003 @ 9:00 a.m w/ Judge Alden

RESPONSE Filed by:

Julia B. Judkins, VSB No. 22597

Telephone: (703) 385-1000

Trichilo, Bancroft, McGavin, Horvath & Judkins, P.C.

3920 University Drive

Virginia State Bar No. 22597

Fairfax, Virginia 22030-0022

Facsimile: (703) 385-1555

REPRESENTATION OF COUNSEL OF RECORD

I represent that: ☒ Prior to filing this Response, I made a good faith effort to resolve this matter with Counsel of Record for the opposing party; or
☐ Prior to filing this Response, I attempted without success, to contact opposing counsel to attempt to resolve this matter.


Julia B. Judkins, Counsel for Responding Party

CERTIFICATE OF SERVICE

I hereby certify that I have filed this Response to Motion along with my Memorandum In Opposition in the Clerk's Office no later than 4:00 p.m. on the Friday preceding the hearing date, and that I have served a copy of this Response to Motion and Memorandum upon all Counsel of Record in a manner intended to ensure receipt by opposing Counsel of Record no later than 4:00 p.m. on the Friday preceding the scheduled hearing date, pursuant to Rule 1:12 of the Rules of the Supreme Court of Virginia, on this 14th day of February, 2003.


Julia B. Judkins, Counsel for Responding Party

000255

VIRGINIA:

IN THE FAIRFAX COUNTY CIRCUIT COURT

FILED
COURT CLERK'S OFFICE

2003 FEB 14 PM 3:53

HOWELL RUSS,

Plaintiff,

v.

JAMES DESTIVAL,

Defendant.

LAW NO. 198752

**DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO MOTION FOR JUDGMENT N.O.V. AND NEW TRIAL**

COMES NOW the defendant, James Destival, by counsel, and for his memorandum of points and authorities in opposition to plaintiff's motion for judgment notwithstanding the verdict and for a new trial filed herein, states as follows:

I. Introduction

The plaintiff, Howell Russ, brought this action against the defendant, James Destival, for damages arising out of a collision between Mr. Russ's bicycle and Mr. Destival's motor vehicle. The case came on for a trial in this Honorable Court on January 27, 2003. At trial, the jury was presented with evidence on the issues of negligence on the part of the defendant and contributory negligence on the part of the plaintiff. After the close of evidence on the second day of trial, the court, after careful deliberation and hearing extensive argument, charged the jury and gave instructions that reflected the law and all applicable duties and obligations of each party under the facts and circumstances of the case. The jury returned a verdict for the defendant.

The plaintiff now seeks to persuade the court to disregard the verdict of the jury and enter judgment in his favor; or, in the alternative, to order a new trial in this matter. Because the verdict is supported by the evidence presented at trial, it should not be set aside, and the defendant moves the court to dismiss plaintiff's motion and to enter judgment on the verdict accordingly.

II. Argument

Section 8.01-430 of the Virginia Code grants a limited power to the court to set aside a grossly inappropriate verdict. Specifically, that power "can only be exercised where the verdict is plainly wrong or without credible evidence to support it. If there is a conflict in the evidence on a material point, or if reasonable men may differ in their conclusions of fact to be drawn from the evidence, or if the conclusion is dependent on the weight to be given the testimony, the trial judge cannot substitute his conclusion for that of the jury merely because he would have voted for a different verdict. The weight of a jury's verdict, when there is credible evidence upon which it is based, is not overborne by the trial judge's disapproval." *Lane v. Scott*, 220 Va. 578, 581, 260 S.E.2d 238, 240 (1979), *cert. denied*, 446 U.S. 986, 100 S. Ct. 2969, 64 L. Ed. 2d 843 (1980), quoting *Commonwealth v. McNeely*, 204 Va. 218, 222, 129 S.E.2d 687, 689-90 (1963). See *Hall v. Hall*, 240 Va. 360, 363, 397 S.E.2d 829, 831 (1990).

Accordingly, the entry of judgment notwithstanding the verdict only rarely is appropriate. The Supreme Court of Virginia has held that the existence of any credible

evidence in support of a verdict mandates the entry of judgment thereon. See *Rogers v. Marrow*, 243 Va. 162, 166, 413 S.E.2d 344, 346 (1992). Moreover, during its analysis of the evidence presented to the jury, the court should accord the party who received the verdict the benefit of all substantial conflict in the evidence and of all inferences which may reasonably be drawn from the evidence. *Id.* The court should give credit to the jury for considering the evidence and returning a verdict based on the evidence: "When conflicting inferences have been resolved by a jury and those necessarily underlying the conclusion reflected in the verdict are reasonably deducible from the evidence, a trial judge should not set the verdict aside." *Lane*, 220 Va. at 582, 260 S.E.2d at 240.

In this case, the evidence presented at trial would support an inference by the jury that the plaintiff acted without due care in crossing the road in front of defendant's vehicle. Accordingly, it is reasonable, in light of the jury's verdict, for the court to deduce that the jury did make that inference. See *Lane*, 220 Va. at 582, 260 S.E.2d at 240.

In response to plaintiff's assertions of error in the instructions given to the jury, it is defendant's position that the instructions were the product of significant discussion and argument, all considered by the court. They stated the law as it applied to each party in this case, leaving the issues of negligence and contributory negligence to the jury as is generally recognized in Virginia. See *Poliquin v. Daniels*, 254 Va. 51, 57, 486 S.E.2d 530, 534 (1997) (holding that negligence ordinarily is a question for the jury); *Love v. Schmidt*, 239 Va. 357, 360, 389 S.E.2d 707, 709 (1990) (holding that contributory negligence

ordinarily is a question for the jury). Although the plaintiff asserts a slight modification of one model jury instruction was a misstatement of the law, that is not the case. See *Hooker v. Hancock*, 188 Va. 345, 356, 49 S.E.2d 711, 716 (1948) (holding that a pedestrian is responsible for exercising care as an ordinarily prudent person would under the specific circumstances of each case and that a pedestrian has a duty to heed traffic which is dangerously near or approaching in such a fashion that an ordinarily prudent person would not attempt to cross); see also, *Conrad v. Thompson*, 195 Va. 714, 717 (1954) (a pedestrian's duty is to await the passage of those vehicles which are so near or approaching at such rate of speed that a person exercising reasonable care for his own safety would not attempt to cross. "If he undertakes to cross without looking, or, if he looks and fails to see or to heed traffic that is in plain view and dangerously close.....") *Id.* at 717. Furthermore, despite the assertion of the plaintiff, a break with the precise language of the model jury instructions is no ground for rejecting a proposed instruction that states the law of the case with accuracy. Va. Code § 8.01-379.2.

As the Supreme Court held in *Hall, supra*, "Great respect is accorded a jury verdict . . . [E]very reasonable inference must be drawn in favor of a verdict that has been rendered fairly under proper jury instructions." See *Hall*, 240 Va. at 363, 397 S.E.2d at 831. Under Virginia law as interpreted by the Supreme Court, therefore, the plaintiff's motion to set aside the verdict should be dismissed and judgment entered in favor of the defendant in accordance with the verdict returned by the jury.

III. Conclusion

WHEREFORE, for all of the foregoing reasons, and any other reasons which may be raised at any hearing on this motion, the defendant, James Destival, by counsel, requests this Honorable Court to dismiss plaintiff's motion for judgment N.O.V. or new trial, to enter judgment for the defendant on the verdict, and for such further relief as the court may deem just and proper.

JAMES DESTIVAL
By Counsel

TRICHILO, BANCROFT, McGAVIN,
HORVATH & JUDKINS, P.C.

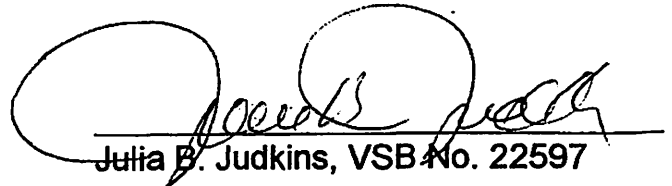


Julia B. Judkins, VSB No. 22597
John C. Nichols, VSB No. 46396
3920 University Drive
Fairfax, Virginia 22030-0022
Telephone: (703) 385-1000
Facsimile: (703) 385-1555
Counsel for Defendant James Destival

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Judgment N.O.V. and New Trial** was faxed and mailed, first-class postage prepaid, on this 14th day of February, 2003, to:

Edward L. Weiner, Esquire
Weiner & Associates
10605 Judicial Drive, Suite B-6
Fairfax, Virginia 22030
Via Facsimile: (703) 273-9505
Counsel for Plaintiff Howell Russ


Julia B. Judkins, VSB No. 22597

LEXSTAT Va. Code Ann. @ 8.01-430

CODE OF VIRGINIA
Copyright (c) 2002 by Matthew Bender & Company, Inc.
a member of the LexisNexis Group.
All rights reserved.

*** THIS DOCUMENT IS CURRENT THROUGH ALL 2002 LEGISLATION ***

TITLE 8.01. CIVIL REMEDIES AND PROCEDURE

CHAPTER 17. JUDGMENTS AND DECREES GENERALLY

ARTICLE 1. IN GENERAL

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

Va. Code Ann. § 8.01-430 (2002)

§ 8.01-430. When final judgment to be entered after verdict set aside

When the verdict of a jury in a civil action is set aside by a trial court upon the ground that it is contrary to the evidence, or without evidence to support it, a new trial shall not be granted if there is sufficient evidence before the court to enable it to decide the case upon its merits, but such final judgment shall be entered as to the court shall seem right and proper. If necessary to assess damages which have not been assessed, the court may empanel a jury at its bar to make such assessment, and then enter such final judgment.

Nothing in this section contained shall be construed to give to trial courts any greater power over verdicts than they now have under existing rules of procedure, nor to impair the right to move for a new trial on the ground of after-discovered evidence.

LEXSTAT va code 8.01-379.2

CODE OF VIRGINIA
Copyright (c) 2002 by Matthew Bender & Company, Inc.
a member of the LexisNexis Group.
All rights reserved.

*** THIS DOCUMENT IS CURRENT THROUGH ALL 2002 LEGISLATION ***

TITLE 8.01. CIVIL REMEDIES AND PROCEDURE

CHAPTER 13. CERTAIN INCIDENTS OF TRIAL

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

Va. Code Ann. § 8.01-379.2 (2002)

§ 8.01-379.2. Jury instructions

A proposed jury instruction submitted by a party, which constitutes an accurate statement of the law applicable to the case, shall not be withheld from the jury solely for its nonconformance with the model jury instructions.

HISTORY: 1992, c. 522.

NOTES:

EDITOR'S NOTE. --Acts 1992, c. 522, which enacted this section, in cl. 2 provides that the provisions of the 1992 act are declaratory of existing law.

LAW REVIEW. --For an article, "The Transformation of the American Civil Trial: The Silent Judge," see 42 *Wm. & Mary L. Rev.* 195 (2000).

220 Va. 578, *; 260 S.E.2d 238, **;

1979 Va. LEXIS 300, ***

LEXSEE 220 va 578

Thomas Lane v. Sarah E. Scott, Administratrix of The Estate of Eugene Scott,
Deceased

Record No. 780278

Supreme Court of Virginia

220 Va. 578; 260 S.E.2d 238; 1979 Va. LEXIS 300

November 21, 1979

PRIOR HISTORY:

[***1]

Appeal from a judgment of the Circuit Court of Albemarle County. Hon. Harold H. Purcell, judge presiding.

DISPOSITION:

Reversed and final judgment.

COUNSEL:

Jay T. Swett (McGuire, Woods & Battle, on briefs),
for appellant.

S. W. Tucker (Hill, Tucker & Marsh, on brief), for
appellee.

JUDGES:

Poff, J., delivered the opinion of the Court.

OPINIONBY:

POFF

OPINION:

[*579] [**238] The dispositive issue on this appeal is whether, as a matter of the law of the case, appellant Thomas Lane was a joint tort-feasor liable in damages for the wrongful death of Eugene Scott.

The motion for judgment was filed by the decedent's mother, administratrix of his estate, against Lane and Carl E. Colvin, Jr. * After both parties had rested, the trial court found that "[t]here isn't too much dispute in the direct evidence" but that the "inferences and conclusions from the evidence do differ making it ... a proper [**239] case for the jury". Upon that finding, the court overruled both motions to strike. [***4] On October 27, 1976, the jury returned a verdict for Lane, and the

plaintiff moved to set the verdict aside. By order entered September 27, 1977, the trial court held that "Lane is liable to the plaintiff as a matter of law", set the verdict aside, and ordered that another jury be empanelled to assess damages. That jury awarded the plaintiff damages in the sum of \$ 18,000, and the verdict was confirmed by final order entered December 1, 1977.

* The plaintiff was unable to serve Colvin with process, and Lane testified at trial that he did not know where Colvin was.

Lane assigns error to the order setting aside the first jury's verdict; the plaintiff assigns cross-error to an evidentiary ruling in the damage trial. No error is assigned to the evidentiary rulings or the rulings on instructions in the liability trial.

Colvin, a farm worker employed by Lane, lived with his wife and three children in a tenant house on Lane's farm. Returning from a shopping trip late one evening in December 1973, the Colvins [***5] saw a strange car parked near a woodshed at their home. As Colvin backed out of the driveway, the strange car followed and, with its horn blowing, pursued Colvin along the highway. After twice reversing his direction, Colvin arrived at Lane's home, told him what had happened, and asked him to investigate. Leaving Mrs. Colvin and the children [*580] with Mrs. Lane, Lane took his .30 caliber rifle, and he and Colvin drove to the tenant house where they saw a light burning in the bathroom. Colvin, who could not remember leaving that light burning, entered the house and got his .22 caliber rifle.

Lane and Colvin then drove back to Lane's home, and Colvin left with his family. A short time later, Mrs. Colvin and the children returned, reported that the strange car was back, and asked Lane to "please go over

220 Va. 578, *; 260 S.E.2d 238, **;

1979 Va. LEXIS 300, ***

there and help." Mrs. Colvin was "in hysterics" and the children "were all crying". Mrs. Lane called the sheriff, and Lane got in his pickup truck and drove to the tenant house.

As he entered the driveway, he saw the strange car facing him. Lane got out of his truck and "hollered" for Colvin. Colvin, standing behind a bush, answered, and Lane walked to the car where [***6] he saw what appeared to be a man "sleeping on the wheel." Knocking on the window and getting no response, Lane opened the car door and shook the man. The man grabbed Lane, tore his jacket, pushed him against the door, got out of the car, cursed Lane, and started to run. Colvin attempted to stop him, but the man struck Colvin in the face and knocked him down. Lane ordered the man to halt and fired his rifle "in the air". With Colvin in pursuit, the man ran behind the woodshed. Lane, who had gone back to his truck to "unjam" his rifle, followed and found the two men "scuffling" over Colvin's rifle. Colvin was "down on one knee". The other man was "over top of [Colvin], holding the rifle", and Lane "grabbed the fellow by the back of the neck" and "pulled him off". The man struck at Lane and Lane fell backwards to the ground. By the time he had gotten to his feet, the other two men had run a distance of approximately 150 feet. At this point, Lane thought he saw Colvin's arms "come up in the air". As Lane approached, Colvin was holding his rifle, which was broken into two pieces. The other man was lying on the ground. Lane could detect no pulse or breathing, and Colvin said [***7] that he supposed he had hit the man too hard with his rifle.

Realizing that there was a man "dead in the field and I was there with a gun", Lane "got scared" and "made up this story, trying to delete myself from being involved." At Lane's suggestion, Colvin "kicked in" the door of the house, and, when the deputy sheriff arrived, they told him that Colvin had chased an intruder from his home and that Lane had arrived only in time to see him running toward the woodshed. After consulting with his wife, Lane corrected the story in an interview with the officers the next morning.

The decedent, who was bearded, was identified as Eugene Scott. Scott once worked two weeks on Lane's farm and was clean-shaven [*581] at that time. Lane testified that he had not recognized Scott until he [**240] saw his face in the light of the officer's flashlight. Lane further testified that he had not heard Colvin's rifle fire and that he had not learned until the officers told him the next morning that the cause of death was a bullet wound in the back of the neck. According to the pathologist who performed the autopsy, the entrance wound was located "just below the hairline and just to the [***8] right of the midline"; the bullet lodged in the brain, indicating that it had "traveled to the left and

upward"; and, assuming that the "extraneous debris" found "[i]n and around the entrance wound" was gun powder, the shot was fired at close range, "somewhere around two feet, as a maximum."

We review this case upon the theory employed by counsel and the court below. The motion for judgment alleged that the two defendants were "each inciting, encouraging, aiding and abetting the other, with the common intention and unlawful purpose" of injuring Scott and that "[i]n the execution of such common intention and purpose, one of the defendants wrongfully and unlawfully shot and killed Eugene Scott". The trial court instructed the jury that "[t]here is no evidence" that Lane killed Scott. Under an instruction offered by the plaintiff and amended by the trial court, the jurors were directed to find for the plaintiff if they believed that Colvin "intentionally shot the decedent" and that Lane "was present, aiding and abetting in such shooting". "Aiding and abetting" was defined as "encouraging or inciting the commission of the unlawful act by words, gestures, looks or signs, or [***9] in some manner offering aid in its commission." The plaintiff assigns no cross-error to the instructions as given, and, indicating no approval, we consider them the law of the case.

[1] Under Code § 8.01-430, a trial court is empowered in a civil action to enter judgment *non obstante veredicto* "upon the ground that [the verdict] is contrary to the evidence, or without evidence to support it".

"[This power] can only be exercised where the verdict is plainly wrong or without credible evidence to support it. If there is a conflict in the testimony on a material point, or if reasonable men may differ in their conclusions of fact to be drawn from the evidence, or if the conclusion is dependent on the weight to be given the testimony, the trial judge cannot substitute his conclusion for that of the jury merely because he would have voted for a different verdict if he had been on the jury. The weight of a jury's verdict, when there is credible evidence upon which it can be based, is not overborne by the trial judge's disapproval."

[*582] *Commonwealth v. McNeely*, 204 Va. 218, 222, 129 S.E.2d 687, 689-90 (1963).

[2] Where the evidence fairly supports [***10] multiple inferences, a trial judge ruling on a motion to strike must adopt those inferences most favorable to the party whose evidence is challenged, even though he may believe different inferences are more probable. *R.F. & P. Railroad v. Sutton*, 218 Va. 636, 643, 238 S.E.2d 826, 830 (1977). By the same logic, when conflicting inferences have been resolved by a jury and those necessarily underlying the conclusion reflected in the verdict are reasonably deducible from the evidence, a

220 Va. 578, *; 260 S.E.2d 238, **;

1979 Va. LEXIS 300, ***

trial judge should not set the verdict aside.

Considering the motions to strike and finding that the "inferences and conclusions from the evidence do differ", the trial court ruled that this was "a proper case for the jury." We agree with that finding and that ruling; we disagree with the subsequent holding that "Lane is liable to the plaintiff as a matter of law."

On brief, the plaintiff argues that the evidence raises inferences that Lane "initiated the armed assault during which Scott was killed"; that Lane's warning shot "triggered Colvin's armed pursuit of Scott", a pursuit in which Lane "actively participated"; and that "there is no reason why [Lane] aided Colvin regain possession and [***11] control of [Colvin's] rifle other than that Colvin should use it against the intruder". Even if the inferences the plaintiff draws justify a conclusion that Lane was, in the language of the jury instructions, "present, aiding and abetting [Colvin] in such shooting", [**241] other inferences and a different conclusion are reasonably deducible from the evidence.

Specifically, we believe it is reasonable to infer that Lane's purpose in arming himself was not to initiate or incite an armed assault but to apprehend a stranger who had invaded his farm in the middle of the night and terrorized the family of his tenant; that Lane's warning shot, which he aimed into the air and not at Scott, was prompted by the same purpose; and that Lane's reason for intervening in the struggle was to rescue Colvin, who appeared to be in imminent peril, and to prevent Scott, who was attempting to seize Colvin's rifle, from using the weapon himself.

The plaintiff acknowledges that "there is no

evidence that Lane gave verbal assent to the shooting." Indeed, it appears that there was no conversation whatever between Lane and Colvin from the time Scott fled from his car until he was killed. Nor do [***12] we find any evidence of "gestures, looks or signs" to compel a conclusion that Lane was "aiding and abetting" as defined in the jury instructions or that he shared the tortious intent alleged in the motion for judgment.

[*583] [3] Going beyond the law of the case underlying the jury's verdict, the trial judge stated that the facts disclosed by the evidence, "coupled with the position of Lane as employer of Colvin indicates that Lane was a dominant factor in the whole episode." Pointing to that statement, the plaintiff contends on appeal that Lane was liable as a matter of law for Colvin's tort under the doctrine of *respondeat superior*. Such a theory of liability was never alleged in the motion for judgment, the trial judge refused the plaintiff's instruction based upon that theory, and the plaintiff assigned no cross-error to that refusal. Accordingly, we will not notice this argument on appeal. Rule 5:27.

Applying the law of the case, we are of opinion that the evidence and inferences reasonably deducible therefrom fairly support the conclusion reached by the first jury, and we hold that the trial court erred in setting their verdict aside. The judgment will be [***13] reversed, the first verdict will be reinstated, and final judgment for Lane will be entered here.

Reversed and final judgment.

204 Va. 218, *, 129 S.E.2d 687, **;

1963 Va. LEXIS 136, ***

LEXSEE 204 va 218

COMMONWEALTH OF VIRGINIA v. JAMES F. MCNEELY AND GAY
MCNEELY

Record No. 5523

Supreme Court of Virginia

204 Va. 218; 129 S.E.2d 687; 1963 Va. LEXIS 136

March 4, 1963

PRIOR HISTORY:

[***1]

Error to a judgment of the Circuit Court of Smyth county. Hon. Thomas L. Hutton, judge presiding.

DISPOSITION:

Judgment reversed, verdict of the jury reinstated and final judgment entered thereon.

HEADNOTES:

(1) Pleading and Practice -- Setting Aside Verdict -- Rules Stated.

(2) Evidence -- When Incredible.

(3) Pleading and Practice -- Setting Aside Verdict -- Held Error on Facts of Case.

1. Though a trial court has power under Code 1950, section 8-352 to set aside a jury verdict, and a verdict so set aside does not have the weight of one approved by the trial judge, this power can be exercised only where the verdict is wrong or without evidence to support it.

2. To be incredible, evidence must be either so manifestly false that reasonable men ought not to believe it, or shown to be false by objects or things as to the existence and meaning of which reasonable men should not differ.

3. The Commonwealth sued McNeely to recover the value of fixtures which the latter had removed from his restaurant after it had been bought for the purpose of widening a highway. McNeely admitted he had sold the fixtures but said Brewer, an agent of the Highway Department, had given him some, [***2] with permission to remove and store others. This Brewer denied. The jury found for the Commonwealth, but the

trial court set the verdict aside. This was error, for Brewer's evidence was not incredible, and the jury was entitled to believe him rather than McNeely. Judgment was accordingly reinstated against McNeely.

SYLLABUS:

The opinion states the case.

COUNSEL:

M. Ray Johnston, Assistant Attorney General (Robert Y. Button, Attorney General; R. Crockett Gwyn, Jr., on brief), for the Commonwealth.

D. Burke Graybeal, for the defendants in error.

JUDGES:

Present, All the Justices.

OPINIONBY:

I'ANSON

OPINION:

[*219] [**687] I'ANSON, J., delivered the opinion of the court.

The Commonwealth of Virginia instituted this action against the defendants, James F. McNeely and Gay McNeely, to recover the sum of \$5,800.36, alleging that they had removed and carried away certain fixtures attached to a restaurant building which they had sold by contract and conveyed by deed to the Commonwealth. A jury trial resulted in a verdict for the Commonwealth against both defendants in the amount of \$2,772.11. The trial court set aside the verdict and entered judgment for the defendants. An appeal [***3] was sought by the Commonwealth only as to the judgment entered for

204 Va. 218, *; 129 S.E.2d 687, **;

1963 Va. LEXIS 136, ***

James [**688] F. McNeely, and we granted a writ of error to that judgment.

The only issue presented is whether the trial court erred in setting aside the jury's verdict and entering judgment for the defendant James F. McNeely.

The material evidence shows that James F. McNeely and Gay McNeely, husband and wife, owned and operated a restaurant in Marion, Virginia, and the State Highway Commissioner determined that portion of the land owned by the defendants on which the restaurant building was located would be needed for the right of way of proposed interstate route 81.

The property was appraised by H. S. Buchanan and L. P. Haywood, two of the Highway Department's appraisers. Buchanan testified that when he and Haywood made their appraisal McNeely furnished them with an inventory list of the restaurant equipment, showing the cost to him of each item. He and Haywood viewed the items listed in the presence of McNeely, discussed them with him, and made check marks on the left-hand margin of the list opposite the items that the defendants were to retain and on the right-hand margin opposite the equipment that [***4] the Commonwealth was to take as a part of the building. This list was introduced in evidence as an exhibit.

Haywood confirmed Buchanan's testimony that they, in the presence of McNeely, designated the items for which payment was to be made by the Commonwealth and those which were to be kept by McNeely.

After the appraisal of the defendants' property, Douglas C. Brewer, a right of way representative for the State Highway Department, [*220] initiated negotiations with the defendants for the purchase of the land, building and equipment. Brewer testified that on February 3, 1960, he informed the defendants that a french frier, a charcoal broiler and a gas stove had been excluded from the consideration because these items were personal property and W. M. Williams, Jr., assistant district right of way engineer for the State Highway Department, had determined that only the fixtures which were attached to the building would be paid for and considered as a part of the real property. At McNeely's insistence, Brewer gave the defendants a written memorandum that the three appliances would be excluded from the sale. A few days later Brewer gave McNeely permission to keep a 45-case [***5] Bevco beer cooler, a 32-foot counter, a steam table, and a well pump, because he thought that the Commissioner's office had decided that those items were also personal property.

The negotiations between Brewer and the McNeelys culminated in the execution of an option agreement by the defendants on February 5, 1960. The consideration clause of the option was written in ink by Brewer and provided in part:

"Landowner to be paid \$39,239.00 in full for land, restaurant, well, septic system, footings, equipment (real property), shrubbery, and any and all damages to residue. Landowner to be paid \$37,239.00 when deed is executed and the balance \$2,000.00 when property is vacated. Landowner agrees to vacate property on or by Sept. 1, 1960. Landowner to affix Revenue stamps to deed when executed."

Brewer testified that he read the inventory list to the McNeelys and they looked over the completed agreement, containing the provisions he had written in ink, before they signed it. The 45-case Bevco beer cooler, 32-foot counter, and steam table, which Brewer had previously told McNeely he could keep, were not excluded from the inventory list and were included in the consideration paid [***6] McNeely.

A deed conveying the land and the restaurant building was executed and delivered on April 8, 1960, pursuant to the option agreement, but the inventory list of the equipment purchased was not made a part of the deed. The initial payment of \$37,239 was made to the defendants when the executed deed was delivered, and the balance of \$2,000 was paid on October 14, 1960, after Brewer told the attorney representing the [**689] Commonwealth that the property had been vacated. However Brewer permitted McNeely to keep the keys to the building in order that he might later remove some merchandise [*221] he had stored there. The keys were not obtained from McNeely until sometime in July, 1961.

On July 14, 1961, a representative of the State Highway Department went to the property to post a notice of sale of the building and saw McNeely coming out of it. Upon investigation it was found that all the equipment and fixtures claimed by the Commonwealth as its property had been removed and that most of it was in the possession of the defendant, James F. McNeely, and some of it was being used by him in his new restaurant.

McNeely testified that he had not seen, before the [***7] day of the trial, the marked list of the inventory as testified to by Buchanan and Haywood. He said that the option agreement he and Mrs. McNeely signed did not contain the provisions written in the instrument by Brewer; that he had told Brewer when he signed the option that he could not sell the building, land, and all the equipment for the price stated; and that Brewer then told him that since the seven items heretofore mentioned had been excluded from the sale that he would see about letting him have other equipment when it was needed in his new building.

McNeely first denied in both his pleadings and testimony that he had sold to the Commonwealth any of the equipment and fixtures listed in the exhibit filed with the motion for judgment, but he later admitted that he

204 Va. 218, *; 129 S.E.2d 687, **;

1963 Va. LEXIS 136, ***

had sold the equipment and fixtures that were attached to the building. He said that he had removed all the fixtures attached to the building after he had been paid the full purchase price and that they were in his possession at the time of the trial. He made no claim of ownership to the light fixtures, furnace, kitchen and restroom fixtures and other items that had been attached to the building, but stated that [***8] he had removed and stored them at the direction of Brewer for the benefit of Brewer or the Highway Department. He admitted, however, that he knew Brewer had no authority to have the property of the Commonwealth removed and stored for his own personal benefit.

Brewer denied telling McNeely that he would consider letting him have any of the equipment and fixtures sold to the Commonwealth or that he could remove them and store them for the benefit of anyone.

There was evidence in the record that McNeely had made several gifts to Brewer after the sale to the Commonwealth had been closed.

Mrs. McNeely did not testify.

[*222] The Commonwealth contends that we should reinstate the verdict against James F. McNeely and here enter a final judgment in its favor against McNeely because the evidence presented a factual question for determination by the jury and their finding was supported by credible evidence.

On the other hand, the defendant argues that the testimony of Brewer was incredible and the judgment of the trial court should be sustained. He says, however, if the Commonwealth is entitled to recover in any amount he does not complain of the amount of the jury's verdict. [***9]

[1] The action of the trial court in setting aside the verdict of the jury and entering judgment for the defendants was an exercise of the power conferred by § 8-352, Code of 1950, 1957 Replacement Volume, and we are aware that a verdict disapproved by the trial judge is not entitled to the same weight as one that has been approved by him. *Butler v. Darden*, 189 Va. 459, 471, 53 S.E.2d 146, 151; *Barb v. Lowe*, 196 Va. 1014, 1015, 86 S.E.2d 854, 855.

But the power conferred on the trial judge under Code § 8-352 to set aside a jury verdict and enter final judgment can only be exercised where the verdict is [**690] plainly wrong or without credible evidence to support it. If there is a conflict in the testimony on a material point, or if reasonable men may differ in their conclusions of fact to be drawn from the evidence, or if the conclusion is dependent on the weight to be given the testimony, the trial judge cannot substitute his conclusion for that of the jury merely because he would have voted for a different verdict if he had been on the jury. The

weight of a jury's verdict, when there is credible evidence upon which it can be based, is not overborne [***10] by the trial judge's disapproval. The question involved under such circumstances is one of fact for determination by the jury, and their verdict cannot be disturbed by either the trial court or by this Court, and if improperly set aside by the trial court it will be reinstated by this Court. *Comess v. Norfolk General Hospital*, 189 Va. 229, 233, 52 S.E.2d 125, 128; *Hoover v. Neff & Son*, 183 Va. 56, 62, 63, 31 S.E.2d 265, 266, 267; *Alessandrini v. Mullins*, 178 Va. 69, 72, 16 S.E.2d 323, 324; *Burks Pleading and Practice*, 4th ed., § 325, pp. 608, 609.

[2] The test to be applied in determining the credibility of witnesses and the weight to be given their testimony has been discussed at length by us in several recent cases. *Thompson v. Letourneau*, 199 Va. 560, 566, 101 S.E.2d 1, 5, 6; *Simpson v. Commonwealth*, 199 Va. 549, 558, 100 S.E.2d 701, 706, 707; *Daniels v. Transfer* [*223] *Co.*, 196 Va. 537, 544, 84 S.E.2d 528, 532. In each of those cases we approved the statement made by Mr. Justice Buchanan in *Burke v. Scott*, 192 Va. 16, at p. 23, 63 S.E.2d 740, at p. 744, where he said:

**** To be incredible, evidence must [***11] be either so manifestly false that reasonable men ought not to believe it, or it must be shown to be false by objects or things as to the existence and meaning of which reasonable men should not differ."

[3] The jury determined, under conflicting evidence, that the Commonwealth was entitled to recover the value of only a part of the items it claimed. An examination of the values on the list of the items which the Commonwealth alleged it purchased shows that the jury's verdict allowed recovery only for the value of those fixtures which were attached to the property and ordinarily pass with the conveyance of real estate in the absence of an agreement to the contrary. Thus, the jury found that there was no such agreement to exclude the fixtures from the sale. See *Myers v. Hancock*, 185 Va. 454, 457, 460, 39 S.E.2d 246, 247, 248; *Bolling v. Hawthorne Coal Co.*, 197 Va. 554, 566, 90 S.E.2d 159, 167.

Moreover, McNeely admitted that he had removed from the building the fixtures which he had sold to the Commonwealth. He attempted to excuse his act by saying that Brewer had permitted him to remove and store the items for Brewer, personally, or for the State Highway Department. [***12] It is inconceivable that McNeely would go to the expense and trouble of removing the fixtures if he had not had some design to profit by it himself. Brewer denied that he had given McNeely permission to remove the equipment and fixtures, and the jury settled this conflict in the evidence by their verdict for the Commonwealth.

Although there were some inconsistencies between

204 Va. 218, *; 129 S.E.2d 687, **;

1963 Va. LEXIS 136, ***

the claim of the Commonwealth and Brewer's testimony, and it is true that Brewer was indiscreet, to say the least, in receiving gifts from McNeely after the sale of the property to the Commonwealth, his testimony was not so manifestly false that reasonable men should not believe his denial that he gave McNeely permission to remove the Commonwealth's property. Nor was his testimony shown to be false by objects or things as to the existence and meaning of which reasonable men should not differ. It was for the jury to determine the credibility of the

witness and the weight his testimony should receive. Hence the trial court should not have set aside the verdict and entered judgment for James F. McNeely.

[*224] [**691] For the reasons stated, the judgment of the trial court as to James F. McNeely [***13] is set aside, the verdict of the jury is reinstated, and final judgment is here entered for the Commonwealth in the amount of \$2,772.11.

240 Va. 360, *; 397 S.E.2d 829, **;

1990 Va. LEXIS 130, ***; 7 VLR 770

LEXSEE 240 Va. 360

Lisa A. Hall, Administratrix of the Estate of Mark Adam Hall, Deceased v. Dennis S. Hall

Record No. 900258

Supreme Court of Virginia

240 Va. 360; 397 S.E.2d 829; 1990 Va. LEXIS 130; 7 VLR 770

November 9, 1990

PRIOR HISTORY:

[***1]

Appeal from a judgment of the Circuit Court of Franklin County. Hon. B.A. Davis, III, judge presiding.

DISPOSITION:*Reversed and remanded.***COUNSEL:**

Richard L. McGarry (Jeffrey H. Krasnow, on brief), for appellant.

Eric H. Ferguson (Ralph B. Rhodes; Hutcherson & Rhodes, on brief), for appellee.

JUDGES:

Justice Stephenson delivered the opinion of the Court.

OPINION BY:

STEPHENSON

OPINION:

[*362] [**830] The principal issue in this appeal is whether [***5] the trial court erred in setting aside a jury verdict in favor of the plaintiff on the ground that, as a matter of law, the evidence was insufficient to support the verdict.

Lisa A. Hall, administratrix of the estate of Mark Adam Hall, brought a wrongful death action against Dennis S. Hall to recover damages for Mark's death, allegedly caused by Dennis' negligent operation of a motor vehicle. A jury returned a verdict in favor of Lisa in the amount of \$ 3,000. The trial court set aside the verdict and entered judgment in favor of Dennis, concluding that the evidence was insufficient to support

the verdict. Lisa appeals.

The well-established standard for appellate review requires us to view the evidence and all reasonable inferences drawn therefrom in the light most favorable to Lisa. On the morning of July 3, 1987, Mark, age 20 months, was struck and killed by an automobile operated by Dennis, Mark's 16-year-old uncle. The accident occurred in the yard of a home in Franklin County shared by Mark, his family, and Dennis.

Shortly before the accident, Mark and his three-year-old brother were playing in the yard near an outdoor fireplace. Dennis also had been in the yard for approximately [***6] 20 minutes. While there with the children's father and another person, Dennis observed the two children at play.

Dennis then left the yard and went into the house for "a few minutes." When Dennis exited the house, he walked directly to the automobile parked in the yard. The distance between the parked automobile and the fireplace was stated as being somewhere between 30 and 70 feet.

As Dennis walked toward the automobile, he neither looked for the children nor looked back to where he previously had seen them playing. He testified that he simply "got in the car ... cranked it up ... [**831] [and] sat there for about a minute." He then "looked up in [the] rear-view mirror," and seeing nothing, "put [the car] in reverse and backed up ... [a]bout 12 feet" in the direction of the fireplace. He stopped the automobile when someone "holler[ed]" and after the vehicle had run over Mark.

Lisa first contends that the trial court erred in setting aside the jury verdict. We agree.

[*363] [1] Great respect is accorded a jury verdict, and it is not sufficient that a trial judge, had he been on the jury, would have rendered a different verdict. Indeed, every reasonable inference must be drawn [***7] in favor of a verdict that has been rendered fairly under

240 Va. 360, *; 397 S.E.2d 829, **;

1990 Va. LEXIS 130, ***; 7 VLR 770

proper jury instructions. *Forbes & Co. v. Southern Cotton Oil Co.*, 130 Va. 245, 259, 108 S.E. 15, 19 (1921). The time-honored standard that a court must apply in deciding whether to approve a verdict was stated succinctly in *Forbes*:

If there is conflict of testimony on a material point, or if reasonably fairminded men may differ as to the conclusions of fact to be drawn from the evidence, or if the conclusion is dependent upon the weight to be given the testimony, in all such cases the verdict of the jury is final and conclusive and cannot be disturbed either by the trial court or by this court, or if improperly set aside by the trial court, it will be reinstated by this court.

Id.; accord *May v. Malcolm*, 202 Va. 78, 84, 116 S.E.2d 114, 119 (1960); *Atlantic Greyhound Corp. v. Shelton*, 184 Va. 684, 693, 36 S.E.2d 625, 628-29 (1946).

[2-3] When the operator of a motor vehicle knows, or in the exercise of reasonable care should have known, of the presence of children playing near his vehicle a short time [***8] before moving it, "he is charged with the duty of exercising the same degree of care and inspection that a reasonably prudent person would have exercised under similar circumstances and conditions." *Wright v. Kelly*, 203 Va. 135, 138, 122 S.E.2d 670, 673 (1961); accord *Conrad v. Taylor*, 197 Va. 188, 191, 89 S.E.2d 40, 42 (1955). The degree of care required of the operator of a motor vehicle not to injure a child whom he has seen, or in the exercise of reasonable care should have seen, "is commensurate with the apparent ability of the child, taking into consideration his age, maturity and intelligence to foresee danger and the probability of injury." *Wright*, 203 Va. at 138, 122 S.E.2d at 673. Thus, a child's conduct is not judged by the same rules that are applied to an adult because "it is a matter of common knowledge that the actions of a child are unpredictable and that he acts thoughtlessly and upon childish impulses." *Id.* Indeed, the younger the child, the greater is the duty owed by the operator of a motor vehicle to exercise care and vigilance to avoid injuring the child. [***9] *Id.* at 138-39, 122 S.E.2d at 673; [*364] *Conrad*, 197 Va. at 191, 89 S.E.2d at 42; *Baker v. Richardson*, 201 Va. 834, 838, 114 S.E.2d 599, 602 (1960); *Harris v. Wright*, 172 Va. 67, 72, 200 S.E. 597, 599 (1939).

In the present case, Dennis knew of the presence of children playing in the yard near the automobile a short time before he moved it. He knew that the children were very young. He admitted that when he returned to the yard from the house, intending to back the automobile, he failed to ascertain the children's whereabouts. He did not even look to see if the children were still playing where he had last seen them several minutes earlier. Instead, he walked directly to the automobile, entered it,

and sat in it for about a minute before backing it. After looking only in the rearview mirror and seeing nothing, he backed the automobile approximately 12 feet in the direction of the fireplace and struck Mark.

[4] We are of opinion that when the evidence and all reasonable inferences drawn therefrom are viewed in the light most favorable to Lisa, [***10] reasonable minds could differ on the question whether Dennis exercised the degree of care to avoid injury to Mark that a reasonably prudent person would have exercised under similar circumstances and conditions. Thus, whether Dennis was guilty of negligence that proximately caused Mark's death was properly a jury issue. Accordingly, the verdict of the jury was conclusive, and the trial court erred in setting it aside.

[5-6] [***832] Lisa next contends that the damages awarded are inadequate as a matter of law. This contention is governed by our recent case of *Bradner v. Mitchell*, 234 Va. 483, 362 S.E.2d 718 (1987). In *Bradner*, a personal injury action, the plaintiff's special damages were uncontroverted. The jury awarded compensatory damages in an amount of \$ 42.65 over the proven special damages. In setting aside the verdict as being inadequate as a matter of law, we focused upon the quality of the evidence of special damages and its relation to the remainder of the award.

Where [the] evidence [of special damages] is uncontroverted and so complete that no rational factfinder could disregard it ... it must be considered as a fixed, constituent [***11] part of the verdict. When the remainder of the award consists of an amount which appears to the court insufficient to compensate the plaintiff for [the] non-monetary elements of damages ..., where such are proven, the verdict should be set aside as inadequate.

[*365] *Id.* at 487, 362 S.E.2d at 720 (footnote omitted).

[7] In the present case, the jury awarded Lisa \$ 3,000. The medical and funeral bills totalled \$ 2,951.31. They were unchallenged and uncontroverted. Indeed, at trial, Dennis' counsel stated that the "medical bills and [the] funeral bills were accumulated as a result of the accident. We are not here today to controvert those." Thus, the jury awarded only \$ 48.69 for the non-monetary elements of damage, viz, grief, solace, and loss of companionship, suffered by the family for the loss of their 20-month old child. Such an award is inadequate as a matter of law. *

* The trial court reached the same conclusion. In its letter opinion, the court stated that "[t]he jury verdict of \$ 3,000 is without question inadequate if the plaintiff was entitled to

240 Va. 360, *; 397 S.E.2d 829, **;

1990 Va. LEXIS 130, ***; 7 VLR 770

a verdict."

[***12]

Finally, we must determine whether, on remand, the new trial should be on all issues, as Dennis contends, or limited solely to the issue of damages, as Lisa contends. The seminal case in determining this question is *Rawle v. McIlhenny*, 163 Va. 735, 177 S.E. 214 (1934).

[8] In *Rawle*, we divided into five classes those cases in which a plaintiff seeks to overturn a verdict on the ground of its inadequacy. One such class comprised cases "in which clearly the decided preponderance of the evidence is in favor of the right of recovery, though there is sufficient evidence to support a verdict finding the defendant *not* liable." *Id.* at 749, 177 S.E. at 220 (emphasis in original). Ordinarily, in such cases new trials are limited to the issue of damages, unless the amount of damages recoverable is not clearly separable

from the matters involved in the question of liability. *Id.* at 749, 177 S.E. at 220-21.

[9-10] We conclude that the present case falls within such class of cases. We reach this conclusion, not only for the reasons previously expressed herein, but because an apparently [***13] unbiased jury under proper instructions found that the evidence preponderated in Lisa's favor. When a verdict, the product of a fair and errorfree trial, so clearly is supported by the evidence, there is no legal justification for a retrial on the issue of liability. Furthermore, the issue of damages is clearly separable from the issue of liability.

Consequently, we will reverse the trial court's judgment, reinstate the verdict in favor of Lisa as it relates to the issue of liability, [*366] and remand the case for a new trial limited to the issue of damages.

Reversed and remanded.

243 Va. 162, *; 413 S.E.2d 344, **;

1992 Va. LEXIS 142, ***; 8 VLR 1868

LEXSEE 243 Va. 162 at 166

John Rogers, m.d. v. Ruby G. Marrow, by Martha Marrow, Her Guardian

Record No. 910218

Supreme Court of Virginia

243 Va. 162; 413 S.E.2d 344; 1992 Va. LEXIS 142; 8 VLR 1868

January 10, 1992

PRIOR HISTORY:

[***1]

Appeal from a judgment of the Circuit Court of Fairfax County. Hon. Rosemarie P. Annunziata, judge presiding.

DISPOSITION:

Reversed and final judgment.

COUNSEL:

Vicki Layman-Jasper (Gary A. Godard; Godard, West & Adelman, on briefs), for appellant.

Harold O. Miller (Miller & Bucholtz, on brief), for appellee.

JUDGES:

Justice Keenan delivered the opinion of the Court.

OPINIONBY:

KEENAN

OPINION:

[*164] [**344] John Rogers appeals from a ruling of the trial court, setting aside the jury's verdict in his favor and entering judgment for Ruby G. Marrow. The dispositive issue in this appeal is whether the trial court erred in setting aside the verdict and in granting Marrow's motion for judgment notwithstanding the verdict. We conclude that the trial court did so err. n1

n1 Because our conclusion on this issue is dispositive of this appeal, we do not reach the secondary issue of sovereign immunity.

Marrow was a patient at Northern Virginia Mental

Health Institute (the hospital) at the time the injuries occurred which gave rise to this action for medical negligence. At the time of the incident in question, she had been [***6] admitted to the hospital as a patient on four previous occasions. Rogers, a full-time staff psychiatrist at the hospital, first treated Marrow on October 26, 1983, when she was admitted to the hospital for the second time. He continued as her treating physician on her successive admissions to the hospital.

Marrow's fifth admission to the hospital, which gave rise to the injuries complained of here, began on August 21, 1985. On [**345] August 22, Rogers evaluated Marrow as being potentially suicidal. Based on this assessment, he placed Marrow in H Unit, which is a semi-closed unit and is the most highly supervised area at the hospital. Rogers also placed Marrow on medication at this time. By September 3, 1985, she appeared to have improved considerably. She told the treatment team, which included Rogers, that although she still heard voices, they did not bother her or "tell her bad things anymore." At this time, Marrow did not indicate having any suicidal thoughts.

Based on this improvement, Marrow was transferred to G Unit, which is an open unit with no locked doors. On September 4, 1985, she left the unit without permission and was seen on a nearby road. On her return, [***7] she was placed back in H Unit. She left H Unit without permission on September 5, 1985. On her return, Rogers ordered that she be checked every 15 minutes. On September 6, 1985, Marrow escaped while Rogers was discussing the need for additional security for her with the staff. During the period of this escape, she was struck by an automobile on a ramp to Interstate Route 495. As a result, she sustained severe orthopedic injuries to both legs.

[*165] Marrow filed a motion for judgment against Rogers seeking damages for injuries arising out of alleged medical negligence. Three expert witnesses testified at the trial. Two of those witnesses were called

243 Va. 162, *; 413 S.E.2d 344, **;

1992 Va. LEXIS 142, ***; 8 VLR 1868

by Marrow. Dr. Edwin Carter, a psychologist, testified that Rogers violated the standard of care in failing to gather sufficient information regarding Marrow's escapes, and in failing to keep her adequately restrained, given her prior escapes and suicidal tendencies. Dr. W. S. Jennings, Jr., a psychiatrist, testified that Rogers violated the standard of care on September 6, 1985 in failing to "expeditiously provide treatment and the most secure environment" for Marrow.

Rogers called Dr. Gordon Kirschner, a psychiatrist, as [***8] his expert witness. Dr. Kirschner testified that Rogers's treatment of Marrow met the required standard of care. He based his opinion on the fact that Rogers had no information indicating that Marrow had suicidal intentions at the time of her escape on September 6, 1985. On cross-examination, however, Dr. Kirschner testified that he was not aware that Marrow had wandered into traffic on previous occasions or that she was found in possession of a piece of glass during one of her hospitalizations in 1984. Dr. Kirschner conceded that this information altered the basis upon which he had given his opinion. However, he did not retract his opinion that Rogers's treatment of Marrow met the required standard of care.

The jury returned a verdict in favor of Rogers. Upon consideration of post-trial motions, the trial court set aside the verdict, denied Marrow's motion for judgment notwithstanding the verdict, and granted Marrow a new trial. The trial court also denied Rogers's plea of sovereign immunity.

Rogers filed a motion requesting that the trial court reconsider its ruling and reinstate the jury's verdict. By letter opinion dated September 10, 1990, the trial court denied Rogers's [***9] motion. The court further ruled that, pursuant to *Code § 8.01-430*, n2 there was [*166] sufficient evidence for it to determine the case on the merits. The court found that Marrow's evidence establishing Rogers's breach of the standard of care was "virtually not rebutted." Accordingly, it entered judgment in favor of Marrow in [**346] the amount of \$ 180,000. This appeal followed.

n2 *Code § 8.01-430* provides:

When final judgment to be entered after verdict set aside. When the verdict of a jury in a civil action is set aside by a trial court upon the ground that it is contrary to the evidence, or without evidence to support it, a new trial shall not be granted if there is sufficient evidence before the court to enable it to decide the case upon its merits, but such final judgment shall be entered as to the court shall seem right and proper. If necessary to assess damages which have not been assessed, the court may empanel a

jury at its bar to make such assessment, and then enter such final judgment.

Nothing in this section contained shall be construed to give to trial courts any greater power over verdicts than they now have under existing rules of procedure, nor to impair the right to move for a new trial on the ground of after-discovered evidence.

[***10]

[1] Rogers argues that the trial court erred in setting aside the jury's verdict because that verdict was supported by the evidence at trial. We agree. Well-settled principles govern the trial court's determination whether a jury's verdict should be set aside. In *Lane v. Scott*, 220 Va. 578, 260 S.E.2d 238 (1979), we summarized these principles, stating that:

Under *Code § 8.01-430*, a trial court is empowered in a civil action to enter judgment *non obstante veredicto* "upon the ground that [the verdict] is contrary to the evidence, or without evidence to support it".

"[This power] can only be exercised where the verdict is plainly wrong or without credible evidence to support it. If there is a conflict in the testimony on a material point, or if reasonable men may differ in their conclusions of fact to be drawn from the evidence, or if the conclusion is dependent on the weight to be given the testimony, the trial judge cannot substitute his conclusion for that of the jury merely because he would have voted for a different verdict if he had been on the jury."

Id. at 581, 260 S.E.2d at 240 [***11] (citation omitted).

[2-3] The role of the trial court under these circumstances is, thus, explicit and narrowly defined. The standard by which we review the trial court's decision is equally explicit. If there is credible evidence in the record which supports the jury's verdict, we must reinstate that verdict and enter judgment thereon. *Graves v. Nat. Cellulose Corp.*, 226 Va. 164, 169, 306 S.E.2d 898, 901 (1983). In analyzing the evidence, even where the trial court has set aside the verdict, we accord the recipient of the verdict the benefit of all substantial conflict in the evidence, as well as all inferences which may be reasonably drawn from the evidence. 226 Va. at 169-70, 306 S.E.2d at 901.

[*167] [4-5] In a letter opinion of March 28, 1990, the trial court set forth its reason for setting aside the verdict. The trial court stated:

Evidence in support of the verdict in favor of Defendant Rogers was presented through the testimony of Dr. Leslie

243 Va. 162, *; 413 S.E.2d 344, **;

1992 Va. LEXIS 142, ***; 8 VLR 1868

Gordon Kirschner. His testimony on the issue of whether defendant Rogers breached the standard of care was inconclusive and ambiguous. [***12] Since there is no other evidence upon which the verdict in his favor can be properly based, the verdict in favor of the defendant, John Rogers, M.D. shall be set aside.

We find that this was not an adequate basis for setting aside the verdict. Rogers, as the defendant, had no obligation to produce any evidence. The burden of proof in a negligence case rests solely on the plaintiff and does not shift. *Myers v. Sutton*, 213 Va. 59, 61, 189 S.E.2d 336, 338 (1972).

[6-7] In order to recover for medical negligence, the plaintiff ordinarily must prove through the use of expert testimony the applicable standard of care, a deviation from that standard, proximate causation, and damages. See *Raines v. Lutz*, 231 Va. 110, 115, 341 S.E.2d 194, 197 (1986). Therefore, in the case before us, Marrow had the burden of proving these factors by expert testimony before Rogers could be held liable for her injuries. Rogers, the defendant, was not required to prove that the standard of care had not been breached.

[8] Sixteen witnesses testified during the course of this eightday trial. Rogers testified [***13] on his own

behalf regarding his knowledge of Marrow's condition, as well as the treatment he gave her during four separate periods of hospitalization. The jury had the duty of evaluating Rogers's credibility, as well as that of the other witnesses. Further, it had a right to accept Dr. Kirschner's testimony that Rogers had not violated the standard of care.

[9] Even if the jury chose to disregard Dr. Kirschner's testimony, it was nevertheless entitled to find that Marrow had failed to meet her burden of proof. The jury could have rejected both parties' expert testimony, or, in weighing the testimony of the different experts in light of Rogers's testimony, it could have concluded simply [**347] that Marrow had not proved by a preponderance of the evidence that Rogers was negligent. Thus, granting Rogers the benefit of all conflicts in the evidence, we conclude that there was [*168] credible evidence in support of the jury's verdict, and accordingly, we must reinstate it. *Graves*, 226 Va. at 169-70, 306 S.E.2d at 901.

For these reasons, we will reverse the judgment of the trial court and enter final judgment for Rogers.

*Reversed [***14] and final judgment.*

254 Va. 51, *; 486 S.E.2d 530, **;

1997 Va. LEXIS 65, ***

13 of 916 DOCUMENTS

**JAMES R. POLIQUIN, M.D., ET AL. v. FELICIA DANIELS, ADMINISTRATRIX
OF THE ESTATE OF SAMUEL DANIELS, DECEASED. M. ABY ALBERT,
M.D., ET AL. v. FELICIA DANIELS, ADMINISTRATRIX OF THE ESTATE OF
SAMUEL DANIELS, DECEASED**

Record No. 961719, Record No. 961761

SUPREME COURT OF VIRGINIA

254 Va. 51; 486 S.E.2d 530; 1997 Va. LEXIS 65

June 6, 1997, Decided

PRIOR HISTORY:

[***1] FROM THE CIRCUIT COURT OF THE CITY
OF RICHMOND. Melvin R. Hughes, Jr., Judge.

DISPOSITION:

Affirmed.

JUDGES:

Present: All the Justices. OPINION BY JUSTICE
ROSCOE B. STEPHENSON, JR.

OPINIONBY:

ROSCOE B. STEPHENSON, JR.

OPINION:

[*53] [**531] OPINION BY JUSTICE ROSCOE B.
STEPHENSON, JR.

These two related medical malpractice cases present issues regarding (1) the testimony of expert witnesses, (2) the sufficiency of the evidence to support the trial court's judgment, and (3) the refusal of certain jury instructions.

[**532] I

Samuel Daniels (Daniels) died following surgery on June 13, 1993. His widow, Felicia Daniels (the Plaintiff), qualified as administratrix of the estate and, thereafter, filed a motion for judgment against James R. Poliquin, M.D., a general surgeon, along with his professional corporation, Commonwealth General and Vascular Surgery, P.C. (collectively, Poliquin), and against M. Abey Albert, M.D., an anesthesiologist, along with his professional group, Midlothian Anesthesia Associates, Inc. (collectively, Albert). The Plaintiff alleged that Drs. Poliquin and Albert negligently breached the applicable

standards of care and that their negligence proximately caused Daniels' death.

The case was tried by a jury which [***2] returned a verdict in favor of the Plaintiff against Poliquin and Albert in the amount of \$ 1,004,929.14. After considering the defendants' motions to set aside the verdict, the trial court overruled the motions, except to reduce the amount of the verdict to \$ 1,000,000 in accordance with the statutory limitation on recovery. Code § 8.01-581.15. On May 29, 1996, the trial court entered final judgment on the verdict as amended. Poliquin and Albert (collectively, the Defendants) appeal.

II

According to established law, we must view the evidence in the light most favorable to the Plaintiff, the prevailing party at trial. On June 12, 1993, Daniels went to a medical clinic for treatment of a perirectal abscess and associated pain and fever. The clinic referred Daniels to the emergency room of Johnston-Willis Hospital for further evaluation. At the hospital, Daniels was examined by Dr. Poliquin who determined that the abscess required surgery. Dr. Poliquin admitted Daniels to the hospital and scheduled him for surgery the next morning.

Daniels was hypertensive, diabetic, and obese, and, because of the surgical risks associated with these conditions, Dr. Poliquin [*54] ordered, among other [***3] tests, an electrocardiogram (EKG) to detect whether Daniels had any pulmonary or cardiac diseases. The EKG was performed on June 12, 1993, about 10:30 p.m., and Dr. Poliquin referred the EKG tracing to a cardiologist for interpretation.

On the morning of June 13, Dr. Albert arrived at the hospital to administer the anesthesia for Daniels' surgery. Dr. Albert noted that Daniels was obese and had a history

000277

367

254 Va. 51, *; 486 S.E.2d 530, **;

1997 Va. LEXIS 65, ***

of hypertension and diabetes and that Daniels suffered from shortness of breath. Dr. Albert also noted that the EKG tracing, which had not yet been interpreted by a cardiologist, showed signs of abnormality, but he neither reported that fact to Dr. Poliquin nor sought an interpretation of the tracing by a cardiologist.

The surgery, performed by Dr. Poliquin, proceeded as scheduled, and Daniels was placed under general anesthesia. At the conclusion of the surgery, Dr. Albert noticed that Daniels was experiencing difficulty breathing, and he attempted to intubate Daniels again. Daniels, however, became unresponsive, went into cardiac arrest, and, despite resuscitation efforts, died.

Later on the morning of June 13, a cardiologist interpreted Daniels' EKG tracing and noted that it [***4] showed that Daniels possibly had previously suffered a myocardial infarction; i.e., heart attack. According to an autopsy, Daniels had suffered a silent myocardial infarction at least one week prior to his death. n1

n1 At trial, an expert witness explained that a silent myocardial infarction "refers to the fact that the patient does not feel pain It is typically found ... in patients who are diabetics So it's not uncommon for a diabetic not to have chest pain, and, yet, they have a major heart problem going on."

At trial, Dr. Stephen Carl Rerych, a general surgeon, Dr. Richard J. Hart, Jr., a cardiologist, and Dr. Brian Gerard McAlary, an anesthesiologist, were called by the Plaintiff as expert witnesses. They explained that surgery under general anesthesia places stressful demands on the heart. They further explained that a healthy heart tolerates these stresses, but a patient who has had a myocardial infarction is at risk during surgery.

[**533] Dr. Rerych, over the Defendants' objection, testified [***5] regarding the standard of care required of a general surgeon. He stated that the standard of care required a surgeon to know prior to surgery the results of tests ordered and that this was particularly important for a patient like Daniels, with a high risk for undiagnosed heart disease. Therefore, before surgery on such patients, a surgeon must order an EKG and receive an interpretation of the results by a qualified physician. [*55] Dr. Rerych opined that Dr. Poliquin's failure to ascertain the results of the EKG prior to performing the surgery was a violation of a surgeon's standard of care.

Dr. Hart testified that diabetics are at risk for silent myocardial infarctions and, therefore, a proper interpretation of Daniels' EKG by a cardiologist was essential. Such an interpretation would have led to a

cardiac evaluation which would have shown the extent of the damage to Daniels' heart from the silent myocardial infarction. With this knowledge, Drs. Poliquin and Albert could have explored other treatment options that, in Dr. Hart's opinion, would have prevented Daniels' death.

Dr. McAlary was the Plaintiff's expert witness on the standard of care for an anesthesiologist treating a patient [***6] like Daniels. Dr. McAlary testified that an anesthesiologist must be sensitive to the possibility that a diabetic may have had a silent myocardial infarction and may have heart disease, particularly when the patient is also hypertensive and obese. He also testified that there were a variety of available monitoring options that would have provided the surgical team with early indications of Daniels' heart failure and that such early indications would have led to immediate treatment. Dr. McAlary opined that Daniels would have survived the surgery had appropriate actions been taken for his condition. According to Dr. McAlary, Dr. Albert breached the standard of care required of an anesthesiologist by failing to know the interpretation of the EKG tracing, to consult with a cardiologist which consultation would have led to invasive monitoring, and to use invasive monitoring of Daniels during surgery.

III

Following a voir dire hearing, the trial court qualified Dr. Rerych as an expert witness on the standard of care for a general surgeon in Virginia. Poliquin contends on appeal, as at trial, that the trial court erred in qualifying Dr. Rerych.

Code § 8.01-581.20 provides for a statewide [***7] standard of care in medical malpractice cases unless a health care provider proves that a local standard of care is more appropriate. Neither the General Assembly nor this Court has ever recognized a nationwide standard of care. Code § 8.01-581.20 provides, in pertinent part, as follows:

In any action against a physician ... to recover damages alleged to have been caused by medical malpractice ... in this [*56] Commonwealth, the standard of care by which [the alleged malpractice is] to be judged shall be that degree of skill and diligence practiced by a reasonably prudent practitioner in the field of practice or specialty in this Commonwealth and the testimony of an expert witness, otherwise qualified, as to such standard of care, shall be admitted Any physician who is licensed to practice in Virginia shall be presumed to know the statewide standard of care in the specialty or field of medicine in which he is qualified and certified. This presumption shall also apply to any physician who is licensed in some other state of the United States and meets the educational and examination requirements for licensure in Virginia.

254 Va. 51, *; 486 S.E.2d 530, **;

1997 Va. LEXIS 65, ***

(Emphasis added.)

Dr. Rerych received [***8] a medical degree from Columbia University College of Physicians and Surgeons in New York. Thereafter, he attended a surgical residency program in North Carolina at Duke University Medical Center. From 1985 to 1986, Dr. Rerych was Chief Resident in General and Thoracic Surgery at Duke University Medical Center, and, from 1986 to 1991, he served as Assistant Clinical Professor of General, Thoracic, and Vascular Surgery at the same facility. Dr. Rerych is a board certified general surgeon. He is licensed to practice general surgery in North Carolina and has practiced his specialty in North Carolina since 1988.

[**534] During voir dire, Dr. Rerych testified that he was "clearly eligible" for licensure in Virginia. Additionally, the trial court received into evidence a letter to that effect from the Commonwealth's Department of Health Professionals. Dr. Rerych also testified that he knew "the standard of care that would have prevailed in Virginia in June of 1993 with respect to the issues in this case." However, the doctor, when asked if he was making an "assumption ... with regard to the [standard of] care in Virginia," answered, "A strong assumption."

Poliquin asserts that, even [***9] if Dr. Rerych met the requirements for licensure in Virginia, his testimony rebutted the statutory presumption and showed that he did not know the standard of care in Virginia. We do not agree. The voir dire hearing was extensive, and, at the conclusion thereof, the trial judge stated: "I'm going to overrule the objection[;] the witness is qualified by the thinnest of reeds under the statute." Thus, the trial court weighed all the evidence before it, [*57] applied the statutory presumption, and concluded that Dr. Rerych was qualified to testify as to the standard of care in this Commonwealth.

The question whether a witness is qualified to express an expert opinion rests within the sound discretion of the trial court. *King v. Sowers*, 252 Va. 71, 78, 471 S.E.2d 481, 485 (1996). We cannot say, based upon the record before us, that the trial court abused its discretion in qualifying Dr. Rerych as an expert witness.

IV

A

Both Albert and Poliquin contend that no evidence was presented to show that their alleged negligence proximately caused Daniels' death. Thus, they assert, the trial court erred in overruling their motions to strike the evidence and to set aside the verdict. [***10]

In medical malpractice cases, as with other tort

litigation, issues of negligence and proximate cause are ordinarily questions of fact for a jury. *Brown v. Koulizakis*, 229 Va. 524, 531, 331 S.E.2d 440, 445 (1985). Only when reasonable minds could not differ about such issues do they become questions to be decided by a court. *Hadeed v. Medic-24, Ltd.*, 237 Va. 277, 285, 377 S.E.2d 589, 593 (1989). In viewing the evidence, an appellate court must give the prevailing party at trial the benefit of all substantial conflict in the evidence and all inferences reasonably deducible therefrom. 237 Va. 280-81, 377 S.E.2d at 590. Thus, a verdict should not be set aside unless it is contrary to the evidence or without evidence to support it. *Code* § 8.01-430; *Brown*, 229 Va. at 531, 331 S.E.2d at 445.

In the present case, the Defendants contend that the evidence, at most, showed only what might have occurred, rather than what necessarily would have occurred had the Plaintiff's experts' recommended standards of care been followed. They assert that there was a complete lack of expert testimony that their alleged negligence caused Daniels' death. We do not agree.

In [***11] medical malpractice death cases, a plaintiff is not required to prove to a certainty that the patient would have survived had certain actions been taken. *Brown*, 229 Va. at 532, 331 S.E.2d at 446; *Whitfield v. Whittaker Mem. Hospital*, 210 Va. 176, 184, 169 S.E.2d 563, 569 (1969). A defendant physician's action or inaction which "has destroyed any substantial possibility of the patient's survival" is a proximate cause of the patient's death. *Brown*, 229 Va. at 532, 331 S.E.2d at 446; accord *Bryan v. Burt*, 254 Va. 28, 1997 Va. LEXIS 58, [*58] (this day decided); *Whitfield*, 210 Va. at 184, 169 S.E.2d at 568.

In the present case, each of the Plaintiff's experts testified that it was his opinion to a reasonable degree of medical probability that, had the Defendants known what they should have known about Daniels' condition prior to surgery and, thereafter, employed the appropriate procedures during surgery, Daniels would have survived the surgery. Therefore, we think the trial court properly submitted the issue of proximate cause to the jury. n2

n2 On brief, Poliquin presents the question whether the Plaintiff showed a breach of the standard of care for general surgeons in the Commonwealth. Poliquin, however, did not file an assignment of error relating to this issue, and therefore, we will not consider it on appeal. Rule 5:21(i).

[***12]

[**535] B

The Defendants further contend that the trial court

254 Va. 51, *; 486 S.E.2d 530, **;

1997 Va. LEXIS 65, ***

erred in allowing the testimony of Norman Fayne Edwards, Plaintiff's economic damages expert. The Defendants objected to Dr. Edwards' testimony because, in formulating the present value of Daniels' lifetime income, Dr. Edwards based his calculations on life expectancy tables contained in *Code* § 8.01-419 and on tables published by the United States Department of Labor (DOL). They assert that the Plaintiff's own evidence contradicted the assumptions which served as the basis for Edwards' opinions.

According to Dr. Edwards, Daniels, who was 38 years old when he died, had a life expectancy of 34.6 years pursuant to *Code* § 8.01-419. Under the DOL tables, Daniels had a work life expectancy of 24 years, or to age 63.

Dr. Hart testified that, had Daniels survived the surgery, he would have lived no more than 10-15 years, unless he made significant lifestyle changes. If he had made such changes, including losing 100 pounds within a year and exercising, his life expectancy would have been 20-25 years.

Code § 8.01-419 provides that the table of life expectancy set forth therein shall be received "as evidence, with other evidence [***13] as to the health, constitution and habits of [the] person" in issue. (Emphasis added.) As we said in *Edwards v. Syrkes*, 211 Va. 600, 602, 179 S.E.2d 902, 903 (1971),

it is the duty of the court, when so requested in an action for wrongful death, to tell the jury that a mortality table introduced [*59] into evidence is to be considered ... along with all the other evidence relating to the health, habits and other circumstances of the person which may tend to influence his life expectancy.

In the present case, the trial court properly instructed the

jury, in accordance with Edwards, that it "should consider [Daniels' life expectancy of 34.6 years] along with any other evidence relating to the health, constitution, and habits of ... Daniels in determining his life expectancy." Thus, based upon the evidence before it, the jury could determine Daniels' life expectancy in formulating the present value of his lifetime income. We hold, therefore, that the trial court did not err in allowing Dr. Edwards' testimony.

C

Finally, the Defendants contend that the trial court erred in refusing their tendered instructions B, C, and D. We think the legal principles [***14] set forth in those instructions were adequately and objectively covered in granted instructions 1, 13, and 17. "When granted instructions fully and fairly cover a principle of law, a trial court does not abuse its discretion in refusing another instruction relating to the same legal principle." *Stockton v. Commonwealth*, 227 Va. 124, 145, 314 S.E.2d 371, 384, cert. denied, 469 U.S. 873, 83 L. Ed. 2d 158, 105 S. Ct. 229 (1984); accord *Hubbard v. Commonwealth*, 243 Va. 1, 16, 413 S.E.2d 875, 883 (1992). Therefore, we conclude that the jury was fully and fairly instructed and the trial court did not abuse its discretion in refusing instructions B, C, and D.

V

In sum, we hold that the trial court did not err in qualifying Dr. Rerych as an expert witness, submitting the proximate cause issue to the jury, allowing Dr. Edwards' testimony, and refusing certain jury instructions. Accordingly, we will affirm the trial court's judgment.

Affirmed.

239 Va. 357, *; 389 S.E.2d 707, **;

1990 Va. LEXIS 48, ***; 6 VLR 1566

LEXSEE 239 Va. 357, AT 360

Martha J. Love v. E. F. Schmidt, Jr.

Record No. 890413

Supreme Court of Virginia

239 Va. 357; 389 S.E.2d 707; 1990 Va. LEXIS 48; 6 VLR 1566

March 2, 1990

PRIOR HISTORY:

[***1]

Appeal from a judgment of the Circuit Court of the City of Richmond. Hon. T. J. Markow, judge presiding.

DISPOSITION:

Reversed and final judgment.

COUNSEL:

William H. Shewmake (J. Thomas McGrath; Malcolm P. McConnell, III; Coates & Davenport, on briefs), for appellant.

*Albert M. Orgain, IV (Robert B. [***4] Delano, Jr.; Wm. Tyler Shands; Sands, Anderson, Marks & Miller, on brief), for appellee.*

JUDGES:

Justice Whiting delivered the opinion of the Court. Chief Justice Carrico, dissenting.

OPINION BY:

WHITING

OPINION:

[*358] [**708] There are two issues in this case: (1) whether a plaintiff, who fell to the floor and was injured after sitting on a properly positioned toilet seat she knew was loose, was guilty of contributory negligence as a matter of law, and (2) whether a landlord is liable for an independent contractor's negligence in failing to perform the landlord's common-law duty to maintain the common areas of an office building in a reasonably safe condition.

On March 23, 1984, Winfree H. Slater, Inc. (Slater) contracted to manage Edward F. Schmidt, Jr.'s office building at 1214 Westover Hills Boulevard in the City of

Richmond. In their written agreement, Slater agreed that it would act as the "sole agent" in all existing leases and that its service "would cover the supervision and control of the property, paying all bills, [and] handling all complaints. ..." In the performance of the contract, Slater and [*359] Schmidt construed these terms to impose a duty on Slater to maintain the premises in a [***5] reasonably safe condition.

Security Pacific Finance Company (Security Pacific) was one of several tenants on the second floor of the building. Approximately two weeks before the plaintiff was injured, Margaret Mawyer, the manager of Security Pacific's office, noticed that the toilet seat in the middle stall of the second floor women's rest room was loose and called the problem to the attention of the janitor. It was not repaired. Approximately one week later, Mawyer called Slater's office and reported the seat's condition.

During this period of disrepair, the employees of Security Pacific made jokes in the office about the loose toilet seat. Mawyer testified that the plaintiff, Martha J. Love, an employee of Security Pacific, was a party to these conversations. Love testified, however, that she did not recall the conversations. n1

n1 Schmidt claims that Love's mere statement that she did not "recall" the conversations, without an explicit denial that she heard them, was negative testimony which is insufficient to overcome Mawyer's positive testimony that Love was present during the conversations. In view of our holding, we need not, and do not, decide this issue, but simply assume that Love heard the conversations.

[***6]

Upon entering the second floor women's rest room on August 1, 1985, Love noticed that the doors were

239 Va. 357, *; 389 S.E.2d 707, **;

1990 Va. LEXIS 48, ***; 6 VLR 1566

closed on all but the middle toilet stall. As she entered the middle stall, Love looked at the toilet, which appeared to be "perfectly normal." However, when she sat on the toilet seat, it slipped. As a result, she fell against the side of the stall and onto the floor, injuring her back and leg. Later, Love's doctors discovered that her fall caused a bulging in one of the discs in her back, which necessitated the removal of a portion of the disc. Love has had chronic back pain since her injury, which has caused her to be constantly depressed.

On September 4, 1986, Love filed this action against Schmidt to recover damages for her injury. Subsequently, she recovered a verdict of \$ 150,000 in a jury trial on September 28, 1988. On January 5, 1989, the trial court set the verdict aside on the ground that Love was guilty of contributory negligence as a matter of law. We granted this appeal to Love, as well as to Schmidt on his assignments of cross-error.

[1] Love contends that the jury should, and did, resolve the issue of her alleged contributory negligence. On the other hand, [***7] Schmidt claims that the trial court should, and did, resolve that issue in his favor. Schmidt says that the evidence established [*360] Love's contributory negligence [**709] as a matter of law. On this appeal, Schmidt has the burden of showing that "there is no direct and reasonable inference to be drawn from the evidence as a whole, sustaining the conclusion that [Love] was free of contributory negligence." *Kelly v. Virginia Power*, 238 Va. 32, 39, 381 S.E.2d 219, 222-23 (1989) (quoting *Virginia Electric and Power Co. v. Wright*, 170 Va. 442, 448-49, 196 S.E. 580, 582 (1938)). Moreover, because Love has recovered a jury verdict, we view the facts in the light most favorable to her. *Murray v. Hadid*, 238 Va. 722, 725, 385 S.E.2d 898, 900 (1989).

Citing a number of cases which found that the plaintiffs were guilty of contributory negligence as a matter of law in failing to observe or remember obvious dangers, n2 Schmidt claims Love's knowledge that the seat was loose likewise establishes her contributory negligence as a matter of law. In this case, however, the danger was not [***8] obvious. Indeed, not long before Love fell, Carol M. Cummings, Linda Cole, and Linda Threadgill used the seat without mishap.

n2 *Kelly v. Virginia Power*, 238 Va. 32, 39, 381 S.E.2d 219, 222 (1989) (19,900 volt electric line which painter touched with metal ladder); *Rocky Mount Shopping Ctr. Assoc. v. Steagall*, 235 Va. 636, 638, 369 S.E.2d 193, 194 (1988) (open and obvious depression in parking lot which plaintiff admitted she could have seen had she looked); *Virginia Beach v. Starr*, 194 Va. 34, 35-36, 72 S.E.2d 239, 240 (1952) (break in

sidewalk which plaintiff saw and realized was dangerous); *Hill v. City of Richmond*, 189 Va. 576, 584, 53 S.E.2d 810, 814 (1949) (depression of which plaintiff was aware in snow-covered sidewalk); *Ward v. Clark*, 163 Va. 770, 776, 177 S.E. 212, 214 (1934) (ice which plaintiff admittedly saw on steps); *Bohlkin v. Portsmouth*, 146 Va. 340, 347, 131 S.E. 790, 792 (1926) (projecting water meter box which had been in place for over 12 years and which plaintiff passed three or four times a week before falling over it on dark rainy night on unlighted and unimproved lane).

[***9]

[2-3] "Ordinarily, the issue of contributory negligence is a question for the jury [unless] persons of reasonable minds could not differ upon the conclusion that such negligence has been established." *Kelly*, 238 Va. at 39, 381 S.E.2d at 222. In our opinion, persons of reasonable minds could differ as to whether Love was negligent in sitting on a toilet seat which she knew was loose, but appeared to be positioned properly on the toilet. Accordingly, the trial court erred in setting the verdict aside.

Even so, Schmidt contends that we can affirm the trial court's judgment because he was not responsible for the unsafe condition of the seat, that responsibility having been delegated to Slater, an independent contractor. However, if a duty to maintain a premises [*361] in a safe condition is imposed by contract or by law, it cannot be delegated to an independent contractor. See *Bowers v. Martinsville*, 156 Va. 497, 515, 159 S.E. 196, 202 (1931) (prime contractor's contractual duty to maintain adjacent property support in excavation work could not be delegated to subcontractor); *Richmond & M.R. Co. v. Moore*, 94 Va. 493, 506, 27 S.E. 70, 71 (1897) [***10] (landowner's common-law duty to provide reasonably safe premises for entertainment of invitees could not be delegated to independent contractor); Restatement (Second) of Property, Landlord and Tenant § 19.1 (1977).

[4] Nevertheless, Schmidt argues that we held in the case of *Kesler v. Allen*, 233 Va. 130, 353 S.E.2d 777 (1987), that a landlord could delegate her duty to maintain the common areas of her premises in a reasonably safe condition. In *Kesler*, however, the negligent act did not arise out of the discharge of the landlord's duty to provide a reasonably safe premises, but upon her independent contractor's negligent installation of a storm door. We held that the landlord was not liable for the contractor's negligence in making such repairs or improvements. *Id.* at 134, 353 S.E.2d at 780. The tenant tripped over an obstacle shortly after the contractor installed it at the threshold of the storm door.

239 Va. 357, *; 389 S.E.2d 707, **;

1990 Va. LEXIS 48, ***; 6 VLR 1566

In *Kesler*, we noted that the landlord was unaware of the obstacle until notified of the tenant's fall. *Id.* at 132, 353 S.E.2d at 779. Moreover, the tenant did not claim that [***11] the obstacle had been in place for a time sufficient to impute constructive notice of the consequently unsafe premises. Thus, the landlord's duty to provide a reasonably safe premises was not involved because the landlord had neither actual notice [**710] of the obstacle nor sufficient time, in the exercise of reasonable care, to become aware of it. See *Revell v. Deegan*, 192 Va. 428, 433, 65 S.E.2d 543, 546 (1951) (landlord only liable if he had actual or constructive notice of unsafe condition of premises).

[5] In contrast to *Kesler*, this case involves an attempt to delegate the landlord's common-law duty to maintain his premises in a reasonably safe condition. Because such a duty cannot be delegated, we are of opinion that notice to Slater of the unsafe condition of the toilet seat was notice to Schmidt, based on agency principles and the doctrine of *respondeat superior*. *Revell*, 192 Va. at 433, 65 S.E.2d at 546; see *Jefferson*

Standard Life Ins. Co. v. Hedrick, 181 Va. 824, 834, 27 S.E.2d 198, 202 (1943); *Rew v. Bloxom*, 181 Va. 136, 140, 23 S.E.2d 771, 773 (1943). [***12]

[*362] For these reasons, we will reverse the judgment of the trial court, reinstate the verdict, and enter final judgment for Love.

Reversed and final judgment.

DISSENTBY:
CARRICO

DISSENT:

CHIEF JUSTICE CARRICO, dissenting.

I would hold the plaintiff guilty of contributory negligence as a matter of law and affirm the judgment of the trial court.

188 Va. 345, *, 49 S.E.2d 711, **;

1948 Va. LEXIS 169, ***

LEXSEE 188 Va. 345, AT 355

I. T. HOOKER v. CORA LEE HANCOCK, ADMINISTRATRIX

Record No. 3361

Supreme Court of Virginia

188 Va. 345; 49 S.E.2d 711; 1948 Va. LEXIS 169

October 11, 1948

PRIOR HISTORY:

[***1]

Error to a judgment of the Circuit Court of Roanoke county. Hon. T. L. Keister, judge presiding.

DISPOSITION:

Reversed and final judgment.

HEADNOTES:

1. AUTOMOBILES -- *Collision between Automobile and Pedestrian -- Failure to Keep Lookout -- Questions of Law and Fact -- Case at Bar.* -- In the instant case, an action by administratrix for wrongful death of decedent, a pedestrian, struck by defendant automobile driver, there was conflict in the testimony as to the effectiveness of the lookout maintained by defendant immediately before and at the time of collision, but the evidence insofar as it bore upon decedent's action and movements immediately prior to and at the time of the collision was undisputed and fair-minded men could not differ as to the inferences to be drawn therefrom.

Held: That the question whether decedent was free from negligence which contributed to the collision was one of law to be decided by the court.

2. APPEAL AND ERROR -- *Scope -- Statement of Fact Favorable to Party with Verdict.* -- Where plaintiff is fortified by a jury's verdict and the judgment of the trial court, he occupies the most favored position known to the law.

3. APPEAL AND ERROR [***2] -- *Reversal -- Judgment Plainly Wrong.* -- In an action for death by wrongful act only if it plainly appears that decedent was guilty of contributory negligence which caused or efficiently contributed to his death should the Supreme

Court of Appeals exercise the power to set aside the judgment of the trial court as provided in section 6363 of the Code of 1942 (Michie). Yet if that fact is so conclusively established by the evidence that fair-minded men could not differ, then any judgment rendered in plaintiff's favor is plainly wrong and it becomes the duty of the Supreme Court of Appeals to so decide.

4. AUTOMOBILES -- *Collision between Automobile and Pedestrian -- Whether Defendant Was Keeping Proper Lookout as Question for the Jury -- Case at Bar.* -- The instant case was an action by administratrix for wrongful death of decedent, a pedestrian, struck by defendant automobile driver. The testimony of the defendant and that of several witnesses called on behalf of the plaintiff disclosed that defendant did not see decedent until about the time he stepped in front of the automobile. Plaintiff obtained a judgment in the lower court.

Held: That viewed most favorably [***3] to the plaintiff, the evidence was sufficient to establish that defendant may have failed to keep a proper lookout and whether defendant was negligent in so failing was properly submitted to the jury.

5. AUTOMOBILES -- *Collision between Automobile and Pedestrian -- Negligence of Pedestrian in Recklessly Exposing Himself -- Case at Bar.* -- The instant case was an action by administratrix for wrongful death of decedent, a pedestrian, struck by defendant automobile driver. The testimony of the defendant and that of several witnesses called on behalf of the plaintiff disclosed that defendant did not see decedent until about the time he stepped in front of the automobile. It was not clear whether decedent hastily walked or actually ran from behind or in front of one or more cars approaching, but the evidence conclusively showed that in the nighttime with automobiles moving in both directions, he left a place of safety on the north side of a street at a

188 Va. 345, *; 49 S.E.2d 711, **;

1948 Va. LEXIS 169, ***

place other than a regular pedestrian crossing and hurriedly weaved his way through traffic approaching from the east and upon reaching a place of comparative safety in the center of the highway, without pause, actually ran on into [***4] the path of defendant's car which was dangerously near. He was instantly struck by that car which was in its proper traffic lane and moving at a reasonable speed.

Held: That decedent was guilty of negligence in recklessly exposing himself to obvious danger. There was no saving fact or circumstance that could excuse decedent's reckless conduct.

6. AUTOMOBILES -- *Collision between Automobile and Pedestrian -- Pedestrian Darting in Front of Car.* -- One who suddenly places himself immediately in front of a moving automobile which is readily observable is generally guilty of negligence *per se*.

7. AUTOMOBILES -- *Collision between Automobile and Pedestrian -- Care Required of Pedestrian in Crossing Street.* -- When undertaking to cross a street highway, a pedestrian should exercise such care as an ordinarily prudent person would exercise under the existing circumstances, and especially when one attempts to cross a busy thoroughfare at night at a place other than a recognized pedestrian crossing, it is incumbent upon him to exercise reasonable care in looking for approaching traffic and to heed that which is dangerously near and open to ordinary observation. If, [***5] under such conditions, he carelessly undertakes to cross without looking, or, if looking, fails to see or heed traffic that is obvious and in dangerous proximity and continues on into its path, he is guilty of negligence as a matter of law.

8. AUTOMOBILES -- *Collision between Automobile and Pedestrian -- Negligence of Pedestrian in Recklessly Exposing Himself -- Doctrine of Last Clear Chance Not Applicable -- Case at Bar.* -- The instant case was an action by administratrix for wrongful death of decedent, a pedestrian, struck by defendant automobile driver. The testimony of the defendant and that of several witnesses called on behalf of the plaintiff disclosed that defendant did not see decedent until about the time he stepped in front of the automobile. It was not clear whether decedent hastily walked or actually ran from behind or in front of one or more cars approaching, but the evidence conclusively showed that in the nighttime with automobiles moving in both directions, he left a place of safety on the north side of a street at a place other than a regular pedestrian crossing and hurriedly weaved his way through traffic approaching from the east and upon reaching [***6] a place of comparative safety in the center of the highway, without pause, actually ran on into the path of defendant's car which was dangerously near. He was instantly struck by

that car which was in its proper traffic lane and moving at a reasonable speed. Upon this evidence at the instance of plaintiff and over objection of defendant, the court instructed the jury under the doctrine of last clear chance.

Held: Error. It was the duty of defendant and decedent each to exercise reasonable care in keeping an effective lookout. Yet decedent having elected to cross a busy street at a place other than a regular pedestrian crossing, that circumstance imposed upon him the obligation of being the more vigilant. If defendant was negligent in failing to see decedent, then it naturally and conclusively follows that the decedent was equally, if not more, negligent in not seeing defendant's approaching automobile. For plaintiff to have been given a last clear chance instruction under the circumstances above recited, it first must be shown that decedent was inattentive to his position of peril in which he had negligently placed himself and that after defendant saw him and realized [***7] or should have realized his inattentiveness, defendant failed to use reasonable care to avoid the collision.

SYLLABUS:

The opinion states the case.

COUNSEL:

Woods, Rogers, Muse & Walker, for the plaintiff in error.

Kime & Hoback, for the defendant in error.

JUDGES:

Present, All the Justices.

OPINIONBY:

MILLER

OPINION:

[*347] [**712] MILLER, J., delivered the opinion of the court.

[*348] Charles L. Hancock died on the 9th day of October, 1946, as a result of injuries sustained eight days prior thereto when struck by an automobile driven by I. T. Hooker. Cora Lee Hancock, his administratrix, obtained a verdict of \$10,000 for the wrongful death of decedent. From a judgment entered thereon, I. T. Hooker obtained this writ of error.

The parties will be hereinafter referred to in accordance with the positions occupied by them in the lower court.

Numerous errors are assigned to rulings of the trial court. They include refusal to set aside the verdict as

188 Va. 345, *; 49 S.E.2d 711, **;

1948 Va. LEXIS 169, ***

contrary to the law and evidence, admission of evidence objected to by defendant, giving certain instructions on behalf of plaintiff and refusal of an instruction offered by defendant.

In our opinion the decisive question [***8] is whether the evidence conclusively discloses negligence on the part of the decedent which proximately caused or efficiently contributed to his death.

[1] Through there is conflict in the testimony as to the effectiveness of the lookout maintained by defendant immediately before and at the time of collision, yet the evidence insofar as it bears upon decedent's action and movements immediately prior to and at the time of the collision is undisputed; nor can fair-minded men differ as to the inferences to be drawn therefrom. Therefore, the question whether decedent was free from negligence which contributed to the collision is one of law to be decided by the court.

In determining whether this verdict is to be set aside and final judgment entered for the defendant, we are governed by the terms of sec. 6363 of the Code of Virginia, 1942 (Michie). That section provides that when then evidence is certified, which has been done in this instance, "**** the judgment of the trial court shall not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it." *Orndorff v. Howell*, 181 Va. 383, 25 S.E.2d 327.

[2] It [***9] must be kept in mind that plaintiff is fortified by [*349] a jury's verdict and the judgment of the trial court — thus he occupies the most favored position known to the law. *Neal v. Spencer*, 181 Va. 668, 26 S.E.2d 70; *Virginia Elec., etc., Co. v. Steinman*, 177 Va. 468, 14 S.E.2d 313, and *Tri-State Coach Corp. v. Walsh*, ante, p. 299, 49 S.E.2d 363.

[3] Only if it plainly appears that decedent was guilty of contributory negligence which caused or efficiently contributed to his death should this court exercise the power given under the preceding section. Yet if that fact is so conclusively established by the evidence that fair-minded men could not differ, then any judgment [**713] rendered in plaintiff's favor is *plainly* wrong and it becomes our duty to so decide. *McQuown v. Phaup*, 172 Va. 419, 2 S.E.2d 330.

When the evidence is viewed as a whole in the light most favorable to plaintiff, it appears that the unfortunate event occurred as follows:

Melrose Avenue, a thoroughfare in the city of Roanoke upon which much traffic passes, runs approximately east and west and its usual width is about fifty feet. Eastwardly from where [***10] the collision happened its southern curb or boundary line curves or loops somewhat to the south, which has the effect of

materially widening the street for some distance. Where it is widened by this curve on its south side and about midway of the loop, it is intersected from the south by 24th Street, which street, however, does not extend across Melrose Avenue at this point.

The collision happened on the 1st day of October, 1946, at about 7:00 o'clock p.m. Decedent, while hurriedly walking or running from the north to the south side of Melrose Avenue, was struck by defendant's automobile at a point about fifty or sixty feet west of the intersection with 24th Street. He was almost across Melrose Avenue, being about five feet from its southern curb, when hit by the right front fender of defendant's car which was proceeding in an easterly direction and approaching 24th Street. The point of impact took place in front of a filling station on the south side of the street almost at the western end [*350] of the curve or loop in the southern side of Melrose Avenue and where the street is about fifty-two feet wide. Though the collision did not occur at the intersection, it did happen [***11] where about seventy-five per cent of the pedestrians cross Melrose Avenue who undertake to do so in that immediate vicinity. It can be crossed more conveniently at this point because it is much narrower here than where it intersects 24th Street.

There is no evidence as to the weather or atmospheric conditions obtaining. The street was reasonably well lighted by the nearby street lights on the north side of Melrose Avenue and lights at the filling station on the south side of the street.

Defendant and his wife were the only occupants of the automobile. It was being driven in the proper lane with the right side of the car about five feet from the southern curb of the street. The headlights were burning and the brakes unimpaired. The speed of the car is rather conclusively established to have been from fifteen to twenty miles per hour, though decedent, shortly before he died, said he thought it probably was about twenty-five miles per hour. It was stopped within six to eight feet after striking decedent.

There is no evidence that defendant was aware that pedestrians usually crossed Melrose Avenue at the place where decedent was struck. He was approaching 24th Street and [***12] under a duty to look for pedestrians at that intersection and for vehicular traffic that might cross his path in entering or leaving that street.

There was other traffic on the highway. Two or more automobiles with bright headlights were then proceeding in a westerly direction along Melrose Avenue and so meeting defendant as he neared the place of accident.

At the trial defendant was called as an adverse witness. He testified that lights on approaching automobiles prevented him from seeing decedent until he was almost in front of or actually in front of the

188 Va. 345, *; 49 S.E.2d 711, **;

1948 Va. LEXIS 169, ***

automobile. His testimony was that he first saw decedent running in a southerly [*351] direction and about four to six feet in front of his left fender. Later in the trial, he was recalled as a witness and cross-examined. At that time he again insisted that the lights on the cars approaching him affected his vision and prevented his seeing decedent sooner.

Though the evidence is undisputed that defendant was approaching or passing two or more oncoming cars at about the time of the accident, there is, however, testimony that shortly after the accident he made statements to the effect that he did not see decedent [***13] until he hit him, and to some witnesses he said nothing about being blinded by the lights of oncoming cars.

[**714] [4] The testimony of the defendant and that of several witnesses called on behalf of the plaintiff disclose that defendant did not see decedent until about the time he stepped in front of the automobile. Viewed most favorably to the plaintiff, this evidence is sufficient to establish that defendant may have failed to keep a proper lookout. We are of opinion that the issue of whether defendant was negligent in failing to keep a reasonable lookout was properly submitted to the jury.

The following excerpts from the uncontradicted testimony of several witnesses establish the place, manner and circumstances under which Mr. Hancock, who was seventy-two years of age, undertook to cross that busy thoroughfare in the nighttime with traffic moving thereon in both directions.

Mrs. Hooker gave this version of the events:

"Q. I believe you were coming towards Roanoke, you were coming eastward?

"A. We were going east, and this man just seemed like run right in front of us and I said, Oh, Mr. Hooker you are going to hit a man and I did this (illustrating by putting [***14] hands over eyes) that is all I saw.

"Q. You said what?

"A. You are going to hit a man; I didn't say he hit, I said you are going to hit a man.

"Q. Tell the jury how this Mr. Hancock was traveling.

" [*352] "A. He seemed to be running, moving fast, real fast.

"Q. Were there any other cars coming in the road?

"A. Yes, the road -- there were cars coming and going.

"Q. You mean by going and coming going in the same direction that you were and approaching you.

"A. Yes.

"Q. Going east and west you mean?

"A. Yes, going east and west; that is what I mean.

"Q. What kind of lights, if any, did these cars have on them?

"A. Real bright.

"Q. Bright lights?

"Yes."

On cross-examination, she further said:

"Q. Whereabouts was the man with reference to your automobile in the street?

"A. He was right, real close to us, seemed to me like.

*** "Q. Why couldn't you see this man before?

"A. The lights were blinding us."

Mr. Moore, on cross-examination, testified that the explanation given by Mr. Hancock when he visited him at the hospital was:

"A. I went -- so I could fill out my report I went to the hospital and I asked Mr. Hancock [***15] his age, he gave it to me as 72. I asked him how he was crossing the street and he said he had been over there and was crossing from the north side to the south side, going over to the filling station. I asked him what hit him and he said he did not remember, he did not know."

On Mr. Cawley's cross-examination, he testified that when he went to the hospital, Mr. Hancock, in undertaking to inform him how the collision occurred, gave the following account:

"Q. Did he tell you whether he ever saw this automobile or not, Mr. Hooker's car?

"A. Never did see it -- he was getting out of the way of one was coming west on Melrose Ave.

[*353] "Q. And never saw Mr. Hooker's car?

"A. I don't think he did; he may have done it.

*** "Q. You have just told us a few minutes ago that he said something about the cars going west, that he came over in front of the cars going west and got over in front of the car going east -- you just told us that?

"A. He was crossing this way, you see (indicating) and he evidently got ahead of the cars going west and was coming and Mr. Hooker was coming east, that is about all he told me and also said if he had had one more step he [***16] would have been on the curb."

Mr. C. Q. Cox, an adjuster for the company that had liability insurance on defendant's car, interviewed Mr. Hancock at the hospital. In his testimony on behalf of

188 Va. 345, *; 49 S.E.2d 711, **;

1948 Va. LEXIS 169, ***

defendant, he stated that Mr. Hancock, in explaining to him how he was injured had this to say:

"A. Mr. Hancock said he was crossing the street, Melrose Ave., from the north side to the south side, he was crossing at a point about opposite the middle between the Esso Station and there [**715] is a barbecue stand which is not on the map there, he was crossing at a point between these 2 places, the Esso Station and the Barbecue stand. He started out into the street and he saw 2 cars or he said a couple of cars coming from his left which would be going west on Melrose Ave., he did not know the speed of them but they were coming fairly fast and they were close to him and he saw that they were going to hit him because he was already out in the street and he ran across in front of these cars.

"Q. These cars you refer to, were going in what direction?

"A. They were going west. When he got past where these cars were going, got past him without hitting him, he looked to his right and [***17] saw Mr. Hooker's car just a few feet from him and he was over in the street so far and he saw Mr. Hooker was going to hit him and he ran just as fast as he could to try to make the curb, and he was [354] about to the curb, I think he said he was 1 or 2 steps from the curb and the right front fender hit him.

*** "Q. Was anything stated by him as to how close the cars were to him going west?

"A. No, sir, he did not say in feet; he would not say, as a matter of fact, he just didn't know, he said they were close. I asked him if he had seen Mr. Hooker's car before he started across the street and he said he did not know whether he saw it or not; that he did see it after he ran past these other cars.

"Q. Did he attempt to state how close the Hooker car was to him when he saw it?

"A. No, sir, he just said it was close and that he was in front of it and knew he was going to get hit unless he ran as hard as he could.

"Q. Did he make any statement as to whether he was walking or running?

"A. Yes, sir, he said he was running as hard as he could go after he got out past the center."

Mrs. L. E. Osborne was asked if Mr. Hancock made any statement to her in regard [***18] to crossing the street and her answer was: "He said -- he kept telling me, 'If I had one more step, I would have made the curb' and said he did not see the car."

[5, 6] Whether decedent hastily walked or actually ran from behind or in front of one or more cars approaching from the east is not made clear. Yet, the

above recited evidence conclusively shows that in the nighttime with automobiles moving in both directions, he left a place of safety on the north side of Melrose Avenue and hurriedly weaved his way through traffic approaching from the east and upon reaching a place of comparative safety in the center of the highway, then, without pause, actually ran on into the path of defendant's car which was dangerously near. He was instantly struck by that car which was in its proper traffic lane and moving at reasonable speed. That decedent was [355] guilty of negligence in so recklessly exposing himself to obvious danger cannot be denied.

In Huddy's Encyclopedia of Automobile Law, Ninth Ed., "Pedestrian's Duty", sec. 88, p. 155, we find such conduct condemned in this language:

"Darting in front of car. One who suddenly places himself immediately in front of a moving [***19] automobile which is readily observable is generally guilty of negligence *per se*."

In sec. 99, p. 156, of that same work, it is also set forth that:

"If a pedestrian looks for approaching automobiles before attempting to cross a street or highway, he is presumed in law to have seen what he should have seen had his observance been careful and attentive. He cannot justify himself by saying that he looked and did not see the approaching car that injured him, when, if he had looked, he must have seen the car. Unless there is some circumstance or condition to excuse him, his failure to see the car constitutes negligence as a matter of law. However, the particular circumstances and conditions of the case may be such as to make the question of his negligence one for the determination of the jury."

From the evidence, we find here no saving fact or circumstance that can excuse decedent's reckless conduct.

Commenting upon the care imposed upon a pedestrian who undertakes to cross [**716] from one side of a street to the other in a city or town though such crossing be undertaken at a street intersection where the pedestrian is accorded the right of way, Chief Justice Campbell, [***20] in *Thornton v. Downes*, 177 Va. 451, at p. 458, 14 S.E.2d 345, said:

"When a pedestrian, in a city or town, steps from the sidewalk into the street at an intersection, the law imposes upon him the legal duty of ascertaining if any vehicular traffic is approaching from the left. If the way be clear, he has the right to proceed to the comparative zone of safety, which is the center of the street. Upon his arrival at the center of the street, he is under the legal duty of looking to his right for approaching vehicles, and while [356] the statute (section 2154(126), subsection b), accords him the right of way, he would be guilty of

188 Va. 345, *; 49 S.E.2d 711, **;

1948 Va. LEXIS 169, ***

contributory negligence which would bar a recovery for injuries suffered, if he attempted to assert his right of way in the face of approaching traffic dangerously near to him."

The above statement reciting the duty of a pedestrian who undertakes to cross a busy street attains added force when applied to one who crosses between intersections.

[7] Each case presents its own problem. The only legal rule that can be laid down is that when undertaking to cross a street or highway, a pedestrian should exercise such care as an ordinarily [***21] prudent person would exercise under the existing circumstances, and especially when one attempts to cross a busy thoroughfare at night at a place other than a recognized pedestrian crossing, it is incumbent upon him to exercise reasonable care in looking for approaching traffic and to heed that which is dangerously near and open to ordinary observation. If, under such conditions, he carelessly undertakes to cross without looking, or, if looking, fails to see or heed traffic that is obvious and in dangerous proximity and continues on into its path, he is guilty of negligence as a matter of law. *Meade v. Saunders*, 151 Va. 636, 144 S.E. 711; *Stephen Putney Shoe Co. v. Ormsby's Adm'r*, 129 Va. 297, 105 S.E. 563; *Frazier v. Stout*, 165 Va. 68, 181 S.E. 377; *Jenkins v. Johnson*, 186 Va. 191, 42 S.E.2d 319; *DeMuth v. Curitiss*, ante, p. 249, 49 S.E.2d 250.

If decedent crossed the northern half of the highway in front of automobiles approaching from the east, as he said he did, then at no time was his view of defendant's car obstructed. If he emerged from behind one of the cars which was proceeding in a westerly direction, then while at or near [***22] the center of the road and from that point and time on until he carelessly and unwittingly placed himself in front of defendant's car and dangerously near thereto, there was nothing to prevent him from seeing and avoiding that vehicle had he exercised reasonable care under the circumstances.

[*357] [8] Upon this evidence at the instance of plaintiff and over objection of defendant, the court instructed the jury under the doctrine of last clear chance. This, we think, was error.

It was the duty of defendant and decedent each to exercise reasonable care in keeping an effective lookout. Yet decedent having elected to cross a busy city street at a place other than a regular pedestrian crossing, that circumstance imposed upon him the obligation of being the more vigilant.

Defendant may have been momentarily blinded by lights of the oncoming cars, but there was no such condition to interfere with decedent's vision. If defendant was negligent in failing to see decedent, then it naturally and conclusively follows that decedent was equally, if not more, negligent in not seeing defendant's approaching automobile.

Nor was defendant under these facts and circumstances afforded [***23] a last clear chance to avoid striking decedent. For plaintiff to have been given a last clear chance instruction under the circumstances above recited, it first must have been shown that decedent was inattentive to his position of peril in which he had negligently placed himself and that after defendant saw him and realized or should have realized his inattentiveness, defendant failed to use reasonable care to avoid the collision. Until [**717] defendant saw decedent in front of his car, after which instant the evidence fails to disclose any way or means by which he could have avoided the accident, decedent enjoyed the same if not a better opportunity of seeing defendant's car than defendant did of seeing him and decedent was afforded equal opportunity of avoiding the accident.

If it be admitted that defendant was negligent in the lookout he maintained and so failed to see decedent in time to avoid the accident, then it must be conceded that decedent was equally negligent in failing to see defendant's car. In the exercise of ordinary care, he should have done so and avoided running or stepping in front of it when it was in dangerous proximity to him. When at the center [*358] [***24] of the street, had decedent looked, he would have had a plain view of the approaching car. He was then confronted with a situation where his hasty onward progress made a collision inevitable. Yet, without properly looking, he hurriedly and carelessly proceeded on directly into that car's path when it was only some four to six feet distant.

The statement of Mr. Justice Spratley in the very recent case of *Stark v. Hubbard*, 187 Va. 820, at p. 826, 48 S.E.2d 216, is most pertinent:

"The plaintiff's own testimony convicts her of contributory negligence as the efficient and proximate cause of the collision. Her misjudgment of the distance of the approaching car and her quickened steps towards its oncoming path show that she failed to observe the ordinary rules of safety in the face of apparent danger."

It being clearly evident that plaintiff was not entitled to an instruction upon the theory that defendant was afforded a last clear chance to avoid the collision, we perceive no basis upon which the verdict and judgment can be sustained.

With the evidence viewed in the light most favorable to plaintiff, the fact that decedent was guilty of negligence stands out in bold [***25] relief. It appears conclusively that his inattentive and reckless manner of crossing the street did not merely create a condition out of which the collision arose but it was an immediate, efficient contributing cause of the collision.

The succinct statement of Chief Justice Hudgins in *Jenkins v. Johnson*, 186 Va. 191, 42 S.E.2d 319, is in

188 Va. 345, *; 49 S.E.2d 711, **;

1948 Va. LEXIS 169, ***

point:

"Both defendant and decedent had equal opportunity to see each other and to avoid the collision. Neither exercised proper care. Decedent's negligence was a contributing cause of his injuries."

To permit recovery upon this undisputed evidence of the manner in which decedent undertook to cross Melrose Avenue would give to a pedestrian crossing a busy street between intersections the status and right of way accorded [*359] him by section 2154 (123) and

(126) when crossing within clearly marked crosswalks or at an intersection.

For the reasons stated, the judgment complained of must be reversed. As all the facts have been fully developed and appear in the record, final judgment will be entered for the defendant. These conclusions render it unnecessary to consider other assignments of error.

*Reversed and final judgment. [***26]*

Conrad v. Thompson, 195 Va. 714, 80 S.E.2d 561 (1954)

In the Supreme Court of Virginia
Richmond

IRENE D. CONRAD
v.
**SABLE THOMPSON, ADMINISTRATRIX OF THE ESTATE
OF WILLIE OWENS, DECEASED.**

Decided: March 15, 1954.
Record No. 4174.

Present, Eggleston, Spratley, Miller, Smith and Whittle, JJ.

- (1) Automobiles — Wrongful Death of Pedestrian — Issues of Negligence for Jury.
- (2) Automobiles — Pedestrian's Right of Way at Highway Intersection — Code § 1950, section 46.244, Construed.
- (3) Negligence — Last Clear Chance — Doctrine Applicable.

1. Plaintiff's evidence showed that her decedent was killed in the middle lane of a three lane highway when struck by defendant's automobile traveling at the legal limit of fifty miles per hour. He had proceeded to cross the highway after looking to left and right at a time when defendant's car was 400 feet distant, and was looking the other way when hit. The road was straight and defendant had had an unobstructed view for 1,500 yards. In action for wrongful death, defendant's evidence generally contradicting that of plaintiff, the issues of negligence and contributory negligence were for the jury. A pedestrian is guilty of negligence as a matter of law, however, if he undertakes to cross a highway without looking or fails to see or heed traffic in plain view and dangerously close.

2. It was prejudicial error, requiring the setting aside of the verdict for plaintiff, to give the jury an instruction based on Code § 1950, section 46-244, that plaintiff's decedent had the right of way over defendant's car if he started to cross the highway at its intersection with a dead-end dirt road. The statute is by its terms limited in application to business and residence districts, and there was no evidence to show the accident occurred within any such district.

3. Since the evidence showed and defendant admitted that she saw deceased in a position of imminent danger of which he was unaware, and had time to avoid striking him, there was no error in instructing the jury on the doctrine of last clear chance. [Page 715]

Error to a judgment of the Circuit Court of Princess Anne county. Hon. F. E. Kellam, judge presiding.

Reversed and remanded.

The opinion states the case.

E. L. Ryan, Jr. and White, Ryan & Holland, for the plaintiff in error.

Kanter & Kanter, H. Lee Kanter and W. H. Starkey, for the defendant in error.

SMITH, J., delivered the opinion of the court.

In an action for wrongful death arising out of an automobile accident in which Willie Owens was killed, the administratrix of his estate has recovered a verdict and judgment of \$7,500 against Mrs. Irene D. Conrad, hereafter referred to as defendant, who is here seeking to have that judgment reversed on the grounds that: (1) the evidence was insufficient to show primary negligence on her part, (2) deceased was guilty of contributory negligence as a matter of law, (3) the evidence did not justify an instruction based on the pedestrian right-of-way statute, Code, § 46-244, (4) there was no evidence to support an instruction on last clear chance.

[1] The facts, stated in the light most favorable to the plaintiff and as they appear from the testimony of a State Trooper and seven eye-witnesses, and from certain exhibits, show that on February 1, 1952, at approximately 4:15 p.m., the defendant, accompanied by her two small children, was driving her automobile at 50 miles per hour eastwardly on U.S. Highway No. 58, referred to locally as the Virginia Beach Boulevard, approximately one mile west of Virginia Beach in Princess Anne county. At this point the speed limit is 50 miles per hour, and the highway is 27 feet wide [Page 716] and divided into three clearly marked lanes. The deceased had crossed the road from the north to the south side where there is an intersecting dead-end dirt road and several mail boxes. After taking a letter from one of the mail boxes he looked both to his right and left before proceeding back across the highway, at which time the defendant's automobile was about 400 feet away. Upon entering the middle lane of the highway he was struck by the right side of defendant's front bumper and received serious injuries which resulted in his death on June 19, 1952. There was no evidence of skid marks and the car travelled approximately 75 yards beyond the point of collision before stopping. The day was warm and clear and the road from the point of impact west toward Norfolk, from which direction defendant was coming, was straight and the view unobstructed for at least 1,500 yards.

The defendant testified that, "All I ever saw [of the deceased] was the back of his head. He was looking at Mr. Weaver [driver of a car approaching from the east] I guess, down from the other way." Then in response to a question as to what she did when she first saw him, she said: "Well, my first impulse was that if I put on my brakes I would just run right over him. My senses didn't tell me to put on my brakes and turn at the same time; so I figured if I turned around him, I would miss him. And I sat on my horn. And he just didn't even — he never — didn't even look; he didn't do anything. So I turned, and hit him."

The administratrix, who was corroborated by another witness, testified that while she was sitting in the hospital two days after the accident the defendant entered into a conversation with her, in the course of which the defendant said: "Well, I have been dreaming about him [deceased] all night I could see him all in my sleep. When I saw your daddy, I saw your daddy long before I got to him and he was far distance enough away that I could have stopped, I could have avoided the wreck." Then in response to a question as to whether the defendant gave any [Page 717] reason for not stopping, the administratrix said: "No, she didn't say. The only reason she say, she was distant far enough away from my father, she thought my father was going to turn around and go back."

Because of our decision to remand the case on another ground it is unnecessary to discuss at length defendant's two contentions that the evidence is insufficient to show primary negligence on her part and that the deceased was guilty of contributory negligence as a matter of law.

A pedestrian on entering a highway is not required to await the passage of all automobiles that may be in sight. His duty is to await the passage of those which are so near or approaching at such rate of speed that a person exercising reasonable care for his own safety would not attempt to cross. If he undertakes to cross without looking, or, if he looks and fails to see or to heed traffic that is in plain view and dangerously close, he is guilty of negligence as a matter of law. *Rhoades v. Meadows*, 189 Va. 558, 54 S.E. (2d) 123. But if reasonable men may honestly differ on the conclusions to be drawn from the evidence as to all kinds of negligence, the question is not one of law, but one of fact for the jury under proper instructions. *Pioneer Construction Co. v. Hambrick*, 193 Va. 685, 70 S.E. (2d) 302; *Steele v. Crocker*, 191 Va. 873, 62 S.E. (2d) 850.

Suffice it to point out that in the instant case the evidence is conflicting as to: whether the defendant made certain admissions; whether the deceased was struck in the middle or south lane of the highway, or stepped in front of the defendant's automobile; whether the deceased looked both to his left and right before entering the highway; and as to what was the position of defendant's automobile when deceased entered the road, its distance being variously estimated to be from two or three car lengths to 600 feet. Clearly, on evidence so conflicting, the questions of negligence and contributory negligence were questions upon which reasonable men might differ, and were therefore questions of fact for the jury. [Page 718]

[2] This brings us to defendant's contention that the court erred in granting over her objection and exception Instruction P. 1. which reads as follows:

"The court instructs the jury that if you believe from the evidence that Willie Owens started across U.S. Highway No. 58 at its intersection with the dirt road at Atlantic Park before Mrs. Conrad's automobile reached that intersection, then Willie Owens had the right of way over the said automobile and it was the duty of the driver to change her course, slow down, or come to a complete stop, if necessary, to permit Willie Owens to safely make the crossing, and if you believe that on the occasion in question Willie Owens was exercising due care for his own safety and that the defendant disregarded her duty, as has been stated, and that her disregard was the proximate cause of his death, you must find for the plaintiff."

This instruction is based on Code, § 46-244,¹ which deals with a driver upon a highway, (1) within a *business*, or (2) *residence* district; and provides that in such districts he shall yield the right-of-way to a pedestrian crossing the highway, (a) within any clearly marked crosswalk, or (b) any regular pedestrian crossing included in the prolongation of the lateral boundary lines of the adjacent sidewalk at the end of a block.

The purpose of this statute is to afford pedestrians crossing highways at the places designated therein a right-of-way [Page 719] over vehicular traffic and to that extent give them some degree of protection from its dangers. *Reese v. Snelson*, 192 Va. 479, 65 S.E. (2d) 547. Except in places where favored positions are assigned by law, the rights of pedestrians and motorists to use the highways are equal and their duties are mutual and reciprocal. *Rhoades v. Meadows, supra*; *South Hill Motor Co. v. Gordon*, 172 Va. 193, 200 S.E. 637. *

Plaintiff, in support of Instruction P. 1, has placed great reliance on *Nelson v. Dayton*, 184 Va. 754, 36 S.E. (2d) 535, which construes section 2154(126) of the Code of 1942. However, this section did not include the limitation with reference to "a highway within a business or residence district."

To enjoy the privileges of the right-of-way under Code, 46-244, a pedestrian must prove that the scene of the accident was within a business or residence district as defined by Code, §§ 46-185,² and 46-186. /3 This cannot be left to speculation and surmise but must be clearly established.

In our search of the testimony and examination of the pictorial exhibits, we are unable to find any evidence that the scene of the accident was within a business or residence district. Moreover, there is no evidence that the accident occurred at a "clearly marked crosswalk or any regular pedestrian crossing included in the prolongation of the lateral boundary lines of the adjacent sidewalk at the end of a block." There being no evidence to show that this accident occurred within either a business or residence district, the giving of Instruction P. 1 was prejudicial error. [Page 720]

[3] We next come to defendant's contention that it was error to grant an instruction on last clear chance because "there is no evidence of a last clear chance and the evidence is incredible." The instruction on that doctrine is P. 8, which reads as follows:

"The Court instructs the jury that even though they may believe from the evidence that the plaintiff's intestate was guilty of contributory negligence, yet if they further believe from the evidence that Mrs. Conrad knew of Willie Owens' danger or by the exercise of ordinary care should have known of his danger in time to have stopped her car and avoided striking him, it was her duty to do so, and if they believe from the evidence that she failed to exercise this duty, then she is liable and your verdict should be for the plaintiff."

Objection was made to the form of the instruction, but this we do not consider because it was not saved as required by Rule 1:8.

Whether the doctrine of last clear chance applies is to be determined by the facts of the particular case. It does not supersede the law of contributory or concurring negligence. *Hardimran v. Dyson*, 194 Va. 116, 72 S.E. (2d) 361; *Keatts v. Shelton*, 191 Va. 758, 63 S.E. (2d) 10.

Mr. Chief Justice Hudgins said in *Umberger v. Koop*, 194 Va. 123, 131, 72 S.E. (2d) 370: "In order for a defendant to be held liable under this doctrine [last clear chance], it must appear from the evidence that the plaintiff has negligently placed himself in a position of imminent peril and he is either unaware of his perilous situation, or unable to escape therefrom, or both, and defendant was apprised of his presence and realized, or, in the exercise of reasonable care, should have realized his danger in time to avoid the accident, and failed to do so. *Anderson v. Payne*, 189 Va. 712, 54 S.E. (2d) 82; *Lanier v. Johnson*, 190 Va. 1, 55 S.E. (2d) 442; *Burton v. Oldfield*, 194 Va. 43, 72 S.E. (2d) 357."

Since there is evidence that the defendant admitted in statements to two of the witnesses that she saw the deceased [Page 721] in danger and unaware of pending calamity in time to avoid striking him, a proper instruction on last clear chance was warranted. However, on a retrial Instruction P. 8 in its present form should not be given. If deceased was guilty of *contributory* negligence plaintiff could not recover in any event. Also, if the defendant saw that deceased was in a situation of helpless or unconscious peril, she must have had time to avoid the accident by exercising ordinary care.

We note that during the trial of the case counsel stipulated that the hospital, medical and funeral expenses amounted to \$2,506.86. The verdict of the jury was as follows: "We the jury find for plaintiff — in sum of \$7500.00, Seven Thousand five Hundred and 00/100, this amt. included all expense, Hospital Bill, Doctor's Bills and Burial expenses totaling \$2506.86." Since the jury failed to direct to whom and in what proportion the verdict should be distributed, the court in its final judgment directed that the sum of \$7,500 "be paid to the children of the decedent, in equal shares, after the payment of costs and attorneys fees." The court's judgment follows Code, § 8-638, which requires that the recovery be distributed to the beneficiaries "after the payment of costs and reasonable attorney's fees." This statute also provides that an award "shall be free from all debts and liabilities of the deceased," therefore the hospital, medical and funeral expenses are not recoverable and are not proper elements of damages. We have frequently held that an action for wrongful death is not for the benefit of the decedent's estate, but for certain near relatives. *Patterson v. Anderson*, 194 Va. 557, 74 S.E. (2d) 195; *Porter v. Va. Elec. & Power Co.*, 183 Va. 108, 31 S.E. (2d) 337. See also, *Wolfe v. Lockhart*, 195 Va. 479, 78 S.E. (2d) 654.

We are of opinion that Instruction P. 1 was erroneous and prejudicial and for that reason the judgment is reversed and a new trial awarded.

Reversed and remanded.

FOOTNOTES

¹ "The driver of any vehicle upon a highway within a business or residence district shall yield the right of way to a pedestrian crossing such highway within any clearly marked crosswalk or any regular pedestrian crossing included in the prolongation of the lateral boundary lines of the adjacent sidewalk at

the end of a block, except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices.

"No pedestrian shall enter or cross an intersection regardless of approaching traffic.

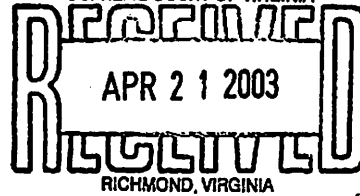
"The drivers of vehicles entering, crossing or turning at intersections shall change their course, slow down or come to a complete stop if necessary to permit pedestrians to safely and expeditiously cross such intersection."

² "'Business district ' defined. — The territory contiguous to a highway where seventy-five per centum or more of the total frontage, on both sides of the highway, for a distance of three hundred feet or more is occupied by buildings actually in use and operation for business purposes shall constitute a business district for purposes of this title."

³ "'Residence district ' defined. — The territory contiguous to a highway not comprising a business district where seventy-five per centum or more of the total frontage, on both sides of the highway, is mainly occupied by dwellings or by dwellings and buildings in use for business purposes shall constitute a residence district for purposes of this title."

030892

CLERK
SUPREME COURT OF VIRGINIA



1

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

-----x
HOWELL RUSS

Plaintiff

v.

At Law No. 198752

JAMES DESTIVAL

Defendant
-----x

Fairfax, Virginia
Friday, February 21, 2003

The above-entitled matter came on for
hearing before the HONORABLE LESLIE M. ALDEN, a Judge
in and for the Circuit Court of the County of Fairfax,
Virginia, held in Fairfax Circuit Court, Courtroom 5A,
Fairfax, Virginia pursuant to notice beginning at 9:03
a.m., when there were present on behalf of the
parties:

CASAMO & ASSOCIATES
ALEXANDRIA, VA 703-837-0076
CULPEPER, VA 540-825-7482

A P P E A R A N C E S O F C O U N S E L

ON BEHALF OF THE PLAINTIFF:

ED WEINER, Esquire

Weiner & Associates
10605 Judicial Drive
Fairfax, Virginia 22030

ON BEHALF OF THE DEFENDANT:

JULIA B. JUDKINS, Esquire

Trichilo, Bancroft, McGavin, Horvath &
Judkins, PC
3920 University Drive, Suite 100
Fairfax, Virginia 22030

C O N T E N T S

	Page
Proceedings.....	3

P R O C E E D I N G S

(Whereupon, the court reporter was duly sworn.)

THE COURT: This is Law 198752, Russ and Destival. Good morning, everyone. Counsel, I've received both of your briefs, and I have reviewed them along with the authorities that are referenced therein.

Mr. Weiner, is there anything that you'd like to add to what you've already submitted?

MR. WEINER: Judge, most of our points are made in our written brief. I would just like to briefly state by way of oral argument that there are very few if any undisputed facts in this case. This was a bicycle accident that occurred at an intersection controlled by a stop sign.

I believe that the instructions given did not point out that there is a difference between a pedestrian's duties and rights and privileges when crossing at an intersection as opposed to crossing in the middle of the block. The case we rely on is cited in our memo, the Tolson case.

1 Your Honor, this was factually a very
2 simple case. I think the fact alone that we did spend
3 so much time arguing jury instructions on what would
4 appear such a straightforward set of facts lends
5 itself also to believe that there was some confusion.

6 And where this really all boils down to is
7 we believe that there is a difference between a
8 stopped vehicle, as we had here, and an approaching
9 vehicle, which the case law that Ms. Judkins relies on
10 -- all, absolutely all of the cases she's citing go to
11 approaching vehicles, moving vehicles not at
12 intersections.

13 And that is the -- if the General Assembly
14 meant approaching to mean stopped, then we must lose.
15 It's our position that the statute is clear and
16 unambiguous, and stopped means stopped. Approaching
17 means moving.

18 THE COURT: All right. Thank you, Mr.
19 Weiner.

20 Good morning, Ms. Judkins.

21 MS. JUDKINS: Good morning, Judge Alden.
22 I do have some additional cases to argue to you that

1 are not in my memorandum, because I noticed that he's
2 arguing that the cases I cited are pedestrians
3 crossing between intersections. There's a case of --

4 THE COURT: Have you given those to Mr.
5 Weiner?

6 MS. JUDKINS: No, I have not. They are
7 cited in the annotations to the statute he's relying
8 on. M-C-M-A-N-A-M-A versus Wilhelm, W-I-L-H-E-L-M.
9 And that's at 222 Va. 335, a 1981 case.

10 Then there's Thornton versus -- and it's
11 T-H-O-R-N-T-O-N -- versus Downes, D-O-W-N-E-S, at 177
12 Va. 451. And Hopson, H-O-P-S-O-N, versus Goolsby,
13 G-O-O-L-S-B-Y, 196 Va. 832.

14 I think these are also cited on the back
15 of the jury instruction. I know that the
16 Gooly, whatever that case is, is cited on the back of
17 the jury instruction that he's complaining about.

18 These are intersection cases where the
19 pedestrian was crossing at an intersection. In
20 McManama, the Supreme Court of Virginia said, We will
21 assume, as did the trial court, that the plaintiff was
22 in a statutory crosswalk. They assumed the plaintiff

1 had the right of way, was crossing the statutory
2 crosswalk.

3 Therefore, McManama had the right of way,
4 and Wilhelm owed him a duty of reasonable care in
5 yielding the right of way.

6 However, the pedestrian must exercise
7 reasonable care for his own safety. He
8 cannot arbitrarily assert his right of way by crossing
9 in the face of traffic dangerously close.

10 That's the exact wording out of that
11 case. And the other cases say the same thing. What
12 Mr. Weiner's arguing to you is if a vehicle is
13 stopped, pedestrian doesn't have the general duties to
14 keep a proper lookout, to exercise ordinary care, and
15 that instruction shouldn't have been given.

16 I think that's what he's arguing in his
17 memorandum. General duties instruction of a
18 pedestrian should not have been given.
19 Pedestrian doesn't have to do anything if they've got
20 the right of way except proceed. And that's not the
21 law.

22 I don't care what the comment on the back

1 of that instruction says. Every pedestrian regardless
2 of whether they're crossing at an intersection,
3 regardless of whether they have the right of way still
4 has a duty to keep a proper lookout. The general
5 duties instruction combines statutory and common law
6 duties.

7 And all of these cases say, Dangerously
8 close, dangerously near, or near. Not all of them
9 have the word dangerously in there or near.

10 The fact that the vehicle was stopped
11 under the circumstances should have heightened Mr.
12 Russ's alert, vigilance to the fact he stopped behind
13 the white line. And if he had looked at Mr. Destival,
14 he would have seen his head turned to the left.

15 All of these issues went to the jury under
16 -- you gave generic instructions is what I was
17 thinking about this last night. They were right out
18 of the Code. You gave them the entire law.

19 Whether it was the pedestrian had the
20 right of way, you gave them when the pedestrian has
21 the right of way, and they could apply it to the
22 facts.

1 You gave them when my guy is supposed to
2 stop right out of the Code. You gave them the general
3 duties. Everybody has to keep a proper lookout.

4 Mr. Weiner summed it up in his closing
5 argument when he said, My client wishes he had
6 stopped. If only he had stopped.

7 Now, that was a failure to exercise
8 ordinary care, what Mr. Russ didn't do that day. If
9 only he had stopped, this accident never would have
10 happened. And that was my argument.

11 They found for my guy probably on
12 contributory negligence. Those issues, as these cases
13 say, are almost invariably one for the jury.

14 I do not recall him ever moving to strike
15 my client's defenses. I was trying to remember
16 whether he had ever made a motion to direct a verdict
17 against my client. I don't believe he did.

18 I asked for that contributory negligence
19 as a matter of law. You said, No. They're all going
20 to the jury.

21 And under the circumstances, giving them
22 the entire law, I don't think you could have done

1 anything else. I did object at the time to the
2 instruction. But it probably benefited my client that
3 you just gave it all to them, and you go back, and you
4 know what the facts are, and this is the law as it
5 exists in the Commonwealth of Virginia, and it's
6 correct.

7 His client did have a duty to exercise
8 ordinary care and to refrain from crossing under the
9 circumstances if the vehicle is close.

10 It doesn't matter whether it's stopped or
11 moving at the time. The question is, is it safe to
12 proceed, or did he exercise ordinary care to determine
13 whether it was safe to proceed.

14 And what the evidence showed is he didn't
15 look at my client to see where he was looking, number
16 one. That would have alerted him. And, number two,
17 he didn't stop to do that to make sure it was safe.

18 THE COURT: All right. Thank you, Ms.
19 Judkins.

20 Mr. Weiner, do you want to respond?

21 MR. WEINER: Yes, your Honor. All the
22 cases cited and indeed the new ones that were just

1 mentioned today, again, deal with moving vehicles
2 approaching intersections or vehicles -- or
3 pedestrians crossing in the middle of the block.

4 THE COURT: Well, even assuming that
5 that's true, I mean, what you're essentially arguing
6 then is -- let's put it in the green-light analogy.

7 If the driver has a green light under your
8 theory, the driver can go irrespective of what may
9 be happening in the intersection that he sees. And
10 that's not the law.

11 MR. WEINER: But to follow through in this
12 case, he saw a stopped vehicle. I agree if -- this is
13 a whole different set of facts. If Mr. Russ
14 approaches that intersection and sees a car
15 approaching the stop sign, he may not have the same
16 rights and expectations that that car is going to stop
17 even though it should and even though he had the right
18 of way.

19 But when he looked, it is undisputed that
20 the car was stopped. And it had been stopped for
21 quite some time.

22 Your Honor, in this case the jury was

1 given absolutely conflicting states -- you cannot --
2 you cannot swear -- one instruction said the driver
3 had the right of way. One said the pedestrian had the
4 right of way. And that is where we got off course.

5 And when they were given Instruction Q,
6 which was modified stating -- adding language that was
7 not in the model and not applicable to this case, that
8 is where we believe the jury was erroneously
9 instructed and instructed in law that was in
10 conflict.

11 Someone had the right of way there. And
12 we think clearly that bicyclists, having the rights of
13 a pedestrian at that stop sign at that intersection
14 when the vehicle was stopped, had every right to
15 proceed. And the granting of Instruction Q turned
16 that upside down and was erroneously given.

17 THE COURT: Well, the problem with your
18 argument, Mr. Weiner, is that it just cuts out half of
19 the case. Essentially, your position is that you want
20 me to rule as a matter of law that because Mr.
21 Destival was stopped, your client had the right to
22 proceed. And I just don't think that's consistent

1 with the law.

2 And what you're asking me to do today is
3 to rule, under these circumstances as a matter of law,
4 your client should prevail. And it's just not -- even
5 if I could make that decision that your client had the
6 right of way, it still doesn't end the inquiry,
7 because the mere fact that he has the right of way
8 doesn't derogate his duty to exercise due care under
9 all the facts and circumstances of the case.

10 And because I believe that's correct, I
11 instructed the jury regarding the duties of both of
12 the parties and believing it was up to the jury to
13 determine whether each party exercised due care under
14 the particular facts and circumstances of this case.

15 And I believe that that's what the jury
16 did. And for whatever it's worth, I don't believe the
17 jury's decision was wrong. I mean, I think the jury
18 concluded that, under the facts and circumstances of
19 this case, Mr. Russ should not have pulled out on his
20 bicycle with his kid on the back in front of the car.

21 MR. WEINER: Well, if I can just be heard.

22 THE COURT: Well, there's really nothing

2-21-02
CMA

Q.

)
)
)
)
)
)
)
)
)

)

)

)

)

)

)

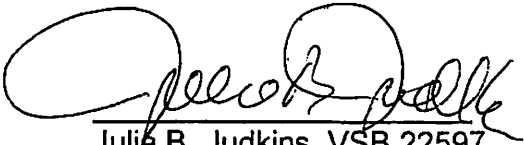
)

Wenc 2/24/03

Wend

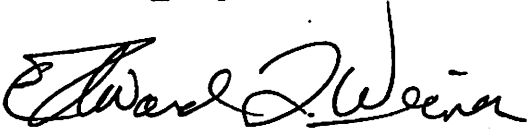
003. Leslie Allen

Seen and agreed:



Julia B. Judkins, VSB 22597
Counsel for Defendant

Seen and OBJECTED



Edward L. Weiner, VSB# 19576
Counsel for Plaintiff

1-28-03
LMA

VIRGINIA

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

HOWELL RUSS,

Plaintiff,

v.

JAMES DESTIVAL

Defendant.

FILED
COURT SERVICES

03 FEB 25 PM 1:18

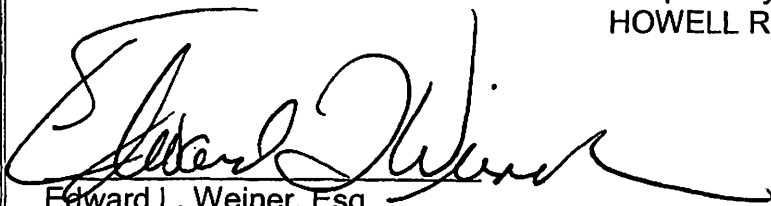
JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

Law No.: 198752

NOTICE OF APPEAL TO SUPREME COURT OF VIRGINIA

COMES NOW the Plaintiff, by Counsel, and gives notice of appeal to THE SUPREME COURT OF VIRGINIA, of the Final Order of this Court, entered January 28, 2003, affirming the verdict of the jury in this matter, and of the Court's denial of Plaintiff's Motion for Judgment N.O.V./ New Trial. A transcript of the trial of these proceedings will be filed. Counsel hereby certifies that the transcript has been ordered from the court reporter who reported the case.

Respectfully Submitted,
HOWELL RUSS, By Counsel:




Edward L. Weiner, Esq.
10605 Judicial Drive, Suite B6
Fairfax, VA 22030
Tel: (703) 273-9500

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Appeal was faxed and mailed, on this 25th day of February, 2003, to counsel for the Defendant:

Julia B. Judkins, Esq.
3920 University Drive
Fairfax, Virginia 22030-0022
Fax: (703) 385-1555


Edward L. Weiner, Esq.

CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA

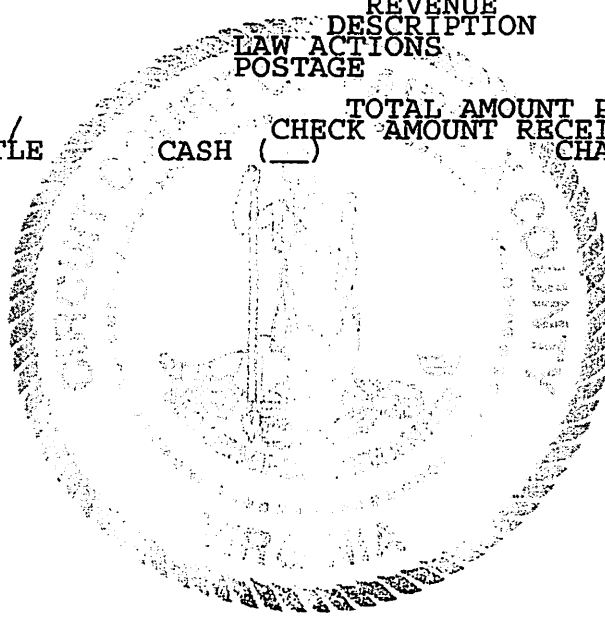
RECEIPT NBR: PS-2003402992 ***** COPY A ***** PAGE: 1
 TIME: 08:35 DATE RECEIPTED: 02/27/2003 DATE FILED: 02/27/2003
 RECEIPT FOR: LAW CASE APPEALED-SUPREME/COURT OF APPEALS
 IDENTIFICATION NAME: RUSS V DESTIVAL

CFN: L198752

CHECK NBR(S) 2555 /
 CASHIER ID: TINA SETTLE

CASH () TOTAL AMOUNT PAID:
 CHECK AMOUNT RECEIVED:
 CHANGE:

REVENUE DESCRIPTION	REVENUE CODE	REVENUE AMOUNT
LAW ACTIONS	0304	\$20.00
POSTAGE	0350	\$12.00
		\$32.00
		\$32.00
		\$0.00



John T. Frey
 Clerk of Circuit Court

000303

Official Receipt

VIRGINIA

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

HOWELL RUSS,

Appellant,

v.

JAMES DESTIVAL

Appellee.


Law No.: 198752

FILED
2003 MAR 26 AM 11:20
JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

NOTICE OF FILING TRANSCRIPTS

PLEASE TAKE NOTICE, that the Appellant, by Counsel, pursuant to Rule 5:11 of the Supreme Court of Virginia, has filed the written transcripts for the trial of this matter (January 27-28, 2003) and of the argument concerning Plaintiff's Motion for Judgment N.O.V./ New Trial (February 21, 2003), with the Office of the Clerk for the Circuit Court of Fairfax County, this 26th day of March, 2003, and that all counsel of record have been mailed a copy of this notice.

Respectfully Submitted,
HOWELL RUSS, By Counsel:

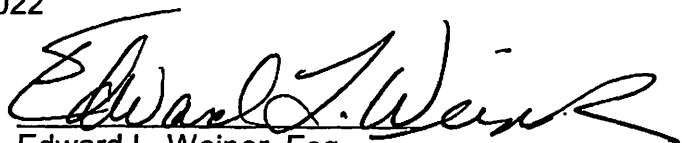


Edward L. Weiner, Esq.
10605 Judicial Drive, Suite B6
Fairfax, VA 22030
Tel: (703) 273-9500
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Filing Transcripts was faxed and mailed, on this 26th day of March, 2003, to counsel for the Appellee:

Julia B. Judkins, Esq.
3920 University Drive
Fairfax, Virginia 22030-0022
Fax: (703) 385-1555


Edward L. Weiner, Esq.

ASSIGNMENT OF ERROR

The court erred in its rulings regarding the jury instructions on the appropriate law, and further in failing to grant the plaintiff judgment notwithstanding the verdict on these grounds.

A. The court erred when it approved defendant's Instruction Q, as modified by the defendant, as it was an inaccurate and misleading statement of Virginia law.
