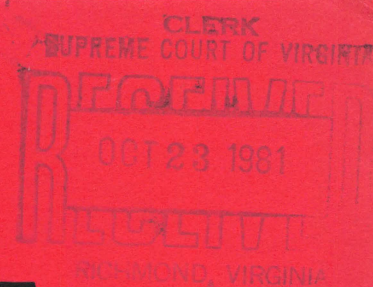


823Va 373



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 810713

RENE DUNCAN, an infant

Appellant

v.

REBECCA C. HIXON, an infant,
who sues by her mother and
next friend, Rose A. Hixon

Appellee

JOINT APPENDIX

Jerry K. Jebo, Esquire
JEBO & ROSENTHAL
P. O. Box 1089
Radford, Virginia 24141

Counsel for Appellant

Edwin C. Stone, Esquire
DAVIS, STONE & WALL
P. O. Box 3448
Radford, Virginia 24143

Counsel for Appellee

TABLE OF CONTENTS

	<u>Appendix Page</u>
Motion for Judgment	1
Jury Instruction No. 6	4
Motion for a New Trial	5
Trial Order	8
Final Order dated February 26, 1981	14
Notice of Appeal	16
Assignments of Error	17
Excerpts from trial testimony:	
Pre-trial motion	18
Testimony of Ralph E. Ebersole	23
Testimony of Rene Duncan	32
Objection to Instruction No. 6	84
Query from Jury	87
Motion to set aside verdict and grant a new trial	90
Ruling on Motion for a new trial	92

V I R G I N I A:

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY

REBECCA C. HIXON, an infant, :
who sues by her mother and :
next friend, ROSE A. HIXON, :

Plaintiff :

v. :

MOTION FOR JUDGMENT

RENE DUNCAN, an infant, :
Old Farm Village :
Apartment 612 :
Christiansburg, Virginia, :

Defendant :

TO THE HONORABLE K. I. DEVORE, JUDGE OF SAID COURT:

Comes now the plaintiff and moves the Court for judgment against the defendant in the sum of SEVENTY-FIVE THOUSAND DOLLARS (\$75,000.00), and in support of said motion, sets forth the following:

1. The plaintiff is an infant, five years of age, having been born on January 3, 1975. She files this action by her mother and next friend, Rose A. Hixon.

2. On June 20, 1979, the plaintiff was riding a tricycle on the premises of Belmont Trailer Park in Montgomery County, Virginia.

3. At the time and place aforesaid, the defendant was operating a Ford Pinto automobile in the vicinity where the plaintiff was playing. Also at the place where the child

was playing and where the plaintiff was operating the automobile, there was a sign advising traffic to drive slowly because of children playing.

4. It became and was the duty of the defendant, Rene Duncan, to exercise ordinary care, to operate her vehicle at a reasonable rate of speed under the circumstances and conditions then and there existing; to keep a proper lookout for children playing in the vicinity; to keep her vehicle under proper control; to operate her vehicle after notice of the presence of children playing in such a manner as to stop immediately; and to otherwise operate her vehicle in a prudent manner.

5. That in violation of the foregoing duties, the defendant, Rene Duncan, was then and there negligent in that she operated her vehicle at an excessive rate of speed under the circumstances and conditions then and there existing; failed to keep a proper lookout for persons who might be affected by the operation of her vehicle; failed to keep her vehicle under proper control; failed to operate her vehicle in such a manner as to be able to stop immediately when a child might be in danger; and was otherwise then and there negligent.

6. That as a result of the foregoing negligence, the defendant's automobile struck the plaintiff with great force and violence.

7. The plaintiff was injured over her entire body and those injuries are of a serious and permanent nature and have caused mental anguish and pain and suffering and will continue to do so.

WHEREFORE, the plaintiff respectfully moves the court for judgment against the defendant in the sum of \$75,000.00.

Respectfully,

REBECCA C. HIXON, an infant, who
sues by her mother and next
friend, ROSE A. HIXON

By: 

Of Counsel

EDWIN C. STONE
Davis & Stone, Attorneys, Inc.
P. O. Box 3448, FSS
Radford, Virginia 24141
Counsel for Plaintiff

STONE
'S, INC.
END
AL BLOS
148
ITATION
A. 24141

INSTRUCTION NO. 6

The Court instructs the jury that the defendant violated the law when she operated this vehicle under a temporary instruction permit without a licensed driver over the age of eighteen years on the seat beside her. This violation of the law was negligence.

And if you believe from a preponderance of the evidence that any such negligence in violating the law was a proximate cause of this accident, then you shall return your verdict in favor of the plaintiff.

VIRGINIA: IN THE CIRCUIT COURT OF MONTGOMERY COUNTY

REBECCA C. HIXON, an infant, :
who sues by her mother and :
next friend, ROSE A. HIXON, :

Plaintiff :

v. :

MOTION FOR A NEW TRIAL

RENE DUNCAN, an infant, :

Defendant :

Comes now the defendant, Rene Duncan, by counsel,
pursuant to the Order of the Circuit Court of Montgomery County
granting judgment in favor of the plaintiff in the sum of
\$25,000.00, with interest from February 6, 1981, and moves this
Court to vacate the aforesaid Order and grant a new trial
pursuant to Rule 1:1 of the Rules of the Supreme Court of
Virginia on the following grounds:

(1) That the trial court erred in allowing the
plaintiff to put on evidence that the defendant only had a
learner's permit at the time of the accident and did not
have a licensed driver over the age of 18 years on the seat
beside her. The trial court also committed error in giving

Instruction No. 6 offered by the plaintiff which advised the jury that the defendant was negligent for having operated the vehicle while possessing only a temporary instruction permit and not having a licensed driver over the age of 18 years on the seat beside her.

(2) That the defendant, Rene Duncan, was prejudiced by the mention of insurance by defendant's witness, Annie Woolwine, under cross-examination by the plaintiff's attorney and the amount of the jury verdict, being \$25,000.00, reflects that the improper mention of insurance did have an effect on the jury since this is the minimum amount of insurance required by anyone driving an automobile on the roads of the State of Virginia.

(3) That the jury verdict in the amount of \$25,000.00 was excessive as a matter of law.

The arguments on behalf of the defendant with regard to these grounds for a new trial are fully set out and discussed in a brief which is submitted to the Court along with this Motion for its consideration. A hearing is scheduled for Friday, February 20, 1981, at 9:00 o'clock a.m. in the Judge's chambers of the Circuit Court of Montgomery County, Virginia for the purpose of hearing arguments on defendant's Motion for a new trial.

Respectfully submitted,

RENE DUNCAN

BY:

 OF Counsel

JEBO & ROSENTHAL
Attorneys at Law
P. O. Box 1089
Radford, VA 24141
Counsel for Defendant

CERTIFICATE

I, Jerry K. Jebo, counsel for the defendant, do hereby
certify that I have this 13th day of February, 1981 mailed a
true copy of the foregoing Motion for a New Trial to Edwin C.
Stone, Esquire, Attorney at Law, P. O. Box 3448 - FSS, Radford,
Virginia 24141, counsel for the plaintiff.



Jerry K. Jebo

- 2 -

VIRGINIA: IN THE CIRCUIT COURT OF MONTGOMERY COUNTY

REBECCA C. HIXON, an infant,
who sues by her mother and
next friend, ROSE A. HIXON,

Plaintiff

v.

RENE DUNCAN, an infant,

Defendant

TRIAL ORDER

This case came on to be heard on the 6th day of February, having previously been set for trial on that date; and came the parties, in person and by counsel, and issue having been joined, the parties announced ready for trial.

And came a jury, a panel of thirteen (13), summoned from the regular venire for this term of this Court, who were duly examined and found to be free of all lawful exceptions and duly qualified to serve as jurors, from which panel the plaintiff and defendant each struck three and there remained for the trial of the case the following jurors, to-wit:
Dan E. Dreyer; Sibil S. Lester; Lena C. Woods; Herbert C. Ayers; Wilson E. Bell; Richard D. Foster; and Margie M. Cupp, who were sworn to well and truly try the issues joined between

the plaintiff and the defendant and a true verdict render according to the law and the evidence.

WHEREUPON, the defendant, by counsel, outside the hearing of the jury, moved the Court to exclude from the jury's consideration any evidence relating to the fact that at the time of the accident in question, the defendant held only a temporary instruction permit and did not have a licensed driver over the age of eighteen (18) years on the seat beside her. The Court overruled the motion to exclude such evidence and the defendant, by counsel, objected.

WHEREUPON, the plaintiff proceeded to introduce her evidence and rested, and the defendant, by counsel, moved the Court to strike the evidence of the plaintiff and to grant summary judgment to the defendant on the grounds that the plaintiff had failed to make out a prima facie case of negligence which was the proximate cause of the injuries to the plaintiff, which motion the Court overruled and to which action of the Court in so doing the defendant, by counsel, objected.

WHEREUPON, the defendant proceeded to introduce her evidence and rested and the plaintiff, by counsel, moved the Court to strike the evidence of the defendant on the grounds that her evidence showed negligence as a matter of law, and to submit the case to the jury only on the question of damages, which motion the Court overruled and to which action of the Court in so doing the plaintiff, by counsel, objected.

And after hearing the instructions of the Court and arguments of counsel, the jury retired to their jury room to consider their verdict, and after a time returned with the following verdict, to-wit:

"We, the jury, on the issues joined, find in favor of the plaintiff and fix her damages at \$25,000. Signed: H. C. Ayers, Foreman".

And the defendant, by counsel, then moved the Court to set aside the verdict of the jury and to enter final judgment for the defendant or in the alternative to grant a new trial, on the following grounds:

1. That the Court erred in allowing evidence to come before the jury to the effect that the defendant was operating her vehicle at the time of the accident holding only a temporary instruction permit and not having a licensed driver over the age of 18 years on the seat beside her.
2. That the Court had given certain erroneous instructions and had refused to give certain proper instructions, over the objections of the defendant.
3. That insurance had been mentioned by one of the defense witnesses, which resulted in substantial prejudice to the defendant, as indicated by the fact that the jury verdict was for the amount of the minimum coverage required under the laws of the Commonwealth of Virginia, which the defendant maintained was an indication that the mention of insurance had affected the jury's deliberations.
4. That the verdict was excessive, without evidence to support it, and plainly wrong.

And the Court overruled the motion of the defendant to set aside the jury verdict, to which action the defendant, by counsel, objected.

Pursuant to a motion filed by the defendant asking the Court to set aside the jury verdict and grant a new trial to the defendant upon grounds more particularly stated in said motion, a hearing was held before the Court on February 20, 1981 at which time briefs and oral argument were presented by counsel for the plaintiff and defendant. After due consideration, the Court overruled the motion of the defendant to set aside the jury verdict, to which action the defendant, by counsel, objected.

WHEREFORE, in accordance with the jury verdict, it is ADJUDGED and ORDERED that the plaintiff shall have and recover judgment against the defendant in the sum of \$25,000.00, with interest from February 6, 1981, and the plaintiff to recover her costs herein.

And it appearing to the Court that the plaintiff is an infant, six years of age, having been born on January 3, 1975, it is further ORDERED that the sum of \$8,333.33 shall be paid to Edwin C. Stone for representing the interest of the plaintiff herein; the sum of \$2,666.67 shall be paid to the parents for the purpose of reimbursing a portion of the medical expenses and other expenses incurred in connection with treatment of the infant plaintiff; and the balance of \$14,000.00 shall be paid to the Clerk of this Court, to be invested by the Clerk in a bank or savings institution at

the highest possible rate of interest, and to be held by the Clerk for the benefit of Rebecca C. Hixon until she shall attain the age of eighteen years, which will be on January 3, 1993, at which time the funds shall be paid to Rebecca C. Hixon without further Order of the Court.

AL
LAW
24141

And the defendant having indicated her intention to apply to the Supreme Court of Virginia for a writ of error and supersedeas to the judgment herein granted and having requested that an appeal bond and suspending bond be set by the Court, the Court doth ADJUDGE and ORDER that the execution of the foregoing judgment be, and the same hereby is, suspended to permit the defendant to apply to the Supreme Court of Virginia for a writ of error to the judgment herein granted, provided, however, that the defendant, or someone on her behalf, shall, within thirty (30) days from the date hereof, execute a bond before the Clerk of this Court with corporate surety conditioned according to law upon the suspension of the execution of the judgment herein granted, and for payment of all costs and damages to the plaintiff by reason of said appeal; which said suspension of execution shall be further conditioned according to law, and shall remain in effect until a petition for a writ of error has been acted upon by the Supreme Court of Virginia, and provided that the said defendant shall prosecute said appeal, by proceeding therewith in the times provided by law.

The Court doth further ORDER that the court reporter's transcript of the proceedings in this case is hereby made a part of the record when filed by the reporter within the time provided by law.

And nothing further remaining to be done in this action, the same is hereby stricken from the docket.

I ASK FOR THIS ORDER:

s/ Edwin C. Stone
Counsel for Plaintiff

I HAVE SEEN THIS ORDER
AND OBJECT TO ITS ENTRY:

s/ Jerry K. Jebo
Counsel for Defendant

ENTER THIS ORDER:

This 25th day of Feb., 1981.

s/ K. I. Devore
Judge

A Copy-Teste:

JOHN B. MYERS, JR. Clerk
Circuit Court, Montgomery County, Virginia

By: May A. Shadler Deputy Clerk

- 5 -

VIRGINIA: IN THE CIRCUIT COURT OF MONTGOMERY COUNTY

REBECCA C. HIXON, an infant,	:	
who sues by her mother and	:	
next friend, ROSE A. HIXON,	:	
	:	
Plaintiff	:	
	:	
v.	:	<u>ORDER</u>
	:	
RENE DUNCAN, an infant,	:	
	:	
Defendant	:	

Pursuant to Order of this Court in the above-styled matter dated February 25, 1981, the Court doth ORDER and ADJUDGE that the amount of the appeal bond and suspending bond to be executed before the Clerk of this Court with corporate surety to allow the defendant to apply to the Supreme Court of Virginia for a writ of error and supersedeas to the judgment herein granted is \$25,000.00. This appeal bond and suspending bond shall remain in effect until a petition for a writ of error has been acted upon by the Supreme Court of Virginia and provided that said defendant shall prosecute said appeal by proceeding therewith in the times provided by law.

And nothing further remaining to be done in this action, the same is hereby stricken from the docket.

BO &
ENTHAL
178 AT LAW
1 1088
VA. 24141

I ASK FOR THIS ORDER:

Joseph L. J. J.
Counsel for Defendant

I HAVE SEEN THIS ORDER:

Ed C. J. J.
Counsel for Plaintiff

ENTER THIS ORDER:

This 26th day of Feb.,
1981.

/s/ K. T. Devore
Judge

A Copy-Teste:

JOHN R. MYERS, JR., Clerk
County Clerk, Loudoun County, Virginia

Carol L. Beechler Deputy Clerk

VIRGINIA: IN THE CIRCUIT COURT OF MONTGOMERY COUNTY

REBECCA C. HIXON, an infant, :
who sues by her mother and :
next friend, ROSE A. HIXON, :

Plaintiff :

v. :

NOTICE OF APPEAL

RENE DUNCAN, an infant, :

Defendant :

Pursuant to Rule 5:6 of the Rules of the Supreme Court of Virginia, the defendant, Rene Duncan, by counsel, herewith files her Notice that she intends to apply to the Supreme Court of Virginia for a writ of error and supersedeas to the judgment herein granted pursuant to Order of this Court dated February 26, 1981.

The defendant, by counsel, gives further notice that the court reporter's transcript of the proceedings in this case shall be filed with the Clerk of the Circuit Court of Montgomery County to be made a part of the record in this matter.

This Notice is dated this 27th day of February, 1981.

Respectfully submitted,

RENE DUNCAN

BY:

Jerrold J. Rosenthal
Of Counsel

JEBO & ROSENTHAL
Attorneys at Law
P. O. Box 1089
Radford, VA 24141
Counsel for Defendant

ASSIGNMENTS OF ERROR

I. TEMPORARY INSTRUCTION PERMIT

- A. ERROR IS ASSIGNED TO THE COURT'S OVERRULING OF DUNCAN'S MOTION TO EXCLUDE EVIDENCE THAT, AT THE TIME OF THE ACCIDENT, DUNCAN HAD A LEARNER'S PERMIT AND WAS NOT ACCOMPANIED BY A DRIVER OVER THE AGE OF 18 YEARS.**
- B. ERROR IS ASSIGNED TO THE COURT'S GRANTING OF INSTRUCTION NO. 6 THAT CHARGED THE JURY THAT DUNCAN WAS NEGLIGENT AS A MATTER OF LAW IN DRIVING WITH A LEARNER'S PERMIT WITHOUT BEING ACCOMPANIED BY A DRIVER OVER THE AGE OF 18 YEARS.**
- C. ERROR IS ASSIGNED TO THE COURT'S OVERRULING OF DUNCAN'S MOTION FOR A NEW TRIAL BASED UPON THE ERRONEOUS INTRODUCTION OF THE EVIDENCE RELATING TO DUNCAN'S LEARNER'S PERMIT AND UPON THE GIVING OF INSTRUCTION NO. 6.**

PRE-TRIAL MOTION

TRANSCRIPT AT PAGE 1-4

1 9:30 A.M. - IN CHAMBERS.

2 BY MR. JEBO:

3 Your Honor, there are just a couple of
4 matters to bring to the Court's attention to maybe
5 avoid some problems. Number (1), this is a Case
6 that, of course, is brought on behalf of the young
7 girl against Rene Duncan for injuries received by the
8 young girl in an auto accident that occurred on June
9 20, 1979. Now, Rene Duncan, who is my client, and
10 who is the Defendant in this case, did not have a
11 Driver's License at the time. She had a Learner's
12 Permit, and of course, we would ask the Court to
13 exclude any evidence that she did not have a Driver's
14 License, since that is irrelevant as far as the issues
15 of negligence in this case.

16 BY THE COURT:

17 Was there a licensed driver with her?

18 BY MR. JEBO:

19 No.

20 BY MR. STONE:

21 The Law is clear she can drive a car
22 if she has an 18-year-old or older driver in the seat
23 beside her. Now, I have tried to figure any reason
24 for that Statute, other than safety. You know, a
25 55 mile an hour speed limit, you can say that's partly

1 for conservation; but there is no reason, other than
2 safety, for her to have an adult driver beside her.

3 BY MR. JEBO:

4 Your Honor, I think the case Law in
5 Virginia - and I didn't look up the case because I
6 thought it was so obvious, you know - let's say some-
7 body who has an expired license or who has a sus-
8 pended license, the fact that he does not have a
9 license is not evidence of his negligence. The evi-
10 dence is whether the person who is operating the
11 vehicle was taking reasonable care at the time of the
12 incident. That's the question, the issue before us;
13 not whether they had a license or not, or just a
14 Learner's Permit or whatever. The question is the
15 way they operate their car. We feel that if the
16 Plaintiff is allowed to bring in the fact that Rene
17 Duncan only had a Learner's Permit, that it will be
18 prejudice to her and would be improper under prior
19 Law in Virginia, and we would ask the Court to
20 exclude that evidence.

21 BY MR. STONE:

22 Judge, especially in this case - and it's
23 obvious that it's to have a mature driver who can
24 give instruction and take control, if necessary - she
25 said two things happened: She was approaching a

1 child who was on the road; that as she got to the
2 child, the child was looking at her and she was look-
3 ing at the child; she assumed the child would stay
4 where she was, one foot into the road, so she took
5 her foot off the brake. Now, a mature driver would
6 say, "Watch that child. Keep your foot on the brake"
7 or at least we are entitled to argue that - and if
8 there's any reason for that Statute which has to do
9 with safety, which the Jury would have a right to
10 believe was the proximate cause or could have avoided
11 this accident, I think we are entitled to it.

12 BY MR. JEBO:

13 The license is not the proximate cause
14 of the accident.

15 BY MR. STONE:

16 The failure to have a driver is. I'm
17 not going to tell them she had to have a license.
18 I'm going to tell them she had to have a licensed
19 adult driver on the seat beside her, which the Law
20 says.

21 BY THE COURT:

22 I think that's the purpose of the law,
23 to have a mature, adult licensed driver there for
24 safety.

1 BY MR. JEBO:

2 Your Honor, we object strenuously to any
3 evidence coming out to the effect that she did not hav
4 a license at the time of this accident, as we feel
5 that is not negligence. It may be illegal, but it is
6 not negligence, and could not be the proximate cause
7 of this accident; and therefore, we feel it would be
8 prejudicial if it was brought out, and so we ask the
9 Court to exclude it.

10 BY MR. STONE:

11 Isn't the Law pretty clear that the viola-
12 tion of a Safety Statute is negligence per se, then
13 it's a question of proximate cause?

14 BY MR. JEBO:

15 But I don't think - the license is not
16 a Safety Statute. It's sort of like driving a car
17 without registration.

18 BY THE COURT:

19 Well, I think that's the purpose of the
20 Statute, to have someone there to advise the person
21 with a Beginner's License, or whatever you call it;
22 and if the facts come out as Ed says they will come
23 out, then that could be part of the negligence, if any,
24 and I would Overrule the Motion.

25 BY MR. JEBO:

We take Exception to the Court's Ruling.

TESTIMONY OF RALPH E. EBERSOLE

TRANSCRIPT AT PAGE 7-14

1 in essence, because of the emphasis that was placed
2 on that tricycle.

3 BY MR. STONE:

4 Judge, the sign says "Slow - Children
5 Playing," and they are going to say that is what it
6 says on the other side of it, and show the close
7 proximity. I think if I put a witness on who says
8 this accurately depicts the car, this shows the little
9 tricycle she was on, this is the sign that was right
10 beside that says "Slow - Children Playing," then I
11 think it's got to be admitted..

12 BY THE COURT:

13 I think so, too.

14 9:45 A.M. - COURT CONVENES

15 COURT REPORTER SWORN

16 PROSPECTIVE JURORS SWORN ON THE VOIR DIRE

17 COURT EXPLAINS CASE TO THE PROSPECTIVE JURORS

18 JURORS SELECTED

19 JURORS SWORN ON THE VOIR DIRE

20 WITNESSES EXCLUDED FROM THE COURTROOM

21 OPENING STATEMENT BY MR. STONE

22 OPENING STATEMENT BY MR. JEBO

23 RALPH E. EBERSOLE, being duly sworn, testified as
24 follows:

25 DIRECT EXAMINATION BY MR. STONE:

Q: What is your name, please?

1 A: Ralph E. Ebersole.

2 Q: You live here in Christiansburg?

3 A: Yes sir.

4 Q: What was your occupation in June of

5 1979?

6 A: State Police Trooper.

7 Q: I believe you are now a full-time

8 student?

9 A: Yes sir.

10 Q: Did you have occasion on June the

11 20th, 1979 to go to the Belmont Trailer Park, over

12 on 114, to investigate an accident?

13 A: Yes sir.

14 Q: Can you tell from your notes approxi-

15 mately what time of the day that was?

16 A: The accident occurred at 6:45 P.M.

17 Q: Daylight?

18 A: Right, in the evening. I arrived

19 approximately 30 minutes later.

20 Q: What two vehicles did you find when

21 you arrived? (I assume a tricycle is a vehicle.)

22 Did you find a tricycle?

23 A: Right, one of the Big Wheel type

24 vehicles and a 1972 Ford, two-door sedan.

25 Q: Had you ever been into Belmont
Trailer Park before?

1 A: Yes sir.

2 Q: Do you know what instructions or
3 warnings there are to drivers, as they enter into
4 the trailer park, regarding children?

5 A: I don't. . .

6 Q: Is there any sign there?

7 A: Slow - Children Playing.

8 Q: Slow - Children Playing. Is that
9 as you go in?

10 A: I think it's right just as you turn
11 off 114 at the. . .

12 Q: Is there one entrance?

13 A: As far as I know. That's the one
14 I'm familiar with.

15 Q: Did you find out who was driving
16 the Pinto?

17 A: Yes sir.

18 Q: Who?

19 A: Rene. Woolwine Duncan.

20 Q: Age 15?

21 A: Right.

22 Q: What kind of Driver's License did
23 she have?

24 BY MR. JEBO:

25 Your Honor, I am going to Object again

1 for the Record. We do not feel the fact that this
2 girl did not have a valid Driver's License is relevant,
3 as far as whether she was operating the vehicle cor-
4 rectly or not.

5 BY THE COURT:

6 Your Objection is Overruled.

7 BY MR. JEBO:

8 Exception.

9 BY MR. STONE:

10 Q: What kind of Driver's License did
11 she have?

12 A: She had what is known as a Temporary
13 Operator's Permit.

14 Q: A Temporary Instruction Permit?

15 A: Yes sir.

16 Q: Is that the same as a Learner's
17 Permit?

18 A: Yes sir.

19 Q: Did she tell you what happened?

20 A: Yes sir.

21 Q: What did she tell you?

22 A: Her statement to me at the time was:
23 "I was talking to Rose Hixon. I was on this side" -
24 (indicating the right side) - "of the roadway."

25 Q: On the right side of the roadway?

1 A: Right. She pointed, indicating the
2 right side. "When I started going, I seen her sister
3 had her hand. I was going five miles per hour when
4 I hit her."

5 Q: Five miles per hour when she hit
6 her?

7 A: Yes sir.

8 Q: All right, go ahead.

9 A: "I hit my brakes, and my foot slipped
10 off."

11 Q: "Foot slipped off?" You're sure
12 that's what she said?

13 A: Yes sir.

14 Q: All right, go ahead.

15 A: She said, "I had on sandals, and I
16 went to get her mother." At the time this statement
17 was taken, I let her reread it, and her name is signed
18 in her own handwriting below it.

19 Q: Is there any particular reason that
20 you know of that she told you she had on sandals?
21 Did she tell you what kind of blouse she had on?

22 A: No sir.

23 Q: But she did say she had on sandals?

24 A: Yes.

25 Q: All right, now I assume that in

1 accident investigations, Trooper Ebersole, that what
2 they tell you about what happened is very important
3 in reconstructing the accident?

4 A: That's correct.

5 Q: In your investigation, would it mean
6 the same if she said my foot slipped off or I took my
7 foot off the brake - would they mean the same thing
8 to you?

9 A: No sir.

10 Q: They would be very different, wouldn't
11 they?

12 A: Yes sir.

13 Q: All right. How wide is this road-
14 way that she was traveling on, approximately - the
15 pavement?

16 A: I would estimate twelve feet.

17 Q: A twelve foot pavement?

18 A: Ten to twelve feet.

19 Q: And she said she was on the right?

20 A: That's right.

21 Q: And the fact is, isn't it Trooper
22 Ebersole, that she ended up over in the left ditch?

23 A: Right.

24 Q: And that she drug the child across
25 the road with the car?

1 BY MR. JEBO:

2 Your Honor, I Object. The Trooper
3 doesn't know what happened at this scene. All he
4 can do is testify what physical facts he found and
5 what. . .

6 BY MR. STONE:

7 I'll withdraw that question as posed.

8 Q: Did Rene Duncan tell you where she
9 struck the child? Did she point it out?

10 A: No sir.

11 Q: How did you determine that?

12 A: She indicated to me that she went
13 to the right side of the road in an attempt to avoid
14 hitting the child.

15 Q: Went to the right side?

16 A: Right.

17 Q: But she actually ended up on the
18 left side?

19 A: Excuse me - she turned to her left
20 to avoid hitting the child who was approaching from
21 her right.

22 Q: All right, do you know what part of
23 the car struck the child?

24 A: Yes sir, it would have been the
25 left-front corner.

1 Q: The left-front corner or the right-
2 front corner?

3 A: The left-front corner - the driver's
4 front corner.

5 Q: In front of the wheel?

6 A: Right.

7 Q: Do you know approximately how far
8 the child was dragged?

9 A: I could only estimate, because I
10 was unable to determine just exactly at what point
11 the child was.

12 BY MR. JEBO:

13 Your Honor, I Object.

14 BY MR. STONE:

15 I will withdraw it then.

16 Q: Was the child there when you got
17 there?

18 A: No sir.

19 Q: Do you know where it had gone or
20 had been taken?

21 A: It was my impression that the child
22 had been taken to the Montgomery County Hospital.

23 Q: By ambulance?

24 A: Yes sir.

1

1 the impression that it was from that point. That's
2 what I have marked on my diagram. I don't recall
3 what indicated that to me, but I had no reason to
4 believe any otherwise. If it had been the front end
5 of the car, it would have been either the right side.

6 Q: Okay. It could have been the right-
7 front, too - right? Of her car?

8 A: The front bumper was what hit the
9 child.

10 Q: That's right, but you are not sure
11 whether. . .

12 A: Exactly what position on that bumper,
13 I couldn't be certain.

14 Q: It could be the right or the left side?

15 A: Very possible.

16 BY MR. JEBO:

17 Okay, that's all.

18 BY MR. STONE:

19 I have no other questions.

20 WITNESS ASIDE

21 RENE DUNCAN, an Adverse Witness called on behalf
22 of the Plaintiff, being duly sworn, testified as follows:

23 DIRECT EXAMINATION BY MR. STONE:

24 Q: Rene, do you recall telling Trooper
25 Ebersole that your foot slipped off the brake?

1 A: Yes, I do.

2 Q: All right. Now, you testified in
3 Depositions in my office back in November, I believe -
4 do you remember that?

5 A: Yes.

6 Q: Do you recall saying three different
7 times that you took your foot off the brake and put
8 it on the floor?

9 A: After I was confident that they would
10 stay there, yes, I did.

11 Q: Now, which is it? Did your foot
12 slip off the brake, or did you take it off and put it
13 on the floor?

14 A: When I seen them, I put my foot on
15 the brake, and I kept it on the brake until I felt
16 confident that they would stay there and not. . .

17 Q: How far away from them were you?
18 About 15 feet when you felt confident they would stay
19 there?

20 A: No.

21 Q: How far?

22 A: Well, they was almost - I was almost
23 past them. They were about like this (INDICATING).
24 Here I was driving and. . .

25 Q: How far away - she was about a foot
in on the road, you said?

1 A: Yes sir.

2 Q: On the right side?

3 A: Right.

4 Q: And you were all the way over on to

5 the left?

6 A: Yes.

7 Q: So you were eight feet away from

8 them, your path of travel would have been eight feet

9 away from Becky?

10 A: Yes.

11 Q: And just as you were beside of her,

12 she rode the Big Wheel out into you?

13 A: Yes.

14 Q: You were going five miles an hour?

15 A: About that.

16 Q: And you are telling this Jury that

17 when you were even with her, she started out and

18 you hit her with your front bumper, although you were

19 beside of her when she started towards you?

20 A: I can't say that I was even with her,

21 but you know, I was almost. . .

22 Q: You did hit her with your front

23 bumper?

24 A: Right.

25 Q: And was your foot on the brake then?

1 A: No.

2 Q: When did your foot slip off the brake?

3 A: When I seen her coming out in front

4 of me and I hit the brake real hard, and I didn't hit

5 it center - because the brake pedals are small - I

6 didn't hit it centered. . .

7 Q: And it slipped off?

8 A: Yes.

9 Q: All right, and if it hadn't slipped

10 off, you probably could have stopped - couldn't you?

11 A: No, if my foot would have stayed on

12 that brake, I would still have hit her.

13 Q: With the front bumper?

14 A: That's right.

15 Q: She must have been moving pretty

16 fast across the road, wouldn't you say?

17 A: Yes, she was.

18 Q: Okay. So you took your foot off

19 one time and set it on the floor and put it back on

20 again and it slipped off?

21 A: No, when I seen them, I had my foot

22 on the brake; and then when I felt confident, I took

23 my foot off and laid it on the floor.

24 Q: How far away from you were they

25 when you felt confident and you took your foot off

and laid it on the floor?

1 A: From the car to them?

2 Q: From the car to them?

3 A: I'd say about four - three or four
4 feet, something like that.

5 Q: Three or four feet, you took your
6 foot off and set it on the floor - right?

7 A: Yes.

8 Q: And then she started towards you?

9 A: Well, I didn't see her start towards
10 me.

11 Q: How far were you from her then?

12 A: I was just - after I felt confident
13 they were going to stay there, I just took my foot
14 off, laid it on the floorboard, and just started rolling
15 on down; and then I took my eye off and just started
16 looking ahead because I was on the wrong side of the
17 road, and then before I knew it, she just darted out
18 in front of me.

19 Q: I hate to badger you and I don't want
20 to - you were going down - you saw them about 50
21 feet away?

22 A: Yes.

23 Q: You knew they were there?

24 A: Right.

25 Q: And you knew Becky?

A: Right.

1 Q: And you knew she was an active
2 little child?

3 A: Right.

4 Q: And she was as apt to ride out in
5 the road in front of you as anything - four years old?

6 A: Right.

7 Q: So you saw her and you were going -
8 whatever speed you say - and you are about four or
9 five feet away, you had your foot on the brake, and
10 four or five feet now would be from right here to
11 about right here (DIAGRAM) - is that what you mean -
12 four or five feet? Is that about the distance?

13 A: Yes, about three, three or four.

14 Q: A little less than that, maybe?

15 A: Maybe.

16 Q: All right, when you were that dis-
17 tance, you took your foot off the brake and rested it
18 on the floor?

19 A: Right, and just started coasting on.

20 Q: Just started coasting. Did she start
21 out beside you, almost?

22 A: Yes, almost.

23 Q: And then you put your foot back on
24 the brake - right?

25 A: Right.

1 Q: And then it slipped off?

2 A: Right.

3 Q: And then about that time Becky hit
4 you in the front bumper?

5 A: When I seen her head. . .

6 Q: Well, answer it - about that time
7 Becky hit you in the front bumper?

8 A: At the time that I stomped my brake?

9 Q: Yes, and your foot slipped off?

10 A: Well, I seen her head and then I
11 stomped the brake.

12 Q: About the time your foot slipped off,
13 she hit you in the front bumper?

14 A: Yes.

15 Q: Isn't it a fact that you told me before:
16 "I assumed she saw me and wouldn't come out any
17 further in the road."

18 A: Yes, I said that.

19 Q: "And I looked on in front of me then."

20 A: Yes.

21 Q: In fact, you took your eye off of her,
22 didn't you?

23 A: Yes.

24 BY MR. STONE:

25 That's all I have to ask her at this point,
Your Honor.

1 If Your Honor please, I offer the Deposi
2 tion of Rene Duncan taken in my office, as I under-
3 stand the Rules of the Supreme Court of Virginia, can
4 be used for any purpose, and I have portions of it
5 which I would like to have read to the Jury.

6 BY MR. JEBO:

7 Your Honor, I don't understand that.
8 Depositions can be used, of course, to contradict and
9 impeach a witness. I have no objection to that, but
10 when the witness is here, even if it is a party, there
11 is no need to read a Deposition. He can ask her the
12 questions, and if they are materially inconsistent
13 with this, read that to her and say, well, how come
14 you said this on one occasion and now you are saying
15 this? But to read a transcript into evidence, makes
16 no sense at all and is not consistent with the Rules.

17 BY THE COURT:

18 I don't think it is either.

19 BY MR. STONE:

20 May I show the Court the Rule? The
21 Rule says the Deposition of a Party may be used for
22 any purpose. Now, if there is some argument, he may
23 want us to have it outside the hearing of the Jury.

24 JURY RETIRES TO THE JURY ROOM

25 COURT AND COUNSEL IN CHAMBERS

1 10:40 A.M. - 10:50 A.M. - RECESS

2 BY MR. JEBO:

3 Your Honor, I object to the sign that
4 Mr. Stone has over there, writing down what he con-
5 siders to be the negligent acts and other pieces of
6 evidence. I don't think that's a proper thing to
7 leave out in front of the Jury.

8 BY MR. STONE:

9 I assume you won't question it if I use
10 it in the closing argument, though?

11 BY MR. JEBO:

12 No, I think that's perfectly right, because
13 that would be illustrative, but to leave it there in
14 front of the Jury through the whole thing... .

15 BY MR. STONE:

16 I will take it down.

17 JURY RETURNS TO COURTROOM

18 CONTINUED DIRECT EXAMINATION OF RENE DUNCAN

19 BY MR. STONE:

20 Q: Miss Duncan, I am just going to ask
21 you these questions and lead you through them as
22 quickly as I can, because we need to get this evidence
23 before the Jury. I am going by your Deposition, which
24 you will recall was taken in my office in Mr. Jebo's
25 presence about three months ago?

1 A: Yes sir.

2 Q: The accident happened in June of

3 1979, didn't it?

4 A: Yes sir.

5 Q: And you had been driving since

6 February?

7 A: That's right.

8 Q: About four months?

9 A: That's right.

10 Q: And you had lived in Belmont Trailer

11 Park all that time, hadn't you?

12 A: Yes sir.

13 Q: You lived close to the Hixons?

14 A: That's right.

15 Q: Was their trailer in sight of yours?

16 A: I don't know. . .

17 Q: Could you see your trailer from there

18 A: If you were sitting in their kitchen,

19 looking out their window, you could see my trailer.

20 Q: Do you recall what time of day the

21 accident happened?

22 A: Not the time. I know, you know, it

23 was during the evening.

24 Q: Do you recall that you said in your

25 Deposition it was around 12:00 or somewhere?

1 A: Yes.

2 Q: Between 12:00 and 2:00? (Page 5,
3 Line 14) Something until 2:00? Do you recall you
4 said that?

5 A: I recall saying it wasn't in the morn-
6 ing. It was after 12:00, up in the evening.

7 Q: Do you deny that you said it was
8 something before 2:00 o'clock?

9 A: No, I don't know.

10 Q: The Trooper said it was around 6:00,
11 something after 6:00. Is he correct?

12 A: I didn't think it was that late, no,
13 I didn't.

14 Q: Had you been home all day?

15 A: Yes.

16 Q: Just sitting around the house?

17 A: Yes.

18 Q: And your mother and your little girl?

19 A: Right.

20 Q: This was during the week?

21 A: Yes.

22 Q: You said you had known the Hixons
23 before the accident?

24 A: That's right.

25 Q: And you had babysat for Becky?

A: Yes.

1 Q: And you knew she was pretty active,
2 playful?

3 A: Yes.

4 Q: Do you recall what you and Becky's
5 mother were talking about?

6 A: Yes.

7 Q: What were you talking about?

8 A: Just social, her talking about going
9 to Eastern Texas to see a friend of ours.

10 Q: Did your father know you had taken
11 the car up there?

12 A: Yes, he did.

13 Q: Did you know you weren't supposed
14 to?

15 A: Well, I had went from my trailer to
16 go get a friend who had a license to go to the store
17 with me.

18 Q: Did you know you weren't supposed
19 to be driving without a licensed driver over 18 beside
20 you?

21 A: I know that there was supposed to be
22 someone with me at all times, but I had drove around
23 to get that person.

24 Q: My question is: Did you know you
25 were not supposed to do it?

1 A: Yes.

2 Q: Did you know there is a purpose for
3 having an adult driver on the seat beside you?

4 A: Yes.

5 Q: What do you think that purpose is?

6 A: So they can be there to help you and
7 everything you need to know about driving.

8 Q: Give you advice or take control, if
9 necessary?

10 A: That's right.

11 Q: Had you ever had a child playing on
12 the road when you were driving by yourself? Have
13 you ever seen that before?

14 A: Yes.

15 Q: Where?

16 A: In the trailer park.

17 Q: There are children playing all over
18 the trailer park, aren't there?

19 A: That's right.

20 Q: In fact, there are two signs before
21 you get to the Hixons' trailer?

22 A: There's one sign as you come in the
23 trailer park that says "Children at Play."

24 Q: Isn't there another one right there
25 where the accident happened?

1 A: Well, that's down below where the
2 accident happened.

3 Q: You knew it was there?

4 A: Yes.

5 Q: Nobody could live in that trailer
6 park without knowing there are children playing all
7 over the place?

8 A: That's right.

9 Q: And your father had allowed you to
10 drive by yourself up there?

11 A: When I told him I was going to go
12 get this person.

13 Q: It was his car?

14 A: It's my mother's car.

15 Q: Your mother's car?

16 A: Right.

17 Q: When you came up to the trailer,
18 what were the children doing?

19 A: They were in the driveway, and I
20 didn't pull in the driveway since they were playing
21 in the driveway. I pulled up off the road on into,
22 like in their yard, sideways.

23 Q: Were they playing with the Big Wheel?

24 A: Yes.

25 Q: That's a little tricycle?

1 A: That's right.

2 Q: Let me hand you a picture and ask
3 you if you can identify this as the Big Wheel, or
4 tricycle that Becky and Bobbie Jo were on?

5 A: Yes, that's it.

6 Q: Is that your car?

7 A: Yes, it is.

8 Q: Is that a sign post right there beside
9 the car?

10 A: Yes.

11 Q: Do you know what that sign post says?

12 A: Yes, it says - the top one says
13 "Children at Play." The bottom one says something
14 like "15 Miles an Hour."

15 Q: It says "Slow - Children at Play"
16 though, doesn't it?

17 A: Yes.

18 Q: And your car ended up about 15
19 feet from it, didn't it?

20 A: Yes.

21 BY MR. STONE:

22 I ask that this be made Plaintiff's Exhibit
23 Number 1, Your Honor.

24 BY THE COURT:

25 All right, over Mr. Jebo's Objection.

1 PLAINTIFF'S EXHIBIT NO. 1

2 BY MR. STONE:

3 I want to give the Jury a minute to pass
4 that around, if Your Honor please. (SHOWING PLAINT-
5 TIFF'S EXHIBIT NO. 1 TO JURY MEMBERS)

6 Q: So when you went up to the house to
7 see Becky's mother, you knew that Becky and Bobbie
8 Jo were playing out with the Big Wheel?

9 A: Yes.

10 Q: And unfortunately, there isn't much
11 place to ride any sort of tricycle in Belmont Trailer
12 Park except in the road or close to the road, is there

13 A: Well, there's patios and. . .

14 Q: The Hixons didn't have a patio?

15 A: Every trailer in the trailer park
16 has a patio.

17 Q: Well anyway, you knew they rode the
18 Big Wheel or tricycle on the road, didn't you?

19 A: I knew they played in the road a lot.

20 Q: And you knew they were riding the
21 tricycle that day?

22 A: Yes, I knew. . .

23 Q: And they were riding it on or close
24 to the road when you came up there, weren't they?

25 A: In the driveway, yes.

1 Q: All right, when you came out of the
2 house, where were they?

3 A: I don't - I didn't see them.

4 Q: You knew they were somewhere with
5 the tricycle though, didn't you?

6 A: I didn't see the tricycle, and I
7 assumed. . .

8 Q: When you left there, didn't you know
9 they were somewhere around there playing?

10 A: Yes, more than likely.

11 Q: And that they had the tricycle?

12 A: Right.

13 Q: All right, do you recall why you
14 left?

15 A: Yes, I had heard my boyfriend leave
16 out of the trailer park, and I said to Rose that I
17 was going down to the trailer to see where he went.

18 Q: You were going to find out where he
19 had gone to?

20 A: I would go ask my mother and father
21 at my trailer where he was at - where did he go.

22 Q: All right, and up to that time you had
23 no plans to leave, you were just sitting around talking?

24 A: Right.

25 Q: Did you hear him leave?

1 A: Yes.

2 Q: And you wanted to go and find out
3 where he had gone?

4 A: That's right.

5 Q: And you pulled out of the driveway?

6 A: Yes, that's right.

7 Q: And started down toward the hill?

8 A: Well, it's flat, and then you go down
9 the hill.

10 Q: It's a fairly steep hill after you
11 get over the flat place, isn't it?

12 A: That's right.

13 Q: After you get over to the flat place,
14 did you see the children?

15 A: As I started over the top of the hill,
16 I seen them, like from their shoulders up, playing.

17 Q: ~~And you were - what?~~ 100 feet away
18 at that time?

19 A: Something like that.

20 Q: And at that time, you saw both chil-
21 dren?

22 A: Yes.

23 Q: What were they playing with?

24 A: Becky, the smallest, was sitting on
25 the Big Wheel, and Bobbie Jo was behind her.

1 Q: Where were they with relation to the
2 road?

3 A: They were on the right side of the
4 road. They would have been sitting - you know, she
5 was sitting on the road, about a foot in the road.

6 Q: So you saw them when you were about
7 100 feet away in the road?

8 A: Right.

9 Q: You said, I believe, that at that
10 point the road was fairly steep?

11 A: That's right.

12 Q: And you said before, I believe, that
13 they were about a foot or a foot and a-half into the
14 road?

15 A: Yes sir.

16 Q: Did you blow the horn?

17 A: No.

18 Q: What did you do?

19 A: When I seen them, I just felt confident
20 of myself. I got over to the left side of the road.

21 Q: All right, and she was still a foot
22 to a foot and a-half into the right side of the road?

23 A: Yes, that's right.

24 Q: And there was nothing to keep you
25 from having clear visibility of them?

1 A: That's right.

2 Q: There were no cars coming the other

3 way?

4 A: That's right.

5 Q: Okay, and you still didn't blow the

6 horn?

7 A: No, I didn't.

8 Q: You never did?

9 A: No.

10 Q: I believe you testified earlier this

11 morning that you had your foot on the brake?

12 A: Yes.

13 Q: You got to a place which was about

14 four feet from them? Right?

15 A: That's right.

16 Q: Took your foot off and rested it on

17 the floorboard?

18 A: That's right.

19 Q: And then you got on beside of Becky?

20 A: Almost beside her.

21 Q: How far from her? Would you say

22 it was a straight line across the road from where she

23 was?

24 A: It was sort of at an angle, I would

25 think. Here I am and they were sort of like right

here - (INDICATING).

1 Q: Was she even with your front bumper
2 and still sitting still?

3 A: Well, no, not even, but. . .

4 Q: How far in front of you?

5 A: Maybe - if I had stopped and she
6 was there, maybe - here's my bumper and she was
7 maybe a-half a foot to a foot down. (INDICATING)

8 Q: All right. She was a-half a foot
9 or a foot in front of you, she is still sitting still
10 and you have taken your foot off the brake, put it
11 on the floorboard and down hill, and she suddenly
12 starts out - twelve foot of road, so she was what,
13 six or seven feet away from you?

14 A: Something like that.

15 Q: So she starts out and she travels
16 six or seven feet, and your foot is not on the brake,
17 and she hits you in the front bumper?

18 A: Yes.

19 Q: Okay, and that's when you hit the
20 brake?

21 A: It was before I hit her, when I seen
22 her head in front of the car, I stomped the brake.

23 Q: And your foot slipped off?

24 A: That's right.

25 Q: And you drug her over about 20 feet
into the ditch?

1 A: I don't know how far it was.
2 Q: You drug her into the ditch?
3 A: After I cut my wheel, I. . .
4 Q: Do you know what part of the car
5 drug her?
6 A: No.
7 Q: It had to be the front part of it,
8 though, didn't it?
9 A: I don't know.
10 Q: Did she end up under the car?
11 A: I guess, I. . .
12 Q: Did you look at her?
13 A: Yes, I did.
14 Q: Did she have blood all over her?
15 A: Her cuts had just started to bleed
16 when I run up to her.
17 Q: Was she making any sounds?
18 A: Yes, she looked up at me and started
19 crying.
20 Q: Was she moving?
21 A: Just starting to, you know, move
22 around a little bit.
23 Q: Did she try to get up?
24 A: I ran off so quick up to her mother's,
25 I didn't. . .

1 Q: Did you touch her?
2 A: No.
3 Q: You didn't see her get up?
4 A: No.
5 Q: And she was under the car at that
6 time?
7 A: No, she was in the ditch about five
8 feet from my car.
9 Q: In front of it?
10 A: Behind it.
11 Q: Behind the car?
12 A: Yes.
13 Q: The car had gone on past her, then?
14 A: Right.
15 Q: Do you recall when we took these
16 Depositions - we spent some time there - that you
17 never mentioned your foot slipped off the brake?
18 A: Did I mention that?
19 Q: Do you recall whether you mentioned
20 it?
21 A: Yes, I recall mentioning that.
22 Q: In the Deposition?
23 A: When you took it - I don't know
24 whether I told you myself. . .
25 Q: You didn't tell us then, did you?

1 A: I don't - I just told you that I hit
2 my brake.

3 Q: Would you try to look at the Deposi-
4 tion with your attorney this afternoon during the
5 recess or sometime, and see if you can find it?

6 A: Okay.

7 Q: But you did tell the truth that your
8 foot slipped off and you had on sandals?

9 A: I told the truth.

10 Q: Why did you tell him you had on
11 sandals?

12 A: That just come to my mind because
13 the sandals were slick and that's why I figured that
14 I didn't want to stomp it as hard - it just slipped
15 off, the sandals were slick.

16 Q: Did you feel like that had caused
17 you to slip off the brake?

18 A: Yes, from hitting - stomping the
19 brake so hard, it just slipped off.

20 Q: Didn't you also feel that your foot
21 slipping off the brake had helped cause the accident?

22 A: No, I don't.

23 Q: You just told the Trooper just in
24 case he was interested in that?

25 A: I just told him.

1 Q: All right, you said in your Deposi-
2 tion that you were aware that the sign was right there
3 that says "Slow - Children Playing"?

4 A: Yes.

5 Q: And you did say in your Deposition
6 that you took your eye off of them and started looking
7 forward?

8 A: That's right.

9 Q: And that you assumed they saw you
10 and would not come out into the road?

11 A: Since the children knew me, I assumed
12 that.

13 Q: Since they knew you, you assumed
14 they wouldn't come out into the road?

15 A: Since I knew them, I assumed they
16 would stay there.

17 Q: How far, Rene, were you from them
18 when you took your eye off of them and started looking
19 forward?

20 A: About a foot and a-half or two foot,
21 something like that.

22 Q: You took your foot off the brake
23 before you stopped looking at them?

24 A: When I was going down at them, and
25 I was looking at them and they were looking at me

1 and I felt sure that they would stay there, I took my
2 foot off the brake and rested it on the floor and
3 started drifting on down.

4 Q: At the risk of being repetitious, let
5 me repeat it again. Four feet away, four or five
6 feet away, you took your foot off the brake?

7 A: About three.

8 Q: About three feet away, you took your
9 foot off the brake and put it on the floor. You traveled
10 one foot - right?

11 A: Yes.

12 Q: You took your eye off of them -
13 right?

14 A: Right.

15 Q: You traveled another half a foot, or
16 a foot, and saw her come from six feet away towards
17 you?

18 A: I didn't see her come toward me,
19 no. I was looking straight ahead, and then all of a
20 sudden her head was right there.

21 Q: Well, you don't know how she got in
22 front of you, then?

23 A: No, I don't.

24 Q: So far as you know, Bobbie Jo could
25 have thrown her over there?

1 A: I don't know how. . .

2 Q: You didn't see her come towards you?

3 A: I didn't see her come - I didn't look
4 at her, and she was coming like this (INDICATING).

5 I was looking straight ahead and she was there.

6 BY MR. STONE:

7 That's all I have, Your Honor.

8 CROSS EXAMINATION BY MR. JEBO:

9 Q: Rene, let me just ask you one question
10 at this point, and we will put on other evidence when
11 it is our turn. These measurements that Mr. Stone
12 keeps going over and over - three feet to four feet to
13 six feet, and all that - have you done anything to
14 measure any distances?

15 A: No.

16 Q: Are these just estimates?

17 A: Yes.

18 Q: Do you know if they are accurate or
19 not?

20 A: I think they're accurate.

21 BY MR. JEBO:

22 That's all the questions I have.

23 WITNESS ASIDE
24
25

1 ROSE MARIE HIXON, being duly sworn, testified as
2 follows:

3 DIRECT EXAMINATION BY MR. STONE:

4 Q: What is your full name, please?

5 A: Rose Marie Hixon.

6 Q: You are the mother of Becky?

7 A: Yes sir.

8 Q: On June the 20th, 1979, I believe
9 she was at your house when Bobbie Jo and Becky were
10 out playing with the tricycle?

11 A: Yes sir.

12 Q: And Rene has said that she baby-sat
13 for these girls when you were working?

14 A: Yes sir.

15 Q: You were employed?

16 A: Yes sir.

17 Q: But you were home on this day?

18 A: It was right after I had gotten off
19 from work.

20 Q: Do you recall what Rene said as
21 she was leaving your place as to why she was leaving?

22 A: Well, her boyfriend had went by the
23 trailer, and she said that she had to go find out
24 where he was going.

25 Q: Was her leaving a casual thing, or

1 BY MR. JEBO:

2 Your Honor, I just reiterate, we don't
3 believe they carried the burden.

4 BY THE COURT:

5 I think they have made out a prima facie
6 case. I Overrule your Motion.

7 JURY RETURNS TO THE COURTROOM

8 RENE MELINDA WOOLWINE DUNCAN, being duly sworn,
9 testified as follows:

10 DIRECT EXAMINATION BY MR. JEBO:

11 Q: What is your full name?

12 A: Rene Melinda Woolwine Duncan.

13 Q: And where are you living at the
14 present time, Rene?

15 A: Lot 47 in Belmont Trailer Park.

16 Q: Is this the same location you were
17 living at the time this accident occurred in 1979?

18 A: Yes, it is.

19 Q: Who do you live with?

20 A: My parents.

21 Q: Do you have any children?

22 A: Yes, one.

23 Q: And who is that?

24 A: Stacy Duncan. She is three.

25 Q: Now, you know Rose Hixon and her
husband, Jerry?

1 A: Yes, I do.

2 Q: Do you also know the two children,
3 Becky and Bobbie Jo?

4 A: Yes.

5 Q: Had you ever done any baby-sitting
6 with those children before?

7 A: Yes.

8 Q: When was that?

9 A: That summer before.

10 Q: Where would you keep these children?

11 A: At my trailer.

12 Q: Had you ever seen Becky and Bobbie
13 Jo playing around the trailer park before this?

14 A: Yes.

15 Q: You were aware that they played out-
16 side quite often?

17 A: Yes.

18 Q: Now, going to the day of June the
19 20th, 1979 when the accident happened, where had
20 you been during the day?

21 A: Just at home.

22 Q: Was anyone else at home with you?

23 A: My mother and my father and my little
24 girl.

25 Q: How old were you at this time?

1 A: Fifteen.

2 Q: When would you be 16?

3 A: Four days from that accident.

4 Q: Whose vehicle were you driving at
5 the time of this accident?

6 A: It was in my mother's name.

7 Q: All right, take us from the time you
8 left your trailer on through the sequence of events.

9 A: I had left - I wanted to go to the
10 store, and I wanted to get a friend. I knew I couldn't
11 go out on the highway without a friend beside me,
12 so I had left my trailer to get a friend of mine to
13 go up to the store with me.

14 Q: Who was that friend?

15 A: Dexter Sloan.

16 Q: Where does Mr. Sloan live?

17 A: About four or five trailers from the
18 Hixons.

19 Q: Was he home?

20 A: No.

21 Q: Then what did you do?

22 A: I just started - I was going to go
23 back around to my house, and I'd seen that she was
24 home, and I thought I would stop and talk a few
25 minutes.

1 Q: She - who is that?

2 A: Rose.

3 Q: All right. Belmont Trailer Park is
4 basically a big circular drive - is that right?

5 A: That's right.

6 Q: Where is the Hixon trailer, say, in
7 relationship to your trailer?

8 A: It's all the way on the other side
9 of the trailer park.

10 Q: How did you pull in to the Hixon area

11 A: Their trailer is - the end of the
12 trailer has a bay window and it is facing the road.
13 The driveway is in front of that, sort of over next
14 to the patio, too, and the children were playing in
15 the driveway, so I pulled - instead of pulling into
16 the driveway, I just pulled up into the grass beside
17 of the road - out of the road, but beside of the road.

18 Q: Was Mrs. Hixon outside at the time
19 you pulled in?

20 A: No, she wasn't.

21 Q: How long did you stay with her?

22 A: About 15 or 20 minutes.

23 Q: What was the purpose of the visit?

24 A: Just to talk.

25 Q: Were you a social friend of hers?

1 A: Yes.

2 Q: Now, why did you leave, or what
3 were the circumstances when you left?

4 A: I heard my boyfriend leave from my
5 trailer and go out of the trailer park, and I said to
6 Rose, "I'm going to go see where he went" - go back
7 down to my trailer and find out where he went.

8 Q: Were you in a big hurry?

9 A: No.

10 Q: Where was your destination when you
11 left?

12 A: To go back to my trailer to find out
13 from my parents where he went.

14 Q: Now, how fast did you travel as you
15 headed towards the crest of the hill?

16 A: Well, when I pulled out, I didn't hav
17 to back out. I just pulled right out into the road,
18 on the left side to my side, the right side, and in
19 first gear. The Pinto is a straight drive, and I
20 would say I might have been going five to eight miles
21 in first gear.

22 Q: When was the first time that you saw
23 either Becky or Bobbie Jo after you left the trailer?

24 A: Well, I was starting over the top
25 of the hill and I seen, you know, like from their

1 shoulders up, playing about a foot in the road.

2 Q: Where were they, in essence, from
3 where you were?

4 A: Well, like I say, I was at the very
5 middle of the top of the hill, and they were about
6 two or two and a-half trailers down.

7 Q: Trailers being trailer lots - right?

8 A: Right.

9 Q: What did you do?

10 A: I got over onto the right side of
11 the road, which is the wrong side of the road - the
12 right side - they were here (INDICATING). This is
13 the left traveling down. I got over into the right.

14 Q: You're confusing me. In your right
15 lane, which of course is the right side of the road,
16 where did you go from that?

17 A: I pulled out onto the left side where
18 they were at. They were on the left side. I pulled
19 out. . .

20 Q: Which side are you talking about as
21 being the left side?

22 A: I mean the right side - the right
23 side - I've got it backwards.

24 Q: All right, they were on your right
25 side - is that right?

1 A: Right.

2 Q: They were about a foot inside the
3 paved portion of the road?

4 A: Yes.

5 Q: And they were about two and a-half
6 trailer lengths down from where you crested the hill?

7 A: Right.

8 Q: What were they doing?

9 A: The youngest was just sitting on the
10 Big Wheel, and the oldest was behind her.

11 Q: Did they see you?

12 A: Yes.

13 Q: Did they know who you were?

14 A: Yes.

15 Q: Were they looking at you?

16 A: Yes, they were.

17 Q: Were they moving at all?

18 A: No.

19 Q: They were just standing and watching?

20 A: Right.

21 Q: What did you do with your car then?
22 You are at the top of the hill, what happened then?

23 A: I got over to the right side of the
24 road.

25 Q: To the right or the left side?

1 A: The left side - to the left side, and
2 they - I stayed on the left side, and just started down
3 I put my foot on the brake, and I went, you know,
4 started rolling, rolling with my foot on the brake,
5 rolling down.

6 Q: Were there any vehicles coming in
7 your direction on that road?

8 A: No.

9 Q: How fast would you have been going
10 as you rolled down there?

11 A: About five miles.

12 Q: Were you keeping an eye out on them?

13 A: Yes, looking at them and they were
14 looking at me.

15 Q: And what were they doing?

16 A: Just standing there.

17 Q: Then what happened?

18 A: Then I - when I looked at them,
19 you know, they were looking at me, and I felt con-
20 fident that they would stay there since they knew who
21 I was. I took my foot off the brake and just rested
22 it on the floor and started drifting on down.

23 Q: How much clearance were you giving?
24 In other words, what was the distance from the right
25 edge of your car to where they were standing, if you

1 stayed in that left portion of the highway?

2 A: Well, from the time I took my foot
3 off and laid it on the floor. . .

4 Q: I'm talking about the distance of
5 clearance you would be giving them?

6 A: If I had went around them, probably
7 about six or seven feet.

8 Q: What happened then?

9 A: Like I say, I took my foot off and
10 laid it on the floor and started on down, and just
11 as I, you know, was almost plumb past them, she just
12 all of a sudden darted out in front of me.

13 Q: What did you do?

14 A: I stomped the brake, and the sandals
15 I had on were slick and the brake pedal is sort of
16 small in these small cars, and I just didn't hit it -
17 I stomped it pretty hard, you know, and I just didn't
18 hit it squarely and it slipped off.

19 Q: Did you turn the wheel at all?

20 A: Yes, so then after I knowed my foot
21 had slipped off, I just cut it - cut it over, and by
22 then I had already hit her.

23 Q: If your foot had not slipped off the
24 brake, would you have hit her anyway?

25 A: Yes.

1 Q: She was that close?

2 A: Yes, she was that close.

3 Q: After you got the car stopped, what
4 happened?

5 A: When I hit a pole, that's what stopped
6 me; and when I cut, I hit a pole on the left side of
7 the road, and it went over into the grassy part off
8 the pavement; and she must have went under the front
9 and out the back, and what got her out from under
10 the car was being in the ditch. I jumped out of the
11 car, and I run up to her and she was on her side, and
12 her arms were bent under her and her legs were bent
13 back; and she looked up at me and started whining,
14 and all the scrapes on her and stuff were just start-
15 ing to bleed.

16 Q: What did you do then?

17 A: I just said, "Oh, God," and I just
18 took off running up to Rose's house; and I run in
19 and said, "I've hit Becky," and I was crying, you
20 know, pretty upset about it.

21 Q: Now, did either you or your parents
22 attempt to get in touch with the Hixons that night to
23 see what. . .

24 A: Yes, we called Roanoke Memorial,
25 Roanoke Community, and finally we called Lewis-Gale

1 and they said they hadn't got there yet. Later on
2 that night, she called the house.

3 Q: Who did?

4 A: Rose.

5 Q: What statement did Rose make to you?

6 BY MR. STONE:

7 Your Honor, I Object, unless it is some-
8 thing that I brought out on Direct Examination of
9 Mrs. Hixon and not something that he made her his
10 witness on, because he can't contradict her like that.

11 BY MR. JEBO:

12 Your Honor, I can use that statement for
13 impeachment. I'm not entering that statement for the
14 purpose of the truth of the facts that are in there,
15 but I am putting it in because she has stated to us
16 here today, and she has stated in the Deposition,
17 denying that she had made that statement to Rene and
18 to her mother; and I can prove here today, through
19 these witnesses, that she did make it. That shows
20 an inconsistent. . .

21 BY MR. STONE:

22 You can't impeach your own witness, if
23 Your Honor please.

24 BY THE COURT:

25 That's exactly right.

1 BY MR. JEBO:

2 Well, I didn't make her my witness. That
3 was used for the purpose of impeachment.

4 BY THE COURT:

5 You asked the questions of her and in
6 response, that wasn't brought out on Direct; so
7 therefore, you made her your own witness, and you
8 can't impeach your own witness.

9 BY MR. JEBO:

10 Well, I didn't make her my witness.
11 Your Honor. I believe that was proper Cross Exam-
12 nation of her, and I can call her as an Adverse
13 Witness and impeach her then.

14 BY MR. STONE:

15 She's not a party.

16 BY MR. JEBO:

17 Oh yes, she is. She's in the Pleadings.
18 Sure, she is.

19 BY THE COURT:

20 Well, the Plaintiff is the young child.

21 BY MR. JEBO:

22 Yes, but it is through her. They are
23 both Parties Plaintiff.

24 BY THE COURT:

25 That's required by the Law, and it is

1 a technicality. It has to be that way.

2 BY MR. JEBO:

3 Yes sir, but she is the Plaintiff along
4 with her daughter.

5 BY THE COURT:

6 No sir, I don't agree with you. The
7 Plaintiff is the child sitting over there.

8 BY MR. JEBO:

9 We note an Exception to that.

10 BY THE COURT:

11 I Sustain your Objection.

12 BY MR. JEBO:

13 Q: Rene, did you go down and visit
14 the hospital?

15 A: Yes, I did.

16 Q: To see how she was doing?

17 A: Yes.

18 Q: Did you call very often to find out
19 how. . .

20 A: Yes, I did.

21 Q: How often?

22 A: I called every day there for a while.

23 Q: And how long after Becky was release
24 from the hospital on July the 5th, 1979, did Becky
25 and her mother, and I guess Bobbie Jo, leave to go
to Texas?

1 A: Well, I didn't talk to her or nothing
2 after that, but I had heard it was a couple of weeks.

3 BY MR. JEBO:

4 Your witness.

5 CROSS EXAMINATION BY MR. STONE:

6 Q: Rene, were you married at the time
7 of this accident?

8 A: Yes.

9 Q: Had you been married?

10 A: Yes, I was married.

11 Q: Were you divorced?

12 A: No, not yet.

13 Q: Who was your boyfriend?

14 A: Bruce A. Correll.

15 Q: Bruce A. Correll?

16 A: Yes.

17 Q: Had you all had sort of a little tiff
18 or a little fuss about something?

19 A: No, we hadn't.

20 Q: Do you still date him?

21 A: Yes, we are planning on getting
22 married.

23 Q: You hadn't had a quarrel?

24 A: No.

25 Q: But you did need to catch him?

1 A: I wanted to know where he went.

2 Q: Why?

3 A: Because he was my boyfriend, and
4 I just wanted to know where he went.

5 Q: Let me ask you a little bit about -
6 you are satisfied now with Mr. Jebo's reconstructive
7 work that the children were on the right side of the
8 road as you were going toward them?

9 A: That's right.

10 Q: And the trooper testified that he
11 thought the pavement was about 12 feet wide?

12 A: Yes.

13 Q: And you could see them when you
14 were about 100 feet away?

15 A: Maybe a little less.

16 Q: I beg your pardon?

17 A: A hundred feet or maybe a little less

18 Q: Certainly 50?

19 A: Yes.

20 Q: Let's say the Hixon trailer is back
21 up here (DIAGRAM) and so this would be where the
22 hillcrest is - pretty steep, you said before?

23 A: Yes.

24 Q: Pretty straight?

25 A: Well, steep, you know, sloped.

1 Q: Right, but no curves in it?

2 A: No.

3 Q: And right here is the entrance that

4 has the sign that says "Slow - Children Playing"?

5 A: Yes.

6 Q: And you are going in this direction?

7 (DIAGRAM).

8 A: That's right.

9 Q: And let's say somewhere between 50

10 to 100 feet you could see (DIAGRAM), and down here

11 was Becky on that tricycle?

12 A: That looks a little far.

13 Q: Well, it's not drawn to scale, but

14 somewhere in front of you. You could see?

15 A: Yes.

16 Q: You could have stopped 50 feet away

17 from them if you wanted to, couldn't you?

18 A: Yes.

19 Q: And you kept on with your foot barely

20 on the brake?

21 A: Right.

22 Q: Were you gaining a little bit of speed

23 A: No.

24 Q: Were you slowing down?

25 A: Yes.

1 Q: Didn't you say that at that position
2 at the top of the hill, 100 feet away, you were going
3 five miles an hour?

4 A: About five or eight.

5 Q: Well, about five to eight? So you
6 traveled 100 feet from the top of the hill down here,
7 slowing down - right?

8 A: Sort of, yes, off and on, slowing
9 down with my foot on the brake.

10 Q: Well, you would have to have been
11 going zero or less at some point, wouldn't you?

12 A: I didn't mash the brake, you know,
13 I didn't mash the brake.

14 Q: I understand that. You were just
15 slowing down?

16 A: Right.

17 Q: But you didn't slow down much, did
18 you?

19 A: Well, to about five miles an hour.

20 Q: Well, didn't you say in your Deposi-
21 tion that you were going eight or ten when she went
22 out in front of you?

23 A: No, I didn't say eight or ten.

24 Q: How fast did you say?

25 A: When I hit her, I don't know how

1 fast I was going, because I just seen her and stomped
2 my brake.

3 Q: Okay, my question - on page 13,
4 Mr. Jebo, line 1 and 2 - do you recall that I ask
5 you this question, Rene: "Okay, had you increased
6 speed, say to as much as 10 when you got up close
7 to them?" Do you remember that question?

8 A: No.

9 Q: All right, do you remember your
10 answer? "Maybe eight or nine." Do you remember
11 that answer?

12 A: When I. . .

13 Q: Do you remember that answer?

14 A: No.

15 Q: Okay. Question: "You were going
16 a little faster?" Do you remember that question?

17 A: No.

18 Q: Answer: "Yeah. Well, when you're
19 rolling down hill, yeah." Do you remember that
20 answer? So you did speed up a little bit, didn't you?

21 A: At the crest of the hill, I might
22 have been going a little bit - eight or nine miles an
23 hour.

24 Q: I'm talking about when you got down
25 close to them.

1 A: No, I wasn't going that fast when I
2 was. . .

3 Q: You were going slower when you got
4 down there close to them than you were at the top of
5 the hill?

6 A: Right.

7 Q: Your answer was wrong in the Depo-
8 sition?

9 A: No, I don't remember that question
10 or the answer.

11 Q: Either it was wrong or the Court
12 Reporter put it down wrong?

13 A: I might have said it.

14 Q: You might have said it?

15 A: Yes.

16 Q: Well, let me ask you this, Rene:
17 Do you think there was anything wrong with you driv-
18 ing without an adult driver, in violation of the law?

19 A: Well, I guess I shouldn't have been,
20 no. I knew I wasn't supposed to go out on the high-
21 way.

22 Q: I understand you know what the law
23 says, but do you think there is a good reason that
24 a 15 year old shouldn't drive without somebody beside
25 of them, an adult?

1 BY MR. JEBO:

2 Your Honor, I don't believe that's a
3 proper question. Her opinion as to whether the law
4 is correct or not. . .

5 BY MR. STONE:

6 I'm Cross Examining, Your Honor.

7 BY THE COURT:

8 I think that's proper Cross Examination.

9 BY MR. STONE:

10 Q: Do you think there is a good reason
11 for it?

12 BY THE COURT:

13 I think she has answered it once, already.

14 BY MR. STONE:

15 She has answered everything three times,
16 I think.

17 Q: You realize that it was wrong?

18 A: Yes.

19 Q: And you realize that it was a mistake
20 on your part?

21 A: I shouldn't have been driving without
22 anybody.

23 Q: And you realize that it was a mistake
24 to assume that the child wouldn't come out in front
25 of you? You realize that now, don't you?

1 A: Well, I wish now I had got out in
2 the road and made them get out of the road, yes.

3 Q: Exactly. Or you could have stopped
4 and motioned for them to get out?

5 A: Yes.

6 Q: They were accustomed to Rene Duncan
7 taking care of them, weren't they?

8 A: Well I baby-sitted for them, yes.

9 Q: And Rene Duncan, if they got close
10 to messing with a receptacle, a lamp plug and recep-
11 tacle, Rene Duncan would run over and grab them,
12 wouldn't she?

13 A: Yes.

14 Q: Or if they got close to a hot eye
15 of a stove, Rene Duncan was the one who would run
16 over and take care of them, wasn't she? When she
17 was baby-sitting?

18 A: I would tell them to get away from
19 it.

20 Q: And they were accustomed to Rene
21 Duncan protecting them, weren't they?

22 A: Well, it had been a while since I
23 had kept them.

24 Q: But Rene looked after them, and Rene
25 knew that a four-year-old child could hurt herself?

1 A: Yes.

2 Q: That they didn't think about their
3 own safety?

4 A: I guess she didn't.

5 Q: Well, you know that. You knew that
6 from baby-sitting them?

7 A: Yes.

8 Q: Any child. Your own child. You
9 watch for the eye of the stove or a receptacle?

10 A: Yes.

11 Q: As a matter of fact, if it had been
12 your own child, you would have stopped, obviously,
13 wouldn't you?

14 A: Yes.

15 Q: Okay, and you're telling the Jury -
16 I will draw a straight line here, across here (DIA-
17 GRAM) - and say your car was traveling down this
18 direction, six to eight feet, did you say? Away
19 from them, if you kept in a straight line?

20 A: If I had went around them, it would
21 have been about six, seven feet clearance.

22 Q: Okay. The accident happened right
23 there, didn't it? She came across there? (DIAGRAM)

24 A: Yes.

25 Q: And hit your front bumper?

1 A: Yes, I guess.

2 Q: Okay, and when you - you said this
3 morning - were a foot and a-half away, you took your
4 eye off of them?

5 A: Yes, about that.

6 Q: And she was still right here, wasn't
7 she, sitting still?

8 A: That's right.

9 Q: And you are telling this Jury that
10 that little four-year-old child on that tricycle traveled
11 six or seven feet and hit your front bumper while you
12 were traveling a foot to a foot and a-half?

13 A: That's right.

14 BY MR. STONE:

15 That's all, thank you.

16 WITNESS ASIDE

17 ANNIE C. WOOLWINE, being duly sworn testified as
18 follows:

19 DIRECT EXAMINATION BY MR. JEBO:

20 Q: Would you please state your name
21 for the Record?

22 A: Annie Woolwine.

23 Q: Mrs. Woolwine, are you related to
24 Rene Duncan?

25 A: She's my daughter.

OBJECTION TO INSTRUCTION NO. 6

TRANSCRIPT AT PAGE 124-125

1 the issue for the Jury. It's not a question of Law,
2 it's a question of fact for the Jury to decide; and
3 for the Court to Rule that it is a question of Law,
4 that it should not be submitted to the Jury, I believe
5 would be improper under the prior case Law in
6 Virginia.

7 BY THE COURT:

8 Although the Court thinks her testimony
9 is incredible, I am going to submit the matter of
10 liability and the damages to the Jury.

11 1:40 P.M. - IN CHAMBERS

12 INSTRUCTION NO. 1, GIVEN AS OFFERED, WITHOUT
13 OBJECTION.

14 INSTRUCTION NO. 2, GIVEN AS OFFERED, WITHOUT
15 OBJECTION.

16 INSTRUCTION NO. 3, GIVEN AS OFFERED, WITHOUT
17 OBJECTION.

18 INSTRUCTION NO. 4, GIVEN AS OFFERED, WITHOUT
19 OBJECTION.

20 INSTRUCTION NO. 5, GIVEN AS OFFERED, WITHOUT
21 OBJECTION.

22 INSTRUCTION NO. 6, GIVEN AS OFFERED, WITH THE
23 FOLLOWING OBJECTION:

24 BY MR. JEBO:

25 Your Honor, we Object to the Court's

1 giving Instruction No. 6, which has been offered by
2 the Plaintiff. This Instruction embodies the fact that
3 since Rene Duncan only had a Temporary Instruction
4 Permit, or a Learner's Permit, she was in violation
5 of the Law and that violation of Law was negligence.
6 What we said at the outset of this Trial and which
7 we have consistently maintained through this Trial is
8 that the fact that she only had a Learner's Permit is
9 not negligence as far as the causation of this accident
10 that she was - as Mr. Stone brought out in his exami-
11 nation - had been driving since February. This
12 accident happened in June of that year, and in four
13 days she would have been able to qualify to get her
14 full license. We just don't feel that that was proper
15 evidence to be brought out to the Jury, and we Object
16 to an Instruction on that particular issue.

17 BY THE COURT:

18 I think that the purpose of the Statute
19 is that an adult with a license has to be in the car
20 sitting beside the driver with someone who had what
21 is commonly referred to as a Learner's Permit, is
22 for the safety of the public.

23 INSTRUCTION NO. 7, GIVEN AS OFFERED, WITHOUT
24 OBJECTION.

25 INSTRUCTION NO. 8, GIVEN AS OFFERED, WITHOUT
OBJECTION.

QUERY FROM JURY

TRANSCRIPT AT PAGE 132-133

1 in the bank, it is going to draw interest. What it
2 will be in 1993, I don't imagine I'll know, because
3 I probably won't be here. I Overrule your Objection.

4 CONTINUED CLOSING STATEMENT BY MR. JEBO

5 FINAL CLOSING STATEMENT BY MR. STONE

6 2:40 P.M. - JURY RETIRES TO THE JURY ROOM

7 3:30 P.M. - COURT AND COUNSEL CALLED TO THE
8 JURY ROOM

9 BY MR. JEBO:

10 Your Honor, just for the purposes of the
11 Record, we would like the Record to reflect - with
12 Mr. Stone here and with your guidance - maybe we
13 can reconstruct what just took place. The Jury called
14 us into the Jury Room to ask a question, and it seemed
15 that they were concerned with the fact that there were,
16 in essence, two or more sets of negligence Instruc-
17 tions or actions of negligence, and were very much
18 concerned that maybe - there is no question she was
19 driving with a Learner's Permit, which was negligence
20 per se under Instruction No. 6; but then if she wasn't
21 guilty of other negligence, they were asking the
22 Court how should they reconcile that in arriving at
23 a Verdict. Of course, the Court directed them to
24 the proximate cause Instruction. If that is a fair
25 summation of what happened, I would like the Record
to so reflect it.

1 BY THE COURT:

2 Do you agree with that?

3 BY MR. STONE:

4 Not entirely. I think the only thing the
5 Record can show is that they asked about Instruction
6 6, and they wanted to know from the Court how it
7 had to relate to the cause, which led the Court to
8 refer them to the other Instructions; namely, the
9 definition of Proximate Cause. I think the Record
10 would be sufficient to show they asked a question
11 about Instruction No. 6, which dealt with proximate
12 cause. Their question dealt with Proximate Cause.

13 BY THE COURT:

14 Yes, and they also wanted me to recon-
15 cile the Instructions as to the other aspects of neg-
16 ligence in the other Instructions, as I recall it; and
17 I told them they would have to consider all the
18 Instructions, the law that applied to the evidence.
19 I believe that's a fair summation of what we all three
20 said, for the Record.

21 3:40 P.M. - JURY RETURNS WITH VERDICT.

22 BY THE COURT:

23 We, the Jury, on the issues joined, find
24 in favor of the Plaintiff and fix her damages at
25 \$25,000.00. Signed, H. C. Ayers, Foreman.

MOTION TO SET ASIDE VERDICT
AND GRANT NEW TRIAL

TRANSCRIPT AT PAGE 136

1 to, that there was insurance involved in the case,
2 which is improper; and therefore, should be grounds
3 for setting aside the Jury Verdict and awarding a
4 New Trial.

5 The other Motion I would like to make
6 is that the Jury Verdict be set aside and a New Trial
7 ordered on the basis that the Court was incorrect in
8 its Ruling which allowed evidence regarding the fact
9 that Rene Duncan had a Learner's Permit, instead of
10 a full License, and that. . .

11 BY THE COURT:

12 Don't you think the questions that the
13 Jury asked that we got in the Record would eliminate
14 that?

15 BY MR. JEBO:

16 No sir, I don't. I think that was the
17 problem that they were having, and I think the fact
18 that the evidence came out that she did have a
19 Learner's Permit and not a full License was a pre-
20 judicial effect. In other words, they're saying that
21 she should not have been driving a car without an
22 adult in the car; and therefore, that was wrong and
23 could be a punitive element as well as an improper
24 negligence issue; and to instruct the Jury on that,
25 of course, adds weight because it basically is saying

RULING ON MOTION FOR NEW TRIAL

TRANSCRIPT AT PAGE 139-140

1 mention of insurance in the Trial and whereas, if the
2 Verdict had come in a lower amount or something like
3 that, you could say it did not have an effect; but in
4 this case, when it corresponds to the minimum amount
5 of required insurance in Virginia, that goes to the
6 fact that the Jury in fact is saying we don't want
7 to punish this girl but we will just give the minimum
8 amount because we know that she is insured, because
9 we heard it from the Stand. That is improper and
10 we ask for a New Trial.

11 BY THE COURT:

12 The Court is of the Opinion and was after
13 lunch, when you made your original Motion, that as
14 the Court understands the Law, if the Plaintiff's
15 Attorney elicits the matter of insurance intentionally,
16 then that is grounds for a Mistrial, but the Attorney
17 for the Plaintiff certainly did not do that in this case
18 Mrs. Woolwine volunteered that information to the
19 Jury. No objections were made at that time, and I
20 don't think the Plaintiff was at fault.

21 I feel that all the parties had a fair
22 trial, and as to the Learner's Permit, I am of the
23 opinion that that was a proper Instruction; and from
24 the question that the Jury asked as to that negligence,
25 and I advised them that it was negligence as the

1 Court Instructed, that it had to be a proximate cause
2 of the accident.

3 So I think the Jury was properly instructed
4 and both sides were certainly ably represented, and
5 I'll Overrule your Motion.

6 BY MR. JEBO:

7 We note an Exception.

8 3:50 P.M. - COURT ADJOURNED

9 * * * * *

10 STATE OF VIRGINIA)
11) TO WIT:
12 COUNTY OF MONTGOMERY)

13 I, Colleen Shoemaker, do hereby certify
14 that the proceedings herein were taken down by short-
15 hand and machine and accurately transcribed, to the
16 best of my ability; and that this transcript is a true
17 and accurate account of all the evidence taken and
18 other incidents in the case of Rebecca Hixon, an in-
19 fant, who sues by her Mother and Next Friend, Rose
20 A. Hixon, Plaintiff, vs. Rene Duncan, an infant,
21 Defendant, heard in the Circuit Court of Montgomery
22 County, State of Virginia, on the 6th day of February,
23 1981.

24 Given under my hand this 16th day of
25 March, 1981.

A Direct Copy -- Attest: _____

Court Reporter

March 16, 1981

94

Court Reporter