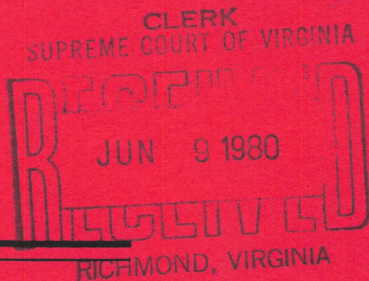


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IN THE  
**Supreme Court of Virginia**  
AT RICHMOND

---

RECORD NO. 791353

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FRANK E. MILLER, Administrator of the  
Estate of Keith G. Miller, Deceased  
Appellant

v.

SHEDRIC NELSON WHITE  
Appellee

---

JOINT APPENDIX

---

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MOTION FOR JUDGMENT

TO THE HONORABLE WILLIAM S. MOFFETT, JR., JUDGE OF SAID COURT:

Comes now the plaintiff, Frank E. Miller, by counsel, and moves for judgment against defendant, Shedric Nelson White, pursuant to §8.01-50 of the Code of Virginia, 1977, on the grounds and in the amount hereinafter set forth:

1. Plaintiff qualified and was duly appointed administrator of the estate of Keith G. Miller, deceased, by the Circuit Court of the City of Staunton, Virginia, on September 6, 1977.

2. On or about August 23, 1977, at approximately 4:45 P.M., plaintiff's decedent was operating his motorcycle in a northerly direction, in the proper lane of travel within the speed limit, on State Route 254, .2 miles east of Route 642 in Augusta County, being approximately 4.7 miles west of the City of Waynesboro.

3. At the same time and place, defendant White was operating his automobile in a southerly direction on the same State Route 254, at approximately the same location.

4. At said time and place, it was the duty of defendant, White, to operate his automobile free from negligence and with due regard for the safety of other persons on the road.

5. Notwithstanding said duties, defendant did then and there recklessly and negligently operate his automobile in such a manner that it struck the vehicle plaintiff's decedent was driving, in the north bound lane of travel. This collision was proximately due to defendant's violation of his duties as aforesaid. Defendant was careless, reckless and negligent in that he:

- (a) Failed to keep his vehicle in the south bound lane of travel;
- (b) Failed to keep a proper lookout;
- (c) Exceeded a reasonable speed under the circumstances and conditions then and there existing;
- (d) Failed to apply his brakes in time to avoid the collision;
- (e) Failed to give full time and attention to the operation of his vehicle;
- (f) Failed to keep his vehicle under proper control and within the proper lane of traffic;
- (g) Operated his vehicle in a reckless manner, by recklessly and inattentively driving it or allowing it to drift into the northbound lane of oncoming traffic, striking plaintiff's decedent and his motorcycle in the north bound lane of travel of Route 254.

6. As a result of the aforesaid collision, plaintiff's decedent was struck by the defendant's vehicle and hurled from his motorcycle, receiving severe and violent injuries which caused his death on August 23, 1977, the date of the aforesaid collision.

7. Defendant's negligence aforesaid was the direct and proximate cause of plaintiff's decedent's death.

8. Plaintiff's decedent, at the time of his death, was twenty-seven years of age and was in good health and was employed at Stanley Furniture at a salary of Three and 85/100 Dollars (\$3.85) per hour.

9. Plaintiff's decedent died intestate, survived by the following statutory beneficiaries: Frank E. Miller, his father, Mrs. Frank E. Miller, his mother, Frank Elwood Miller, his brother, Lois Catherine Miller, his sister, and Donald W. Miller, his brother. Said beneficiaries have sustained financial and pecuniary loss as a result of the death of the plaintiff's decedent and have suffered severe mental anguish at the loss of his company as follows:

- (a) Sorrow, mental anguish and loss of decedent's company and counsel suffered by the beneficiaries;



- (b) Funeral expenses of decedent;
- (c) Compensation for loss of income of the decedent; and
- (d) Compensation for loss of services, protection, care and assistance provided by defendant.

WHEREFORE, plaintiff's decedent demands judgment against defendant in the amount of Two Hundred Fifty Thousand Dollars (\$250,000.00), and his costs in this behalf expended.

Respectfully submitted,

FRANK E. MILLER, Administrator  
of the estate of Keith G. Miller,  
deceased

By Counsel

EDMUNDS, COOLEY & WILLETTS

By Roger B. Willetts, p.q.  
Of Counsel

110 North Wayne Avenue, Waynesboro, Virginia 22980

Filed In the Clerk's Office of the Circuit Court of Augusta County  
the 13 day of June, 19 78

Writ Tax \$ 25.00

Teste:

Fee 30.00

Total Paid \$ 55.00

Lewis L. Stacker, Clerk  
D. C.

## GROUND'S OF DEFENSE

Comes now S. N. White, by counsel, and files as his grounds of defense to plaintiff's motion for judgment the following:

(1) Said defendant denies each and every material allegation contained in the aforesaid motion for judgment.

(2) Said defendant denies being negligent in any manner which caused or contributed to cause the accident about which plaintiff complains.

(3) Said defendant denies that plaintiff was injured and damaged in the manner and to the extent alleged.

(4) Defendant alleges and avers that the accident, injuries, and damages about which plaintiff complains were caused solely by the act or acts of others, negligent or otherwise, over whom defendant exercised no control and for whose actions defendant is not responsible and that said accident occurred without negligence on defendant's part and was as to the defendant unavoidable.

(5) Defendant avers that plaintiff's decedent was guilty of negligence which caused or contributed to cause the accident about which plaintiff complains.

(6) Defendant avers that plaintiff's decedent assumed the risk of injury occasioned by the accident about which plaintiff complains.

(7) Defendant states and says that he reserves the right to rely upon such other defense or defenses as may appear from the evidence developed during discovery or at trial of this action.

WHEREFORE, having so stated, defendant, moves the Court for judgment in his favor and the costs in this behalf expended.

Respectfully submitted,

SHEDRIC NELSON WHITE

BY COUNSEL

Timberlake, Smith, Thomas & Moses

By James B. Welch  
P. O. Box 2566 *c.f.*  
Staunton, Virginia 24401

CERTIFICATE

This is to certify that a true copy of the foregoing Grounds of Defense was mailed this 30th day of June, 1978 to Roger B. Willetts, Esquire, Edmunds, Cooley & Willetts, 110 North Wayne Avenue, Waynesboro, Virginia 22980, of counsel for plaintiff.

John S. Thomas

Filed in the Clerk's Office of the  
Circuit Court of Augusta County

July 3, 1978

Teste:

Kurt B. Riggs Dep. Clk.



On May 22, 1979, came the parties, each in his own proper person and by counsel, and thereupon came a jury, to-wit: David Webster Kiser, Betty B. Reeves, Edward McCarthy Driver, Helen Wood Harper, William Keith Wine, Donna Lee Hall and Theresa Anne Nacrelli, who were duly selected according to law and sworn to well and truly try the issues joined, and a true verdict render according to the law and the evidence. After opening statements of counsel for both parties were made, the plaintiff proceeded to introduce his evidence, and rested. Thereupon, defendant, by counsel, moved the Court to strike plaintiff's evidence and enter summary judgment on defendant's behalf.

UPON CONSIDERATION WHEREOF, the Court having maturely considered said motion and all the grounds therefor, the authorities cited by the parties, and the views of counsel, and the Court being of the opinion that the evidence adduced by plaintiff in this case is not sufficient to entitle him to recover herein doth grant said motion and doth

ADJUDGE and ORDER that plaintiff recover nothing of defendant about his action herein but that the defendant recover and have judgment against the plaintiff for his costs in this behalf expended.

And the jury was discharged from the further consideration of this case.

Plaintiff, by counsel, having indicated that he intends to take an appeal from this judgment to the Supreme Court of Virginia and having moved for a suspension of execution of this

judgment pending action thereon by the Supreme Court of Virginia, it is further ORDERED that the provisions of this judgment be, and the same are hereby suspended for a period of Thirty (30) days and thereafter until the Supreme Court of Virginia acts on plaintiff's petition for appeal, provided that within said period, plaintiff, or someone for him, files with the Clerk of this Court an appeal bond in the penalty amount of \$ 1000.00 with surety to be approved by this Court, conditioned according to law; and it is further ORDERED that the transcript of testimony taken at the trial of this case on May 22, 1979, together with all exhibits filed in connection therewith, be made a part of the record in this case, provided that said transcript be filed in the office of the Clerk of this Court within Sixty (60) days from the date of this judgment.

Nothing further remaining to be done, this action is stricken from the docket of the Court.

ENTER: This 12 day of June, 1979.

Russell B. Burgdon  
Judge

Asked for:

James G. Waddell, p.d.

Seen and objected to:

Russell B. Waddell, p.q.

Entered June 12, 1979  
Common Law Order Book No. 42  
Page 250

### ASSIGNMENT OF ERROR

The trial court erred in granting the defendant's Motion to Strike at the close of plaintiff's evidence, in effect holding that the plaintiff did not present sufficient evidence to make out a prima facie case of negligence against the defendant.

### QUESTION PRESENTED

~~Did the trial court err in granting the defendant's Motion to Strike at the close of plaintiff's evidence, in effect holding that the plaintiff failed to present sufficient evidence to establish a prima facie case of negligence against the defendant?~~



WITNESS - R. W. JORDAN

Direct Examination by Mr. Willetts:

Q. Trooper Jordan, would you tell the jury, please, your full name and your occupation.

A. Trooper R. W. Jordan, I'm a trooper with the Virginia State Police.

Q. Trooper Jordan, did you have occasion to investigate an accident in Augusta County in August of 1977?

A. Yes sir.

Q. Would you tell the jury what date the accident happened and where it happened?

A. It happened on August 23, 1977, at approximately 4:45 P.M., it was on a Tuesday evening, 4.7 miles west of Waynesboro on Route 254.

Q. Describe the road, Trooper Jordan, if you will for the jury.

A. It's a two lane road at the location of the accident and it's just a real slight curve to the right.

Q. I show you some photographs, one which is a color photograph, and ask you if that photograph accurately depicts the accident scene.

A. Yes sir.

Q. Now, Trooper, would you show the jury in that case which lane is the westbound lane and which lane is the east-

1. bound lane?

2. A. This is the westbound lane right here.

3. Q. And which lane was the motorcycle operated by Keith

4. Miller traveling in prior to the accident?

5. A. In the westbound lane.

6. MR. WELSH: I object to that question, Your Honor. If

7. he investigated it after the accident, he wouldn't know

8. what lane he was in prior to the collision.

9. COURT: Sustained. Rephrase the question.

10. Q. Trooper, in the course of your investigation did you

11. determine what kind of accident occurred?

12. A. It was a head-on collision.

13. Q. Did you have occasion to talk to either one of the parties

14. in the accident?

15. A. I talked to Mr. White a couple of hours after the acci-

16. dent.

17. Q. Did you talk to Mr. Miller?

18. A. Mr. Miller was dead upon my arrival there at the scene.

19. Q. When you talked with Mr. White, did he tell you in which

20. direction he was traveling?

21. A. He stated he was traveling in the eastbound lane towards

22. Waynesboro.

23. Q. Would you put a "W" in the lane that he was traveling in?

24. Just mark a "W" at the bottom of the picture.

1. A. (Witness marks on photograph)

2. Q. Okay, and did he tell you whether or not he saw the  
3. motorcycle before the accident?

4. A. His only statement to me, he all of a sudden seen the  
5. bike upon collision. He didn't say he seen it prior to  
6. the collision.

7. Q. He didn't say he saw it prior to the collision?

8. A. No.

9. Q. Tell the jury if from your investigation you could deter-  
10. mine which direction the bike was headed in.

11. A. Mr. Miller was coming from work in Waynesboro, so he  
12. would have been heading west.

13. Q. Would you mark with the same pen an "M" or write "Miller"  
14. on there?

15. A. (Witness marks on photograph)

16. Q. Now, Trooper Jordan, in marking the photograph you have  
17. marked Miller for the westbound lane and put a "W" in  
18. Mr. White's lane, is that correct?

19. A. Yes sir.

20. Q. Would you tell the jury with regard to the photograph  
21. what you discovered at the scene of the accident?

22. A. There was scattered debris all over the road. This road  
23. was quite busy this time of day, people getting off in  
24. Waynesboro and Staunton, and the debris was scattered.



1. I found a gouge mark in the road at this location.
2. Q. Would you just describe the gouge mark.
3. A. It appeared some heavy metal came down on the road. I
4. don't really recall how long it was, but about that wide
5. (indicating); about three inches wide or so. But it was
6. five foot eleven inches from the centerline.
7. Q. For the jury, are you speaking of these gouge marks,
8. this gouge mark here?
9. A. Yes sir.
10. Q. Is that where this first stick is located?
11. A. Yes sir.
12. Q. Now, would you tell the jury how far the gouge mark was
13. from the centerline? Is this what you are speaking of?
14. A. Yes sir.
15. Q. How far was that?
16. A. Five feet eleven inches.
17. Q. From the centerline?
18. A. Yes sir.
19. Q. And did you determine how far it was from the shoulder
20. of the road in Mr. Miller's lane?
21. A. Four foot nine inches.
22. Q. Now, at the gouge mark, did you also see skid marks from
23. the vehicle?
24. A. Yes sir, there was skid marks. They appeared to start

1. from that location.

2. Q. At the gouge marks?

3. A. Yes sir.

4. Q. All right, now, tell the jury, if you will, how many  
5. skid marks you found and what direction they took.

6. A. There were four skid marks from all four tires of the  
7. vehicle. And they were headed eastbound in the west-  
8. bound lane from the location of the gouge mark.

9. Q. Now, where did they terminate?

10. A. They ended over on the east side of the private driveway.  
11. There was a mailbox that was knocked down, and they ended  
12. at the White vehicle. It was a Mercury.

13. Q. I ask you if this photograph #14 here shows the gouge  
14. marks and also shows the White vehicle.

15. A. Yes sir.

16. Q. Now, if you would just tell the jury, if you will, where--  
17. what did you find as far as the skid marks are concerned.  
18. Would you just describe for the jury the path of the  
19. skid marks in relation to the White vehicle?

20. A. It appeared as though the vehicle went into a side slide  
21. down to the vehicle, close to where the vehicle, it just  
22. came all the way around. It appeared as though the ve-  
23. hicle was going east and then for some reason started  
24. sliding sideways, then completely turned around when it

1. got across the private drive there.

2. Q. Now, I ask you this, Trooper, in regard to your investi-  
3. gation did you find any skid marks or gouge marks in the  
4. White lane of travel, which was the eastbound lane?

5. A. No sir.

6. Q. Did you find, Trooper, any other scratches or marks on  
7. the road in your investigation?

8. A. There was a scratch going from . . .

9. Q. Let me get you to hold the photo up and show it to the  
10. jury.

11. A. Well, unfortunately I don't see it in either one of the  
12. photos, but it was just a real weak scratch going down  
13. the surface of the road from the gouge mark.

14. Q. All right, and where did it go to?

15. A. It went down to the White vehicle. It went all the way  
16. to where it ran off the shoulder of the road and then I  
17. couldn't find it, pick it up from that.

18. Q. Now, how would you describe visibility on this particular  
19. road with regard to both lanes of travel; first the  
20. eastbound lane and then the westbound lane?

21. A. Both lanes have real good visibility. I'd say it was  
22. one or two hundred feet, just approximately.

23. MR. WILLETTTS: Could we take just a minute, Your Honor,  
24. and let the jury examine them.



1. MR. WELSH: I didn't hear what he said about the dis-  
2. tance.

3. A. I said approximately two hundred feet; that's an approxi-  
4. mation.

5. Q. Trooper, I'm going to ask you if you can identify this  
6. photograph and what basically that shows.

7. A. It . . .

8. MR. WELSH: What number is that?

9. MR. WILLETTTS: That is photograph #16.

10. A. It shows the accident scene and the roadway as if you  
11. was going eastbound on Route 254. The rescue squad ve-  
12. hicle, the body was behind the rescue squad vehicle,  
13. and then this second rescue squad vehicle, I believe, was  
14. right beside the White auto.

15. Q. That would have been from the direction Mr. White was  
16. traveling, is that correct?

17. A. Yes sir.

18. Q. This is photograph #13 and I'll ask you to describe to  
19. the jury just what that photo depicts.

20. A. It's a closer shot of that prior one. It's taken above  
21. the first rescue squad vehicle. The first rescue squad  
22. vehicle would be down here, and this would be the body,  
23. and this is the vehicle up here. This is the westbound  
24. lane of 254. The gouge marks and skid marks started up

1. here approximately a quarter of an inch behind my vehicle  
2. there in this photograph.

3. MR. WELSH: What was that number, Trooper?

4. A. Thirteen.

5. Q. You said the gouge marks started where?

6. A. Right here (indicating).

7. Q. Trooper, when you testified about the sliding marks,  
8. there are some color photos here and I'm going to ask you  
9. if you can--this is photo #2, and I'll ask if you can  
10. identify that and tell the jury if there are, in fact,  
11. four marks visible there and if they are the marks you  
12. were talking about.

13. A. These appear to be the marks, the skid marks I was talk-  
14. ing about. They started close to the centerline, one  
15. wheel did, and then all four of them merged right to the  
16. White vehicle, which would be down here. This is as if  
17. you was looking westbound.

18. Q. Now, does it actually show them going off the road?

19. A. Yes sir.

20. Q. Again, Trooper, in this case all of these skid marks  
21. started and stopped in Mr. Miller's lane, is that correct?

22. A. Yes sir.

23. MR. WELSH: Objection. That assumes facts not in evi-  
24. dence.

1. COURT: Sustained. I think, counsel, if maybe we can  
2. refer to these as the eastbound direction and the west-  
3. bound, rather than make a statement that indicates that  
4. it's established exactly where the vehicles were in rela-  
5. tion to the east and westbound lane, it might solve the  
6. problem.

7. Q. Trooper, I'll ask you to identify this photo which is  
8. #4.

9. A. This is a picture just east of the private driveway, and  
10. it's further skid marks going through the gravels. The  
11. White auto would be down here, at the lower end of the  
12. picture.

13. Q. And photo #5?

14. A. This is just showing an overall photograph of the acci-  
15. dent scene with the gouge mark up here.

16. MR. WELSH: Your Honor, could I ask everybody to speak  
17. up. I might be going deaf in my old age, but I can hard-  
18. ly hear anybody.

19. A. This is an overall photograph of the accident scene,  
20. and this would be the westbound lane. And it's got the  
21. gouge mark over in this location. And the White auto  
22. and the Miller bike was down here on the other side  
23. of the private driveway.

24. Q. Photo #6?

1. A. This would be the westbound lane and this private drive-  
2. way, it shows the skid marks leaving the pavement onto  
3. the gravels. Again, this is just an overall photograph . .

4. MR. WELSH: What number is that?

5. A. Number three. It's just an overall photograph of the  
6. accident scene with this being the gouge mark and this  
7. being where the vehicles were.

8. Q. Trooper, these are two photographs, #18 and #19, and I  
9. ask you what those two photographs depict.

10. A. This is a picture of Mr. White's 1973 Mercury, the ve-  
11. hicle which was going eastbound, and it has the damage  
12. to the vehicle, just to the left of the front headlight.

13. Q. Which direction is the vehicle pointing in that photo?

14. A. It's pointing west.

15. Q. Pointing west. All right, and I'll ask you with regard  
16. to the vehicle, can you tell the jury the approximate  
17. width of that vehicle?

18. A. Approximately six feet or so.

19. Q. Trooper, when you investigated this damage did you find  
20. any--would you describe whether or not there was any  
21. destruction or damage to the tire, the left front tire?

22. A. This left front fender was down on the tire. I don't  
23. know how much pressure it was exerting on the tire, but  
24. it was down on the tire.

1. Q. Trooper, the three photos here, #8, #9 and #10, are all  
2. of the same automobile. I would just ask you if you  
3. would identify those for the jury.

4. A. This is Mr. White's vehicle and it does show the damage  
5. to the vehicle.

6. Q. This is photo #7. Is that the same, the accident scene?

7. A. Yes sir.

8. Q. Are the marks consistent with the marks that you found  
9. that day?

10. A. Yes sir. This picture is just an overall picture of the  
11. scene. This is not the gouge mark down here. There's  
12. a white patch in the road down there and it's due to  
13. the process of something, but that's not the gouge mark.  
14. The gouge mark is on up the road. And this picture shows  
15. this vehicle right here, he's westbound, and the White  
16. vehicle and the motorcycle is around behind the rescue  
17. squad. In between the rescue squad vehicle and my ve-  
18. hicle.

19. MR. WELSH: What's the number on that?

20. A. Number twenty-one.

21. Q. I want to show you photograph #22 and #23, and ask you  
22. if you can identify those with regard to the vehicles  
23. that are in the photographs.

24. A. This is the White vehicle, the Mercury, and this is the

1. 1977 Kawasaki motorcycle belonging to Mr. Miller, up under  
2. the White vehicle. The White vehicle is facing west here  
3. and the motorcycle is facing eastbound.

4. Q. All right, Trooper, did you have an occasion to examine  
5. the motorcycle itself?

6. A. Yes sir, I examined it at the scene just briefly, and  
7. then the next day I went to Landes Garage and looked  
8. at it again.

9. Q. What did you find about the motorcycle as far as the  
10. damage?

11. A. I found the roll bar on the left side of the motorcycle  
12. bent in towards the engine or towards the rear of the  
13. motorcycle.

14. Q. You say roll bar, would you describe that, where it's  
15. located on the motorcycle?

16. A. Okay. The roll bar attaches to the frame on the motor-  
17. cycle and it goes around like the left leg--like the left  
18. roll bar would go around the left leg of the operator,  
19. so it he did have an accident it would prevent you scrap-  
20. ing your leg down on the road. It attached to the frame.

21. Q. And what did you say, how was it affected or how was it  
22. when you found it?

23. A. It was bent back towards the rear of the motorcycle and  
24. had bits of pavement in it; gravels and asphalt in it.

1. Q. Okay, and this is the roll bar on the left side?

2. A. Yes sir.

3. MR. WELSH: I'm sorry. Trooper Jordan speaks so softly  
4. that I just can't hear his answers.

5. A. Okay, it had bits and pieces of pavement, asphalt and  
6. gravels, in the roll bar.

7. Q. Did you find any other damage to the motorcycle?

8. A. The motorcycle was totaled. The front forks were bent,  
9. the handlebars, the frame was bent.

10. Q. You say the front forks. I'm not a motorcycle enthus-  
11. iast and I don't know what . . .

12. A. It holds the tire on the front of the motorcycle. It's  
13. two forks that go down.

14. Q. And how were they bent?

15. A. I don't recall.

16. Q. In which direction?

17. A. I don't recall.

18. Q. And what about the handlebars?

19. A. It was just bent down, like it was pushed down.

20. Q. Now, when you got to the scene and saw Mr. Miller, tell  
21. the jury whether he had any particular injuries to his  
22. left side.

23. A. I don't recall, but if I could look at one of my photo-  
24. graphs . . .



1. Q. If you'd just look at your photographs and refer to your  
2. notes.

3. A. (Witness examines photographs and notes.) His left leg  
4. was obviously fractured, twisted around behind him.  
5. His left boot was off, there were abrasions to his arm  
6. and to his stomach.

7. Q. Did you make any notes about this injury or are you tak-  
8. ing that from the photograph?

9. A. (Witness examines notes.) All I've got in my accident  
10. pad is broken neck and severed left leg.

11. Q. Severed left leg?

12. A. Yes sir.

13. Q. Now, Trooper, when you examined the motorcycle it's my  
14. understanding your testimony is the handlebars were bent,  
15. the forks were bent, and the left roll bar which is the  
16. apparatus that goes down outside of the left leg was push-  
17. ed back into the motorcycle.

18. A. Yes.

19. Q. And I take it you found the motorcycle under the car at  
20. the scene as depicted in this last photograph.

21. A. Under the rear of the vehicle, yes sir.

22. Q. Did you measure the skid marks, Trooper Jordan, to deter-  
23. mine their length?

24. A. Yes sir.

1. Q. Referring you to photograph #1 again, which is a color  
2. photo, I ask you if you can point out to the jury what  
3. measurements you did make.
4. A. Okay. I measured from this outside skid mark, and I  
5. measured from the gouge mark. And from the gouge mark  
6. to the vehicle was sixty-one feet, eight inches.
7. Q. From the gouge mark to the vehicle?
8. A. Yes sir, that's where the first skid mark started.
9. Q. Okay, do you remember which tire you measured to on the  
10. vehicle?
11. A. The left front.
12. Q. The left front tire?
13. A. Yes sir.
14. Q. Now, did the other marks lead directly to the tires?
15. A. Yes sir.
16. Q. Were they unbroken?
17. A. They were broken just where they went over the private  
18. drive. It was a dropoff there.
19. Q. But otherwise the marks led directly to the tires?
20. A. Yes sir.
21. Q. Can you show the jury in this picture which marks went  
22. to which tires? Or, do you know.
23. A. Okay, from the gouge mark the left front tire went down  
24. to this left front here, and this would be the right

1. front tire going across; the right rear, and this would  
2. be the left rear.

3. Q. Let me just mark those, if I may. (Counsel marks on  
4. photograph) Trooper, I have marked these left front with  
5. an "LF", left rear with an "LR", right front and right  
6. rear. Now, in this picture with regard to the right  
7. front, the paper cup is where the mark starts and it goes  
8. in this direction and then comes across. Is that correct?

9. A. I can't really make it out in this photo. I don't re-  
10. call.

11. MR. WELSH: I can't hear you.

12. A. I can't make it out in that photo and I don't recall.

13. Q. Well, it's stipulated that the mark starts there at the  
14. cup, and that's the same mark around.

15. A. I don't recall.

16. MR. WILLETTS: Let's just take a minute and let the  
17. members of the Jury see this. What I've done, members of  
18. the Jury, is mark from the trooper's testimony the left  
19. front tire right here, the left rear tire right here  
20. which crosses the right front tire which starts at the  
21. paper cup. And then the right rear.

22. MR. WELSH: Which one are you having at the paper cup?

23. MR. WILLETTS: The right front.

24. MR. WELSH: The right front or right rear?

1. MR. WILLETTS: The right front.

2. (Counsel confer as to markings.)

3. COURT: Do the markings here, "LF", "LR" and all those,  
4. are they put at the right . . .

5. MR. WELSH: Exactly.

6. COURT: There's no question that two of them are in the  
7. proximity of that . . .

8. MR. WELSH: That's exactly right. That's the point.

9. COURT: So, the markings are correct?

10. MR. WELSH: Yes sir.

11. Q. Now, Trooper, with regard to this photograph, can you  
12. tell the jury if there is a place on the pavement, and  
13. I'm not referring to off the pavement; but there's a  
14. place on the pavement where the skid marks crossed?

15. A. The left rear and the right front crossed at this loca-  
16. tion.

17. Q. Now, I'll ask you, if you will, if I can draw an arrow  
18. right here. Is that what you're testifying, is that  
19. where the left front and the right rear crossed?

20. A. The left rear and the right front.

21. Q. Excuse me, the left rear and the right front crossed.

22. A. Right.

23. Q. Trooper, I am going to show you photo #4 and ask you if  
24. in photo #4 can you tell whether or not the tire crossed

1. after they get off of the pavement?

2. A. Yes sir.

3. MR. WELSH: That's a leading question, Your Honor, and  
4. I can't hardly hear what he's saying.

5. Q. Trooper, looking at photo #4 can you see marks there as  
6. they lead off the pavement, do the marks again cross?

7. A. Yes sir.

8. Q. And is this the point where they cross?

9. A. Yes sir.

10. Q. With regard to photo #4, I have drawn an arrow on it  
11. to show the point where they crossed off the pavement. Is  
12. that the correct point?

13. A. Yes sir.

14. Q. Now, comparing photo #4 to photo #6, I'm going to ask  
15. you if that is the cross that's apparently made by the  
16. two rear tires . . .

17. MR. WELSH: Objection. It calls for a conclusion.

18. MR. WILLETTS: Let me rephrase it, Your Honor, if I may.

19. Q. You testified, Trooper, that the marks led directly to  
20. the tires, is that correct?

21. A. Yes sir.

22. Q. If you look at #1, I'll ask you with regard to #1 if the  
23. arrow that we have placed on photo #4 is this "x" back  
24. here that shows?

1. A. Yes sir.
2. Q. And in marking that as the cross, what tire marks do we
3. have going to that point that we have already designated?
4. A. The left rear and right rear.
5. MR. WELSH: The left rear and right rear?
6. A. Yes sir.
7. Q. Trooper, I want to ask you one other question with regard
8. to the photo. As you traced the path of the left front
9. and the right front tires, did they also cross up about
10. where the culvert is located, where it went across the
11. culvert?
12. A. Yes sir.
13. Q. And is this the approximate location here where they
14. cross?
15. A. Yes sir.
16. Q. I have drawn an arrow to that point. Is that correct?
17. Is that the approximate location where the left front
18. and the right front crossed?
19. A. I believe it would be closer up here to the grassy area.
20. Q. All right. Here?
21. A. Yes sir.
22. Q. Trooper, just for the record, let me go ahead and intro-
23. duce--if you'll just refer to these pictures so we can
24. go ahead and show them. I want to make sure they are all

1. shown to the jury.

2. A. Number eleven and twelve are pictures of the White auto.  
3. Number seventeen shows this vehicle right here is headed  
4. westbound and had nothing to do with the accident, the  
5. rescue squad just got stopped; but this would be west-  
6. bound and this is eastbound. And this picture is a pic-  
7. ture of the White auto that shows . . .

8. MR. WELSH: What number is that?

9. A. Number twenty. It shows the windshield is broken up in  
10. the upper left-hand corner, and from the upper left-hand  
11. corner where this chrome goes around there was pieces of  
12. hair. It was the location where Mr. Miller's head ap-  
13. parently hit.

14. Q. Now, Trooper Jordan, again with regard to the investiga-  
15. tion you made at the scene. Did you find any brake marks  
16. prior to--any marks prior to the gouge marks?

17. A. No sir.

18. Q. And how do you describe the marks, the car marks, after  
19. the gouge marks?

20. A. Would you rephrase the question?

21. Q. Well, what did it appear to you happened when the marks  
22. first appeared?

23. A. It appeared like the brakes were applied then and it was  
24. going into a sideways skid.



1. side of the road.

2. A. I don't recall.

3. Q. Now, I take it you talked to Mr. White at the scene or  
4. shortly after the accident?

5. A. It was approximately two hours after the accident.

6. Q. Would you tell the jury exactly what conversation you had  
7. with Mr. White?

8. A. When I talked to Mr. White at the Hospital he stated to  
9. me that he was going down the road and all of a sudden  
10. this bike hit and I saw him go over the car. Then he  
11. stated, I think I was on my side of the road.

12. MR. WILLETTS: That's all the questions I have.

13.

14. ~~Cross Examination by Mr. Welsh:~~

15. Q. Trooper Jordan, what is the posted speed limit in the area  
16. where the accident occurred?

17. A. Fifty-five.

18. Q. Fifty-five miles per hour?

19. A. Yes sir.

20. Q. When you talked to Mr. White a couple of hours after the  
21. accident, he was at the hospital, is that correct?

22. A. Yes sir.

23. Q. And did he have an injury to his head?

24. A. Yes sir, he had abrasions on his forehead.

1. Q. Did you notice on the inside of the windshield down lower  
2. than the spot in the upper corner that it appeared that  
3. something had struck the windshield from the inside?

4. A. Yes sir.

5. Q. Was that approximately the height of a man's head sit-  
6. ting in the vehicle?

7. A. Yes sir.

8. Q. At the time you spoke to Mr. White, would you describe  
9. his condition?

10. A. Mr. White was very upset and appeared to be shaken and  
11. he was in right much pain from his head.

12. Q. He indicated in the statement that I think I was on my  
13. side of the road. Was that in response to a question you  
14. asked him about where he was?

15. A. Yes sir.

16. Q. And his answer was, "I think I was on my side of the  
17. road."

18. A. Yes sir.

19. Q. Did you also ask him his speed?

20. A. Yes sir.

21. Q. What did he tell you?

22. A. He said fifty miles an hour.

23. Q. A great deal of discussion has been made about the skid  
24. marks of the vehicle. Did that vehicle, those skid

1. marks, at the point they began did they run more or less  
2. uninterrupted? In other words, those marks ran all the  
3. way to the respective wheels of the vehicle, didn't they?

4. A. Yes sir.

5. Q. And were they curving away from the center of the road?

6. A. Yes sir.

7. Q. And did they show the vehicle to already be in a canted  
8. position toward the highway? In other words, that the  
9. vehicle was not on line in an east/west direction, the  
10. route the roadway was laid out, but was canted or off-  
11. center already?

12. A. From the starting of the skid marks, yes sir.

13. Q. So, the vehicle would not have been going straight east  
14. at that point, it would already be out of control?

15. MR. WILLETTS: Your Honor, I'm going to object to this.  
16. I don't know from what point you're talking about.

17. COURT: I think you should rephrase the question.

18. Q. I'm talking about the point where the marks start, the  
19. tire marks along the highway start. And those are the  
20. only marks that you found except for the gouge marks that  
21. you can associate with this occurrence.

22. A. Yes sir.

23. Q. And at that moment the vehicle was already out of con-  
24. trol, wasn't it? It was already apparently in an out of

1. control situation?

2. MR. WILLETTS: Your Honor, I again object.

3. COURT: I think the "out of control" should be left  
4. out of the question.

5. Q. All right, the vehicle was already in a sliding config-  
6. uration at that moment, wasn't it?

7. A. Yes sir, it was.

8. Q. In other words, the back wheels were not rolling along  
9. behind the front wheels, they were already out of line?

10. A. Yes sir.

11. Q. Now, the question was asked about visibility for a ve-  
12. hicle traveling eastbound and you indicated it was good  
13. visibility. Was the visibility equally good in a vehicle  
14. going westbound?

15. A. Yes sir.

16. Q. Now, you indicated in testimony as to the damage to the  
17. motorcycle. It was a 1977 motorcycle?

18. A. Yes sir.

19. Q. A pretty new one?

20. A. Yes sir.

21. Q. Would it be fair to say that this motorcycle was totally  
22. demolished?

23. A. Yes sir.

24. Q. And there was other damage than that which you have spe-

1.       cifically testified to.
2.   A.   Yes sir.
3.   Q.   And the roll bar that you were talking about that guards
4.       the leg of the operator of the vehicle if the motorcycle
5.       goes over on its side, that would be the left one where
6.       you found asphalt and gravel in the roll bar?
7.   A.   Yes sir.
8.   Q.   And did that roll bar appear to have been dragged down
9.       the pavement?
10.  A.   Yes sir.
11.  Q.   Did that roll bar appear to be approximately the same
12.       distance apart, the ends of it, as the distance between
13.       the gouge marks on the highway?
14.  A.   Yes sir.
15.  Q.   And there's been a great deal of testimony about these
16.       crossing of these tire marks.  Would you describe suc-
17.       cinctly, if you would, what appeared to be the movement
18.       of the vehicle from the moment those tire marks start.
19.  A.   Well, the vehicle started as if it was just in a mild
20.       slide and then it just like turned around in a counter-
21.       clockwise motion as it approached the private drive, it
22.       just went on around.
23.  Q.   So that would in essence be the car turning not complete-
24.       ly end for end because it wasn't straight to start with,

1. but it turned greater than ninety degrees?
2. A. Yes sir.
3. Q. Toward the other end.
4. A. Yes sir.
5. Q. Now, you were not able to determine as a fact whether or
6. not the brakes had actually been applied at the moment
7. the slide marks started, were you?
8. A. No.
9. Q. Did Mr. White tell you that he had been knocked uncon-
10. scious?
11. A. I don't recall.
12. Q. He may have, you just don't remember?
13. A. No sir, I don't recall.
14. Q. Now, this road is, as you travel eastbound towards Waynes-
15. boro, the road is downhill that way, isn't it?
16. A. At the point of this accident it's more or less a hill-
17. crest. It's just very slightly going down at that point.
18. Q. Just after you come over a hillcrest and slightly going
19. down?
20. A. Yes sir.
21. Q. It falls off more after that?
22. A. Yes sir.
23. Q. And it bears around to the right?
24. A. Yes sir, going eastbound.

1. Q. That's going toward Waynesboro you bear around to the  
2. right?
3. A. Yes sir.
4. Q. And the road is slightly banked at that point, isn't it?
5. A. Just slightly, yes sir.
6. Q. You found no marks to indicate any braking by the motor-  
7. cycle, did you?
8. A. No sir.
9. Q. And you found no marks indicating any braking by the  
10. automobile unless perhaps it might have been as part and  
11. parcel of the skid marks about which you have already tes-  
12. tified while the vehicle was out of control?
13. A. No sir.
14. Q. That's not correct or it is correct?
15. A. That is correct.
16. Q. Now, in looking at the damage to Mr. White's car, it  
17. did appear that the motorcycle rode up and into and onto  
18. the fender of the car, didn't it?
19. A. Yes sir.
20. Q. And it pushed the fender out; this would be the left  
21. front fender, pushed it out and away from the car to some  
22. degree.
23. A. Yes sir.
24. Q. And do you know whether or not the tire was flat when



1. you examined the car?

2. A. I don't recall right now.

3. Q. Did you have occasion to examine the car to determine  
4. whether there was any damage to the frame or to the  
5. suspension system or steering mechanism in Mr. White's  
6. car?

7. A. No sir, I didn't.

8. Q. And you indicated that the fender was pushed down some  
9. from the motorcycle being up there, but it has been push-  
10. ed down some on the tire, is that correct?

11. A. Yes sir.

12. Q. But you could not ascertain how much pressure there would  
13. have been on that?

14. A. No sir.

15. Q. As the result of your investigation you found no evidence  
16. or rather you found no witnesses to the occurrence other  
17. than Mr. White?

18. A. No sir.

19. Q. And this accident occurred on August 23rd and you have  
20. set the time at approximately 4:45. How did you deter-  
21. mine that?

22. A. The rescue squad received the call at 4:50. The people  
23. who live in the house that this private drive was con-  
24. nected to, they said that they heard the accident and saw

1. that the boy was down there and ran up and called the  
2. rescue squad immediately.

3. Q. Didn't they call the state police about 4:45?

4. A. Yes sir.

5. Q. Now, was this a sunny day?

6. A. Yes sir.

7. Q. And is the road at the point where this occurrence took  
8. place generally in an east/west direction?

9. A. Yes sir.

10. COURT: All of the exhibits which have been marked and  
11. referred to are admitted in evidence.

12. MR. WELSH: They are numbered consecutively one through  
13. twenty-four.

14. COURT: They will be admitted as Plaintiff's Exhibits  
15. #1 through #24.

16. MR. WELSH: That's all the questions I have.

17.

18. Re-Direct Examination by Mr. Willetts:

19. Q. Trooper, just one question. In response to Mr. Welsh's  
20. question you said it appeared that the roll bar appeared  
21. to be dragged down the pavement. Did it appear that the  
22. motorcycle, or is that what you're speaking of, the motor-  
23. cycle, was dragged down the pavement?

24. A. Yes sir.

1. Q. And it ended up under the car?
2. A. Yes sir.
3. Q. Where the car stopped.
4. A. Would you repeat the question, please.
5. Q. Well, the motorcycle ended up under the car, is that
6. right?
7. A. Yes sir.
8. Q. You testified earlier there were some scratch marks that
9. didn't really show in the photo; but you do recall scratch
10. marks from the gouge mark down to where the motorcycle
11. came to rest?
12. A. A scratch mark went from the gouge mark down to where
13. the vehicle went over into the gravels and then I
14. couldn't . . .
15. Q. Was that scratch mark uninterrupted?
16. A. Yes sir.
17. Q. Did you ask Mr. White when he first saw the motorcycle?
18. A. No sir.
19. Q. Did you ask him if there was any reason why he didn't
20. see it?
21. A. No sir.
22. Q. Did he ever tell you the motorcycle was on his side of
23. the road?
24. A. No sir.

1. that what you believe?

2. MR. WILLETTTS: Yes sir.

3. COURT: That he was driving fourteen and a half hours  
4. in a twenty-four hour period?

5. MR. WILLETTTS: In a twenty-four hour period. Yes.

6. MR. WELSH: The evidence would be, Your Honor, that he  
7. drove from Waynesboro . . .

8. COURT: Well, let's do this. I'll rule that you can  
9. go into that twenty-four hour period prior to the acci-  
10. dent. If it turns out that driving for that length of  
11. time isn't established, then it would be ruled that that  
12. instruction wouldn't be given. If that's what actually  
13. comes out. I don't guess we can decide whether it be  
14. eleven and a half or fourteen and a half or whatever un-  
15. til we hear the evidence. Things before the twenty-four  
16. hour period are remote and would not be relevant.

17. (Jury Returns to Courtroom)

18. Q. Mr. White, would you tell the jury where your employer's  
19. place of business is located or what point you generally  
20. check in and out of as a truck driver?

21. A. It's over there right off of 254. I don't remember the  
22. road number.

23. Q. How far is it approximately from the point where this  
24. accident happened?

1. A. About four and a half, five miles.

2. Q. And would you tell the jury, were you familiar with this  
3. particular stretch of road?

4. A. Well, I had drove it from February until August, so I  
5. guess fairly familiar.

6. Q. Tell the jury, if you will, what the visibility is like  
7. at the general location of the accident scene?

8. A. It's good both east and west.

9. Q. Now, Mr. White, tell the jury, if you will, you were  
10. driving a tractor for Shenandoah Recycling; is that  
11. right?

12. A. That's right.

13. Q. Now, the day prior to the accident, which I believe was  
14. Monday, could you tell the jury where you were in Flor-  
15. ida?

16. A. On Monday I was in Tampa, Florida. Monday morning.

17. Q. You were in Tampa, Florida?

18. A. Yes.

19. Q. And how far is Tampa, Florida roughly from Waynesboro  
20. and your point of . . .

21. MR. WELSH: Your Honor, we are going outside of the  
22. twenty-four hour period.

23. COURT: Rephrase the question.

24. Q. You were in Tampa, Florida and you left Tampa, Florida

1. and drove to what point?

2. A. I drove to Wildwood to begin with.

3. Q. And what time did you arrive in Wildwood, Florida?

4. A. About four o'clock, I'd say.

5. Q. Four o'clock. And what did you do in Wildwood?

6. A. Fueled up, changed clothes, cleaned up and got something  
7. to eat.

8. Q. And what time did you leave Wildwood?

9. A. Roughly about six, I imagine.

10. Q. Now, Mr. White . . .

11. A. I can't remember exactly.

12. Q. Do you remember taking your deposition under oath?

13. A. Yes.

14. Q. On September 20, 1978?

15. A. That's right.

16. Q. Do you remember my asking you about this trip? I asked  
17. you on page 74 of the deposition . . .

18. MR. WELSH: What line?

19. A. Page 74, line 14--well, back up to line 12. That would  
20. put you at the truck stop at about four thirty to five  
21. or something similar to that. Three thirty or four is  
22. your answer. The question was, Three thirty or four  
23. o'clock. Something like that.

24. MR. WELSH: Your Honor, I object. I think the answer

1. should be read just exactly as he gave his answer, as  
2. opposed to reversing it. Because it's very different.  
3. He answered the question . . .

4. COURT: All right, read exactly what it is.

5. Q. The question is, "At three thirty or four o'clock?"  
6. Answer, "Something like that."

7. MR. WELSH: Just a minute.

8. MR. WILLETTS: I'm reading at page 74, lines 15 and 16.

9. MR. WELSH: You started at line 12 though. You revers-  
10. ed the answer on line 14.

11. COURT: Let me suggest you go up to line 12 and start  
12. there and bring it on down.

13. Q. Question, "That would put you at the truck stop at about  
14. what, four thirty or five?" Answer, "Something similar  
15. to that, about three thirty or four." Question, "Three  
16. thirty or four o'clock?" Answer, "Something like that."  
17. Question, "The truck stop is in Wildwood?" Answer, "Yes."  
18. Question, "And that's still in Florida?" And the answer  
19. is "Yes." Question, "All right, what did you do, eat  
20. there?" Answer, "Ate there and filled up and left there.  
21. I don't know what time it was." Question, "What would be  
22. your best guess be, your time to eat and clean up and  
23. fuel up?" Answer, "I'd say not much over an hour."  
24. Question, "That would put you at five or five thirty

1. approximately." Answer, "Yes." Is that your testimony  
2. then?
3. A. Yes sir.
4. Q. Now, after you left Wildwood, Florida would you tell the  
5. jury what kind of vehicle you were driving? And where  
6. you drove to.
7. A. It was a 1969 Mack tractor pulling a flatbed truck.  
8. We drove to--is that what you want, where we drove to?
9. Q. Yes sir.
10. A. Up on 220, I'd say about an hour's driving out of Greens-  
11. boro. We stopped there and slept. We slept there and  
12. then when I left from there . . .
13. Q. When you got to Greensboro, what time would you tell the  
14. jury that you got to Greensboro.
15. A. I said about an hour out of Greensboro, about two o'clock.
16. Q. About 2:00 A.M.
17. A. I think that's what I told you, isn't it?
18. Q. Yes. And then in Greensboro what did you do?
19. A. Well, we pulled over at a wayside and I slept there for  
20. four hours.
21. Q. Four hours, until 6:00 A.M.
22. A. And when I left from there I came home, drove on into  
23. home.
24. Q. When you drove home, what time did you arrive at your



1. home?

2. A. I got home, I think it was about eleven o'clock in the  
3. morning.

4. Q. Eleven o'clock in the morning. Now, where is your house,  
5. so the jury knows.

6. A. That's over at Afton, over on 151.

7. Q. And what did you do when you got home?

8. A. Well, I took a shower and shaved and cleaned up, changed  
9. clothes there, and I left there about two, or something  
10. like that, and brought the truck over to the shop.

11. Q. How long did it take you to drive from your house to the  
12. shop in the truck?

13. A. From Afton to Staunton it's forty-five minutes or something  
14. like that.

15. Q. And that put you to the shop about what time?

16. A. I left home about two; around a quarter to three to three  
17. o'clock.

18. Q. Now, who was with you on the trip?

19. A. My son.

20. Q. And how old is he?

21. A. Well, he's seventeen now.

22. Q. When you stopped in Greensboro, you slept for four hours?  
23. Is that your testimony?

24. A. That's what I told you.

1. Q. And where did you sleep?

2. A. Well, I got in the sleeper. The tractor had a sleeper  
3. on it.

4. Q. What about your son?

5. A. Well, he laid across what we call the dog house; across  
6. the motor, it's flat and you can lay across there.

7. Q. Then you got up at six and came on into the . . .

8. A. To home.

9. Q. To home and then on to the shop.

10. A. Right.

11. Q. Did your son ride with you over to the shop?

12. A. No, he stayed at home.

13. Q. What did he do?

14. A. At home? I don't know, I don't remember.

15. Q. What kind of time do you average in that truck on the  
16. road?

17. A. That old truck, I don't know, forty-five mile an hour  
18. probably if you're lucky.

19. Q. Now, you got to the shop, Mr. White, and after you got to  
20. the shop what did you do?

21. A. I fueled the tractor up and parked around behind the  
22. shop, and then got in my car and got ready to go home.

23. Q. And what kind of car were you operating?

24. A. A 1973 Mercury Cougar.

1. Q. You have seen these pictures before, and I just ask you  
2. if this is a picture--these pictures here, which is  
3. picture #18 and #19, is that your car?

4. A. That's it.

5. Q. And is that the car after the accident?

6. A. Yes sir.

7. Q. In which direction is it pointing?

8. A. It's going westbound.

9. Q. You were traveling eastbound before the accident, is  
10. that correct?

11. A. That's right. That's towards Waynesboro.

12. Q. And after the accident, Mr. White, did you have occasion  
13. to examine the front of the car?

14. A. Not to any extent. I went down to where Landis had it  
15. down at Verona on the day after the accident.

16. Q. And what did you find to be wrong with the front end?

17. A. The left front tire was flat and the frame was cracked.  
18. To the best of my knowledge it was cracked over the wheel.  
19. Of course, the windshield.

20. Q. What about the suspension?

21. A. I didn't check it that close.

22. Q. Didn't you testify in your earlier deposition that the  
23. suspension was broken behind the left tire?

24. A. I said the frame, I'm pretty sure. I might have said

1. the suspension.

2. Q. On page 98, Mr. White, of your depositions under oath on  
3. September 20th, I asked you the question, this is line  
4. 22. "Did you make any investigation of the car at the  
5. time?" Answer, "Well, I checked the left front and the  
6. suspension under there was broke." Do you remember making  
7. that statement?

8. MR. WELSH: Will you read the rest of his answer.

9. Q. "You know, the cross piece right back of the wheel. And,  
10. if I recall, the left front tire was flat. But other  
11. than that, no, I didn't make no investigation."

12. A. Wouldn't that cross piece be considered the frame?

13. I mean, I'm no mechanic. I don't know that much about  
14. a vehicle.

15. Q. Well, today, if I understand what you're saying, you say  
16. the frame was cracked.

17. A. Well, broke, cracked; I mean, you know, I meant the same  
18. thing. It was broke.

19. Q. Can you show the jury, Mr. White, in these pictures of  
20. your car what you are talking about?

21. A. I don't know exactly. The frame was cracked in behind  
22. the wheel, or broke, whatever you want to call it.

23. Q. Where did it hook to; what do you mean when you say it  
24. was cracked?

1. A. Like I tell you, I'm no mechanic. I don't know what it  
2. hooked to because I didn't check it that close. I just  
3. know it was cracked, broke, or whatever you want to call  
4. it.

5. Q. Now, just for my information, broke to me means something  
6. is completely broken; and cracked means something that's  
7. just got a crack. Are you saying it was completely  
8. broke?

9. A. I guess so. It's been so long ago that I don't remember  
10. exactly.

11. Q. And that was in behind the tire?

12. A. Yes sir, I guess so.

13. Q. Now, Mr. White, as you traveled on the road in an easter-  
14. ly direction, the sun would have been to your back, is  
15. that correct? At four o'clock in August, were we still  
16. on daylight savings time?

17. MR. WELSH: It was a quarter of five.

18. Q. A quarter of five. Were we still on daylight savings  
19. time?

20. A. As far as I know.

21. Q. It was plenty of daylight, I mean, it was clear and  
22. there's no question about that, the roadway was clear.

23. A. Yes sir.

24. Q. Dry pavement?

1. A. Dry pavement.
2. Q. Now, will you tell the jury when you first saw the motor-
3. cycle?
4. A. Like I told you, I first saw the motorcycle just about
5. on impact. And after that I was threw into the wind-
6. shield and that's the last I remember until the car
7. had stopped.
8. Q. When you saw the motorcycle it was just about the point
9. of impact, those are your words, is that correct?
10. A. I don't know where he came from.
11. Q. Now, after the impact, what happened?
12. A. Well, as I remember it, he went up on the car and I
13. went into the windshield.
14. Q. You saw him come up on the car?
15. A. Something came up on the car. I figure it was him or
16. the motorcycle, you know.
17. Q. You thought it was him, you mean Mr. Miller?
18. A. Mr. Miller. Then I was thrown into the windshield.
19. Q. Now, you were thrown into the windshield. Did you raise
20. up out of your seat and go into the windshield?
21. A. That I don't remember.
22. Q. Well, could you reach the windshield without coming out
23. of your seat?
24. A. Well, it got me in the top of the head, so . . . I guess

1. it could have.
2. Q. Did you lose your grasp on the steering wheel?
3. A. I lost the car.
4. Q. You lost the car at that point?
5. A. From impact I don't remember a thing, like I said, until
6. I got out.
7. Q. Now, after losing the car, do you know what it did?
8. A. I couldn't say for sure, no.
9. Q. The car ended up pointing back in the same direction
10. Mr. Miller was coming, is that correct?
11. A. Yes sir.
12. Q. When you saw the bike at impact, it was upright?
13. A. As far as I could say, yes sir.
14. Q. Apparently proceeding in a westerly direction?
15. A. As far as I know.
16. Q. There didn't seem to be anything unusual about it?
17. A. You mean about the bike?
18. Q. Yes sir.
19. A. Not that I could see.
20. Q. Now, will you tell the jury, Mr. White, when you last
21. remember, were conscious, of the lines dividing the
22. highway.
23. A. Well, I guess just as I came over--there's a slight hill
24. there, right?

1. Q. Yes sir.
2. A. Just as I came over that hill there.
3. Q. Were you conscious of the line itself?
4. A. I couldn't say.
5. Q. You couldn't say. And do you know what lane the motor-
6. cycle was in?
7. A. I know what lane I was in.
8. Q. Well, I want to ask you first, do you know what lane the
9. motorcycle was in?
10. A. Well, if I had been in my lane and we hit head on, the
11. motorcycle would have had to have been on my side.
12. Q. With the motorcycle proceeding in a westerly direction,
13. Mr. White, the visibility was clear, there was no ob-
14. struction; can you tell the jury why you never saw the
15. motorcycle?
16. A. I couldn't say until the point of impact. That was the
17. first time I seen it.
18. Q. In other words, as you were driving in this direction,
19. you can't tell the jury where the motorcycle--you never
20. saw it until the point of impact?
21. A. That's right.
22. Q. And at that point you hit your head on the windshield
23. and lost the car; is that right?
24. A. Right.



1. Q. Your last recollection, as I understand it, of the yellow  
2. line was as you entered the curve.
3. A. At the top of the hill, the slope on the hill.
4. Q. Can you explain to the jury why you told the trooper that  
5. you think you were on your side?
6. A. Well, at the time, the way I was bleeding, the way I was  
7. injured, I don't actually recall what I told the trooper.
8. Q. You don't deny telling the trooper--his recollection and  
9. his notes indicate that you told him you thought you were  
10. on your side.
11. A. No, I can't deny because I was injured and, you know, I  
12. could have said it.
13. Q. When you say the motorcycle must have come out of nowhere,  
14. what do you mean by that?
15. A. Because I would have seen it before the impact.
16. Q. You would have seen it before the impact except for the  
17. fact that it came out of nowhere.
18. A. That's the best I know. I still haven't figured out how  
19. it happened.
20. Q. Can you tell the jury whether or not you hit the brakes  
21. before impact?
22. A. No sir, I couldn't say. From all the evidence, I didn't.
23. Q. Now, Mr. White, I asked you in the deposition, page 88;  
24. of course these depositions were taken in September of

1. 1978 which was thirteen months after the accident. Is  
2. that right?

3. A. Yes sir.

4. Q. I asked you in your deposition, line 14, "When do you last  
5. remember seeing the center line before impact?" Answer,  
6. "I couldn't tell you, because riding along, you know,  
7. you look down at it, you look through the front at it,  
8. I usually ride to the shoulder, you know, stay off the  
9. line as much as I can." Question, "Do you last remember  
10. seeing the center line before impact?" Answer, "I guess  
11. so." Question, "Do you remember when?" Answer, "Well,  
12. I'd say just before the impact if I was on my side of the  
13. road."

14. MR. WELSH: Your Honor, I object to the reading of it  
15. that way and the accenting of it in that fashion. That's  
16. not necessarily how the witness spoke the answer, and  
17. it's not underlined in the deposition.

18. MR. WILLETTS: Isn't that a fair . . .

19. MR. WELSH: You verbally accented the if.

20. Q. Isn't that what you said at those depositions, Mr. White,  
21. "if" you were on your side.

22. A. I don't remember, but I guess it was.

23. Q. That's thirteen months later, is that right?

24. A. Yes.

1. Q. And that's after you had a chance to talk to your attor-  
2. ney and your counsel was there when I asked you that  
3. question. Isn't that true?

4. A. Yes sir.

5. Q. Now, Mr. White, you are familiar with this route and you  
6. have told the jury that it's good visibility, it's nothing  
7. to obstruct a motorcycle coming towards you from Waynes-  
8. boro. Now, you and I know the motorcycle didn't come  
9. out of nowhere, it had to be there. Isn't that true?

10. A. All I know is just like I told you. I didn't see it un-  
11. til the point of impact and I was on my side of the road.

12. Q. Well, weren't you watching up the road?

13. A. Yes sir.

14. Q. I mean, weren't you looking ahead of you as you were  
15. on your way home?

16. A. Yes, but I didn't see the motorcycle until the point of  
17. impact.

18. Q. And at the point of impact you lost recollection and  
19. don't know what happened after that. Is that correct?

20. A. That's right because it threw me into the windshield.

21. Q. But your explanation to the jury is that the motorcycle  
22. came out of nowhere and that's why you didn't see it.

23. A. Well, like I told you before, I told you the truth,  
24. that I did not see it until the point of impact, and I

1. was on my side of the road.

2. Q. Was there any reason why you didn't see it as it approach-  
3. ed you?

4. A. Not that I recall.

5. Q. There was no reason at all why you didn't see it.

6. A. I just don't know how it happened. I've said that and I  
7. still say it.

8. Q. I understand that, but I mean the point is, it didn't  
9. come out of nowhere.

10. A. Well, where did it come from?

11. Q. It came up the road, didn't it?

12. A. Yeah, but I mean he could have been on my side of the  
13. road, couldn't he?

14. Q. But you didn't see him on your side of the road.

15. A. I seen it at the point of impact. That's all I can tell  
16. you.

17. Q. And yet thirteen months later in my office under oath you  
18. said, "If I was on my side of the road."

19. MR. WELSH: Your Honor, I object to that. He's taking  
20. a clause out of context out of a statement that was read.  
21. And there is a clear lead-in on the thing, and I think  
22. that if he's going to testify by that he ought to go back  
23. and begin where we talk about--where he goes back on  
24. page 87 where the question, beginning at line 19, and

1. read the entire series of questions as you lead into this  
2. thing.

3. COURT: I'll allow the question and allow you to ex-  
4. plore this point.

5. Q. You said, "If I was on my side of the road," didn't you?  
6. Thirteen months later.

7. MR. WELSH: Your Honor, I object to that.

8. COURT: I think we're arguing the case.

9. MR. WELSH: He's trying to impeach a witness he has  
10. called himself.

11. MR. WILLETTS: As an adverse witness, Mr. Welsh.

12. MR. WELSH: The witness said that if that's what's writ-  
13. ten down, that's what he said. And he's never questioned  
14. it. Now, how can he badger his own witness.

15. MR. WILLETTS: I will rephrase the question, Your Honor.

16. Q. Mr. White, all I'm asking you is, is it your explanation  
17. to this jury that the reason you didn't see the motor-  
18. cycle before impact was it came out of nowhere?

19. A. Yes sir.

20. Q. You will not say to the jury that you could have been  
21. looking off of the road and let your car drift as you  
22. approached this curve?

23. A. No sir.

24. Q. You don't think you dozed off?

1. A. I know I didn't.

2. Q. You know, Mr. White, this road, if you look at these  
3. photos, I just want to call your attention particularly  
4. to photo #16. This is the direction you were going,  
5. is that right?

6. A. On the eastbound.

7. Q. Eastbound, and this is the westbound lane. And as you  
8. approach the point where this accident happened, if you  
9. don't make that slight curve you drift over into the on-  
10. coming lane.

11. A. But the westbound side also slopes down. That could drift  
12. down too, couldn't it?

13. Q. The point is, if you don't make that curve, wouldn't you  
14. drift over into that lane?

15. A. I guess you would, I'm not sure.

16. Q. Do you think, Mr. White, in this case you had been driv-  
17. ing out of the last twenty-four hours, you had been driv-  
18. ing fourteen or fifteen hours, you only had four hours  
19. sleep in the back in the sleeper, and as you went in and  
20. checked out with your car and approached the scene, as  
21. you came to the curve the reason you didn't see the bike  
22. is because you were dozed off or let your attention go  
23. to something else, you drifted into the oncoming lane,  
24. and hit the bike here where these gouge marks are; you

1. were thrown to the top of the car into the windshield,  
2. the car swapped ends from the impact . . .

3. MR. WELSH: Your Honor, I object to that question. It  
4. is argumentative, it's . . .

5. A. No sir, I don't believe I did. I said I was on my side  
6. of the road and the point of impact couldn't have been  
7. the gouge marks. In other words, you're saying I went  
8. to sleep or something. No.

9. Q. Were you paying attention to anything else?

10. A. No, nothing that I know of.

11. Q. And you didn't go to sleep?

12. A. No.

13. Q. But you didn't see the motorcycle.

14. A. Didn't see it until the point of impact. I've said it  
15. before and I still say it.

16. Q. You say you saw the boy coming up over the car?

17. A. At the point of impact it was something, him or the  
18. motorcycle, and that's the last I remember.

19. Q. He actually landed up the road a little ways--if the point  
20. of impact is right in here, he actually landed . . .

21. MR. WELSH: Objection, Your Honor.

22. MR. WILLETTS: All right, strike that.

23. Q. The gouge marks are right here, Mr. White. The car is  
24. back down here and the motorcycle is back down here and

1. the boy is right here.

2. A. I don't know where--all I know is he landed up the road.

3. Q. Behind you?

4. A. I never did get to look at him.

5. Q. But he landed west of the point where your car ended up  
6. and where the gouge marks were, is that correct?

7. A. Yes.

8. Q. As you remembered the motorcycle just before impact, it  
9. was upright and appeared to be under control?

10. A. Just like I told you before, as well as I remember.

11. Q. And it was headed in a westerly direction.

12. A. Yes sir.

13. Q. Now, your statement is, Mr. White, that you didn't do  
14. any steering after impact. You lost the car?

15. A. Well, it's just like I said, as far as I know I didn't.

16. Q. You lost the car?

17. A. I was thrown into the windshield and that's the last I  
18. remember.

19. MR. WILLETTTS: That's all the questions I have.

20.

21. Cross Examination by Mr. Welsh:

22. Q. Mr. White, beginning at page 87 of your deposition, the  
23. plaintiff's attorney was asking you some questions, and  
24. beginning at line 19 on page 87, there was a question



1. asked, "As you entered the curve you didn't see the  
2. motorcycle?" Answer, "I didn't see the motorcycle until  
3. just before the point of impact . . ."

4. MR. WILLETTS: What line?

5. MR. WELSH: Beginning at line 19.

6. Q. "I didn't see the motorcycle until just before the point  
7. of impact and he was right on me and I was on my side of  
8. the road." You made that statement, didn't you?

9. A. Yes sir.

10. Q. And the next question was, "At that point where was the  
11. motorcycle with regard to the yellow line." Answer, "I  
12. don't remember." Question, "You say you were on your  
13. side of the . . ." Answer, "Because I wasn't thinking  
14. about all of those things like that, you know." Question  
15. "You say you were on your side of the road, where was  
16. your car with regard to the center line?" Answer, "Well,  
17. I don't know how you usually drive, about that far from  
18. the center (indicating)." Question, "Do you recall  
19. whether or not you were any measurable distance inside  
20. the center line?" Answer, "I don't recall, I couldn't  
21. say." Question, "You couldn't say?" Answer, "No."  
22. Question, "When do you last remember seeing the center  
23. line before the impact?" Answer, "I couldn't tell you  
24. because riding along, you know, you look down at it, you

1. look through the front of it at it, you usually ride to  
2. the shoulder anyway, you know, stay off the center line  
3. as much as you can." Question, "Do you last remember  
4. seeing the center line before the impact?" Answer, "I  
5. guess so." Question, "Do you remember when?" Answer,  
6. "Well, I'd just say before the impact if I was on my  
7. side of the road." Is that the whole series of questions  
8. dealing with this center line that were asked at that  
9. time?
10. A. Yes sir.
11. Q. Is your testimony here today any different from that?
12. A. None that I can see.
13. Q. Now, as you traveled along driving the truck, there are  
14. requirements about the number of hours you may drive in  
15. any day, is that correct?
16. A. Yes sir.
17. Q. And how many hours may you drive?
18. A. Ten hours--well, in Virginia it's about thirteen, it's  
19. usually ten, within twenty-four.
20. Q. It varies from state to state?
21. A. Yes sir.
22. Q. Now, is there a requirement that you stop and rest after  
23. so many hours?
24. A. You can drive five hours and stop for one hour and then

1. five more hours.

2. Q. You left down in Wildwood somewhere around five or six  
3. o'clock, is that correct?

4. A. Yes sir.

5. Q. Now, did you stop on the way before you had driven all  
6. the way to Greensboro?

7. A. I stopped about two o'clock, like I stated before.

8. Q. I mean did you stop somewhere in that--you drove from  
9. about five o'clock or six o'clock.

10. A. I stopped for fuel one time.

11. Q. All right, did you stop and rest at that time?

12. A. I . . .

13. Q. In other words, take a break.

14. MR. WILLETTS: Your Honor, I think he's leading the  
15. witness.

16. COURT: Go ahead with your question.

17. Q. Did you take a break at that time?

18. A. Long enough to fuel and get a couple of drinks.

19. Q. Was that the break that you are required to take?

20. A. Yes.

21. MR. WILLETTS: Your Honor, I'm going to object again.  
22. He's leading the witness. The witness said he didn't  
23. stop, he told me he didn't stop, under oath. That he  
24. drove from Wildwood, Florida into just below Greensboro

1. without any stop. He never mentioned any rest break in  
2. the depositions, Your Honor.

3. MR. WELSH: You didn't ask him about it.

4. COURT: I don't think the question was asked.

5. MR. WELSH: That's precisely why the question wasn't  
6. asked, and that's why I'm asking him to go into it at  
7. this time.

8. COURT: Go ahead.

9. Q. So you stopped for fuel and to get a bite to eat, and  
10. whatnot, is that correct?

11. A. Yes.

12. Q. Do you know about how long you were stopped?

13. A. Roughly about a half an hour.

14. Q. Do you know of any reason why the motorcycle never saw  
15. you?

16. A. No sir.

17. Q. He had equally good visibility?

18. A. Yes sir.

19. Q. The plaintiff's attorney has asked you a bunch of ques-  
20. tions speculating about how this accident occurred and  
21. claiming that you lost attention or drifted or went to  
22. sleep. It's certainly possible that the same thing hap-  
23. pened to . . .

24. MR. WILLETTS: Your Honor, I'm going to object to ask-

1. ing for a conclusion from the witness.

2. COURT: I'll sustain it.

3. MR. WILLETTS: Thank you, Your Honor.

4. Q. All right, I'll ask the question this way. Could the  
5. other driver have also . . .

6. MR. WILLETTS: Your Honor, I am going to object again.  
7. I object for this reason, we are entitled to an instruc-  
8. tion that the deceased is presumed to have used self  
9. preservation and done everything to prevent the thing.  
10. Mr. White has already testified that the motorcycle ap-  
11. peared to be upright, traveling in a westerly direction  
12. and there wasn't anything wrong with him.

13. MR. WELSH: And on the wrong side of the road.

14. MR. WILLETTS: He did not testify he was on the wrong  
15. side of the road.

16. COURT: Let's not argue that. Rephrase the question  
17. so we can deal with the circumstances.

18. Q. Do you know whether or not the motorcycle operator was  
19. paying attention or not?

20. A. No sir.

21. Q. Do you know whether he let his motorcycle drift?

22. MR. WILLETTS: Your Honor, I'll object again. Mr.  
23. White has already testified that he didn't see the motor-  
24. cycle until impact.

1. COURT: I'll sustain the objection. I don't think this  
2. witness is able to answer that question. You can answer  
3. the question if you know.

4. Q. When you--did you have occasion to look for your old  
5. log books from when you were driving to see if you had  
6. any log books?

7. A. Yes sir, I called Shenandoah Recycling and the dispatcher  
8. said they had done away with them. The time was up on  
9. them or something.

10. Q. Did you also keep a set of your own for awhile?

11. A. The driver is required to keep them for thirty days,  
12. thirty days after he starts a new log book; and naturally  
13. mine was gone.

14. Q. So, as a result, you are not--are you able to say defi-  
15. nitely the times that you started or made these stop in-  
16. tervals on your trip?

17. A. Not to the exact minute, no.

18. Q. These are your best guesses and approximations?

19. A. Yes sir.

20. Q. Would you tell the jury one more time where your vehicle  
21. was at the time of this accident?

22. A. My vehicle was on my side of the road.

23. MR. WELSH: Thank you.

24. MR. WILLETTS: Your Honor, I would object to that ques-

1. tion. I think Mr. White has already testified that he  
2. last saw the center line before he got to the point of  
3. impact.

4. COURT: Gentlemen, I think it came out several differ-  
5. ent ways, and I would not overrule the question.

6.

7. Re-Direct Examination by Mr. Willetts:

8. Q. Mr. White, just a couple of questions. I asked you on  
9. page 74 in talking about this trip up from Wildwood,  
10. line 14. Question, "That would put you at the truck stop  
11. at about 4:35." Answer, "Something similar to that,  
12. about three thirty or four." Question, "Three thirty or  
13. four o'clock?" Answer, "Something like that." Question,  
14. "The truck stop is at Wildwood?" Answer, "Yes." Ques-  
15. tion, "That's still in Florida?" Answer, "Yes." Ques-  
16. tion, "All right, what did you do, eat there?" Answer,  
17. "Ate there and fueled up and left there, I don't know what  
18. time it was." Question, "What would be your best guess  
19. for the time for you to clean up and fuel?" Answer, "I'd  
20. say not much over an hour." Question, "That would put  
21. you at five or five thirty approximately?" Answer, "Yes."  
22. Question, "Then what did you do?" Answer, "Left from  
23. there and took a shortcut coming back. We stopped that  
24. morning, it was in North Carolina I think it was. We

1. slept about four hours." Question, "You say you took a  
2. shortcut from Wildwood, do you remember what route it  
3. was?" Answer, "We came back up I think it was 220 com-  
4. ing back up, it brings you out in Greensboro, it comes  
5. up that way." Question, "Is that where you stopped in  
6. North Carolina?" Answer, "Greensboro, just below Greens-  
7. boro. And then we stayed there for about four hours."  
8. Question, "So you drove from Wildwood to just below  
9. Greensboro Monday night or Tuesday morning, I take it?"  
10. Answer, "It was about two in the morning when we stopped.  
11. It wouldn't have been close to Greensboro, I'd have to  
12. go back to the map, you know, and check definitely where  
13. it was, but I know we stayed there about three or four  
14. hours." Question, "Okay, now, you think it was somewhat  
15. below Greensboro, can you give me a best estimate of where  
16. you were below Greensboro?" Answer, "It was about an hour  
17. or something out of Greensboro. So, figure that roughly,  
18. in that old truck about fifty miles or something like  
19. that." You didn't mention anything about any other stop  
20. between Wildwood . . .
21. A. You didn't ask me. I had to stop one time to buy more  
22. fuel before that time I stopped and went to sleep.
23. Q. And you slept four hours, is that right?
24. A. That's what you've got there, yes sir.



1. Q. And that's the only sleep you had in the twenty-four  
2. hour period prior to the accident?

3. A. That four hours.

4. Q. During that twenty-four hour period you were on the road---  
5. is it not true that you were on the road something over  
6. fourteen hours?

7. A. From two o'clock Monday . . .

8. Q. Let's back up. You left Wildwood at 5:00 P.M. and drove  
9. until 2:00 A.M. Is that right?

10. A. Yes.

11. Q. That's a total of how many hours; nine hours?

12. A. Except for the fuel stop.

13. Q. Then you stopped at 2:00 A.M. and slept for four hours  
14. until 6:00 A.M. Is that right?

15. A. Yes sir.

16. Q. You got up at 6:00 A.M. and drove into Waynesboro, and  
17. you got to Afton at 11:00. Is that right?

18. A. Yes sir.

19. Q. From six to eleven is five hours, isn't it?

20. A. Yes.

21. Q. Then you left Afton and drove over here, which is another  
22. forty-five minutes. Is that correct?

23. A. That's right, but I had been off then. I had been home  
24. from eleven until the time I left home.

1. Q. The point is, even by these estimates you were on the  
2. road fourteen hours and forty-five minutes. And you say  
3. now that there was another fuel stop in between there,  
4. somewhere between Wildwood and Greensboro; but you were on  
5. the road fourteen hours and forty-five minutes. Isn't  
6. that correct?

7. MR. WELSH: Your Honor, he gave the figure. His testi-  
8. mony today was it was six o'clock when he left at Wild-  
9. wood, and in the series of questions asked in the other  
10. depositions he had originally said about five thirty or  
11. so, and then the question of the timing and he came to  
12. five or five thirty, and now we're back up to five o'clock.  
13. And I submit that that's an unfair characterization.

14. COURT: Gentlemen, the testimony that I recall, he said  
15. it was six o'clock. Let's get the questions out as to  
16. what he did and when he did it, and then the arguments  
17. and the mathematics of it we can leave for argument before  
18. the jury.

19. Q. Well, just one question then on that point. When you  
20. left Wildwood you don't deny, Mr. White, that in your  
21. depositions under oath on September 20th when I asked  
22. you what would be your best guess as to your time to  
23. eat and to clean up and fuel up. Answer, "I'd say not  
24. much over an hour." Question, "That would put you at

1. five or five thirty approximately." Answer, "Yes."

2. MR. WELSH: Your Honor, I think we ought to include his  
3. original answer to this thing.

4. MR. WILLETTS: Okay, let me do that.

5. MR. WELSH: We've gone over this, Your Honor, twice now  
6. and I submit that it's been hashed over and over on this  
7. thing.

8. MR. WILLETTS: I think it's a critical point, Your  
9. Honor.

10. MR. WELSH: He's impeaching his own witness on time  
11. here today . . .

12. MR. WILLETTS: He was called as an adverse witness, Mr.  
13. Welsh.

14. COURT: Wait a minute, gentlemen. Where do you pro-  
15. pose to start from?

16. MR. WILLETTS: Your Honor, I propose to start from line  
17. 10.

18. MR. WELSH: On page what?

19. MR. WILLETTS: On page 74.

20. COURT: I think the last time you started at line 12.  
21. Is this not just repetition?

22. MR. WILLETTS: Well, the point is, Your Honor, I sug-  
23. gested that Mr. White got to the Wildwood Truck Stop  
24. between four thirty and five, and Mr. White in answer

1. Q. Yes.

2. A. Well, nothing other than--you know, any family has prob-  
3. lems at times; but basically we didn't have any problems.

4. Q. Tell the jury how much money you spent on the funeral  
5. expenses?

6. A. I believe the funeral was about twenty-one hundred dol-  
7. lars; \$2,111.00 or something like that.

8. Q. After the accident, Mr. Miller, did you have occasion to  
9. go out to the scene yourself?

10. A. I went out the next day with some of the family.

11. Q. Did you view the scene as it's shown here in this photo-  
12. graph, which we have marked as Exhibit #1?

13. A. Yes, I did.

14. Q. Is that the scene as you recall it that day?

15. A. Yes.

16. Q. I would ask you, Mr. Miller, with regard to--this is  
17. Exhibit #1--with regard to this white piece of paper here  
18. which we have identified early on as a paper cup. Is  
19. that the point where the right front tire marks started?

20. MR. WELSH: Objection. Unless he can establish that  
21. he was there and visualized it or the car was there,  
22. I don't see how he can . . .

23. MR. WILLETTS: Let me rephrase that.

24. COURT: Rephrase the question.

1. Q. Is that the point where that skid mark starts that has  
2. been designated as the--well, is that the point where that  
3. skid mark starts?  
4. A. Right.  
5. Q. That is the point where this skid mark starts?  
6. A. Right.  
7. Q. I want to take a minute and let the jury see it. The  
8. white piece of paper that's designated--the skid mark  
9. is designated as right front and starts at the white  
10. piece of paper.  
11. A. And it's continuous until it . . .  
12. Q. Is it interrupted at any point?  
13. A. No.  
14. Q. Mr. Miller, was Keith in good health at the time of his  
15. death?  
16. A. Yes sir.  
17. Q. And he was twenty-seven years old?  
18. A. Right.  
19. MR. WILLETTS: I think that's all the questions I have.  
20.  
21. Cross Examination by Mr. Welsh:  
22. Q. You were not at the scene at the time of the accident,  
23. is that right?  
24. A. No sir.

1. fore he left for work?
2. A. I would guess so. He usually got a bite of breakfast
3. before he left.
4. Q. Looking at this photo, you indicated that this skid mark
5. that you're talking about here at the beginning of this
6. cup--is this a normal curve from where it started?
7. Is it parallel to the curve on the one marked "RR" over
8. here?
9. A. It went to the right for a little bit and then back
10. around.
11. Q. You didn't find the same kind of mark on the left front?
12. Was it parallel to this "LF" one?
13. A. Now, I don't know about that. The only one I could see
14. visibly was that one. It was plainer that day than it
15. is in the picture.
16. Q. You're sure that this one marked "LR" that seems to come
17. right to that point isn't the one that came up to that
18. mark?
19. A. As I remember the road that day, this one went out this
20. way and then around.
21. Q. Which one are you talking about?
22. A. The right front, the "RF".
23. Q. The "RF" went--where did it start?
24. A. It started right there and went that way for a little ways.

1. and then went around that way.

2. Q. Where did this "LR" start? Looking at this photograph  
3. it would seem to come right to that point. That's what  
4. I'm asking about.

5. A. I'm not sure with what you can see right there, but I  
6. don't know . . .

7. Q. You're not sure, it may have come right to about the same  
8. point?

9. A. I really can't say. The one I'm sure of is the one  
10. you can see where it went to the right a little ways and  
11. then around to the left.

12. Q. And you're sure that's not a mark on the highway?

13. A. Yes sir, I'm sure of that.

14. Q. So, you're disagreeing with the officer's testimony that  
15. there was no deviation in these marks, there was just a  
16. curving of lines. You're suggesting that there was a  
17. deviation in one of them?

18. A. No, I'm not suggesting a deviation of them. I'm suggest-  
19. ing that it changed direction.

20. Q. And it was the only one that did?

21. A. The one that you could see, yes.

22. Q. As I understand it, the decedent regularly traveled 254  
23. going to and from work virtually everyday?

24. A. That's right.

1. ~~(Jury Leaves the Courtroom)~~

2. MR. WELSH: May it please the Court. I would make  
3. my motion to strike on the basis the plaintiff has failed  
4. to make out a prima facie case of negligence that was a prox-  
5. imate cause of the occurrence. In fact, the evidence is un-  
6. contradicted at this point that in answer to a question pos-  
7. ed by the attorney for the plaintiff, the defendant being  
8. called as an adverse witness, stated that he was on his own  
9. side of the road. He said, "I was on my side; so I guess  
10. he was on my side." This was in answer to a question that  
11. was posed. He further testified later that he was on his  
12. own side of the road.

13. Your Honor, this case is very similar to the case of  
14. Weddle's Administratrix v. Draper. It's not totally on all  
15. fours, the facts are somewhat different; but the essential  
16. basis of the case is exceedingly similar. An accident oc-  
17. curred in which the plaintiff's decedent was obviously kill-  
18. ed and the only testimony in the case, the only eyewitness  
19. to the accident, was the defendant and she testified as to  
20. the action of what she did. She was called as an adverse  
21. witness by the plaintiff and she testified as to what she  
22. did, which absolved her of any negligence. I think in this  
23. case the testimony of Mr. White clearly absolves him of any  
24. negligence in this case. He was on his own side of the road



1. and the question of this thirteen hour driving situation,  
2. this is depending upon how one views the time. You can argue  
3. that it's close to thirteen hours, it could be thirteen hours  
4. and fifteen minutes; it's right on the line. But there's  
5. no showing that that had any effect whatsoever. And the law  
6. of Virginia does not make driving thirteen hours negligence  
7. per se, it is simply one of the elements of proper driving;  
8. like in keeping a proper lookout. There is no case in Vir-  
9. ginia holding it to be negligence per se. It's simply one  
10. of the things, like keeping a proper lookout, keeping your  
11. vehicle under proper control, that is a duty of a driver.  
12. This was a duty he had and it's very questionable if it was  
13. over thirteen hours or if it had--and it certainly, based  
14. upon the vigorous cross examination of the plaintiff's attor-  
15. ney which did nothing to alter the fundamental facts of what  
16. Mr. White said; that he didn't go to sleep, he didn't do any-  
17. thing wrong, he was on his own side of the road, he was driv-  
18. ing fifty miles an hour which was under the speed limit, and  
19. all of a sudden this vehicle was in front of him.

20. Now, they talk about lookout. The lookout is equal  
21. in both directions. All of these things--and the clear evi-  
22. dence is, it's uncontradicted, that the defendant was on his  
23. own side of the road, the plaintiff was not, and certainly  
24. the physical facts do not show where, why and how. And I

1. would point out that the trooper testified in answer to a  
2. question posed by plaintiff's attorney that he was not able  
3. to ascertain the point of impact because the debris was so  
4. scattered. And that was a question that plaintiff's attorney  
5. asked him and he answered it in that fashion unequivocally.  
6. I submit, Your Honor, that in this case that where  
7. a plaintiff wants to rely on physical facts to overcome the  
8. testimony of a witness to the thing, they must show by those  
9. physical facts that are so clearly preponderating that the  
10. meaning of the facts relied upon by the plaintiff is unmistakable.  
11. And I submit that it is not unmistakable in this  
12. case. That burden has not been met by the plaintiff to  
13. overcome that oral testimony in this case. Those physical  
14. facts do not show where or how or why this accident happened.  
15. And I submit, Your Honor, that taking the plaintiff's  
16. case in the light most favorable to him, that it's not a  
17. prima facie case; that a jury cannot under the laws of  
18. Virginia decide this case in favor of the plaintiff without  
19. engaging in speculation and conjecture and random judgment  
20. because the how, why and where of this accident has not been  
21. taken out of that realm. Even if you exclude the testimony  
22. of Mr. White, and certainly if you put his testimony into  
23. it--and they called him and they are stuck with so much of  
24. his testimony as is not contradicted. And this is not con-

1. tradicted. And I think the case cited clearly says that it  
2. is not contradicted, unless those facts, those physical  
3. facts, are so clearly preponderating to make that conclusion  
4. unmistakable.

5. I submit, therefore, Your Honor, that the defendant  
6. is entitled to have the plaintiff's evidence struck and en-  
7. titled to a judgment in his favor. Thank you.

8. COURT: Mr. Willetts.

9. MR. WILLETTS: Your Honor, if it please the Court.  
10. It is our position that the evidence does show clearly and  
11. convincingly how this accident happened. The physical facts,  
12. we suggest to the Court, overcome any protest by Mr. White  
13. at this stage that he was on his side of the road. The  
14. physical facts start and stop with the vehicle on Mr.  
15. Miller's side of the road.

16. Mr. White was asked at the time of the accident and  
17. he said, "I think I was on my side." When Mr. White was  
18. asked thirteen months later with his counsel he said, "If  
19. I was on my side." Now, that's not to argue that he hasn't  
20. said on occasion that prior to the impact I was conscious  
21. of the yellow line; but the fact of the matter is, Your Hon-  
22. or, that Mr. White's explanation is that the motorcycle came  
23. from nowhere. Even though there was clear visibility, that  
24. he didn't see the motorcycle. He couldn't explain where it

1. had come from; it came as if out of nowhere. It is further  
2. Mr. White's testimony that after impact he lost control of  
3. the car. That, Your Honor, is completely consistent with  
4. the physical evidence, which has the gouge marks of the car  
5. starting in a side slide. The fact of the matter is, the  
6. physical mark, the point of impact, beginning at that point  
7. where he lost control, the car went into a side slide, the  
8. gouge marks were left from Mr. White's vehicle for five  
9. feet in the westbound lane. Those are the physical facts.

10. COURT: Counsel, do you agree with the statement that  
11. was made in the opening remarks, that the issue of this case  
12. is that you have to prove the accident happened in the left  
13. lane? Would you agree that's an issue that has to be proved  
14. in this case by physical facts?

15. MR. WILLETTS: We take the position, Your Honor, that  
16. the physical facts are not susceptible to any interpretation  
17. but that. And when we look then to Mr. White's testimony  
18. he says he didn't see the vehicle, number one, until impact.  
19. He says he lost control after impact. He also says that  
20. he had been driving fourteen hours in the last twenty-four.  
21. He had only had four hours sleep in the last twenty-four.  
22. I submit to the Court that the physical evidence clearly and  
23. convincingly shows that Mr. White dozed off or inattentively  
24. allowed the vehicle to go into the westbound lane.

1. COURT: What evidence, physical or otherwise, is  
2. there that he dozed off?

3. MR. WILLETTS: Otherwise, that he didn't see the  
4. vehicle which was clearly before him. That's the explana-  
5. tion, the motorcycle didn't come out of nowhere, and I think  
6. the instruction would read . . .

7. COURT: That since he didn't see the motorcycle?

8. MR. WILLETTS: Well, since he didn't see, he either  
9. wasn't looking or he must have dozed off. And I submit fur-  
10. ther, Your Honor, that where the plaintiff is deceased, he  
11. is presumed to have acted from the instinct of self preser-  
12. vation, exercised due and proper care for the protection of  
13. his person. Mr. White offered absolutely no explanation for  
14. how his car got over into the westbound, five feet over in-  
15. to the westbound lane, where the gouge marks start. His  
16. testimony was . . .

17. COURT: Do you feel the gouge marks represent the  
18. point of impact?

19. MR. WILLETTS: Approximately the point of impact,  
20. yes sir. I think the pictures show . . .

21. COURT: If it's not the point of impact, how do you  
22. figure where is the point of impact?

23. MR. WILLETTS: I figure that is the impact point.

24. COURT: Didn't the trooper state and doesn't it some-

1. what look like the car is already in a slide at the time  
2. the marks start?

3. MR. WILLETTS: I think . . .

4. COURT: Canted, I believe, was the word used. The  
5. question went something like this, "When the skid marks be-  
6. gan, were they curved . . ."--I believe this is what his tes-  
7. timony was, "The skid marks were curving away, it showed  
8. that the car was already canted, already skidding out of  
9. line, the back wheels were not behind the front wheels."  
10. Isn't that what he said was the position at the point which  
11. you are saying is the point of impact?

12. MR. WILLETTS: What I am saying, Judge . . .

13. COURT: Wouldn't that be indicative that it couldn't  
14. have been the point of impact?

15. MR. WILLETTS: What I'm saying is, the skid marks  
16. indicate that the car drifted into the westbound lane, at  
17. impact the car was canted, the left front went down as the  
18. car ran into the cycle. In other words, I'm not saying that  
19. the car was driving completely with the front wheels--the  
20. back wheels traveling in the same track as the front wheels  
21. in the westbound lane; what I'm saying is, the skid marks  
22. are entirely consistent with the car drifting in this lane,  
23. it was canted at the impact. At impact the car was pushed  
24. in this direction just a short distance, and then the momen-

1. tum carried it around and it swapped ends. The point is  
2. that it was canted at impact.

3. COURT: It could be about what, a forty-five degree  
4. angle?

5. MR. WILLETTS: As it came, as it approached, and I  
6. submit to the Court that the physical evidence at this junc-  
7. ture in the case, taken in the light most favorable to the  
8. plaintiff, shows clearly that at impact the car had drifted  
9. across. And the explanation I offer to the Court for the  
10. drifting is tied to the fact that Mr. White never saw the  
11. vehicle, and . . .

12. COURT: The motorcycle had to stay on the ground.

13. MR. WILLETTS: Yes sir.

14. COURT: But isn't the testimony that it jumped up  
15. and mashed down the fender and . . .

16. MR. WILLETTS: I think the testimony is that something  
17. came into the car. Mr. Welsh is saying it rode up. My  
18. point is, Your Honor, that Mr. White testified the boy came  
19. over the car, the motorcycle went under the car. If the  
20. motorcycle had come up overtop of the car, it would have not  
21. gone backwards, there would have been nothing to change his  
22. direction.

23. COURT: But didn't the trooper testify that the motor-  
24. cycle went up and into the car and pushed the fender down?

1. Didn't he testify that this is how we get the fender broken  
2. up?

3. MR. WILLETTS: I think the impact--I don't know what  
4. exactly caused the contortion of the car itself. I mean,  
5. the impact caused it. My suggestion to the Court is that if  
6. you think about it, if the motorcycle came up over the car  
7. and it's still moving forward, after impact there's no reason  
8. for that motorcycle to start going backwards. The point I  
9. am making to the Court is that the motorcycle hit the car  
10. and was under, turned under the car. That's why it ended up  
11. under the car, that's why the scratch marks from the gouge  
12. mark . . .

13. COURT: If the impact is the point of the gouge marks,  
14. it had to start under the car then, it couldn't have been up  
15. on the fender and then back down, if that is the starting  
16. point.

17. MR. WILLETTS: Well, I don't know, I assume the bike  
18. collapsed at impact, and it could very well have--if you look  
19. at the fender, the fender is pushed down. And Mr. White's  
20. testimony is that he saw the boy come over, not the motor-  
21. cycle. He saw the boy come over. And the boy, of course,  
22. landed on up the road. The motorcycle, where the scratch  
23. marks start, the scratch marks start at the gouge mark all  
24. the way back. I would further suggest to the Court that the



1. physical evidence being what it is, it's totally inconsis-  
2. tent with this accident occurring in Mr. White's lane. Be-  
3. cause at impact he lost control. And the evidence taken in  
4. the light most favorable to the plaintiff at the time is that  
5. the fender was down on the tire and the suspension was brok-  
6. en. Now, at impact the car started to skid, that's the evi-  
7. dence most favorable to the plaintiff at this stage. It's  
8. no other explanation for the car changing directions and  
9. swapping ends over here if the accident happened over in the  
10. eastbound lane.

11. COURT: Would it be an explanation at the point where  
12. the gouge marks are, the skid marks start, that this is where  
13. you have the motorcycle jammed up under the car. And that  
14. that's what caused the car to go in the slide.

15. MR. WILLETTS: Well, I think that . . .

16. COURT: That until the gouge marks the motorcycle  
17. wasn't under the car. Would that be an explanation?

18. MR. WILLETTS: Well, I think that's a possibility; I  
19. think that's a possibility. But the point I'm making, Your  
20. Honor, is that if the impact was anywhere but there, then you  
21. have to assume that the car continued to roll without making  
22. any skid mark. That the impact was not severe enough to  
23. cause the car to change its direction. And then when it hit  
24. the motorcycle down in the road, then it changed direction.

1. But you have to assume this impact, which is shown by these  
2. pictures, was not enough to cause the car to change direction  
3. at all, because there was no other skid marks. And I sug-  
4. gest to the Court that the physical evidence, the pictures,  
5. rule that out. And certainly there is evidence here, if you  
6. want to conclude that it could have happened somewhere else,  
7. there's evidence here that a reasonable man could conclude  
8. and be satisfied with that this is the point of the impact.  
9. That's what caused the car to swap ends, and I think that's  
10. consistent with the physical, with the pictures that we've  
11. entered. We've got the trooper saying the fender was down  
12. on the tire, we've got Mr. White saying the suspension was  
13. broke, we've got Mr. White saying he lost the car at the  
14. point of impact. I think all of these things are consistent  
15. with the skid marks starting as they did; whereas to adopt  
16. the other theory that it happened somewhere else, we also  
17. have to say, I think, that the impact was not enough to start  
18. any kind of a skid or make any mark at all. So, the car con-  
19. tinued on in a normal fashion not making any skids and then  
20. when it hit the bike, as I understand the Court's question,  
21. that's when it changed direction.

22. Frankly, I don't think that theory, in face of the  
23. evidence, if the evidence is to be taken in the light most  
24. favorable to the plaintiff, I don't think that's evidence

1. that the jury--I think the jury could differ. I think the  
2. jury could look at this accident and say, "This impact from  
3. these pictures was severe enough to cause this car to change  
4. directions." And I think the pictures bear that out. That's  
5. why I think it's so significant that the skid marks that you  
6. see there is a change in direction. And I think a jury could  
7. conclude that that's where the impact occurred. And the  
8. reason it occurred there is because Mr. White had been driv-  
9. ing for a long time with very little sleep, by his own testi-  
10. mony, and he allowed the car to drift. The reason that hap-  
11. pened and the reason he didn't see the motorcycle was because  
12. he had dozed off; which is perfectly reasonable, and that's  
13. the reason for the driving restriction.

14. And the total lack of any explanation by Mr. White of  
15. how this accident happened; I mean, I'm not talking about  
16. after impact, I'm talking about before impact. I think you  
17. can argue to the jury very logically, Your Honor, that a  
18. motorcycle just doesn't come out of nowhere, especially when  
19. there's no reason to have your visibility obscured. I think  
20. you could also argue, Your Honor, that Mr. White was unsure.  
21. "I think I was on my side." But being on his side is totally  
22. inconsistent with the physical evidence. The car didn't jump  
23. over there five feet into Mr. Miller's lane. And the physi-  
24. cal evidence, I submit to the Court, is such that this car,

1. this impact, was severe enough that this car would have chang-  
2. ed directions or made some mark.

3. But if you adopt the theory that Mr. Welsh presents,  
4. you would have to say the impact was not severe enough to  
5. cause the car to change directions, to cause it to slide;  
6. the car then traveled some other distance, then whipped  
7. around. My suggestion to the Court is that the motorcycle  
8. went under the car, it collapsed and went under the car, from  
9. the force of the impact. And that's the explanation, or one  
10. of the explanations.

11. COURT: From the physical evidence wouldn't it be just  
12. as easy to find that it went up and then came back down?

13. MR. WILLETTS: Well, I think if he went up and came  
14. back down, Your Honor--we've got the motorcycle and the car,  
15. the motorcycle goes up, then what gets the motorcycle back  
16. behind the car? I mean, if the motorcycle had that colli-  
17. sion in Mr. White's lane, it seems to me that then the next  
18. question is how does the automobile get over into the other  
19. lane, five feet over, and then all of a sudden starts to turn  
20. around.

21. COURT: It's turning when it starts the marks, so  
22. it's already canted.

23. MR. WILLETTS: And that is consistent, Your Honor,  
24. with the theory . . .

1. COURT: But isn't it consistent also with an impact  
2. to the left wheel, would it be reasonable then that it could  
3. bounce off of it and somehow the car catches up with it and  
4. it gets under the wheel?

5. MR. WILLETTS: Well, . . .

6. COURT: And wouldn't that account for canting the car  
7. at an angle of about forty-five degrees?

8. MR. WILLETTS: If a car cants at fifty miles an hour,  
9. it would make a mark. Why wouldn't it leave a mark if it  
10. cants at fifty miles an hour? The point I make, Your Honor,  
11. is that these marks are consistent with exactly the point the  
12. Court makes. It made the marks when it started to cant. If  
13. it's going straight and you've got impact and the car cants,  
14. then it would make those side slide marks when it changed  
15. directions.

16. COURT: If the point of impact is the gouge marks, how  
17. did the motorcycle get upright?

18. MR. WILLETTS: It seems to me that that is the point  
19. of impact or the closest point of impact, the closest point  
20. to it. The impact collapsed the motorcycle, you don't have  
21. the frame apparatus that you have in a car, and the motor-  
22. cycle went down at that point. And the car, that's what  
23. started the cant; and the same cant, if we argue that the  
24. cant started somewhere else and that's why the car got into

1. this lane and canted, then my point to the Court is that  
2. there were no marks. This car, if it became canted at some  
3. earlier time, there would have been some marks to show a  
4. change in direction. If it was going fifty miles an hour,  
5. when it changes direction--if it please the Court, what we're  
6. saying is, at impact if it was severe enough to make that  
7. car change directions there would have been some marks.  
8. There are no marks. That, to me, Your Honor, is the most  
9. significant point in the case, that there are no marks on Mr.  
10. White's side.

11. COURT: How would I know, or how would anyone know,  
12. that that impact would have to leave marks? The initial im-  
13. pact must leave marks.

14. MR. WILLETTS: What my argument is, and I think it's  
15. logical, that when that car changes directions, when those  
16. wheels change directions, it's going to leave some mark. It  
17. is going fifty miles per hour. When it changes direction  
18. from the impact, we're not talking about turning, we're talk-  
19. ing about an impact that causes it to cant; when it makes  
20. that impact you're going to have some skid marks. You're  
21. going to have a side slide mark, which is exactly what we've  
22. got here. Now, the Court's position, if I understand it  
23. now, if we want to assume arguably that the impact was some-  
24. where else, then the first thing--if I understand the Court's

1. questions--if the impact causes the car to cant, then it  
2. seems to me that at fifty miles per hour you're going to have  
3. some marks. The car is not traveling straight, it's caused  
4. to cant by the impact and it's caused to slide sideways. And  
5. the very point I'm making, Your Honor, is that that's what  
6. these pictures show. Now, if it happened somewhere else, I  
7. think you would have the same kind of skid marks. And that's  
8. the argument that I say that the plaintiff's evidence, taken  
9. in the light most favorable to the plaintiff, that's why it  
10. didn't happen someplace else.

11. COURT: I'm a little worried when you say--you said,  
12. for instance, you think there would be skid marks at the  
13. point of impact--and I'm a little worried about . . .

14. MR. WILLETTS: I'm not making myself clear. There  
15. were skid marks here. The car changed direction, it's a  
16. side slide. Now, if the car changes directions at fifty  
17. miles an hour due to impact, then there are going to be some--  
18. it seems to me that just the fact that these are skid marks,  
19. and maybe I'm arguing in a circle and I apologize to the  
20. Court, but it just seems to me that to change directions at  
21. fifty miles per hour due to an impact, the tires are going to  
22. leave some mark unless they continue to go straight ahead.  
23. And I think that's the point of the case. That's why it  
24. didn't happen somewhere else.

1. And, secondly, I think it's within the province of  
2. the jury and, of course, the court in considering the evi-  
3. dence is--if the car is canted in Mr. White's lane, then how  
4. does it get five feet over into this lane and then start to  
5. side slide. How does it get over there? It didn't fly  
6. through the air. Mr. White's testimony is, "I lost it at  
7. the point of impact." The evidence is that the fender was  
8. down on that tire. Could that have had some effect? I don't  
9. know. The trooper said he couldn't tell how much pressure,  
10. but the fender was definitely down on the tire. That's  
11. another reason why the tire, I think it's logical to assume,  
12. would have made some mark.

13. COURT: Have you had a chance to look at the case cit-  
14. ed by Mr. Welsh? Weddle.

15. MR. WILLETTS: No sir.

16. COURT: It says in that case, "But when physical facts  
17. are relied upon to overcome oral testimony they must be estab-  
18. lished by evidence so clearly preponderating that the exis-  
19. tence of such facts is unmistakable." If the physical facts  
20. do not show how, why and where the accident occurred, they  
21. create no more than a possibility of negligence. In that  
22. case the factors that they thought seemed to be important  
23. were no skid marks or debris to indicate the point of col-  
24. lision, the tire marks started east of the intersection and



1. the accident was in the middle of the intersection and did  
2. not show how the collision occurred.

3. MR. WILLETTS: Well, Your Honor, I don't want to be-  
4. labor the point, but it just seems to me that Mr. White's  
5. testimony that he didn't see something clearly in view; he's  
6. not offered any claim how this accident happened. He said,  
7. "I didn't see it, it came out of nowhere." And his state-  
8. ments, I think, would be interpreted to be questionable if  
9. not inconsistent when he says, "I never saw anybody, he came  
10. out of nowhere." That's totally inconsistent. He offers  
11. no explanation.

12. COURT: It's a very similar situation to this case.  
13. Anything further?

14. MR. WELSH: No sir, Your Honor.

15. MR. WILLETTS: No, Your Honor.

16. COURT: Gentlemen, viewing the evidence in the light  
17. most favorable to the plaintiff, we start with the plaintiff  
18. must show how and why the accident happened. That can not  
19. be left to speculation or conjecture. I believe that this  
20. Weddle v. Draper case, in 204 Va. 319, the principles in it  
21. anyway are applicable to this case, although there are some  
22. details in it that vary. It is necessary in a situation such  
23. as this that the physical facts show how, where and why the  
24. accident occurred. I believe in this case as in that case

1. the facts create no more than a possibility that the defen-  
2. dant was negligent, and further that any conclusion based on  
3. physical facts would have to be based on conjecture and guess.  
4. The plaintiff had to bear the burden of explaining how, where  
5. and why, and from the physical facts that cannot be done in  
6. the state of the evidence, and the motion to strike will be  
7. granted.

8. (Jury Returns to the Courtroom and is Discharged)

9. MR. WILLETTTS: Your Honor, for the record, we would  
10. like to note our exception to the Court's ruling as being  
11. contrary to the law and the evidence. And we would also  
12. like to reserve our exception to the Court's earlier ruling  
13. regarding letting the trooper testify to the lack of his be-  
14. ing able to locate the point of impact.

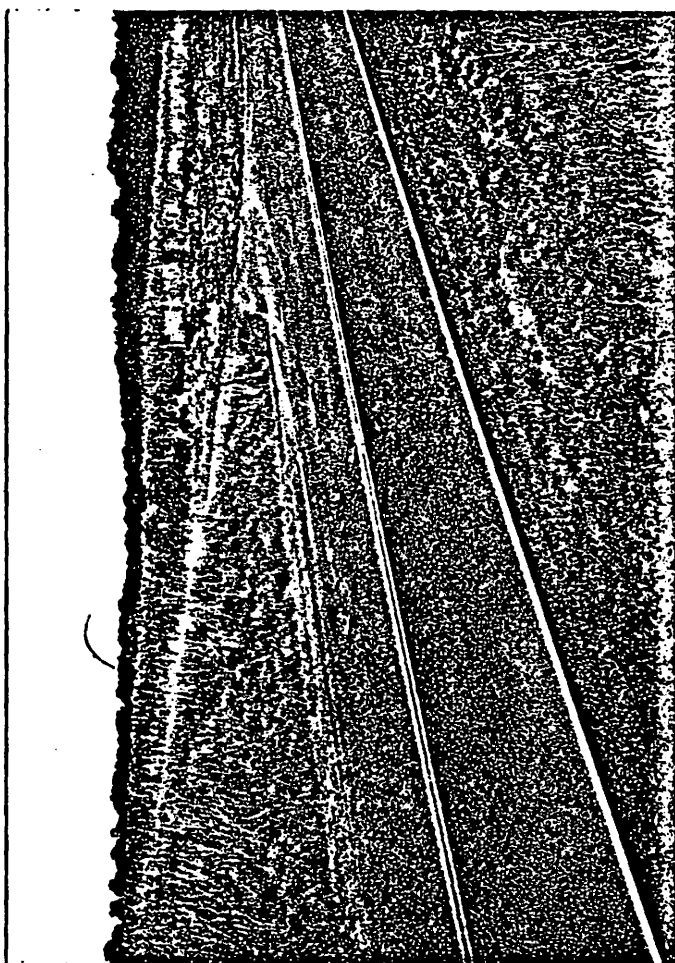
15. COURT: Let's get that point straight for the record.  
16. When you asked the Court to rule on that, the Court specifi-  
17. cally said I wouldn't rule until I saw the way the questions  
18. came out. And I believe the answer to that question was in  
19. response to a question that you had asked. The Court never  
20. ruled, did not rule at that time, and it came in response to  
21. a question that you asked and it was not in response to any  
22. ruling of the Court. Specifically I refused to try to rule  
23. prior to the trial because of the details.

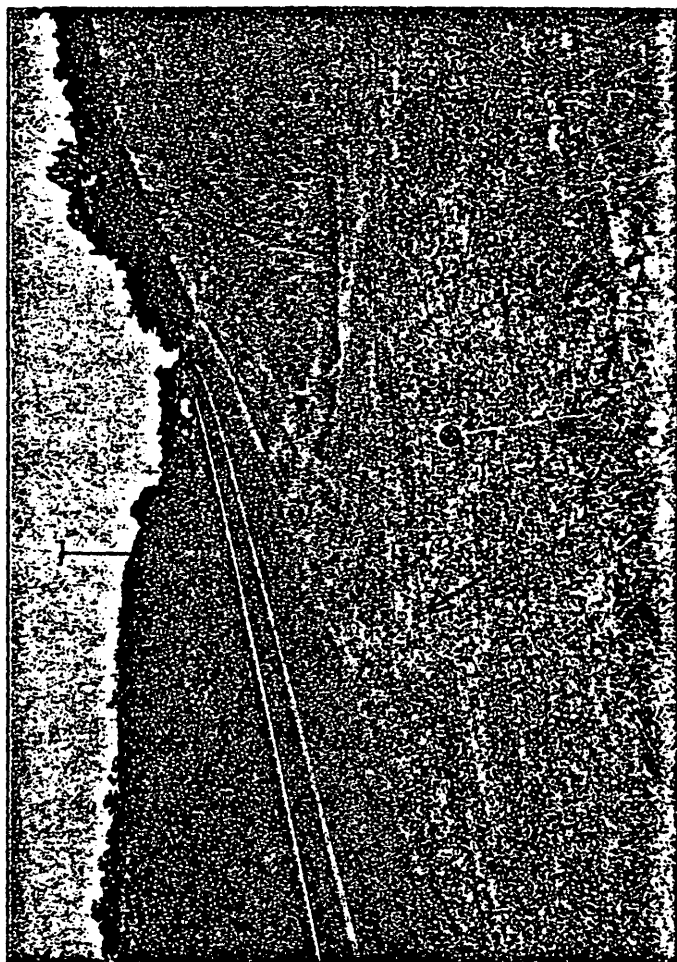
24. MR. WILLETTTS: Well, our point, Your Honor, respect-



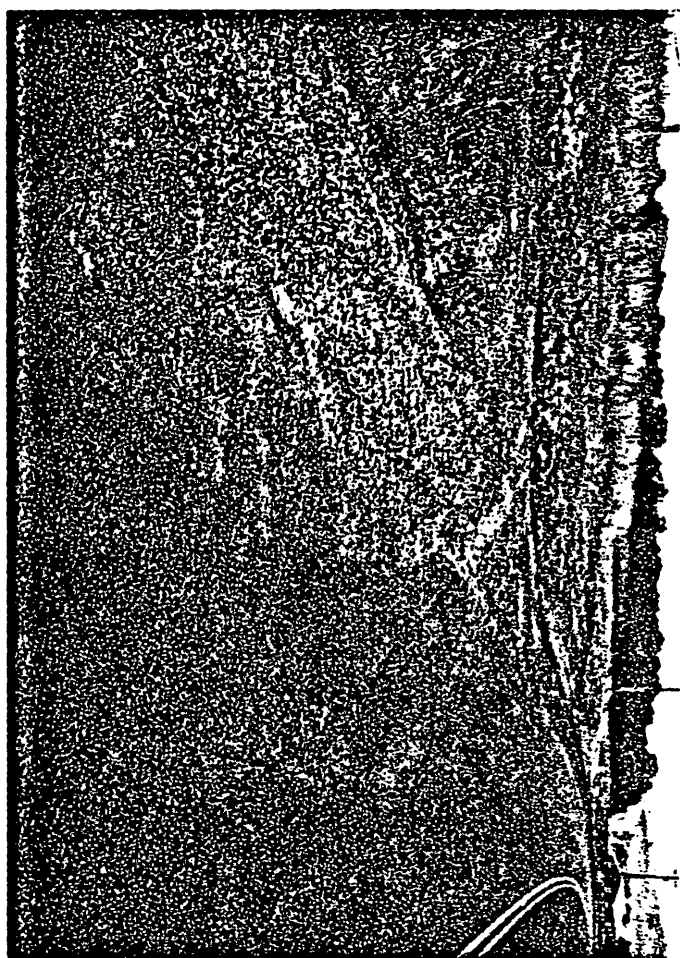
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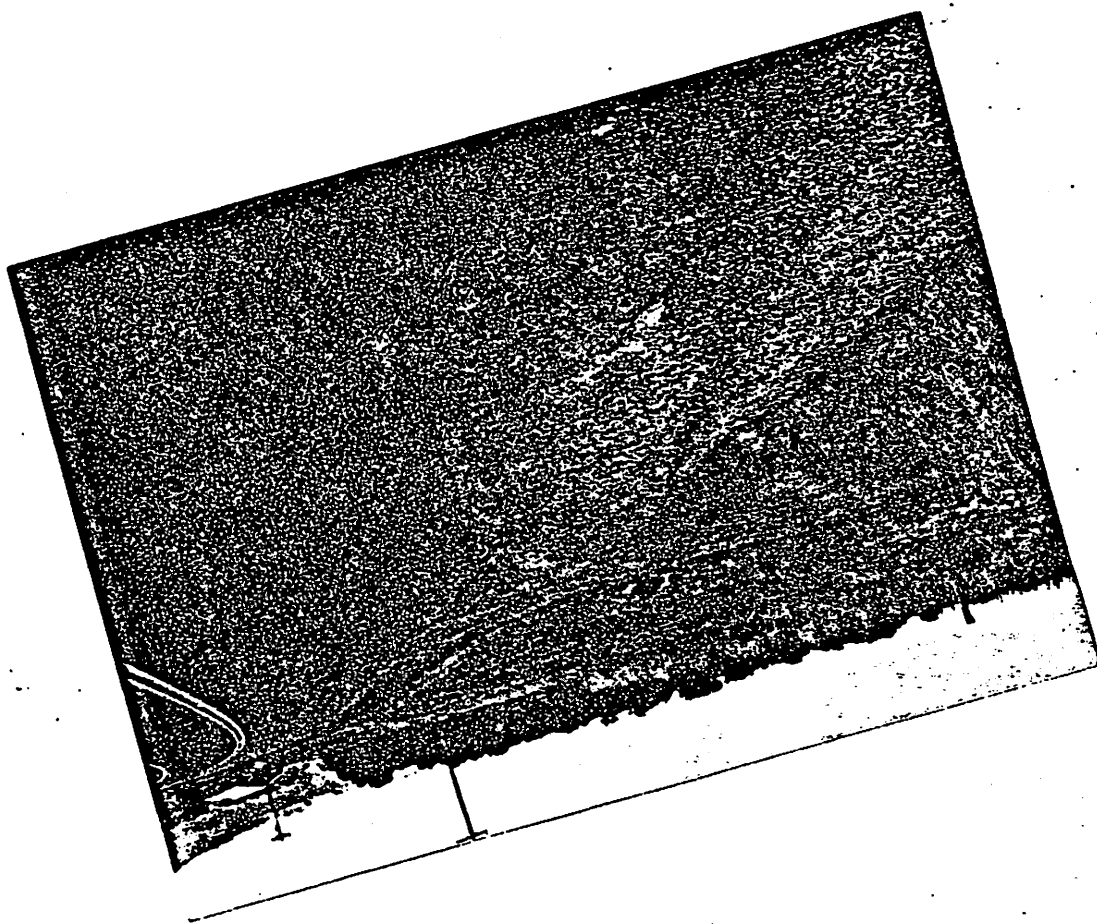


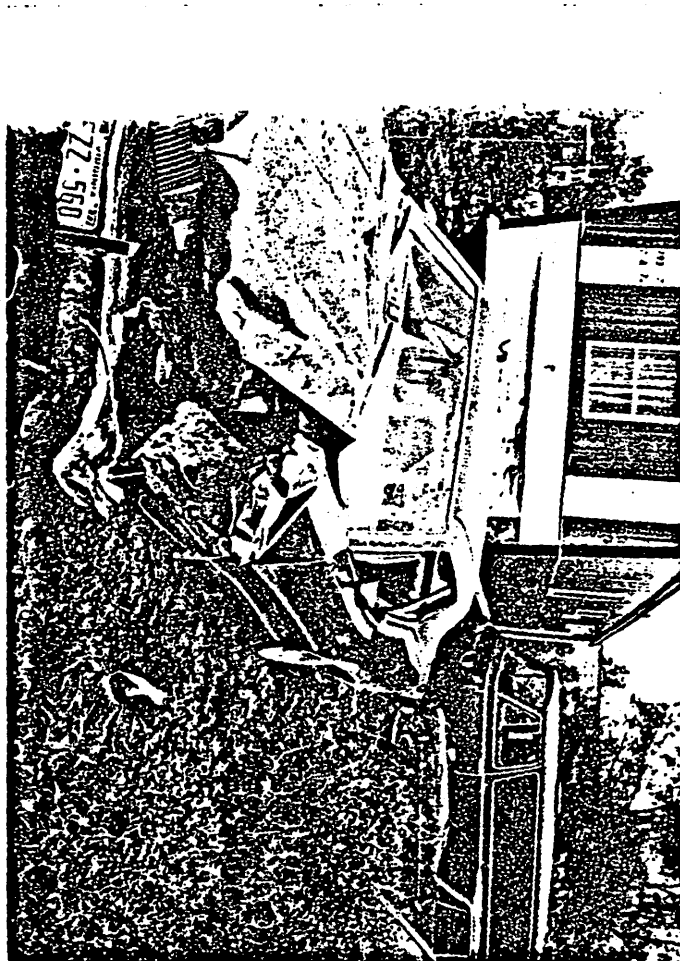
















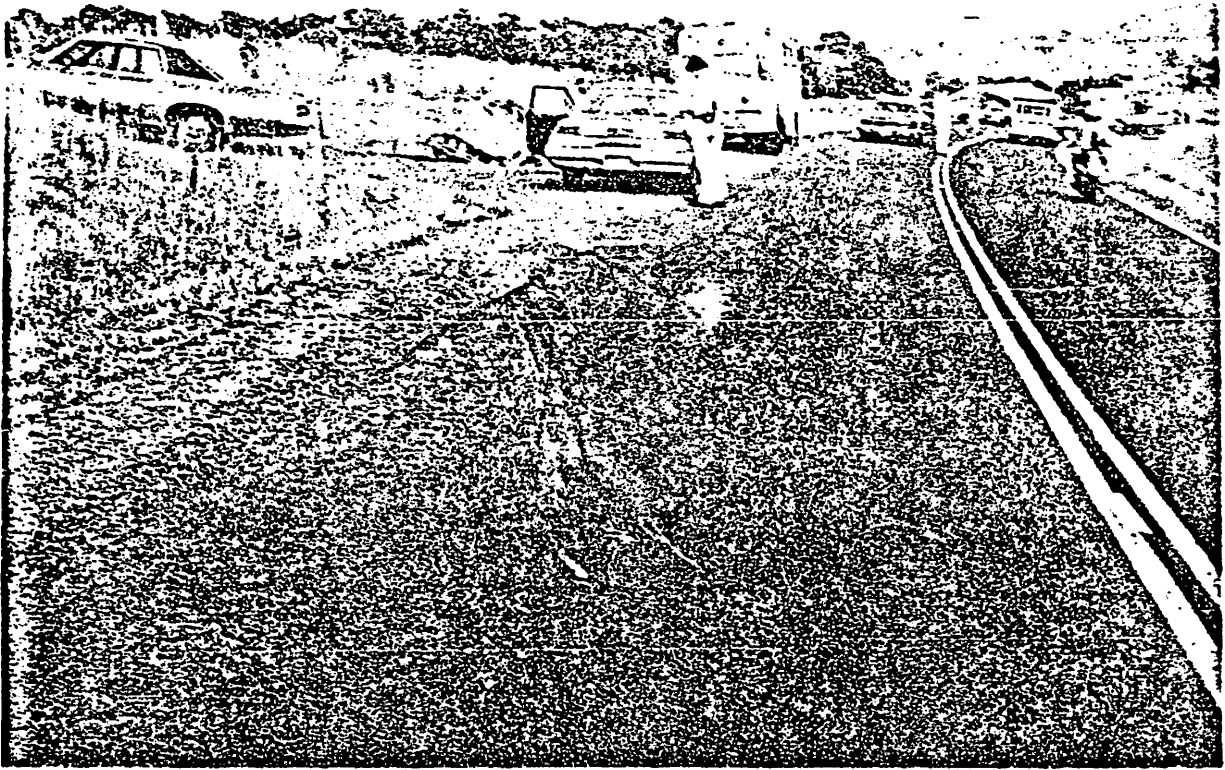


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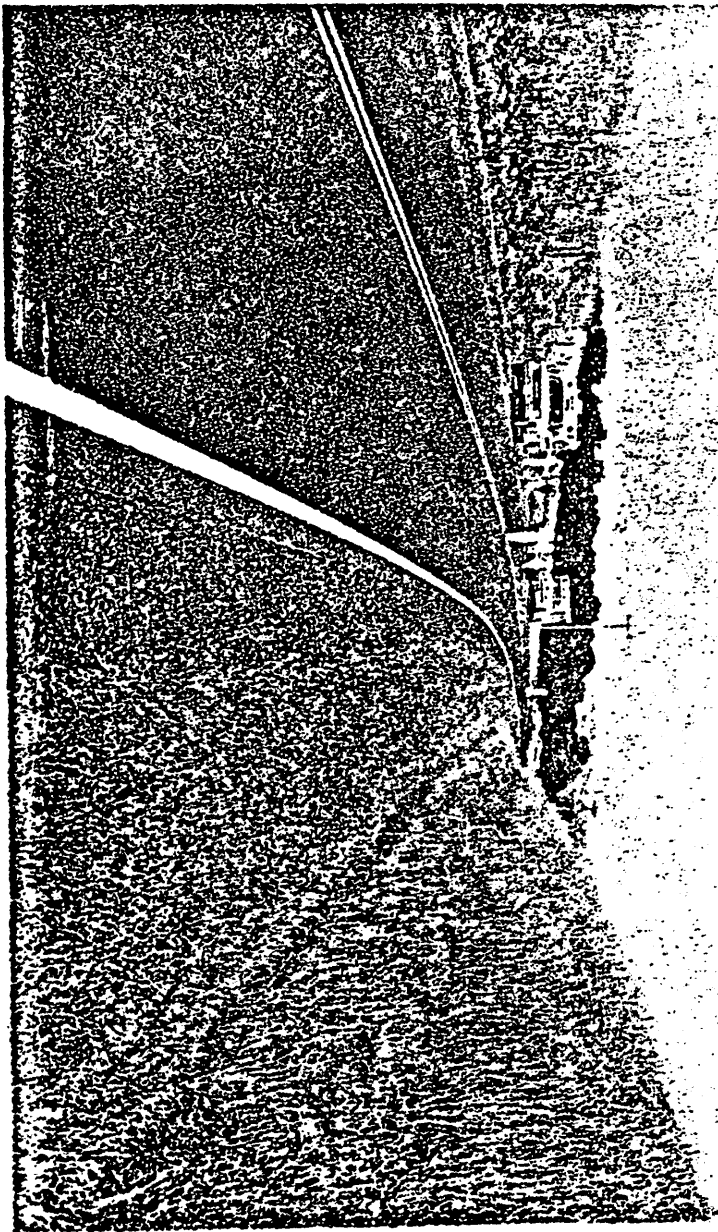




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N. Llew







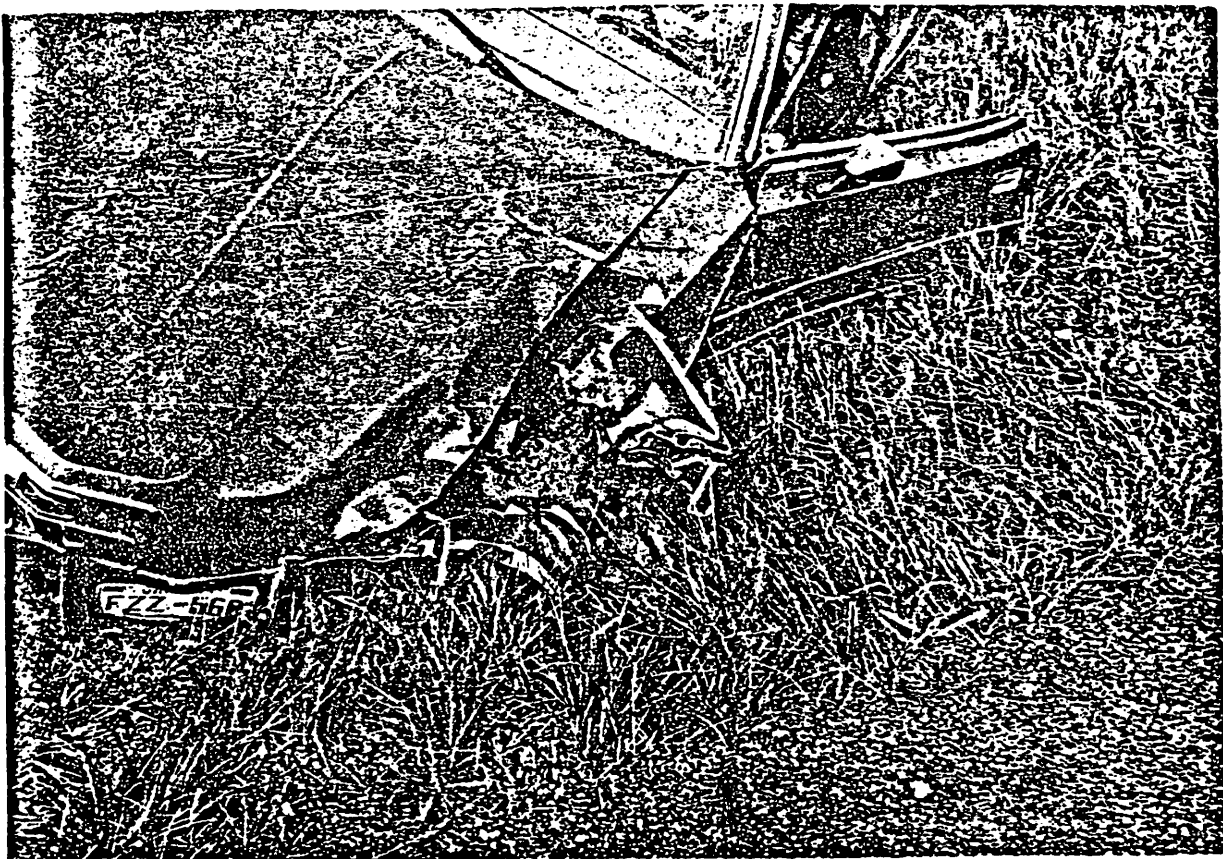
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D. Rana

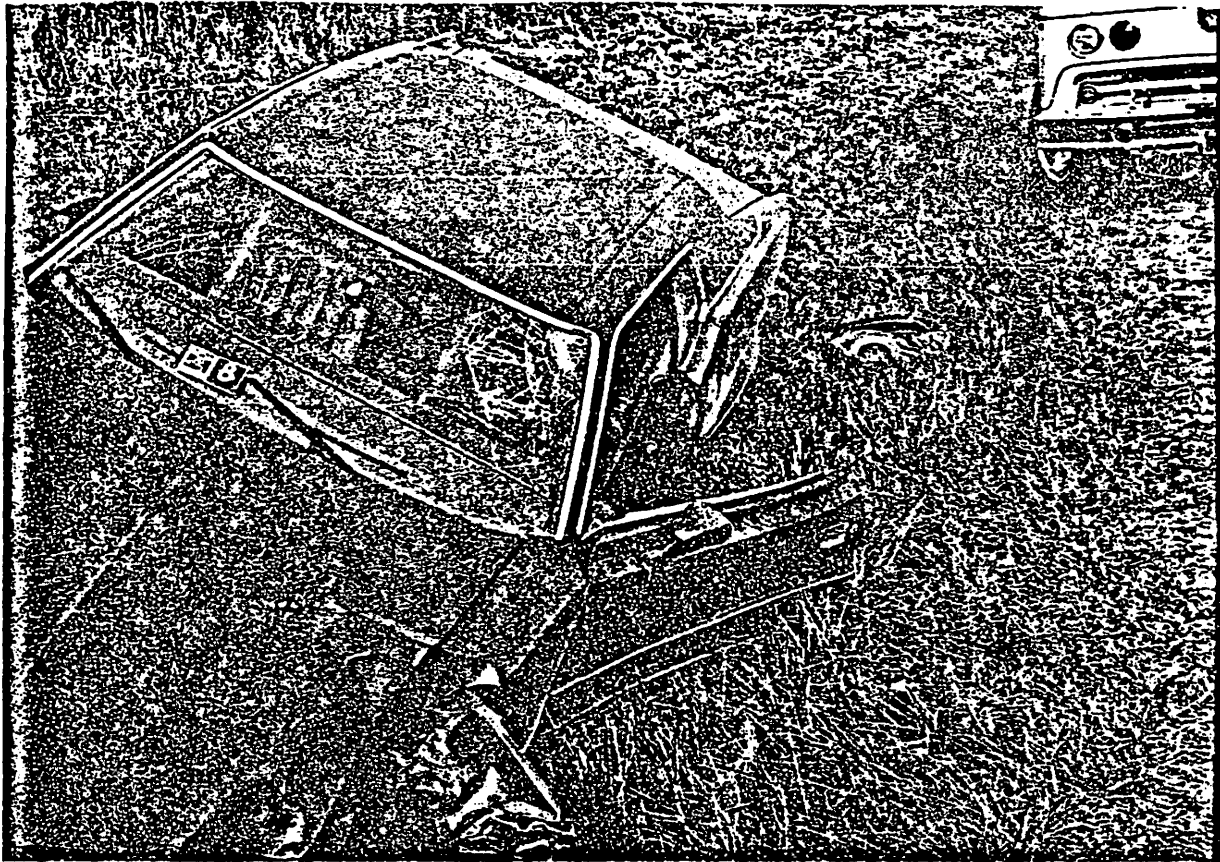


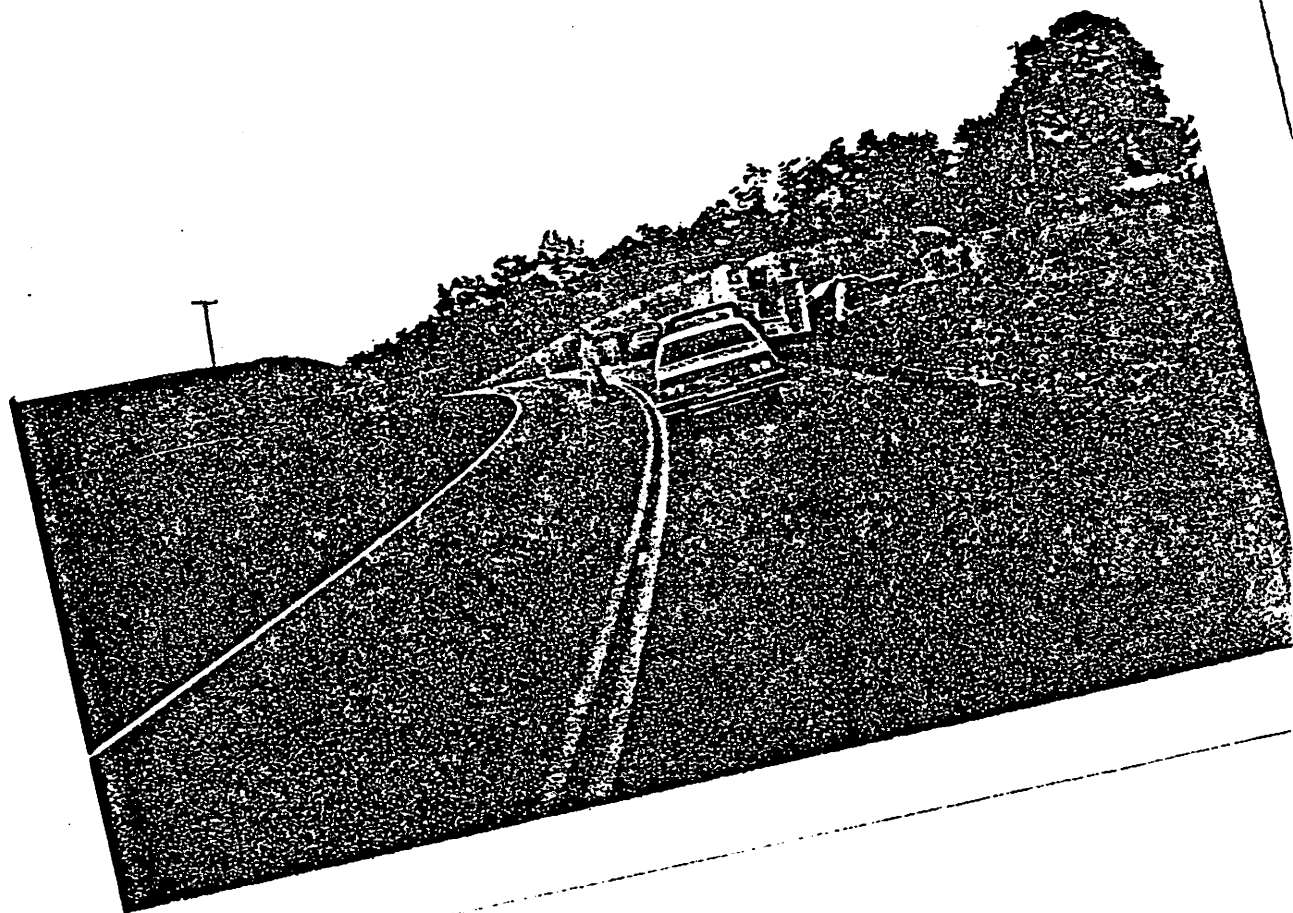
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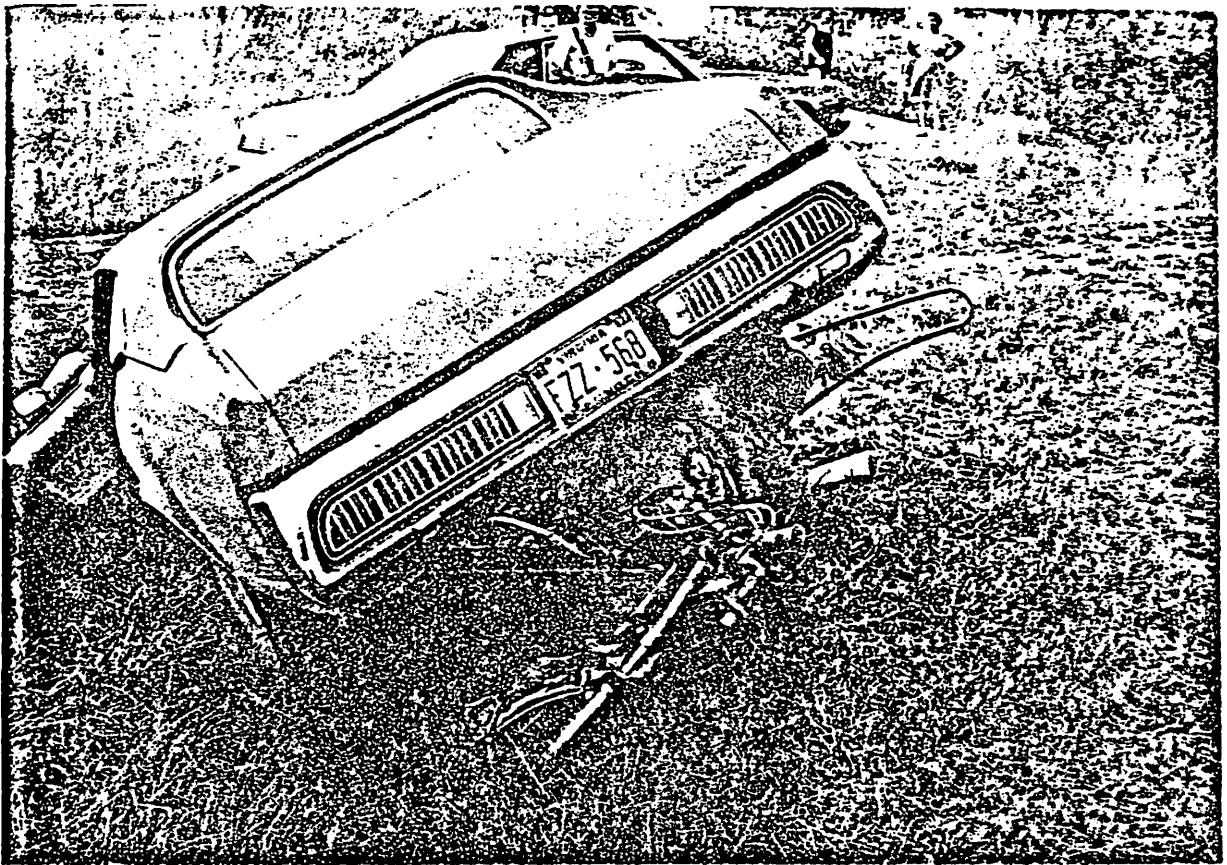


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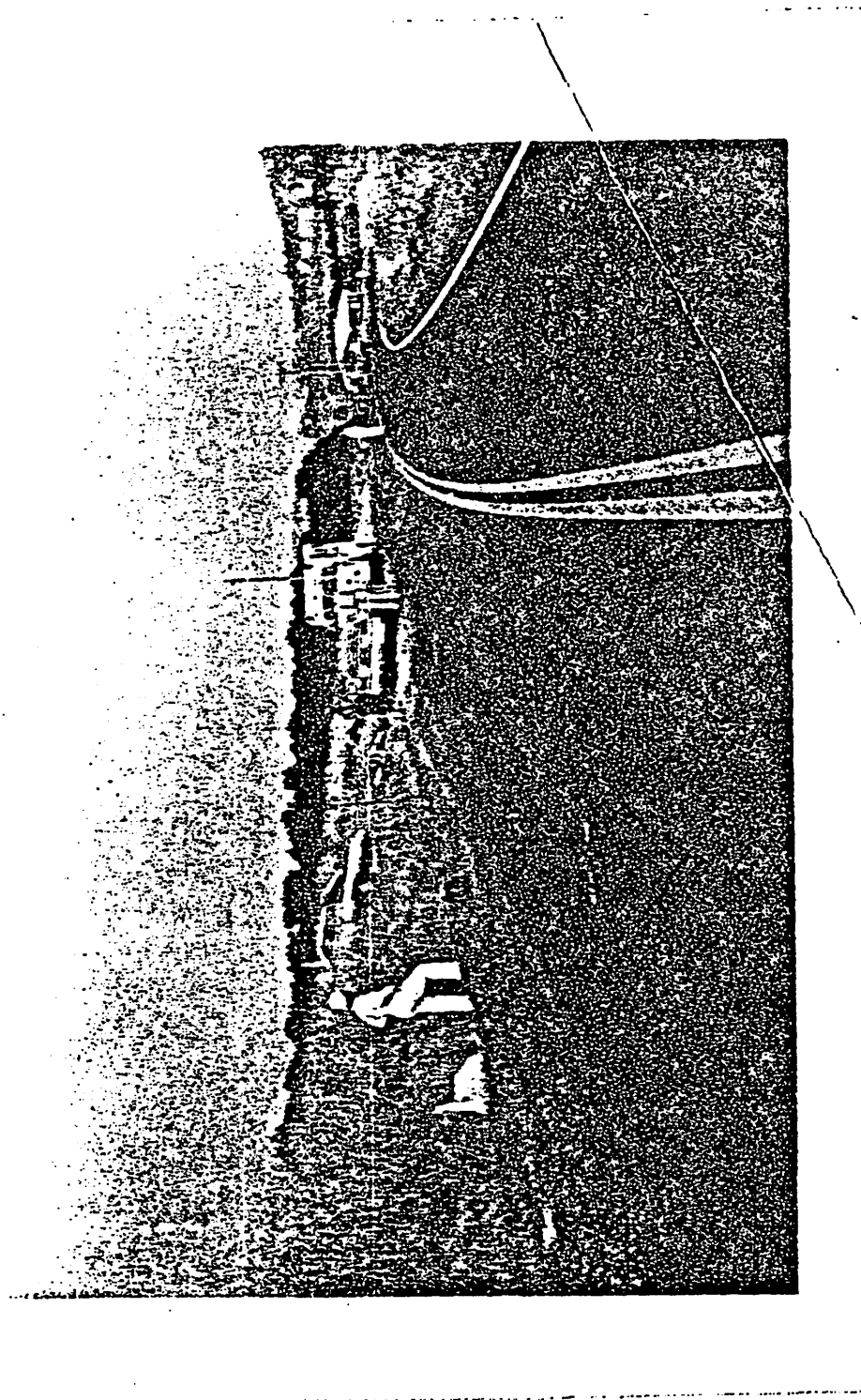


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ASH  
FRANK E. MILLER,  
ADMR., ETC.

CIRCUIT COURT OF THE COUNTY OF AUGUSTA  
Rudolph Bumgardner, III, J.

-v- Record No. 791353

SHEDRIC NELSON WHITE

Roger B. Willetts

James G. Welsh

CIVIL

PROCEEDINGS:

On June 13, 1978 the petitioner, Miller, filed a motion for judgment in the Circuit Court of Augusta County against the respondent, White, seeking damages of \$250,000 for the wrongful death of the decedent, one Keith G. Miller. (Pet. 1-3.) The motion alleged that the negligence and recklessness of White in operating a motor vehicle had caused a fatal collision with decedent's motorcycle. On May 22, 1979 a jury heard the matter and at the conclusion of Miller's presentation the trial court sustained White's motion to strike the evidence on the basis that Miller had failed to demonstrate how and why the accident occurred. (Tr. 103-104.) On June 12, 1979 the trial court entered a final order to this effect. (R. 41-42.)

ISSUE PRESENTED:

Whether the trial court erred in granting White's motion to strike the evidence.

FACTS:

This case presents a question whether Miller adduced sufficient evidence of the manner in which an automobile accident occurred to allow a jury to determine the issue of White's negligence.

The subject accident occurred on August 23, 1977 at approximately 4:45 p.m. at a point on Route 254 some 4.7 miles west of Waynesboro. (Tr. 1.) Route 254 is a two-lane road at that location. (Tr. 1.) The accident involved a head-on collision between a motorcycle operated by the decedent, one Keith A. Miller, traveling in the westbound lane, and an

automobile driven by the respondent, White, heading in the opposite direction. (Tr. 1-2.)

Trooper R. W. Jordan of the Virginia State Police, responded to the accident and testified that White told him that he had not seen the bike until collision, but that he believed he remained on his own side of the road. (Tr. 3, 22.) Jordan found a gouge mark near the center of Miller's westbound lane where some heavy metal had apparently impacted. (Tr. 4.) Jordan testified that skid marks from all four tires of the White vehicle also appeared in the Miller lane. The skid marks commenced at the gouge site and subsequently crossed, indicating that the car had gone into a side skid before turning practically around and coming to rest in a ditch off the shoulder of the westbound lane. [See Pl. Exh. 1]. (Tr. 4-6.)

Jordan testified that extensive scattered debris from the collision prevented him from determining the precise point of impact. (Tr. 21.) An examination of the White vehicle revealed significant damage to the left front. (Tr. 19-20.) [See Photo Exhs. #11 and #12). The motorcycle had been dragged down the pavement, ending up under the White car. Jordan agreed that the skid marks indicated that the White vehicle was already canted or off center when the brakes were applied. (Tr. 24.)

White, a tractor trailer driver for Shenandoah Recycling, conceded that both parties enjoyed good visibility at the time and place of the accident. (Tr. 37.) White related that in the 24-hour period preceding the accident he had driven from Wildwood, Florida, to Waynesboro. White detailed that he had left from Wildwood at about 5:00 p.m. the previous afternoon, and arrived in Greensboro, North Carolina, at about 2:00 a.m. (Tr. 40.) In Greensboro White slept in the cab of his truck until 6:00 a.m., at which time he drove to Waynesboro, arriving about 11:00 a.m. [Note: As disputed, infra, White's testimony fairly indicates he, in fact, drove in excess of 13 hours



during the 24-hour period preceding the accident]. (Tr. 66-67.)

White testified that he does not remember seeing the motorcycle until impact, at which point he struck his head on the windshield, losing control of the car. (Tr. 46-48.) White stated that he had remained in his own lane and did not doze off. (Tr. 48, 54.) [Clearly White can offer no recollection of the accident at all other than he did not see the motorcycle until impact]. (Tr. 45-52.)

Frank Miller, the decedent's father, testified that at the time of his death the decedent was 27-years-old, in good health, and traveled Route 254 daily to and from work. (Tr. 71-80.)

At the conclusion of Miller's case, White moved the court to strike his evidence on grounds that White had failed to make out a prima facie case of negligence. (Tr. 86.) After considerable argument out of the presence of the jury, the trial court determined that Miller had failed to demonstrate how, why and where the accident occurred and sustained White's motion. (Tr. 104.)

ARGUMENT:

Whether the trial court erred in granting White's motion to strike the evidence.

Miller contends that his case differs significantly from the fact pattern in Weedle, Administratrix v. Draper, 204 Va. 319 (1963), upon which the trial court relied in sustaining White's motion to strike the evidence, and maintains accordingly that the principles articulated there do not control this case. [In Weedle the Court determined that the plaintiff had presented insufficient physical evidence of the manner in which an accident occurred to overcome the testimony of the defendant, the sole surviving eyewitness, and accordingly affirmed the decision of the trial court to strike the evidence]. (Pet. 8.)

Miller argues first that he presented substantially more affirmative physical evidence of White's negligence than did the plaintiff in Weedle, and offered additional evidence of White's negligence as well. [Comment: My review and reflection of the record convinces me Miller indeed presented more physical evidence than did the plaintiff in Weedle. Plaintiff's Exhibit #1, a large color photograph of the accident scene, indicates the clear presence of skid marks which White's vehicle left in the decedent's lane. As discussed, supra, the testimony and argument focused largely upon the significance of these marks as indications of how the accident occurred. Importantly, the Court in Weedle observed that in that case "there were no skid marks or debris found in the intersection to give an indication of the point of collision". Id. at 323. While Trooper Jordan testified that the scattered debris prevented him from locating the precise point of impact (Tr. 21), he did observe a "gouge mark" in the pavement in the decedent's lane where he believed some heavy metal impacted against the road]. (Tr. 4.)

Miller further distinguishes the Weedle case from the present situation in several respects. (Pet. 10.) He notes that the Weedle accident occurred at night, while the accident here happened in daylight with good visibility. Miller notes also that White offered no affirmative testimony explaining the accident, while the plaintiff in Weedle testified to the decedent's own clear negligence. [Accordingly, then, the physical evidence which Miller submits need not overcome as high an obstacle as did the plaintiff's evidence in Weedle]. (Pet. 10-11.)

Miller submits essentially that the physical evidence here coheres uniformly with a conclusion that White drifted into Miller's lane, struck him and upon impact lost control of his vehicle, precipitating a side skid which concluded with his car facing the opposite direction. (Pet. 11.) Miller notes as especially critical to this theory White's own testimony that he lost control of his car upon impact. (Pet. 11.) [White

testified that upon impact his head struck the windshield and that he doesn't recall anything further until the car stopped]. (Tr. 46.) Miller cites White's description that the motorcycle came from "nowhere" as a poor explanation of how the accident occurred. (Pet. 11.)

Miller also submits that additional evidence reinforces the distinctions between this case and Weedle. Miller notes that White acknowledged he had driven over 13 hours within the 24 hours period preceding the accident, and accordingly violated Va. Code § 46.1-201. Miller contends that White's physical condition in conjunction with his testimony that the motorcycle emerged from "nowhere" indicates that White may likely have fallen asleep at the wheel. (Pet. 13.)

Miller analogizes the present case to Chick Transit Corp. v. Edenton, 170 Va. 361 (1938). The Court in this case determined that the physical evidence of tire marks as well as other evidence justified a jury inference that the defendant truck driver had negligently encroached into the path of decedent's oncoming vehicle. Here too the defendant had driven for a substantial period without sleep, and violated the prohibition against driving in excess of 13 hours in one 24-hour period. Id. at 366. The Court here also articulated the principle that circumstantial evidence may sufficiently support a verdict and judgment in a civil action. Id.

Miller notes that in Mobley v. Pendleton, 212 Va. 418 (1971), the Court upheld a jury instruction which determined a violation of Code § 46.1-201 to be negligence per se. (Pet. 14.)

Miller additionally contends that the physical evidence clearly places White in the decedent's lane, and his presence there gives rise to a presumption of his negligence. (Pet. 14-15.)

Miller cites Interstate Veneer Co. v. Edwards, 191 Va. 107 (1950) for the principle that the law deems the failure to

operate a vehicle on the right side of the road as negligence absent a reasonable explanation. (Pet. 16.)

Miller additionally notes that White never attempted to place the decedent on the wrong side of the road. Miller submits that White has offered no other explanation for the accident other than his own negligence, and a jury might have reasonably so concluded. (Pet. 6.) Miller contends that the physical evidence of this case completely contradicts White's incredulous testimony that he remained on his own side of the road, and cites Early v. Mathena, Adm'r., 203 Va. 330 (1962) for the proposition that a jury verdict in favor of defendant, predicated solely upon his testimony, does not bind the Court on review when the weight of the physical evidence so overwhelms his account of the accident.

Miller additionally submits that White's clear failure to keep a proper lookout also gives rise to a presumption of his negligence. Miller observes that White admitted to not seeing the decedent approaching, and again invokes White's description that the motorcycle came from "nowhere" as evidence of White's obvious failure to maintain a proper lookout. (Tr. 18.)

Miller analogizes the present situation to the fact pattern in Via v. Badanes, 189 Va. 44 (1949), in which the Court concluded that the occurrence of a head-on collision indicated the negligence of either one or both drivers. Miller argues that White adduced no credible evidence whatsoever of the decedent's negligence and submits that White has failed to rebut the presumptions of negligence which attach against him. (Pet. 19-20.)

Miller invokes Matthews v. Hicks, Adm'r., 197 Va. 112 (1955) as authority for the principle that a statement by a defendant that he failed to detect the presence of a vehicle until impact amply supports a jury conclusion of his negligence. [In Matthews the culpable defendant failed to observe a slower vehicle traveling in the right-hand lane as he switched from

the passing lane.

Miller cites Von Roy v. Whitescarver, 197 Va. 384 (1955) as authority for the principle that a driver owes an absolute duty to detect an oncoming vehicle when the exercise of reasonable care must necessarily disclose the presence of such car. (Pet. 21.)

Miller also invokes Armstrong v. Rose, 170 Va. 190 (1938) for the principle that the law presumes the decedent in a wrongful death action acted from the instinct of self-preservation and exercised due and proper care until defendant affirmatively proves the contrary. Miller contends that White has failed to rebut this presumption. (Pet. 22.)

Miller maintains that the law cannot fairly deny him recovery because he lacks direct evidence of White's negligence. Miller notes that White stands as the only eyewitness to the accident, and his testimony contributes little. Miller cites Skyes v. Langley Cabs, Inc., 211 Va. 202 (1970) for the principle that the circumstantial evidence which the plaintiff adduces as proof of defendant's negligence need not negate every possibility that the accident occurred in some manner consistent with defendant's innocence. "All that is required is that a jury be satisfied with proof which leads to a logical conclusion with probable certainty where absolute logical certainty is impossible". Id. at 208-09.

Miller advances Milton v. Norfolk & W.R. Co., 108 Va. 752, 764 (1908) as authority for the principle that a prima facie case of negligence requires only proof that the injury more probably resulted from defendant's negligence than any other reason (Pet. 25), and invokes Williams v. Vaughan, 214 Va. 307 (1973) for the proposition that in ruling upon a motion to strike the trial court must resolve any reasonable doubt as to the sufficiency of the evidence in plaintiff's favor. (Pet. 26.)

White responds that Miller has failed to meet the burden of establishing a prima facie case of negligence as

Weedle, Adm'x, supra, requires. White contends that Miller improperly bases his case upon mere inferences and presumptions, and has adduced no sure evidence explaining how and why the accident occurred.

White contends that although the skid and gouge marks appear in his lane, the testimony of Trooper Jordan that the White vehicle had already assumed a canted position before skidding poses a reasonable inference that White struck Miller before entering Miller's lane. (Pet. 9.)

White notes testimony from Trooper Jordan that the motorcycle may have ridden up the front fender of the White car as important, but does not clearly or meaningfully explain how this testimony advances his theory of the accident. (Br. Opp. 10.)

Miller submits that the physical evidence does not unmistakably demonstrate the manner in which the accident occurred, and contends accordingly that any jury verdict predicated upon such evidence must necessarily result from mere conjecture and speculation. (Br. Opp. 11.)

White attempts to distinguish some of the case authority which Miller invokes, and submits that the principles which controlled there should not apply here. White argues that Via v. Badanes, supra, is distinguishable from the present situation because there the two parties offered conflicting accounts of a head-on collision, while here White's survived as the only eyewitness. (Pet. 13-14.)

White submits that Matthews v. Hicks, Adm'r., supra, [ruling generally that the defendant's admission to not seeing a vehicle traveling in the right lane before defendant entered this lane from the passing lane constituted ample evidence for the jury conclusion of defendant's negligence] is inapposite because of the clear incongruence of the fact patterns. (Br. Opp. 15.)

White contends that his testimony that he remained in his own lane (Tr. 18) effectively rebuts whatever presumption Miller may have enjoyed that the decedent acted with reasonable care. (Br. Opp. 15.)

White additionally argues that his testimony reveals him to have been on the road really only about 13 hours out of the past 24 hours. (Br. Opp. 17.)

White submits that the facts of Chick Transit Corp. v. Edenton, 170 Va. 316 (1938), in which the Court determined that the physical evidence allowed a reasonable inference of negligence, is distinguishable from the present situation because there the skid marks from decedent's car placed him in the proper lane. (Br. Opp. 18.)

White also maintains that Masters v. Cardi, 186 Va. 261 (1947), which Miller relies upon for the sufficiency of circumstantial physical evidence, involved speeding and rain conditions, factors absent here.

White maintains that no case directly holds that driving in excess of 13 hours constitutes negligence per se. (Br. Opp. 20.)

White concludes that too many uncertainties afflict Miller's case to allow a jury to consider his possible negligence. (Br. Opp. 21.)

COMMENT:

Clear ambiguity and tension clouds the above authority, and the legal issue raised, as well as Miller's own case, deserve a closer look.

T.J.H.  
3/27/80