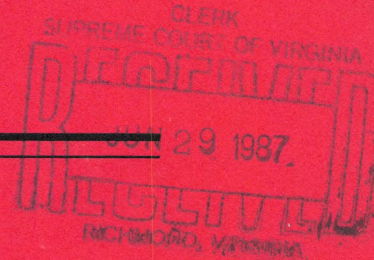


236 Va 356



IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 860638

MAR 23 1989

ELIZABETH ANNE PAYNE,

Appellant,

v.

ROBERT JOHN GLOECKL and
HARVEY LEON FULGHAM, SR.,

Appellees.

JOINT APPENDIX

John P. Harris, III
HARRIS & HARRIS
1619 Jefferson Davis Highway
Fredericksburg, Virginia 22401
(703) 371-4941

Charles D. Bennett, Jr.
Attorney at Law
1119 Caroline Street
Post Office Box 561
Fredericksburg, Virginia 22401
(703) 371-2907

Counsel for Appellant

H. Harrison Braxton, Jr.
WILLIS, BRAXTON, ASHBY & BASS
315 William Street
Fredericksburg, Virginia 22401
(703) 373-5053

Counsel for Appellee - Gloeckl

Edwin C. Brown, Jr.
Brenda J. Gilliam
BROWN, BROWN & WATKINS
320 North Fayette Street
Alexandria, Virginia 22314
(703) 549-7070

Counsel for Appellee - Fulgham

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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF FREDERICKSBURG

ELIZABETH ANNE PAYNE

Plaintiff

vs.

ROBERT JOHN GLOECKL
7703 Ardmore Road
Richmond, Virginia 23229

Defendants

and

HARVEY LEON FULGHAM, SR.
106 James Street, S.W.
Vienna, Virginia 22180

MOTION FOR JUDGMENT

COMES NOW the plaintiff, Elizabeth Anne Payne, by counsel, and moves for judgment against the defendants, Robert John Gloeckl and Harvey Leon Fulgham, Sr., and each of them, on the grounds and in the amount as hereinafter set forth:

1. On Friday, May 25, 1984, a ramp existed from Route 3 westbound to I-95 northbound in the City of Fredericksburg, Virginia.

2. On May 25, 1984, at approximately 7:10 a.m., the plaintiff was a passenger in an automobile operated by the defendant, Harvey Leon Fulgham, Sr.

3. At the above-mentioned time, the defendant, Harvey Leon Fulgham, Sr., was operating his automobile in a westerly direction on the ramp from Route 3 westbound onto I-95 northbound.

FILED 5-24-85 @ 8:49 AM
AGNES A. WILLS, CLERK
BY THE *Musser* DEPUTY

4. At the above-mentioned time, Robert John Gloeckl, was operating his automobile on I-95 northbound near the Route 3 westbound on-ramp.

5. A collision occurred at the foresaid time and place between the vehicle driven by the defendant, Harvey Leon Fulgham, Sr., and the vehicle driven by Robert John Gloeckl.

6. As a result of the said collision and because of the severity of the blow, when the two vehicles collided, the plaintiff received serious bodily injuries, has suffered and will continue to suffer physical pain and mental anguish, great humiliation and embarrassment, and has suffered great inconvenience in the past, and will suffer great inconvenience in the future, has incurred medical expenses and will in the future incur medical expenses, and has been unable to work at her calling, and her earning capacity has been greatly impaired.

7. At the time and place aforesaid, the defendants, and each of them, were negligent in among other things:

- (a) failure to keep a proper lookout;
- (b) failure to operate the vehicle at a reasonably safe speed;
- (c) failure to maintain control of the vehicle;
- (d) failure to apply the brakes on the vehicle in sufficient time to avoid the collision;
- (e) failure to turn the wheels of the vehicle in such a way as to avoid colliding with the other vehicle;

- (f) failure to observe and recognize the signal of the other vehicle;
- (g) failure to give an appropriate signal;
- (h) failure to yield the right-of-way.

8. Each and all of said acts of negligence on the part of each defendant constituted the proximate cause of the accident, damages, and injuries suffered by the plaintiff.

9. As a direct and proximate result thereof, plaintiff has been caused to sustain serious and permanent injuries, has been prevented from transacting her business and household duties, has suffered and will continue to suffer great pain of body and mind, has sustained permanent disability, and has incurred and will in the future incur, hospital, doctors and related bills in an effort to be cured of said injuries and has suffered and will continue to suffer great embarrassment and inconvenience.

WHEREFORE, plaintiff demands judgment against the defendants, and each of them, in the sum of ONE HUNDRED THOUSAND AND NO/100 DOLLARS (\$100,000.00) and her costs in this behalf expended, all with interest as allowed by law.

ELIZABETH ANNE PAYNE

By John P. Harris, III
Of Counsel

John P. Harris, III
John P. Harris, III, p.q.
HARRIS & HARRIS, P.C.
809 William Street
Fredericksburg, Virginia 22401

Charles D. Bennett, Jr.
Charles D. Bennett, Jr., p.q.
700 Princess Anne Street
Fredericksburg, Virginia 22401

CIRCUIT COURT CITY OF FREDERICKSBURG

Received and filed this 21 day of

VIRGINIA:

June, 1955 at 1976

IN THE CIRCUIT COURT OF THE CITY OF FREDERICKSBURG

ELIZABETH ANNE PAYNE

AGNES A. MILLS, CLERK

PLAINTIFF

vs

By J. E. J. [Signature]
Deputy

ROBERT JOHN GLOECKL

and

HARVEY LEON FULGHAM, SR.

DEFENDANTS

ANSWER AND GROUNDS OF DEFENSE

Comes now Robert John Gloeckl , by counsel, and answers Plaintiff's Motion for Judgment as follows:

1. He admits the allegations set forth in Paragraphs 1, 2 and 3 of Plaintiff's Motion for Judgment.

2. He denies the allegations set forth in Paragraphs 4, 5, 6, 7, 8 and 9 of Plaintiff's Motion for Judgment.

3. He denies that he is liable to or indebted to Plaintiff in the amount sued for or in any amount whatsoever.

4. He alleges that the sole proximate cause of the accident complained of was the negligence of Harvey Leon Fulgham, Sr.

5. He reserves the right to use any affirmative defense which may become available to him prior to or during the trial of the issues of this case.

6. He reserves the right to amend this Answer and Grounds of Defense at any time prior to or during the trial of

the issues of this case.

7. He alleges that Plaintiff was guilty of contributory negligence.

And now having answered in full, he prays that this action be dismissed with his costs herein expended.

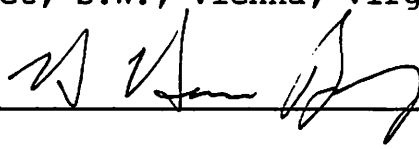
ROBERT JOHN GLOECKL
by counsel

WILLIS, BRAXTON, ASHBY & BASS, p.d.
P. O. Box 7005
Fredericksburg, Virginia 22404

By


H. Harrison Braxton, Jr.

I certify that a true copy of the foregoing Answer and Grounds of Defense was mailed, postage prepaid, this 20th day of June, 1985 to John P. Harris, III, Esquire, Harris & Harris, 809 William Street, Fredericksburg, Virginia 22401; and Charles D. Bennett, Jr., Esquire, 700 Princess Anne Street, Fredericksburg, Virginia 22401, and to Harvey Leon Fulgham, Sr., 106 James Street, S.W., Vienna, Virginia 22180.



CIRCUIT COURT CITY OF FREDERICKSBURG

Received and filed this 11 day of

March, 1986 at 2:00
o'clock PM.

VIRGINIA

IN THE CIRCUIT COURT FOR THE CITY OF FREDERICKSBURG
AGNES A. MILLS, CLERK

By Joe J. Harrison

ELIZABETH ANNE PAYNE)

Deputy

Plaintiff,)

vs.)

Case No. _____

ROBERT JOHN GLOECKL)

and)

HARVEY LEON FULGHAM, SR.)

Defendants.)

ANSWER AND GROUNDS OF DEFENSE

COMES NOW the defendant, Harvey Leon Fulgham, Sr., by
counsel, and for his Grounds of Defense to the Motion for
Judgment filed herein, he avers as follows:

1. Defendant admits the allegations in paragraphs 1 and
2 of the Motion for Judgment.

2. Defendant denies the allegations in paragraph 3 of
the Motion for Judgment.

3. Defendant admits the allegations in paragraph 4 and
5 of the Motion for Judgment.

4. Defendant is without sufficient information to
either admit or deny the injuries complained of in paragraph 6
of the Motion for Judgment and demands strict proof thereof.

5. Defendant denies the allegations contained in
paragraphs 7 and 8 of the Motion for Judgment with respect to
himself.

6. Defendant is without sufficient information to

1
2 either admit or deny the injuries complained of in paragraph 9
3 of the Motion for Judgment and demand's strict proof thereof.

4 7. The injuries complained of by the plaintiff, if any,
5 were due to the sole negligence of a third independent party.

6 WHEREFORE, the defendant prays that the Motion for
7 Judgment be dismissed.

8
9 CROSS-CLAIM

10 COMES NOW defendant, Harvey Leon Fulgham, Sr., and for
11 his cross-claim against defendant Robert John Gloeckl herein
12 says as follows:

13 1. Defendant Harvey Leon Fulgham, Sr., adopts the
14 foregoing Answers and Grounds of Defense and incorporates the
15 same by reference hereto.

16 2. The injuries and damages incurred by the plaintiff,
17 if any, were due to the sole and/or concurring negligence of the
18 defendant, Robert John Gloeckl.

19 3. That if plaintiff should recover against defendant
20 Fulgham, Sr., then said defendant is entitled to indemnification
21 or contribution from the defendant Gloeckl.

22 WHEREFORE, defendant Fulgham prays that he be awarded
23 indemnification, or contribution from the defendant Gloeckl for
24 any and all sums that the plaintiff may recover from him.

25
26 HARVEY LEON FULGHAM, SR.
27 By Counsel

28 BROWN, BROWN AND WATKINS

By: 

Brenda J. Gilliam, Esq.
Counsel for Defendant

320 North Fayette Street
Alexandria, VA 22314
(703) 549-7070

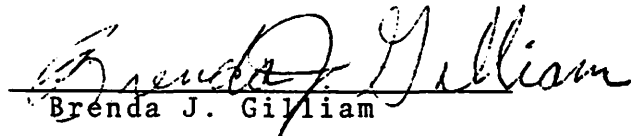
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Answer and Grounds
of Defense and Answers to Interrogatories of Defendant Harvey
Leon Fulgham, Sr. were mailed this 7th day of March, 1986,
to the following:

John P. Harris, III, p.q.
HARRIS & HARRIS, P.C.
809 William Street
Fredericksburg, Virginia 22401

Charles D. Bennett, Jr., p.q.
700 Princess Anne Street
Fredericksburg, Virginia 22401

H. Harrison Braxton, Jr.
Willis, Braxton, Ashby & Bass
315 Williams Street
Fredericksburg, Virginia 22401


Brenda J. Gilliam

FRANCES K. HALEY & ASSOCIATES

Court Reporters
1311 Princess Anne Street
Fredericksburg, Virginia 22401
Office: 371-5258



CIRCUIT COURT CITY OF FREDERICKSBURG
Received and filed this 5 day of 1.
1986 at 10:30
o'clock

1 VIRGINIA:

2 IN THE CIRCUIT COURT OF THE CITY OF FREDERICKSBURG
By Agnes A. Mills Clerk
Deputy

3
4 -----
5 ELIZABETH ANNE PAYNE, Plaintiff :

6 vs. :

7 ROBERT JOHN GLOECKL and :
8 HARVEY LEON FULGHAM, Defendants :
9 -----

10 EXCERPT from the trial in the above styled case,
11 when heard on April 16, 1986, at 10:30 a.m., before Honorable
12 Dixon L. Foster, Judge, with a jury.

13 APPEARANCES:

14 Mr. John P. Harris, III, Harris & Harris
15 809 William Street, Fredericksburg, Virginia 22401
16 Counsel for the Plaintiff;

17 Mr. H. Harrison Braxton, Jr., Willis, Braxton, Ashby & Bass
18 315 William Street, Fredericksburg, Virginia 22401
19 Counsel for Robert John Gloeckl;

20 Mr. Edwin C. Brown, Jr., Brown, Brown & Watkins
21 320 North Fayette Street, Alexandria, Virginia 22314
Counsel for Harvey Leon Fulgham;

Ms. B. J. Gilliam, Brown, Brown & Watkins
320 North Fayette Street, Fredericksburg, Virginia 22401
Counsel for Harvey Leon Fulgham.

Reported by: Barbara A. Ferrell

FRANCES K. HALEY & ASSOCIATES

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2.

I N D E X

DIRECT CROSS REDIRECT RECROSS

Donald E. Bley, M.D.	3	17, 19	20	20
R. M. Ivey	22	27, 28		
Robert John Gloeckl	31	34, 36		
Harvey Leon Fulgham	36	40		
Elizabeth Anne Payne	44	56, 64	64	



1 admitted. I have no further questions.

2 THE COURT: Is the doctor
3 excused?

4 MR. HARRIS: Yes, sir.

5 THE COURT: You are excused,
6 doctor.

7 THE WITNESS: Thank you.

8 -----

9 WITNESS STOOD ASIDE

10
11 THE COURT: Next witness.

12 MR. HARRIS: As my next
13 witness, I would like to call Trooper Ivey.

14
15 R. M. IVEY, a witness,
16 being called for examination by Counsel for
17 the Plaintiff, first being duly sworn, testified
18 as follows:

19
20 DIRECT EXAMINATION

21 BY MR. HARRIS:



direct - Ivey

1 Q For the record, would you tell us your
2 name and occupation?

3 A I am Trooper R. M. Ivey of the Virginia
4 State Police. I have been with them for two years. It will
5 be two years this summer.

6 Q Would you please tell us if you in-
7 vestigated an accident on I-95 on May 25, 1984?

8 A I did.

9 Q What time did you arrive on the scene?

10 A I was dispatched at 7:20 a.m. and
11 arrived at 7:40 a.m.

12 Q When you arrived, did you talk to either
13 one of the drivers?

14 A Yes, I did.

15 Q In either order, would you tell us
16 what each said about how the accident happened?

17 A First of all, I obtained the informa-
18 tion of who was the operator of each vehicle involved. Mr.
19 Harvey Fulgham identified himself as the operator of the
20 '84 Ford, four door sedan; and Mr. Robert Gloeckl, I guess
21 is the way it is pronounced, he identified himself as the



direct - Ivey

1 operator of the '74 Ford, four door sedan.

2 Mr. Fulgham stated
3 to me at the scene: "I don't know what happened. All I
4 heard was brakes." Mr. Gloeckl's statement says: "He
5 pulled out in front of me. I slammed on my brakes." That's
6 the statement I obtained at the scene.

7 Q Were there any skid marks?

8 A Yes, sir, there were.

9 Q From which vehicle?

10 A They were from the '74 Ford, the
11 Gloeckl vehicle.

12 Q Would you be able to draw a little
13 sketch showing the terrain where this accident happened?

14 A Yes, sir.

15 NOTE: The witness leaves
16 the witness stand and draws a diagram on the
17 blackboard.

18 MR. HARRIS: Excuse me.
19 Would it be all right if I move you out so they
20 can see you?

21 Q Where are the skid marks that you found?



direct - Ivey

1 A Okay, the skid marks came from the
2 left northbound lane. This is I-95 northbound, which was
3 under construction at that time. This is the entrance ramp
4 from U. S. Route 3 northbound. It was also under construc-
5 tion.

6 The skid marks that
7 I found started over in this lane. There were two tire skid
8 marks that started over in that lane and went over to the
9 right lane indicating the collision by the skid marks or
10 the skid marks variation or variation of the skid marks and
11 under-body debris and the debris of the vehicles indicated
12 that the collision took place in the right northbound lanes.

13 Q Did either of the drivers describe
14 to you the movement that that driver's automobile went through
15 prior to impact or after impact for that matter?

16 A When I arrived, I found one vehicle
17 here at this location, and the other vehicle was over in
18 this bank at this location. (witness indicating)

19 Q Which is which?

20 A This is the '74 Ford that was driven
21 by Mr. Gloeckl that put down the skid marks found up against



direct - Ivey

1 this. This is a concrete barrier along here, and this is
2 the vehicle that was driven by Mr. Fulgham, which was owned
3 by Ms. Payne, registered in her name.

4 Q Where was the damage to the automobile
5 driven by Mr. Gloeckl?

6 A Okay, his damage was to the left front
7 of his vehicle, the left front fender. I estimated the
8 damage to that to be approximately two hundred dollars worth
9 of damage.

10 Q Where was the damage to Mr. Fulgham's
11 vehicle?

12 A That vehicle had damage to the front
13 of it and to the left rear at this location, which indicated
14 to me that is where he was hit, right in this lane. (witness
15 indicating)

16 Q How was the weather that day?

17 A The road alignment is level. The
18 weather was clear and the surface was dry. It was daylight
19 at that time of the year.

20 Q Was anything wrong with the roadway
21 itself on I-95 where Mr. Gloeckl was originally driving?

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27.

direct - Ivey

1 A Nothing wrong with this location other
2 than it being under construction.

3 Q How about the location where Mr.
4 Fulgham was driving? Was there anything wrong with that?

5 A This is not in proportion. The way
6 they had it is this is a concrete barrier, right down through
7 here. It was also a barrier along this location. When you
8 came on the ramp right here, it was not like a regular ramp
9 that had been completed. You had to stop here or get on
10 with the acceleration and get out of the traffic. The
11 acceleration lane ended very abrupt so you didn't have time
12 to get out there and accelerate like you normally would under
13 normal conditions of a completed highway. (witness indicating)

14 MR. HARRIS: Thank you.

15 Please answer any questions of both counsel.

16 MR. BRAXTON: Your Honor,
17 I have no questions. I think the trooper
18 covered everything.

19

20 CROSS EXAMINATION

21 BY MR. BRAXTON:



cross - Ivey

1 Q Mr. Gloeckl's car was driveable, was
2 it not, after the accident?

3 A I don't recall, but according to the
4 damage it would indicate that it was.

5 Q Your notes, I assume, are scant, but
6 your memory of the damage is it was minimal, the damage was
7 quite minimal to his car?

8 A Yes.

9 MR. BRAXTON: Thank you.

10 Wait, one other question.

11 Q Did your notes show that Ms. Payne
12 complained of any injuries at the scene?

13 A I didn't indicate in my field notes.
14 I don't have anything here as being injured.

15 Q Do you have any injuries noted?

16 A I had that Mr. Fulgham complained of
17 injuries to me.

18 MR. BRAXTON: Thank you,
19 sir.

20

21

CROSS EXAMINATION

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29.

cross - Ivey

1 BY MS. GILLIAM:

2
3 Q Officer, can you explain exactly where
4 the skid marks emanate from Mr. Gloeckl's vehicle?

5 A Do you mean where they started?

6 Q Yes, sir.

7 A Well, not exactly. They did start
8 back here before the entrance ramp started in the left lane.
9 They were double skid marks from the right and left side
10 of the vehicle. They indicated that the wheels locked up.
11 It was level highway at that time. Generally, if the
12 wheels lock up, and there is a slope in the road, the vehicle
13 will go which way the slope is unless one of the side tires
14 grab more than the other one, and the other one has more
15 traction, and it will go the other way, but the skid marks
16 start here before the ramp and started over into the right
17 lane as he lost control. You lose your steering when your
18 tires lock up.

19 Q Could you tell whether or not Mr.
20 Fulgham's vehicle or Ms. Payne's vehicle had been hit in
21 the rear?

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30.

cross - Ivey

1 A There was damage to -- as I said, there
2 was damage to this part right here and damage on this
3 vehicle on the left front there. (witness indicating)

4 MS. GILLIAM: Thank you.

5 THE COURT: Is that all
6 of the questions?

7 MR. HARRIS: Yes, sir.

8 May he be excused?

9 THE COURT: May he be
10 excused?

11 MR. BRAXTON: Yes, sir.

12 THE COURT: You are free
13 to leave.

14 -----
15 WITNESS STOOD ASIDE

16
17 MR. HARRIS: As my next
18 witness, I would like to call the defendant,
19 Gloeckl.

20 THE COURT: I am going
21 to take a short recess first before you call

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31.

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your next witness. We will take about a five minute recess. The jury can step into the jury-room.

NOTE: A brief recess is now taken by the Court. After which, all parties present as before, with the jury seated in the jurybox, the matter continues as follows:

MR. HARRIS: For purposes of scheduling, will you break at one o'clock?

THE COURT: Yes, sir.

MR. HARRIS: Mr. Gloeckl is my next witness.

ROBERT JOHN GLOECKL, a defendant, first being duly sworn, testified in his own behalf as follows:

DIRECT EXAMINATION

BY MR. HARRIS:



direct - Gloeckl

1 Q Would you state your name and occupa-
2 tion, please?

3 A Robert John Gloeckl, X-ray technologist.

4 Q Would you tell us where you were going
5 and, if on your way on May 25th, there was an accident?

6 A I was traveling between Richmond,
7 Virginia, and Toledo, Ohio. I was headed for the I-95 and
8 Route 3 interchange but I did not know it at the time. I
9 was in the lefthand lane proceeding probably fifty-seven
10 miles an hour. A car came down the entrance ramp, pulled
11 directly across the righthand lane to the lefthand lane
12 forcing me to put on my brakes and swerving to avoid hitting
13 the car. I ended up in the righthand lane. The front of
14 my car was against the concrete abutment.

15 MR. HARRIS: No further
16 questions. Well, maybe I do.

17 Q When did you realize that there was
18 going to be a collision between you and the other automobile?

19 A Shortly before the entrance ramp. In
20 other words, the passenger in my car said, "That gentleman
21 is not watching where he is going." I said, "He will stay



direct - Gloeckl

1 in the righthand lane." So, at that time, I did not slow
2 up. I looked. He crossed right over in the righthand lane.
3 I put my brakes on. I put my horn on. When he didn't speed
4 up, I had to turn to avoid it.

5 Q Would you go to the blackboard and
6 show us with the automobiles how it happened?

7 A I will try.

8 NOTE: The witness leaves
9 the witness stand and stands in front of the
10 blackboard.

11 A The car they say was mine --

12 THE COURT: (Interjecting)
13 I believe it is necessary for the Court to see
14 that since we have to make some rulings on it.
15 It may be better to have it on the other side.

16 MR. HARRIS: Put it right
17 here?

18 THE COURT: That's fine
19 with me if the jury can see it.

20 A This being my car in the lefthand lane
21 going this way. This is the other car, came down, directly

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34.

direct - Gloeckl

1 across like that. I saw him, put on my horn, put on my brakes.
2 I started to skid some. He still continued over. My car,
3 I turned it to try to avoid hitting him. Somewhere down
4 in here, I ended up like this. This car was like I said
5 earlier, ended up over here. It spun around.

6 NOTE: The witness returns
7 to the witness stand.

8 MR. HARRIS: No further
9 questions. Your witness.

10
11 CROSS EXAMINATION

12 BY MR. BRAXTON:

13
14 Q What was the damage to your vehicle,
15 Mr. Gloeckl?

16 A It was a '74 Ford. It had a rubber
17 strip around the front bumper. The rubber strip was loose.
18 It came unattached on the lefthand side.

19 Q Did you tell the jury where you were
20 headed that day?

21 A Toledo, Ohio.

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35.

cross - Gloeckl

1 Q Were you alone?

2 A No, my mother, Mary Lancaster, was
3 with me.

4 Q Were you able to continue your trip
5 as soon as the officer completed the investigation?

6 A Yes, sir, we did.

7 Q Did you see Ms. Payne at the scene?

8 A Yes, sir, I did.

9 Q Did she complain of any injuries while
10 you were there?

11 A When the accident first happened, Mr.
12 Fulgham was out walking around the car. I am an X-ray
13 technician. I know some emergency procedures. I wanted
14 to check and make sure that everyone was okay. She was
15 still seated in the car. She said she was okay at that time.
16 I said, "Is she okay," and he said, "Yes, she is crying because
17 it is her brand new car." When I found out they were okay,
18 I went back to make sure my mother was okay. Later on, she
19 was walking around outside of the car looking at it.

20 Q Ms. Payne was walking around outside
21 the car?



cross - Gloeckl

1 A Yes, sir.

2 MR. BRAXTON: That's all.

3

4 CROSS EXAMINATION

5 BY MS. GILLIAM:

6

7 Q Mr. Gloeckl, did you say you were
8 traveling about fifty-seven miles per hour?

9 A It was in the general vicinity of
10 fifty-five, fifty-seven.

11 MS. GILLIAM: Thank you.

12 THE COURT: All right.

13 You may step down.

14

15 DEFENDANT STOOD ASIDE

16

17 MR. HARRIS: I would like
18 to call the defendant, Fulgham.

19

20 HARVEY LEON FULGHAM, a
21 defendant, first being duly sworn, testified



direct - Fulgham

1 in his own behalf, as follows:

2
3 DIRECT EXAMINATION

4 BY MR. HARRIS:

5
6 Q Again, for the record, please tell
7 us your name and your occupation.

8 A My name is Harvey Fulgham. I am a
9 self-employed landscaper.

10 Q And on May 25, 1984, were you involved
11 in an automobile accident?

12 A Yes, sir.

13 Q Would you tell us how it happened?

14 A Yes.

15 Q You may also step down and show us.

16 NOTE: The witness leaves
17 the witness stand and stands in front of the
18 blackboard.

19 A I was on the ramp heading in this
20 direction.

21 MR. BROWN: Mr. Fulgham,



direct - Fulgham

1 stand to the right so the jurors can see you.

2 THE WITNESS: Over here?

3 MR. BROWN: That's okay.

4 A I was on the ramp, the northbound ramp
5 exiting from 3 onto 95. As I approached the ramp, there
6 is a barricade and all. It is real close in that area. I
7 looked back here and --

8 MR. HARRIS: (Interjecting)

9 Excuse me for interrupting you, but I think if
10 you stood on this side, they might be able to
11 see.

12 A As I looked back here, this lane was
13 clear as we approached it here. I was still next to the
14 barricade. As I approached the intersection, approximately
15 along in this area here, I heard a noise, a screeching noise.
16 I looked in the rearview mirror. I seen this car out of
17 control. As I continued to move on, this car came across
18 here like this and hit the back fender of the car I am driving
19 and causes this car to go out of control, across the highway,
20 and hit the embankment. When it hit the embankment, the
21 car landed in this direction when it was completed. This

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39.

direct - Fulgham

1 car was facing the barricade this way. (witness indicating)

2 Q Did you see the car prior to starting
3 to pull out?

4 A No.

5 Q Did you pull over into your lefthand
6 lane?

7 A Into the left lane?

8 Q When you were pulling out, did you
9 at anytime cross all the way to the far left lane?

10 A No.

11 Q When you ended up hitting into the
12 embankment from your description, does that mean your rear
13 end of the car went into the embankment?

14 A No.

15 Q The front end went in?

16 A The car hit the back end of this car,
17 like that. When it hit it, it shot like that. I went across
18 and hit head-on. When the car rested, after all of the
19 bouncing around and everything, it was this way. (witness
20 indicating)

21 It hit and bounced

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40.

cross - Fulgham

1 off and then spun around and was this way. (witness indicating

2 MR. HARRIS: No further

3 questions. Your witness.

4 NOTE: The witness returns

5 to the witness stand.

6
7 CROSS EXAMINATION

8 BY MR. BRAXTON:

9
10 Q What you are telling the jury now
11 is a lot more detailed than what you told the trooper at
12 the time of the accident?

13 A At the time of the accident, he didn't
14 question me about that.

15 Q Do you mean he wasn't concerned about
16 what happened?

17 A He didn't ask me to go into detail
18 about that.

19 Q You had a duty to yield going onto
20 95, didn't you?

21 A I sure did.

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41.

cross - Fulham

1 Q You sure did?

2 A Yes.

3 Q And how fast do you contend you were
4 going?

5 A I was in third gear.

6 Q Well, how many gears do you have?

7 A Five. As far as speed is concerned --

8 Q (Interjecting) Your vehicle had enough
9 speed at the conclusion of this, this car came to a complete
10 stop right where you say there is an impact, and your car
11 had an opportunity to cross both lanes of I-95, go into a
12 ditch, and turn around a couple of times?

13 A I didn't turn around a couple of times.
14 It turned around one time.

15 Q Turned around one time, okay. How
16 fast were you going?

17 A I don't know how fast I was going.
18 I mean, I wasn't exceeding the speed limit or wasn't running
19 fifty-five miles an hour.

20 Q Well, what were you doing?

21 A I don't know. I imagine around forty-

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42.

cross - Fulgham

1 five miles an hour.

2 Q Isn't there a sign that says ramp speed,
3 thirty miles an hour?

4 A Probably.

5 MR. BRAXTON: That's all.

6 Excuse me, one other question while you are
7 on the stand.

8 Q You and Ms. Payne are old friends,
9 I assume?

10 A Yes.

11 Q And you remained friends after this
12 accident?

13 A Yes.

14 Q Do you have a motorcycle?

15 A No.

16 Q Were you in a motorcycle accident with
17 Ms. Payne around the 4th of July, 1984?

18 A I was riding a motorcycle, and she
19 was on it. The motorcycle turned over at the gas pump.

20 Q It turned over?

21 A Yes.



cross - Fulgham

1 Q And she was on it. This was a month
2 and a half after this accident?

3 A I imagine so.

4 Q And she felt good enough to go out
5 riding on a motorcycle with you in spite of all of these
6 doctors she was seeing at the time?

7 A I imagine so.

8 Q How often did she go out riding with
9 you?

10 A That's the only time.

11 Q Where did you go?

12 A Beg your pardon?

13 Q Where did you go? Where did you travel?

14 A Where did I go? Just riding there
15 in the area. No particular place.

16 MR. BRAXTON: Thank you.

17 MS. GILLIAM: No further
18 questions.

19 THE COURT: You may step
20 down.
21

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44.

DEFENDANT STOOD ASIDE

NOTE: At this time,
the video deposition of Andre Eglevsky, M.D.,
is played to the jury.

ELIZABETH ANNE PAYNE, the
plaintiff, being called for examination by
Counsel for the Plaintiff, first being duly
sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HARRIS:

Q Please tell the jury your name and
occupation.

A My name is Elizabeth Anne Payne. I
am a computer analyst.

Q For whom do you work?

A I work for the federal government



direct - Payne

1 at the United States Marine Corps Base, Quantico.

2 Q How long have you worked there?

3 A I worked for the government for
4 eleven years. I have been with the Marine Corps for three
5 and a half years.

6 Q Where did you work prior to working
7 for the Marines?

8 A I worked at the Pentagon for the Army.

9 Q Prior to this automobile accident we
10 have heard about, had you ever had problems with your neck?

11 A No, I didn't.

12 Q Since the automobile accident, have
13 you had problems with your neck?

14 A Yes, I have.

15 Q Let's talk about the time frame be-
16 ginning right after the automobile accident. Right after
17 the automobile accident, did you notice that you had any
18 pains or discomfort anywhere on your body?

19 A Well, at the time of the accident,
20 I hit my head on the window, and I was upset. I wasn't really
21 thinking at the time, and I felt that I was okay until I

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46.

direct - Payne

1 went to the hospital. When I went to the hospital, I suf-
2 fered pain up through my shoulders, like an aching, and they
3 X-rayed and examined me.

4 Q So you were treated at the hospital
5 on the day of the accident?

6 A Yes, I was.

7 Q Now, on that date, what did you make
8 of your situation? What did you think about your situation
9 at that point?

10 A Regarding?

11 Q Regarding how soon you would be well?

12 A Well, I thought I was okay. When they
13 X-rayed me and after they examined me and all and told me
14 I had a problem with my neck, and they gave me a cervical
15 collar to wear. I went to spend the weekend with my family.
16 I went there, and I was shook up. I wasn't feeling too good
17 after being in an accident.

18 Q Now, the cervical collar you described,
19 what does that look like?

20 A It is a foam rubber apparatus that
21 goes around your neck to hold your neck up to take the

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direct - Payne

1 pressure off the neck.

2 Q Did it work?

3 A No.

4 Q How long did you wear it?

5 A I wore it for about a week.

6 Q How did you like wearing it during
7 that week?

8 A I didn't like it at all.

9 Q Why not?

10 A Well, number one, it was uncomfortable.
11 It was hard to sleep with this thing on. When I went to
12 work, I had to take a lot of criticism of the people I work
13 with of them laughing at me.

14 Q You mentioned sleeping with it. Did
15 you literally sleep with it?

16 A Yes, I did.

17 Q Why?

18 A Because my neck bothered me when I
19 laid down on the pillow. It seemed like it would help to
20 lift the pressure off.

21 Q Now, when you went to see Doctor Bley,

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direct - Payne

1 how were you feeling?

2 A Well, I wasn't feeling too good,
3 because the night after the accident when I laid down, I felt
4 like I had been run over by a tractor-trailer truck. Every
5 part -- I guess when I finally relaxed, every part of my
6 body seemed to ache. When I went into Doctor Bley on
7 Tuesday -- I saw Doctor Bley on Tuesday because it had been
8 Memorial Day Weekend. I had headaches. My neck was bothering
9 me. My shoulders still ached.

10 Q Was there significant discomfort
11 involved?

12 A Yes.

13 Q How long did the really bad thing last?

14 A Well, it hurt quite a bit there for
15 the first few weeks. I suffered a lot of headaches and pain
16 up through my neck. It would come and go. It would ease
17 off and then it would come back and then ease off and come
18 back.

19 Q Since that time, has it continued to
20 improve?

21 A It is not bad like it was right after



direct - Payne

1 the accident, but I still suffer.

2 Q In terms of percentages, how much better
3 than it was initially is it now? I don't mean at this
4 instance but in the present existing time frame.

5 A In this present existing time frame,
6 I am not having headaches like I had right after the acci-
7 dent. I still do suffer with my neck hurting me at times,
8 at least, once a month, sometimes for a day, sometimes it
9 will last a week or two.

10 Q The headaches you mentioned, what were
11 the headaches like?

12 A The headaches started at the back of
13 my head. This is where it hurt mostly back here. It was
14 a really tight feeling. Sometimes it spread over the top
15 and sometimes it felt like I had someone squeezing at the
16 back of my head.

17 Q Doctor Bley mentioned nausea associated
18 with the headaches. Did you, in fact, have nausea associated
19 with the headaches?

20 A Yes.

21 Q At the time that you were having the



direct - Payne

1 nausea, were you taking any particular medication that he
2 reported sometimes made you nauseous?

3 A Yes, I did.

4 Q Were you able to establish whether
5 it was the medicine that was making you have the nauseous-
6 ness or the headaches that made it?

7 A I am not sure which one it was.

8 Q When you had the nausea and the head-
9 aches, what affect did the nausea, however it was caused,
10 have on the headaches? Did you throw up?

11 A No, I didn't throw up. I just felt
12 sick to my stomach.

13 Q Regarding the treatment you received
14 from Doctor Bley, why is it -- and Doctor Eglevsky -- why
15 is it you have not kept going to those doctors?

16 A Well, when Doctor Eglevsky released
17 me in December, after I had undergone a lot of testing, and
18 what he told me was there really wasn't anything else he
19 could do except for me to take the muscle relaxers, put hot
20 compresses on my neck, use Bengay or something like that,
21 be careful what I did so it didn't put further strain on



direct - Payne

1 my neck; and even though I still continued to hurt, I would
2 take the medication when it got bad, and I would sleep with
3 my heating pad at night, and I would try to avoid doing any-
4 thing that would cause me pain on my neck.

5 I could not afford
6 to keep going to the doctor. I didn't have the money to
7 keep paying to go everytime I hurt, and I couldn't keep
8 taking off from work.

9 Q Now, when you were having the problems,
10 after this particular time, was there anything that kept
11 you from going other than the things you just told us?

12 A That kept me from going --

13 Q To the doctor?

14 A Just the fact that I couldn't afford
15 to keep going. I didn't feel there was anything that they
16 could do for me.

17 Q When you were talking a moment ago,
18 you mentioned something about things that seemed to cause
19 you pain. Are there things that cause the pain to come on?

20 A Yes. Sometimes if I just wake up in
21 the morning and lift my head up off the pillow, my neck will

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direct - Payne

1 start hurting. There are times when I am driving, and I
2 have to turn and look to see if anything is coming, and I
3 can feel a pain in my neck.

4 If I do anything
5 to exert myself, like one day I was out trying to rake up
6 some leaves in my yard, just the effort of that. If I lift
7 anything that is a little heavier, it will bring it on.

8 I used to be in the
9 rescue squad, and I had to give that up, because I couldn't
10 lift the patients without causing me pain.

11 Q I take it that is the volunteer rescue
12 squad?

13 A Yes, the Spotsylvania Rescue Squad.

14 Q Explain to us a little bit about why
15 you had to give it up.

16 A Well, after I had the accident, and
17 the doctor told me to rest and take care of myself and not
18 to exert myself, I went on a six months leave from the res-
19 cue squad. While I was on there, I was also taking a cardiac
20 technology course that lasted nine months. I started that
21 in January of that year, which went through October, and



direct - Payne

1 the accident occurred in May.

2 During this time,
3 I was on muscle relaxers. There were times that I couldn't
4 attend classes. When I did go to class, I couldn't think.
5 The muscle relaxers, I couldn't function when I took them
6 very well. I couldn't comprehend everything.

7 As a result of that,
8 the classes I had missed and the fact that I could not
9 function, after the end of the nine months, when I took my
10 state exam, I failed it. When I went back to the rescue
11 squad, I served for three weeks, and we had to pick up a
12 patient, and I had to help lift the stretcher. When I did,
13 my neck again went into spasms, and I decided right then,
14 it wasn't worth it to me to help the community service and
15 help the people at the risk of hurting my ownself.

16 Q Has there been any inconvenience
17 associated with this particular injury?

18 A Yes. Inconvenience in the fact that
19 I cannot function totally the way I did before because
20 basically -- I don't have a husband. I have just a son,
21 and he is not around a lot because he works, and there



direct - Payne

1 are things that I always did for myself, and now I am
2 limited. I cannot do these things without risking hurting
3 my neck.

4 Q Is it true that you can do virtually
5 anything you want to do, isn't that really true?

6 A I can do anything I want to, but if
7 I do, I risk hurting my neck and suffering for a week or
8 so.

9 Q Was there any mental anguish associated
10 with this particular injury when you arrived at the hospital
11 and found your neck had been hurt?

12 A Yes. Due to the fact that I was on
13 the rescue squad and have had quite a bit of training, I
14 know that injuries to the neck can be very serious. I don't
15 like to hurt. I don't like to be injured, but when Doctor
16 Bley called me that weekend in June and told me that I had
17 this very serious problem and that I should be very careful
18 that week not to do anything that could possibly cause
19 an injury to my neck or I could be paralyzed, I was very
20 upset, and I didn't know what was going to happen, because
21 I didn't want to be paralyzed. I have to live. I have to



direct - Payne

1 function.

2 Q How long was it until you found out
3 that the threat of being paralyzed had passed; that that
4 was not a real threat?

5 A That was Friday, and I went to see
6 Doctor Eglevsky on Tuesday, and that's when I found out.

7 Q Was it June or September that Doctor
8 Bley told you that?

9 A It was six months later. It must have
10 been September.

11 Q Regarding Doctor Eglevsky's testimony
12 about the operation, how do you feel about that?

13 A I don't like that at all.

14 Q Tell us why.

15 A Well, when I listened to Doctor
16 Eglevsky talk about this possibility of what might happen
17 to me in the future, I was very upset with the fact that
18 I don't want to face surgery, and I don't want them cutting
19 on me and things that I don't like at all.

20 Q How do you feel about anesthesia?

21 A I am scared to death of it.

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direct - Payne

1 Q Why?

2 A Because you may not come out. You
3 may go to sleep and that may be it, and that's the scariest
4 part to me, because I have had a reaction in the past to
5 anesthesia.

6 Q How do you feel about your immediate
7 future or your long-term future knowing what you know about
8 your neck?

9 A I am very apprehensive. I pray to
10 God that I don't have to go through anything like that, but
11 I am very scared.

12 MR. HARRIS: No further
13 questions. Your witness.

14
15 CROSS EXAMINATION

16 BY MR. BRAXTON:

17
18 Q On the morning of the accident, where
19 did you start out that morning?

20 A I started out from Spotsylvania County.

21 Q Where?



cross - Payne

1 A Route 620 to Route 3.

2 Q Was it your house?

3 A Yes.

4 Q Who started driving from your house?

5 A Mr. Fulgham.

6 Q Why was Mr. Fulgham driving your car
7 rather than you?

8 MR. HARRIS: Objection
9 as to relevance, Your Honor. It is beyond the
10 scope of direct examination. It may possibly --

11 MR. BRAXTON: (Interjecting)
12 I will take her on as my witness at this point
13 if it is beyond the scope of direct examination.
14 I would like to ask her, and maybe she is going
15 to say that she was physically unable to drive
16 the car at that time.

17 THE COURT: Overrule the
18 objection, and she can answer the question.

19 A I was more than physically able to
20 drive the car.

21 Q Why didn't you drive the car?

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cross - Payne

1 A Because I didn't want to drive a car
2 that day. I knew that we were going into rush hour traffic
3 on I-95, and I did not care to drive in the rush hour traffic.

4 Q You went out to Route 3 and then down
5 the interchange. When you were going down the interchange
6 from Route 3 to I-95, what were you doing?

7 A I was sitting in the car.

8 Q Where were you looking?

9 A I was looking at the road.

10 Q Were you looking to either side, right
11 or left?

12 A I know I was looking as we went onto
13 the ramp, the barricades along the side of the road going
14 out, the construction along the side.

15 Q Do you drive that ramp regularly?

16 A I drive that road everyday.

17 Q And you know that you have to yield
18 going onto 95 to the traffic on 95?

19 A Yes.

20 Q Mr. Fulgham knew that?

21 A I guess he does.



cross - Payne

1 Q There is a speed limit going on that
2 ramp, too, isn't there? Isn't there a maximum speed of
3 thirty miles per hour on that ramp?

4 A As I recall on that date when the con-
5 struction was going on, there was no sign as being a speed
6 limit.

7 Q Do you recall talking to Mr. Fulham
8 as you went on the ramp?

9 A At that particular time, I don't. I
10 was thinking about I would like to get something to eat
11 eventually.

12 Q Did you leave before breakfast?

13 A Yes.

14 Q Where were you going?

15 A I was going up to Northern Virginia.

16 Q Where?

17 A To Tyson's Corner.

18 Q Did you ever see Mr. Gloeckl's car
19 prior to the accident?

20 A No.

21 Q Do you know how fast your vehicle was



cross - Payne

1 going?

2 A No.

3 Q Are you in a position to refute Mr.
4 Gloeckl's statement that you pulled right in front of him?

5 A I do not believe that we pulled out
6 in front of another car, no.

7 Q Are you able to refute the statement?

8 A What do you mean?

9 Q You said what you believe. I am saying
10 are you able to refute that statement?

11 A When you say refute, what do you mean?

12 Q Are you able to categorically say that
13 you didn't pull out in front of another car?

14 A No, I am not able to say that.

15 Q Did you tell the trooper at the scene
16 that you were injured?

17 A I said that I had hit my head on the
18 window.

19 Q When did you decide to go to the hos-
20 pital?

21 A When? When the ambulance came.

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cross - Payne

1 Q The ambulance came to pick up Mr.
2 Fulgham and you decided to go to the hospital at that time?

3 A Yes.

4 Q Even though you weren't hurt at that
5 time?

6 A I didn't realize that I was hurt at
7 that time.

8 Q Now, when you went to the hospital,
9 they X-rayed you and told you you had a problem is what you
10 are telling me?

11 A Yes.

12 Q In spite of that, months later, on
13 July 4th weekend, you undertook to go out and ride on a motor-
14 cycle with Mr. Fulgham, didn't you?

15 A Yes.

16 Q You did have an accident while you
17 were riding the motorcycle, didn't you?

18 A I wouldn't call it so much an accident.

19 Q What was it?

20 A Well, I would like to say that the
21 reason I was on the motorcycle is that I didn't have a car.



cross - Payne

1 My car was damaged. Mr. Fulgham came down and brought his
2 motorcycle, and we went for a ride on the motorcycle. At
3 the gas station, the motorcycle was leaning over this way,
4 and it fell. The muffler fell on my leg and burned my leg.

5 Q Did you fall over with it?

6 A No, because my foot went down, and
7 the motorcycle leaned against my leg and burned my leg.

8 Q So you went out for a ride on that
9 day?

10 A Yes, it was July 4th.

11 Q You felt good enough to go out and
12 ride a motorcycle on that day?

13 A On that day -- there were times --
14 on that day, I felt better than I had been feeling. There
15 were days that I was feeling good, and there were days that
16 I wasn't.

17 Q Do you remember talking to Doctor
18 Eglevsky in October of '84 and describing your pushing over
19 a tree?

20 A Yes.

21 Q You felt strong enough to go out a

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cross - Payne

1 couple of months later and push over a tree, didn't you?

2 A I felt strong enough at times from
3 the beginning of the accident to try to live as normal a
4 life as I could. The tree you are talking about was a small
5 tree about this big that was dead, and I pushed, like this,
6 and the tree broke. (witness indicating)

7 Q This was between the time or after
8 the time you had talked to Doctor Bley, and he had told you
9 about being very careful about your neck, wasn't it?

10 A Are you talking about the time when
11 he told me to be very careful because of the subluxation?

12 Q That's correct.

13 A But that was only for a three or four
14 day period.

15 Q And after that, you went on out and
16 pushed down trees after that?

17 A No. As I said, from the time of the
18 accident, I tried to live as normal a life as possible.

19 Q Do you know how many times your car
20 turned around?

21 A It turned around one time.



cross - Payne

1 MR. BRAXTON: Thank you.

2
3 CROSS EXAMINATION

4 BY MS. GILLIAM:

5
6 Q Ms. Payne, on the day of the accident,
7 did you give Mr. Fulgham permission to drive your vehicle?

8 A Yes, I did.

9 Q To the best of your memory, do you
10 remember Mr. Fulgham coming off of the ramp and traveling
11 across two lanes of traffic before you were hit?

12 A No, we did not.

13 Q Ms. Payne, were you hit from the rear?

14 A Yes. We were hit in the back lefthand
15 side in the rear.

16 MS. GILLIAM: Thank you

17 very much.

18
19 REDIRECT EXAMINATION

20 BY MR. HARRIS:



redirect - Payne

1 Q When we are talking about pushing over
2 a tree, when the tree went over, did you flinch?

3 A Yes, the tree broke. When I pushed
4 it down, I heard it crack when the tree broke, and I
5 immediately flinched, like that.

6 Q Was it pushing it over or the flinching
7 that precipitated the neck pain?

8 A It was the flinching. The tree was
9 nothing. It was a dead, little small tree.

10 MR. HARRIS: No further
11 questions.

12 THE COURT: All right.
13 You may step down.

14 -----
15 PLAINTIFF STOOD ASIDE

16
17 MR. HARRIS: Your Honor,
18 we rest.

19 THE COURT: The plaintiff
20 rests.

21 MR. BRAXTON: I have a



1 motion, Your Honor.

2 THE COURT: We will be
3 in recess. We will be in recess for approxi-
4 mately one hour. We will reconvene at two
5 o'clock. We will tell you, do not discuss the
6 case with anybody. When you come back, please
7 go back to the juryroom so you won't have to
8 be around the witnesses when you do. You don't
9 have to be back until two.

10 When you come back,
11 go to the juryroom so you won't be around the
12 witnesses. The Court is in recess until the
13 jury retires.

14 NOTE: The jury now depart
15 from the Courtroom.

16
17 JURY OUT

18 THE COURT: Yes, sir.

19 MR. BRAXTON: Your Honor,
20 I move to strike the plaintiff's evidence
21 against Mr. Gloeckl. The evidence is -- the



JURY OUT

testimony of Mr. Gloeckl, I submit, which is certainly accepted by the plaintiff, the plaintiff has taken this on as her evidence, and the only evidence against Mr. Gloeckl is he was operating his vehicle properly on Interstate-95; that a car pulled out in front of him and that he braked and that the other car went out of control across the interstate.

There are some degrees of evidence as to what both Mr. Fulgham and Ms. Payne may have thought happened, but none of that refutes her evidence from Mr. Gloeckl that he was driving on the interstate, and this other car pulled out in front of him.

I submit there is no evidence upon which a jury can find negligence on the part of Mr. Gloeckl, and I ask that the case against him be struck.



1 JURY OUT

2
3
4 MR. HARRIS: Your Honor,
5 there is sufficient evidence to show that Mr.
6 Gloeckl, under the circumstances that he was
7 faced with, reacted so severely that he lost
8 control of the automobile, and there is plenty
9 of evidence to substantiate that theory that
10 he over reacted to the point of losing control
11 of his automobile, and one of the duties is to
12 remain in control of the automobile.

13 It is true, his auto-
14 mobile never left the highway until impact, but
15 it is also true that while it was out of control,
16 as testified to by the police officer, the skid
17 marks led from the lefthand lane into the right-
18 hand lane where the debris as if from the colli-
19 sion was found; that had he remained in control
20 of the vehicle and the testimony is also that
21 he couldn't steer while he was skidding; and



1 JURY OUT

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4 that if he had continued to go straight ahead,
5 straight down I-95, there would, in fact, be
6 no impact.

7 In any event, I hate
8 to bring up fifty-seven miles per hour, Your
9 Honor, but --

10 THE COURT: (Interjecting)
11 Please don't.

12 MR. HARRIS: It is ridi-
13 culous. It is ridiculous. The situation is
14 clearly that if one version of the facts is
15 accepted and, at this point, it should be taken
16 in the light most favorable to the plaintiff,
17 is that he simply lost control by over-reacting
18 to a situation he was confronted with, plenty
19 enough for the jury to find him negligent.

20 MR. BRAXTON: Your Honor,
21 there is no -- this is the evidence which is

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JURY OUT

I submit that, based on that , the only evidence is the negligence on the part of Mr. Fulgham, the failure to yield the right-of-way, and there is no evidence which holds Mr. Gloeckl in at this point that shows any negligence on his part, and I ask that he be struck.

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1 JURY OUT

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4 to him.

5 I think that my
6 distinguished colleague, Mr. Braxton, apparently
7 overlooks the fact, among the witnesses called
8 by the plaintiff, was also Mr. Fulgham himself.
9 Mr. Fulgham's testimony, if believed, is suffi-
10 cient to establish liability on the part of
11 defendant, Gloeckl.

12 Mr. Braxton has no
13 right to presume that the only evidence that
14 may be accepted by the jury is the version of
15 defense as given by his client when, indeed,
16 they are free to accept the version given by
17 our client as well, and our client's testimony
18 was the exact opposite, Your Honor, that he
19 exited the ramp lane, remained in the righthand
20 lane and heard screeching tire noises, at which
21 time he was struck in the right lane and forced



1 JURY OUT

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4 him completely across the road.

5 THE COURT: Didn't he also
6 tell the trooper he didn't know what happened?

7 MR. BROWN: I am sorry,
8 Your Honor?

9 THE COURT: Didn't he also
10 tell the trooper that he didn't know what
11 happened?

12 MR. BROWN: That's true,
13 if Your Honor please, however, what he said to
14 the trooper was he didn't know how the accident
15 occurred, but he certainly knew what happened
16 after the accident occurred and where he was
17 when it occurred, and I suggest that despite
18 the illusion that Mr. Braxton creates by the
19 question of didn't you tell the trooper you didn't
20 know what happened is not inconsistent with
21 someone who says he was struck by a baseball



1 JURY OUT

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4 coming through a window, I don't know what
5 happened, but I know when that baseball hit me,
6 it knocked me on the floor, and I know when I
7 was hit I was standing at the table, and I
8 suggest, Your Honor, that can be consistent with
9 Mr. Fulgham's testimony.

10 He knows what he
11 was doing when he was struck. He knows where
12 he was when he was struck. He knows what happened
13 to the vehicles after he was struck, but he does
14 not know how the accident occurred.

15 I suggest, Your Honor,
16 taking that much of the evidence as given by
17 him and placing his vehicle in the righthand
18 lane with the demonstrative evidence adduced
19 by the officer himself, there is nothing to
20 suggest that Mr. Fulgham was in the lefthand
21 lane until such time after the impact occurred



1 JURY OUT

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4 as evidenced by the skid marks from the car well
5 beyond where Mr. Gloeckl testified the point
6 of impact was and then striking Mr. Fulgham's
7 vehicle.

8 THE COURT: I think it
9 is a close question. I am going to grant your
10 motion. I don't think you have proven any
11 negligence on the part of the other defendant.

12 MR. HARRIS: Note my
13 exception, sir.

14 THE COURT: Or that the
15 proximate cause was the fifty-seven miles an
16 hour speed limit. I grant the motion as to
17 defendant, Gloeckl. We will recess for one hour
18 for lunch.

19 NOTE: A lunch recess is
20 now taken by the Court. After which, all parties
21 present as before, with the jury seated in the



1 jurybox, the matter continues as follows:

2
3 MR. BROWN: May we approach
4 the bench, Your Honor?

5 THE COURT: Certainly.

6 NOTE: Counsel approach
7 the bench, which conference is not reported.

8 THE COURT: I am going
9 to ask the jury to step outside for a few minutes.

10 NOTE: The jury now depart
11 from the Courtroom.

12
13 JURY OUT

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15 MR. BROWN: Thank you,
16 Your Honor. If Your Honor please, on behalf
17 of the defendant, Mr. Fulgham, we would like
18 to make a motion to strike the plaintiff's evi-
19 dence on the grounds that the plaintiff having
20 adopted that evidence by virtue of calling Mr.
21 Fulgham as a witness in its case in chief has



1 JURY OUT

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4 established through his testimony the following.

5 Mr. Fulgham was
6 approaching I-95 off of the Route 3 access ramp,
7 at which point, he looked to the left, according
8 to his testimony, and saw the extreme righthand
9 lane into which he intended to merge was clear;
10 that he then began to enter that righthand lane,
11 remaining in that righthand lane; that as he
12 did so, he heard the screeching of tires, subse-
13 quent to which, he was struck in the rear in
14 the righthand lane, and the vehicle forced across
15 the road, off of the roadway, and ended up in
16 the position that is indicated by his testimony.

17 Accordingly, if Your
18 Honor please, that testimony would indicate that
19 Mr. Fulgham was free of negligence in the operation
20 of his vehicle. As Your Honor noted during the
21 earlier motion, he testified or rather there

JURY OUT

was testimony to the effect that he advised the officer that he did not know what happened. I suggest to the Court the consideration that that is not inconsistent with nor an extension of that particular advice for, indeed, the defendant does not know how the accident, in fact, occurred, but he does know from the time the impact took place.

According to that testimony, that testimony indicates he did nothing more than enter the righthand lane and is controverted by nothing more than the testimony of Mr. Gloeckl, which testimony I would urge the Court would likewise be contradicted by Mr. Fulgham's testimony to the effect he remained in the righthand lane.

Accordingly, on behalf of defendant, Fulgham, we make a motion to strike.



1 JURY OUT

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4 THE COURT: What's good for
5 the goose is good for the gander.

6 MR. HARRIS: I don't want
7 to talk myself into a hole twice.

8 THE COURT: What?

9 MR. HARRIS: I don't want
10 to talk myself into a hole twice. In this case,
11 it is our position that there is sufficient evi-
12 dence both ways, and it is a question of fact
13 for the jury to decide whether only one was at
14 fault or, if so, which one, of if they were both
15 at fault. There is an abundance of evidence
16 to show that that it was a combination of errors
17 of both that created the collision and, in this
18 case, we have testimony both ways. It is a jury
19 question, Judge.

20 THE COURT: Mr. Harris,
21 I have to grant the motion. I don't believe



JURY OUT

the plaintiff has shown any negligence on the part of that defendant either as a proximate cause. I don't believe it has been shown. In fact, I think she, herself, absolved him in her testimony.

MR. HARRIS: Your Honor, could you explain how you reach that conclusion? It is hard to understand.

THE COURT: Well, I don't know whether I have to explain too much. I am telling you that I don't know you have proven as a matter of law that there was negligence on the part of the defendants, and I don't believe she can recover from either one of them. It isn't hard for me to reach that conclusion, Mr. Harris.

Of course, you are in the position of your client having to depend



1 JURY OUT

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4 on the testimony of them to recover, and I don't
5 believe -- of course, the things they have
6 testified to that are not contradicted you are
7 stuck with.

8 MR. HARRIS: But only in
9 the totality of the total circumstances. I take
10 it what you feel we are dealing is the so-called
11 Massey v. Firmstone ruling.

12 THE COURT: Partially.

13 MR. HARRIS: Pardon?

14 THE COURT: I said partially,
15 of course, it is Massey v. Firmstone.

16 MR. HARRIS: And that by
17 calling the defendants to testify as to their
18 version of how the particular accident happened
19 that she is stuck with the situation where each
20 one says I didn't do it and, therefore, she is
21 out and has no way of showing how it happened



Here in Ford Motor Company v. Bartholomeu, 224 Va. 421, the Court explained that the Massey doctrine is not to be read as a rule of thumb categorically, absolute and universally applicable by definition and by the statement of facts made by the litigant to statements within his own knowledge and the necessary inferences therefrom. It does not apply to statements of opinion, and these gentlemen have given their, at least, three different sets of facts.

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1 JURY OUT

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4 cannot be correct in this case.

5 Moreover, when a
6 litigant explains or clarifies an adverse
7 statement, his testimony must be considered as
8 a whole. It is generally for the jury to
9 determine whether it will accept such explana-
10 tion or clarification, and when he said he didn't
11 know how it happened, and then later he says
12 he does know how it happened if, in fact, that
13 is what he said, the jury is to decide whether
14 they believe the first version or the second
15 version.

16 If the jury believes
17 the first version, it is entirely consistent
18 with what Mr. Gloeckl said; therefore, he should
19 be held accountable. If, on the other hand,
20 they believe his second version that he was in
21 the right lane and he never crossed the lane



1 JURY OUT

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4 into the lefthand lane, the inner-most lane,
5 if he never crossed that, then if the jury finds
6 that is the case, then Gloeckl is the one that
7 left his lane of travel and came over and col-
8 lided with the plaintiff.

9 Anything else
10 would certainly result in a miscarriage of
11 justice and the intent of Massey v. Firmstone
12 was never any such as that and, at this stage,
13 it is against each moving party. The facts
14 regarding that particular movement are to be
15 viewed in the light most favorable to the
16 plaintiff.

17 As regarding Mr.
18 Fulgham, when he said he moved to strike, then
19 the facts that oppose him are the facts to
20 be used in the light most favorable to the
21 plaintiff in opposition to that motion, and



1 JURY OUT

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4 the testimony viewed in that light is he pulled
5 out in front of me and I tried to avoid him.
6 He is at fault.

7 If, on the other
8 hand, Mr. Gloeckl moved and, again, the facts
9 at this stage are to be viewed in the light most
10 favorable to the plaintiff, then the statement
11 by Mr. Fulgham should be taken at face value,
12 and that is I did pull across, and it is totally
13 a miscarriage.

14 There is no evi-
15 dence that the plaintiff was in anyway contri-
16 butorily negligent. Accidents don't happen by
17 themselves. There are two versions. The jury
18 should decide the question as to both of them.
19 Certainly, to deprive the plaintiff of any
20 opportunity to get to the jury is a miscarriage
21 and Massey v. Firmstone never intended that.



1 JURY OUT

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4 She hasn't given
5 her account, and the days of vouching for the
6 plaintiff as they have served their usefulness
7 have long gone.

8 THE COURT: Well, of course,
9 I ruled on one before lunch. The one we are
10 on now, maybe I didn't hear the evidence right,
11 but I thought the plaintiff, herself, said
12 he never did go into the other lane, so she is
13 bound by that testimony.

14 MR. HARRIS: Well, I guess
15 the thing to do is read back, but I still think
16 it comes in the light of an opinion, and it was
17 not presented as far as the plaintiff's evidence
18 in the first place, because the plaintiff never
19 put it on. It stopped, and you allowed them
20 to put on evidence which would in normal order
21 come in his case in chief and use evidence that



1 JURY OUT

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4 would come in his case in chief at the time of
5 the motion to strike is certainly unfair.

6 THE COURT: Well, I hate
7 to be guilty of a miscarriage of justice, Mr.
8 Harris, but I have ruled in the matter, and I
9 think my ruling is correct. You will have to
10 take your exception.

11 MR. HARRIS: Yes, sir.

12 MR. BROWN: Thank you,
13 Your Honor.

14 THE COURT: We still have
15 a cross claim here, I guess.

16 MR. BROWN: Yes, we do,
17 if Your Honor please. At this time, the defen-
18 dant, Fulgham, would move to dismiss or non-
19 suit its cross claim.

20 THE COURT: Motion granted.

21 MR. HARRIS: Your Honor,



1 JURY OUT

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4 obviously, I feel it will be necessary for us
5 to appeal. I would ask leave to photograph the
6 large exhibit and substitute a photograph of
7 it during the appeal procedure.

8 THE COURT: The large
9 exhibit is -- there is no problem there. You
10 can photograph it and substitute a photograph.

11 MR. HARRIS: Thank you,
12 sir.

13 THE COURT: Bring the jury
14 back in.

15 NOTE: The jury now enters
16 the Courtroom and take their seats in the jury-
17 box.

18
19 JURY IN

20
21 THE COURT: The Court will

FRANCES K. HALEY & ASSOCIATES

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88.

1 tell the members of the jury that at the con-
2 clusion of the plaintiff's evidence, both
3 defendants made a motion to strike. In other
4 words, asked the Court to dismiss the proceedings
5 on the ground that the plaintiff has not proven
6 as a matter of law a case against either of these
7 defendants, which evidence does not justify a
8 verdict or a matter to be submitted to the jury.

9 The Court has granted
10 that motion, and we granted a motion to strike
11 and, in effect, found for the defendants. We
12 have dismissed the charges, and you do not have
13 to remain any longer.

14 -----
15 HEARING CONCLUDED AT 2:15 p.m.
16
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CERTIFICATE OF COURT REPORTER

I, Barbara A. Ferrell, hereby certify that I,
first being duly sworn, was the Court Reporter in the
Circuit Court of the City of Fredericksburg, Virginia, on
April 16, 1986, at the time of the hearing herein.

I further certify that the foregoing excerpt
is a true and accurate record taken from the trial of
ELIZABETH ANNE PAYNE vs. ROBERT JOHN GLOECKL and HARVEY
LEON FULGHAM.

Given under my hand this 9th day of May, 1986.


BARBARA A. FERRELL Court Reporter

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF FREDERICKSBURG

WEDNESDAY, APRIL 16, 1986

ELIZABETH ANNE PAYNE

Plaintiff

vs.

ROBERT JOHN GLOECKL

and

HARVEY LEON FULGHAM, SR.

Defendants

ORDER

This day came the parties in person and by counsel on the Plaintiff's Motion for Judgment filed herein and on the Cross-Claim filed by Harvey Leon Fulgham, Sr. against Robert John Gloeckl, and the Defendants having filed their grounds of defense herein, issue is joined.

Thereupon the Court Reporter was sworn.

Whereupon came a jury, to-wit: Clarence L. Minor, Raymond D. Minor, James G. Ingalls, Morris W. Jones, Donald C. Sears, Todd W. Harper and Edward J. Delamere who were sworn to well and truly the issues joined and a true verdict give according to the evidence and the law.

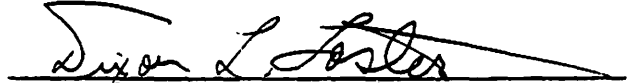
The evidence of the Plaintiff was presented and at the conclusion thereof both Defendants by counsel moved to strike the evidence of the Plaintiff on grounds stated in the record, which Motions were granted and exceptions noted by the Plaintiff, and the Defendants are hereby dismissed.

Whereupon the Attorney for the Defendant, Harvey Leon Fulgham, Sr., moved the Court to non-suit his cross-claim filed against Robert John Gloeckl, which motion was granted.

Thereupon the jury was discharged.

On Motion of the Attorney for the Plaintiff, it is the ORDER of this Court that a copy of Plaintiff's Exhibit Number 6 be substituted in the Court File in lieu of the original document, and the original thereof be returned to John P. Harris, III, Attorney for the Plaintiff.

Enter this 16th day of April, 1986.


DIXON L. FOSTER, JUDGE

ENTERED LAW ORDER BOOK 19 PAGE 405-406

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF FREDERICKSBURG

ELIZABETH ANNE PAYNE

vs.

ROBERT JOHN GLOECKL

and

HARVEY LEON FULGHAM, SR.

CIRCUIT COURT CITY OF FREDERICKSBURG
Received and filed this 17 day of
October 1964

AGNES A. Plaintiff

Defendants

MOTION TO RECONSIDER THE DEFENDANTS' MOTION TO STRIKE

Plaintiff produced evidence, which if believed by the jury, is sufficient to establish that defendant Gloeckl left his lane of travel while out of control and collided with the vehicle in which the plaintiff was riding thereby causing her injuries. Plaintiff also produced evidence, which if believed by the jury, is sufficient to establish that the Defendant Fulgham pulled in front of the vehicle driven by Gloeckl thereby causing the collision which injured Mrs. Payne. This evidence was sufficient to support a jury verdict for the plaintiff, and the jury should have been allowed to consider it. In addition, the plaintiff alleged in the motion for judgment the combined negligence of both parties caused her injuries. Therefore, the court erred in granting the motion of Defendant Gloeckl to strike the evidence and also erred in granting the motion of Defendant

Fulgham to strike the evidence, and the substantial rights of the plaintiff were infringed.

WHEREFORE, plaintiff moves the court for an order rescinding its granting of each defendant's motion to strike and placing the matter on the docket for a new trial.

ELIZABETH ANNE PAYNE

By John P. Harris, III
Of Counsel

NOTICE OF MOTION

PLEASE BE ADVISED that on Wednesday, April 23, 1986, at 11:00 a.m., the undersigned will move this honorable court of the Circuit Court of the City of Fredericksburg, sitting in the Circuit Court of Essex County, at Tappahannock for the above prayed for relief.

John P. Harris, III
John P. Harris, III

John P. Harris, III
HARRIS & HARRIS, P.C.
809 William Street
Fredericksburg, Virginia 22401

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Motion and Notice of Motion were mailed, postage prepaid, or hand delivered, this 17th day of April, 1986, to H. Harrison Braxton, Jr., Esq., P.O. Box 7005, Fredericksburg, Virginia, 22404; and Brenda J. Gilliam, Esq., 320 Fayette Street, Alexandria, Virginia, 22314.

John P. Harris, III
John P. Harris, III

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF FREDERICKSBURG

ELIZABETH ANNE PAYNE,)
)
Plaintiff)
)
v.)
)
ROBERT JOHN GLOECKL and)
HARVEY LEON FULGHAM,)
)
Defendants)

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO VACATE

Plaintiff has moved this Court to vacate its dismissal order, entered on April 16, 1986 and submits this memorandum in support.

FACTS

Plaintiff sued Defendants for damages resulting from injuries in an automobile accident occurring on May 25, 1984 in Fredericksburg, Virginia. Defendant Fulgham was the driver of the automobile in which the Plaintiff was a passenger and Defendant Goeckl was the driver of the other car involved in the collision.

At the trial of the case on April 16, 1986, in the Circuit Court for the City of Fredericksburg, this Court struck the Plaintiff's evidence at the conclusion of her case, dismissing the case against both Defendants. Although the Court issued no specific supporting opinion for such dismissal, it appears clear that the decision was based upon the evidence on the question of liability.

On the liability issue, Plaintiff, herself, was silent, and introduced the testimony of both Defendants as adverse witnesses,

*Filed: April 22, 1986
Proton & J. Stuber
Judge*

CHARLES D. BENNETT, JR.
ATTORNEY AT LAW
1119 CAROLINE STREET
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FREDERICKSBURG, VIRGINIA 22404
(703) 371-2907

each placing fault for the accident on the other. The accident occurred at the intersection of Interstate 95 and State Route 3, west of Fredericksburg. Defendant Fulgham, driving Plaintiff's vehicle, testified that Defendant Gloeckl crossed into his lane of traffic and struck the back of his vehicle, causing the accident. Defendant Gloeckl testified that Defendant Fulgham drove across his lane of traffic, forcing him into a roadside barrier.

LAW

This case is controlled by Newton v. Veney, 220 VA 947, 265 S.E.2d 707 (1980). There, as here, the Plaintiff was a passenger in one of two vehicles involved in a collision and filed a suit against both drivers. There, as here, the Plaintiff was, herself, silent on the issue of liability*/ but called both Defendants as adverse witnesses and each blamed the other for the accident.

In reversing the Trial Court's dismissal of Plaintiff's case against both Defendants, the Supreme Court in Newton held that the evidence of the two adverse witnesses made a prima facie case of negligence, entitling the Plaintiff to a jury determination. The Court pointed out that on a Motion to Strike, the Court must resolve evidentiary issues in the Plaintiff's favor:

*/A copy of the transcripts of the testimony of Plaintiffs in these two cases is attached. Ms. Newton testified that she did not know what happened to cause the accident {p.60 of transcript}. Mrs. Payne was silent on the issue of liability on direct examination. On cross examination, when Defense Counsel for Defendant Gloeckl made her his own witness, she testified that she did not believe Fulgham pulled out in front of another car but did not know {p.7 of transcript}.

Even if Payne's testimony were different from Newton's, which, in substance, it is not, this testimony was not in support of her own case but in support of the Defendant questioning her.

The issues which confront us on this Appeal are whether the Plaintiff's evidence raised jury questions as to negligence and proximate cause. The general rule is that negligence becomes a question of law only when reasonable men cannot differ. When the sufficiency of a Plaintiff's evidence is challenged by a Motion to Strike, the Trial Court should resolve any reasonable doubt as to the sufficiency of the evidence in Plaintiff's favor and should grant the motion only when it conclusively appears that the Plaintiff has proved no cause of action against the Defendant, or when it plainly appears that the Trial Court would be compelled to set aside any verdict found for the Plaintiff as being without evidence to support it.

Newton v. Veney, Supra, p. 710.

Evaluating the evidence against that criteria, the Court found that the accident was not unavoidable and that the Plaintiff, therefore, was entitled to a jury determination of liability.

In the case under review, Ms. Newton made no statement of fact concerning the cause of the accident. We must, therefore, look solely to the testimony of the Defendants to determine if a prima facie case of negligence was established as to either or both. While the testimony can be best described as meager or sketchy, it is adequate for us to conclude that we do not have here an unavoidable accident. The trier of the facts in this case may not be able to determine which Defendant was 'at fault' or the degree of negligence of the one at fault. However, it is apparent that an act of omission or commission by one or both of the Defendants precipitated the accident.

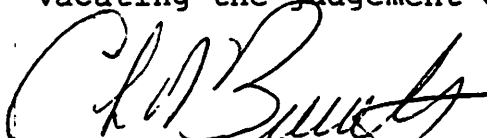
Newton v. Veney, Supra, p. 709.

Here, it is equally "apparent" that the Payne accident was not unavoidable but was caused by one or both Defendants. Like

Newton, Mrs. Payne, is entitled to a new trial and a jury determination of negligence.

CONCLUSION

For the reason stated above, Plaintiff prays for an Order vacating the judgement of dismissal and granting a new trial.



John P. Harris, III
Harris and Harris
Attorneys at Law
809 William Street
Fredericksburg, Virginia 22401

Charles D. Bennett, Jr.
Attorney at Law
1119 Caroline Street/P.O. Box 561
Fredericksburg, Virginia 22404

CERTIFICATE OF SERVICE

I, Charles D. Bennett, Jr., Counsel for Plaintiff, hereby certify that I have delivered, or mailed, postage prepaid, a copy of Plaintiff's Memorandum in Support of Motion to Vacate to Mr. H. Harrison Braxton, Jr., Willis, Braxton, Ashby and Bass, Attorneys at Law, 315 William Street, Fredericksburg, Virginia 22401 and Mr. Edwin C. Brown, Jr. and Ms. Brenda J. Gilliam, Brown, Brown and Watkins, Attorneys at Law, 320 North Fayette Street, Alexandria, Virginia 22314, this 22nd day of April, 1986.



Charles D. Bennett, Jr.

CHARLES D. BENNETT, JR.
ATTORNEY AT LAW
1119 CAROLINE STREET
P.O. BOX 561
FREDERICKSBURG, VIRGINIA 22404
(703) 371-2907

1 THE COURT: Yes, sir.

2
3 NOTE: At this point
4 counsel approach the bench, which conference is not
5 reported.

6 THE COURT: All right, sir, call your
7 next witness.

8 MR. BREIT: Jennie Newton.

9
10 JENNIE F. NEWTON, the
11 defendant, being called for examination by counsel
12 for the defendant, first being duly sworn, testi-
13 fied in her own behalf as follows:

14 DIRECT EXAMINATION

15 BY MR. BREIT:

16 Q You are Jennie F. Newton, is that
17 correct?

18 A Yes, sir.

19 Q Jennie, I want you to speak up so that
everybody on that jury can hear what you are saying. Where
do you live?

direct - J. Newton

1 A Burgess, Virginia.

2 Q How old are you, Jennie?

3 A Thirty-one.

4 Q Are you married?

5 A Yes, sir.

6 Q Do you have any children?

7 A Yes, sir.

8 Q How many children do you have?

9 A I have five.

10 Q Now, on September 10th, 1976, were
11 you in the automobile of Mrs. Raines when it was involved
12 in an accident?

13 A Yes, sir.

14 Q Tell us where you had been just
before the accident?

15 A Well, we had been down to Lilian and
16 Heathsville, and then went back to the Junior High School.

17 Q And, what were you planning to do at
18 the Junior High School?

19 A Go home after we left the school.

20 Q Now, were you there to pick up her
daughter?

direct - J. Newton

1 A Yes, sir.

2 Q How long before the accident occurred
3 was it that you had arrived at the schoolyard?

4 A Well, I don't know exactly the time,
5 how long we were sitting there, but maybe twenty-five to
6 thirty minutes, if that long.

7 Q And, you had been parked during that
8 period of time, or were you moving?

9 A We had been parked.

10 Q Just before the accident, do you
11 know whether or not Mrs. Raines started the engine of her
12 automobile?

13 A I don't know, I really don't know.

14 Q What were you all doing as you were
15 seated there?

16 A Just sitting. Just sitting and looking
17 and talking.

18 Q Do you know what happened?

19 A No, I really don't know exactly what
20 happened.

21

direct - J. Newton

Q Well, was there any conversation between you and Mrs. Raines concerning Odell Venney just before the accident or not?

A Yes, we was just talking and then by the time we stopped talking, he went up the road, and next thing I know, he had turned around. He had come back.

Q Do you know if Mrs. Raines did during that period of time?

A See him?

Q No, no, do you know what she did, not what she saw.

A She didn't do anything, just sit there.

Q Do you know how the accident occurred?

A Well, next thing I know, he was behind us, and I don't know whether -- I don't know exactly what happened.

Q Did you feel an impact between the two cars?

A Yes, I did.

direct - J. Newton

1 Q What happened to your body when that
2 impact occurred?

3 A Well, I started hurting. My stomach,
4 neck, and back started hurting, I started hurting.

5 Q You were pregnant at the time, I
6 believe?

7 A Yes, I was.

8 Q How far pregnant?

9 A Five months.

10 Q What problems, if any, were you having
11 with carrying your baby during that five month period
12 prior to this accident, before the accident, now?

13 A Well, I wasn't having any trouble
14 before the accident.

15 Q Tell us what you felt immediately
16 after the accident.

17 A Well, after the accident, I started
18 having a lot of pain, having trouble carrying the baby,
19 dilating, you know. I was almost at the verge of losing
20 the baby.

21

direct - J. Newton

1 Q When did you first seek any medical
2 attention after that?

3 A I went to the -- the same night I went
4 to the hospital.

5 Q What hospital?

6 A Tidewater.

7 Q And, what did they do for you there?

8 A He treated me.

9 Q And, where did you then go?

10 A I went to Doctor Charlton on the
11 eleventh, on a Saturday.

12 Q Doctor Charlton?

13 A Yes.

14 Q Had he ever treated you before?

15 A Yes, he has.

16 Q Where is Doctor Charlton's office
17 located?

18 A Well, it was in Reedsville, but now
19 he is located in Wicomico.

20 Q When you went to see him, where was
he located?

direct - J. Newton

1 A Reedsville.

2 Q And, that was the day following the
3 accident?

4 A Yes, sir.

5 Q What were your problems and difficulties
6 the day that you went to see him?

7 A Well, I was -- whiplash, and I had --
8 my back -- having trouble carrying the baby, I was just about
9 to loose it.

10 Q All right, what, if anything, did he
11 do for you?

12 A Well, he gave me a lot of needles
13 and some perscriptions to get filled, and told me to get
14 into bed.

15 Q Were you able to go to work on the
16 twenty-third of September?

17 A No, sir, I wasn't.

18 Q And, did Doctor -- who kept you out of
19 work?

20 A Doctor Charlton.

direct - J. Newton

1 Q Now, assuming there had been no accident,
2 what were your plans as far as working for Mr. Treakle?

3 A Well, I would have went to work on
4 the twenty-third, and would have worked until about the
5 middle of January, until I got ready to have the baby. And,
6 after the baby became, maybe four to five weeks, I went back
7 to work.

8 Q Your job was an oyster shucker, I
9 believe?

10 A Yes, sir.

11 Q And, as an oyster shucker, just exactly
12 what did you do?

13 A Just stick the knife in the oyster,
14 open them up, and put them in my bucket -- cut them out of
15 the shell.

16 Q Do you do it standing up or are you
17 seated?

18 A Standing up.

19 Q Do you have any heavy lifting to do
20 as part of that occupation?

21

direct - J. Newton

1 A No, I tote my bucket, but they not
2 heavy.

3 Q Now, did you go to work that September?

4 A No, sir, I did not.

5 Q Were you able to work in October or
6 November?

7 A Yes, sir.

8 Q How about in December?

9 A No.

10 Q And, your baby was born on what date
11 in January?

12 A The twenty-sixth.

13 Q Twenty-sixth of January?

14 A That's right.

15 Q If there had been no automobile accident,
16 or no problem associated with it, you would have worked until
17 the fifth, about, in January, is that what you are saying?

18 A Yes, I would have.

19 Q Had you done that in previous times when
20 you had babies?

21 A Yes, I sure have.

direct - J. Newton

1 Q How long before the baby was born, in
 2 the past?

3 A I have worked up to, maybe, a week
 4 before the baby was born.

5 Q About how many years have you been
 6 oyster shucking?

7 A Oh, I guess about ten years.

8 Q You continued under Doctor Charlton's
 9 care. Did he refer you to any other physician because of
 10 any problems with your baby?

11 A Yes, he did. Doctor Harry Royal and
 12 Doctor Cherry, in Richmond.

13 Q And, they are what kind of specialists,
 14 if you do know.

15 A Baby doctor, whatever you call it.

16 Q What problems were you having, after
 17 the accident, from the standpoint of carrying your baby, that
 18 you weren't having before the accident?

19 A Well, a lot of hurting and bleeding.

20 Q Had you been bleeding at all before?

21 A No, sir.

direct - J. Newton

Q What, if anything, did you do to prevent that, or to stop that?

A Well, a lot of rest and medication, doctor treatments.

Q And, how frequently would you go to see Doctor Charlton after this accident?

A I went to see Doctor Charlton approximately three times a week, sometimes more.

Q And, when did you quite going to him for injury you received in this accident?

A I stopped going to see him February the something, it was in the first part of February.

Q Shortly after the baby was born?

A Yes, sir.

Q I show you this bill from Tidewater Memorial Hospital for treatment rendered on September 10th, in the amount of twenty-six dollars and seventy-five cents, and for the emergency room visit of an additional fifteen dollars. Are these the bills that you received from Tidewater Memorial for the treatment rendered that night?

Prothonotary
Jenny Kramer
Jenny Kramer

direct - J. Newton

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MR. BREIT: May it please the Court,
I have torn the bill, but we would tender it.

THE COURT: All right, sir, these
two bills are admitted, without objection?

MS. KRAMER: No objection.

THE COURT: I will admit them together
as Plaintiff's Exhibit Number One.

MR. BREIT: Jenny, I want you to
answer the questions of these other attorneys.

CROSS EXAMINATION

BY MR. McVEY:

Q Mrs. Newton, you told Doctor Charlton that you were in a parked car, didn't you?

A Yes, we was in a parked car. I said a while ago we was in a parked car.

Q So, you were parked at the time this accident happened?

A Yes.

Q And, you don't know whether Mrs. Raines had turned her engine 'on or not, is that right?

A I don't know for sure.

Q But, you do know that the car was parked at the time it was hit?

A Yes.

Q It was in a stopped position?

A Yes.

MR. McVEY: Thank you very much.

1 CROSS EXAMINATION

2 BY MS. KRAMER:

3 Q Mrs. Newton, you also testified you
4 don't know how the accident happened, didn't you?

5 A All I know is they was jammed together.

6 Q You can't say who jammed into whom can
7 you?

8 A Not exactly.

9 Q You don't know?

10 A No.

11 Q Mrs. Newton, you went to the emergency
12 room that night?

13 A Yes, I did.

14 Q All right, what did they do for you
15 at the emergency room?

16 A He treated me and he tested me, and
17 he give me a collar and, you know, told me to go home, go
18 to my family doctor.

19 Q And, you got a collar at the hospital,
20 is that correct?

cross - J. Newton

1 A Yes, they put it on.

2 Q And, did you wear that the next day
3 when you went to Doctor Charlton?

4 A Yes, I did.

5 Q And, Doctor Charlton gave you a collar
6 too, didn't he?

7 A No, he didn't.

8 Q He didn't give you a collar?

9 A No, he didn't.

10 Q Did Doctor Charlton tell you to wear
11 the collar?

12 A Yes, he did.

13 Q And, how long did you wear the collar
14 for?

15 A About six months, I guess.

16 Q Six months?

17 A Approximately six months.

18 Q Past February?

19 A No, it wasn't past February. I don't
20 know exactly, but it was around five -- I don't know exactly
21 how many months.

cross - J. Newton

1 Q Before the baby was born, then? You
2 stopped wearing it before the baby was born?

3 A Yeah.

4 Q Now, Doctor Charlton gave you certain
5 treatment, is that correct?

6 A Yes, he did.

7 Q These are heat treatments, is that
8 right?

9 A Yes.

10 Q Did he give them to you, or did an
11 assistant give them to you?

12 A He did. He treated me, gave me needles,
13 medications, that sort of thing.

14 Q Well, I know you went to his office,
15 but who actually gave you the treatments?

16 A He did.

17 Q Each and every time?

18 A Yes, he did.

19 Q How long were you in his office at
20 a time?

cross - J. Newton

1 A (no response)

2 Q Let me ask you this. How long did
3 the treatments take? They only take about four or five
4 minutes, don't they?

5 A Longer than that. Sometimes I was
6 in there fifteen or twenty minutes. Longer than that
7 sometimes.

8 Q With the heat treatments?

9 A Yes, with him waiting on me.

10 Q With him applying these heat treatments
11 you would be as long as fifteen minutes?

12 A I don't know exactly how long because
13 I never timed them.

14 Q All right, now, Mrs. Newton, five
15 days before this accident you had been involved in a shooting
16 incident, hadn't you?

17 A Yes, I had.

18 Q And, at that time you went to the
19 emergency room, did you not?

20 A Yes, I did.

21 Q And, you were shot in the leg?

cross - J. Newton

1 A Yes, I was.

2 Q At that time, doctors told you to
3 stay off your feet, didn't they?

4 A When I was in the hospital, yeah.
5 But, I was fine after I came out of the hospital.

6 Q You didn't bother doing -- going by
7 what they told you to do?

8 A They didn't tell me, because I was
9 fine. I didn't have any trouble after I came out of the
10 hospital. I was completely well from that.

11 Q And, then, you were back at the emer-
12 gency room again on September 25th? September 25th, 1977,
13 is that correct?

14 A No way.

15 Q For an overdose of Valium?

16 A No, ma'am, I didn't take any of those
17 pills.

18 Q You didn't go to the hospital on
19 November, excuse me, September 25th, 1976?

20 A I don't know whether I went there or
21 not.

cross - J. Newton

1 Q Well, if the hospital records, which
2 we subponeaed into Court, showed that you had been there,
3 you say you were not there?

4 A I might have, I don't know.

5 Q You don't remember going to the
6 hospital for that?

7 A Yeah, I think I did go there. But,
8 I didn't take those pills, I just told them that.

9 Q Why did you go to the hospital then?

10 A Because I had some problems.

11 Q You had some problems?

12 A Yes.

13 Q What kind of problems did you have?

14 A Personal problems.

15 Q Personal problems?

16 A Right.

17 Q Such as?

18 A Family problems, if you want to know.

19 Q All right, you were having troubles
20 with your stomach?

21 A No.

corss - J. Newton

1 Q You weren't having any trouble with
2 your stomach at that point?

3 A Having trouble with my stomach? What
4 you mean, having pains?

5 Q Stomach troubles.

6 A Stomach troubles? Yes, I was still
7 having troubles from the accident, if that what you mean.

8 Q At that particular time, you didn't
9 tell the people at the hospital you had been involved in that
10 accident, did you? You told them you had taken an overdose
11 of Valium and some alcohol.

12 A No, I did not tell them I took no
13 alcohol.

14 Q You mean they wrote down something that
15 wasn't true?

16 A That's right, and I got witnesses to
17 that. I didn't take no alcohol. I took my medicine. They
18 was given to me by the doctor.

19 Q Which doctor gave you the Valium?

20 A Doctor Charlton gave them to me.
21

cross - J. Newton

1 Q Doctor Charlton wasn't your regular
2 OBGYN man, was he?

3 A My who?

4 Q Your baby doctor.

5 A No, he wasn't.

6 Q You were going to Doctor Neale, weren't
7 you?

8 A Yes, I was.

9 Q Did you go to Doctor Neale for having
10 this bleeding?

11 A I was going to the clinic for my
12 monthly checkups.

13 Q Did you tell Doctor Neale about this
14 particular problem?

15 A Yes, I have told him about it, yes.

16 Q And, what did he do about it?

17 A He told me to go to Richmond. Every
18 time I tell him, he will tell me to go to Richmond.

19 Q Why didn't you go to Doctor Neale
20 right after the accident? He was your regular doctor.

cross - J. Newton

1 A Because he wasn't -- he's just a
2 health doctor for the clinic, and you go there while you're
3 pregnant. He don't treat you for no accidents and things,
4 and when you are sick either. He will treat you for a cold.

5 Q You didn't call him or anything like
6 that to find out if he would take you?

7 A No, I went to the hospital.

8 Q And, they told you to go to your
9 regular doctor?

10 A Yes, they did.

11 Q And, you never called Doctor Neale
12 about this?

13 A No, he is not my family doctor. Doctor
14 Charlton is.

15 Q Why were you going to Doctor Charlton
16 about the baby?

17 A Because he do not take care of
18 you that much while you are pregnant. He can't deliver any
19 babies.

 Q Did you have x-rays taken?

cross - J. Newton

- 1 A No, they treated me, he examined me.
- 2 Q Doctor Charlton did?
- 3 A No, the hospital.
- 4 Q They didn't take any x-rays?
- 5 A No.
- 6 Q Doctor Charlton, did he take any
- 7 x-rays?
- 8 A No.
- 9 Q No? Did he send you for x-rays?
- 10 A To Richmond, yeah.
- 11 Q He sent you to Richmond?
- 12 A Yeah.
- 13 Q Did they x-ray you in Richmond?
- 14 A They can't do it while you are pregnant.
- 15 Q So, you didn't get x-rayed?
- 16 A They cannot take x-rays while you are
- 17 pregnant.
- 18 Q Well, Mrs. Newton, how many times have
- 19 you been to Doctor Charlton?
- 20 A How many times?
- 21 Q Yes.

cross - J. Newton

1 A Oh, quite a few times.

2 Q Is he the doctor you regularly consult?

3 A Most of the time, yes.

4 Q Have you seen Doctor Charlton since
5 February 15th, of 1977?

6 A Yes, I have been to him.

7 Q What have you been to him for?

8 A Well, not for myself, I have carried
9 somebody there.

10 Q Now, I'm talking about you, yourself.

11 A No, I haven't because I haven't been
12 sick enough to go.

13 Q So, the last time you saw him was on
14 or about February 16th, 1977?

15 A Somewhere, yes.

16 Q And, then, Mrs. Newton, at our request
17 you went to see Doctor Mauck in Richmond?

18 A Yes, I did.

19 Q And, you saw him in October of this
20 year, is that correct?

21 A Yes, I did.

cross - J. Newton

1 Q At that time, did you relate to
2 Doctor Mauck you had been involved in two accidents after
3 this particular accident?

4 A After this one?

5 Q Yes.

6 A Well, one, really accident.

7 Q The one in February?

8 A Yes.

9 Q Did you tell him about any other
10 accidents?

11 A The one in '73.

12 Q Okay, that's right. Did you tell him
13 about any other in 1977?

14 A No. When I ran into a ditch ducking
15 a dog, nobody didn't get hurt.

16 Q Was that the two accidents you were
17 involved in in '77?

18 A Yes.

19 Q And, did you tell Doctor Mauck about
20 those?

21 A No, I don't recall telling him about
those.

cross - J. Newton

1 Q You didn't tell him about either one
2 of them.

3 A No, I dind't.

4 MS. KRAMER: That is all I have,
5 thank you.

6 THE COURT: Any further questions,
7 Mr. Breit?

8 MR. BREIT: No, sir.

9 THE COURT: You can step down.
10

11 -----
12 WITNESS STOOD ASIDE

13 THE COURT: We will take a short
14 recess at this time and let the jury step in the
15 juryroom and take about a ten minute recess.
16

17 NOTE: At this
18 point the Jury departs from the Courtroom in the
19 company of the Sheriff, after which the matters
20 continue as follows:
21



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Y

1 VIRGINIA:

2 IN THE CIRCUIT COURT OF THE CITY OF FREDERICKSBURG

3
4 -----
5 ELIZABETH ANNE PAYNE, Plaintiff :

6 vs. :

7 ROBERT JOHN GLOECKL and :
8 HARVEY LEON FULGHAM, Defendants :
9 -----

10 EXCERPT from the trial in the above styled case,
11 when heard on April 16, 1986, at 10:30 a.m., before Honorable
12 Dixon L. Foster, Judge, with a jury.

13
14 APPEARANCES:

15 Mr. John P. Harris, III, Harris & Harris
16 809 William Street, Fredericksburg, Virginia 22401
Counsel for the Plaintiff;

17 Mr. H. Harrison Braxton, Jr., Willis, Braxton, Ashby & Bass
18 315 William Street, Fredericksburg, Virginia 22401
Counsel for Defendant Robert John Gloeckl;

19 Mr. Edwin C. Brown, Jr., Brown, Brown & Watkins
20 320 North Fayette Street, Alexandria, Virginia 22314
Counsel for Defendant Harvey Leon Fulgham;

21
Reported by: Barbara A. Ferrell

FRANCES K. HALEY & ASSOCIATES

Court Reporters
1311 Princess Anne Street
Fredericksburg, Virginia 22401
Office: 371-5258



2.

1 Ms. Brenda J. Gilliam, Brown, Brown & Watkins
2 320 North Fayette Street, Alexandria, Virginia 22314
3 Counsel for Defendant Harvey Leon Fulgham.
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I N D E X

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cross - Payne

CROSS EXAMINATION

BY MR. BRAXTON:

Q On the morning of the accident, where did you start out that morning?

A I started out from Spotsylvania County.

Q Where?

A Route 620 to Route 3.

Q Was it your house?

A Yes.

Q Who started driving from your house?

A Mr. Fulgham.

Q Why was Mr. Fulgham driving your car rather than you?

MR. HARRIS: Objection as to relevance, Your Honor. It is beyond the scope of direct examination. It may possibly --

MR. BRAXTON: (Interjecting)
I will take her on as my witness at this point if it is beyond the scope of direct examination. I would like to ask her, and maybe she is going



cross - Payne

1 to say that she was physically unable to drive
2 the car at that time.

3 THE COURT: Overrule
4 the objection, and she can answer the question.

5 A I was more than physically able to
6 drive the car.

7 Q Why didn't you drive the car?

8 A Because I didn't want to drive a car
9 that day. I knew that we were going into rush hour traffic
10 on I-95, and I did not care to drive in the rush hour traffic.

11 Q You went out to Route 3 and then down
12 the interchange. When you were going down the interchange
13 from Route 3 to I-95, what were you doing?

14 A I was sitting in the car.

15 Q Where were you looking?

16 A I was looking at the road.

17 Q Were you looking to either side, right
18 or left?

19 A I know I was looking as we went onto
20 the ramp, the barricades along the side of the road going
21 out, the construction along the side.



cross - Payne

1 Q Do you drive that ramp regularly?

2 A I drive that road everyday.

3 Q And you know that you have to yield
4 going onto 95 to the traffic on 95?

5 A Yes.

6 Q Mr. Fulgham knew that?

7 A I guess he does.

8 Q There is a speed limit going on that
9 ramp, too, isn't there? Isn't there a maximum speed of thirty
10 miles per hour on that ramp?

11 A As I recall on that date when the con-
12 struction was going on, there was no sign as being a speed
13 limit.

14 Q Do you recall talking to Mr. Fulgham
15 as you went on the ramp?

16 A At that particular time, I don't. I
17 was thinking about I would like to get something to eat
18 eventually.

19 Q Did you leave before breakfast?

20 A Yes.

21 Q Where were you going?



cross - Payne

1 A I was going up to Northern Virginia.

2 Q Where?

3 A To Tyson's Corner.

4 Q Did you ever see Mr. Gloeckl's car
5 prior to the accident?

6 A No.

7 Q Do you know how fast your vehicle was
8 going?

9 A No.

10 Q Are you in a position to refute Mr.
11 Gloeckl's statement that you pulled right in front of him?

12 A I do not believe that we pulled out
13 in front of another car, no.

14 Q Are you able to refute the statement?

15 A What do you mean?

16 Q You said what you believe. I am saying
17 are you able to refute that statement?

18 A When you say refute, what do you mean?

19 Q Are you able to categorically say that
20 you didn't pull out in front of another car?

21 A No, I am not able to say that.



cross - Payne

1 Q Did you tell the trooper at the scene
2 that you were injured?

3 A I said that I had hit my head on the
4 window.

5 Q When did you decide to go to the hos-
6 pital?

7 A When? When the ambulance came.

8 Q The ambulance came to pick up Mr.
9 Fulgham and you decided to go to the hospital at that time?

10 A Yes.

11 Q Even though you weren't hurt at that
12 time?

13 A I didn't realize that I was hurt at
14 that time.

15 Q Now, when you went to the hospital,
16 they X-rayed you and told you had a problem is what you are
17 telling me?

18 A Yes.

19 Q In spite of that, months later, on
20 July 4th weekend, you undertook to go out and ride on a motor-
21 cycle with Mr. Fulgham, didn't you?



cross - Payne

1 A Yes.

2 Q You did have an accident while you
3 were riding the motorcycle, didn't you?

4 A I wouldn't call it so much an accident.

5 Q What was it?

6 A Well, I would like to say that the
7 reason I was on the motorcycle is that I didn't have a car.
8 My car was damaged. Mr. Fulgham came down and brought his
9 motorcycle, and we went for a ride on the motorcycle. At
10 the gas station, the motorcycle was leaning over this way,
11 and it fell. The muffler fell on my leg and burned my leg.

12 Q Did you fall over with it?

13 A No, because my foot went down, and
14 the motorcycle leaned against my leg and burned my leg.

15 Q So you went out for a ride on that
16 day?

17 A Yes, it was July 4th.

18 Q You felt good enough to go out and
19 ride a motorcycle on that day?

20 A On that day -- there were times --
21 on that day, I felt better than I had been feeling. There



cross - Payne

1 were days that I was feeling good, and there were days that
2 I wasn't.

3 Q Do you remember talking to Doctor
4 Eglevsky in October of '84 and describing your pushing over
5 a tree?

6 A Yes.

7 Q You felt strong enough to go out a
8 couple of months later and push over a tree, didn't you?

9 A I felt strong enough at times from
10 the beginning of the accident to try to live as normal a
11 life as I could. The tree you are talking about was a small
12 tree about this big that was dead, and I pushed, like this,
13 and the tree broke. (witness indicating)

14 Q This was between the time or after
15 the time you had talked to Doctor Bly, and he had told you
16 about being very careful about your neck, wasn't it?

17 A Are you talking about the time when
18 he told me to be very careful because of the subluxation?

19 Q That's correct.

20 A But that was only for a three or four
21 day period.



cross - Payne

1 Q And after that, you went on out and
2 pushed down trees after that?

3 A No. As I said, from the time of the
4 accident, I tried to live as normal a life as possible.

5 Q Do you know how many times your car
6 turned around?

7 A It turned around one time.

8 MR. BRAXTON: Thank you.

9
10 CROSS EXAMINATION

11 BY MS. GILLIAM:

12
13 Q Ms. Payne, on the day of the accident,
14 did you give Mr. Fulgham permission to drive your vehicle?

15 A Yes, I did.

16 Q To the best of your memory, do you
17 remember Mr. Fulgham coming off of the ramp and traveling
18 across two lanes of traffic before you were hit?

19 A No, we did not.

20 Q Ms. Payne, were you hit from the rear?

21 A Yes. We were hit in the back lefthand



cross - Payne

1 side in the rear.

2 MS. GILLIAM: Thank you

3 very much.

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Court Reporters
1311 Princess Anne Street
Fredericksburg, Virginia 22401
Office: 371-5258



13.

CERTIFICATE OF COURT REPORTER

I, Barbara A. Ferrell, hereby certify that I, first being duly sworn, was the Court Reporter in the Circuit Court of the City of Fredericksburg, Virginia, on April 16, 1986, at the time of the hearing herein.

I further certify that the foregoing excerpt is a true and accurate record taken from the trial of ELIZABETH ANNE PAYNE vs. ROBERT JOHN GLOECKL and HARVEY LEON FULGHAM.

Given under my hand this 18th day of April, 1986.


BARBARA A. FERRELL, Court Reporter

Maddox Reporting Service

REGISTERED PROFESSIONAL REPORTER
11 WINSLOW ROAD
HARTWOOD, VIRGINIA 22405
(703) 752-5355

222

CIRCUIT COURT CITY OF FREDERICKSBURG
Received and filed this 9 day of
May 1936 at 2:50
o'clock P. M.

AGNES A. MILLS, CLERK

By *N. E. Mueselman*

Deputy

IN THE CIRCUIT COURT OF THE CITY OF FREDERICKSBURG

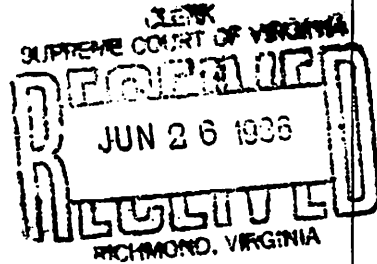
ELIZABETH ANNE PAYNE, Plaintiff :

vs. :

ROBERT JOHN GLOECKL :

and :

HARVEY LEON FULGHAM, Defendants :



Complete TRANSCRIPT of all the incidents in the motion in the above styled case, when heard on April 23, 1936, at 11:25 a.m., in the Circuit Courtroom of the County of Tappahannock, Virginia, before Honorable Dixon L. Foster, Judge.

APPEARANCES:

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Counsel for Robert John Gloeckl;

Ms. Brenda J. Gilliam, Brown, Brown & Watkins
320 North Fayette Street, Alexandria, Virginia 22214
Counsel for Harvey Leon Fulgham.

1 April 23, 1986

2
3 NOTE: Court convenes at 10:00

4 a.m. This case was called to be heard at 11:25
5 a.m. After the swearing of the Court Reporter, the
6 hearing is begun as follows:

7 THE COURT: All right, sir, whoever
8 wishes to be heard.

9 MR. BENNETT: Yes, sir, Your Honor, I am
10 Charles Bennett. I am one of the attorneys for
11 Mrs. Payne, and I am co-counsel for Mr. Harris.

12 THE COURT: You did not appear at the
13 other case.

14 MR. BENNETT: My name is on the
15 pleadings. I was present in Court, but I wasn't at
16 counsel table.

17 Your Honor, as you know the
18 case, it's only a week old and we appreciate your
19 letting us be heard this quickly. The reason we are
20 coming back here is that shortly after the ruling
21 of the Court, we hurriedly ran out and did some
22 research and we found a case which we believe to be
23 controlling. It's a case that is so close and so

1 parallel that we decided to proceed on a motion to
2 reconsider instead of proceeding with an appeal,
3 and so that is the reason we are here today.

4 THE COURT: This is the case I heard in
5 Northumberland County.

6 MR. BENNETT: It's entitled Newton v.
7 Veney, and I suspect you are more familiar with it
8 than we are.

9 THE COURT: Yes.

10 MR. BENNETT: In any event, Your Honor,
11 if I can just parallel the case just to show how
12 close they are. The plaintiff, Mrs. Newton, and
13 the plaintiff, Mrs. Payne, were both passengers in
14 the vehicle and sued the driver of their own
15 vehicle as well as the driver of the other vehicle
16 involved in the collision.

17 Mrs. Newton did not testify
18 regarding liability. She testified but was silent
19 or ambiguous on the question of liability. So was
20 Mrs. Payne. Neither one of them really made a
21 comment on it. Mrs. Payne didn't testify on it at
22 all on direct examination. Mrs. Newton called both
23

1 defendants as adverse witnesses and both testified
2 that the other was at fault. So did Mrs. Payne.
3 The defendants both filed motions to strike and at
4 the completion of the plaintiff's testimony, the
5 Court struck the plaintiff's evidence dismissing
6 both defendants. The same thing happened with Mrs.
7 Payne.

8 Now, that takes us to what
9 happened in the Supreme Court. The case was
10 decided in May of 1980, the Newton v. Veney case.
11 Now the Supreme Court in that case handled it this
12 way, they said, "We have the threshold question of
13 what is the standard, what is the evidentiary
14 criteria for a motion to strike? If reasonable men
15 can differ as to the evidence, then it should not
16 be struck." That is the criteria that we are all
17 familiar with.

18 And then it said, "What is the
19 threshold question beyond that?" The first
20 question would be is there negligence and proximate
21 cause at all? In other words, regardless of who
22 did it, is there negligence. The Court said,
23 "Well, we can tell from the evidence, using this

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1 standard of reasonable men differing, we can tell
2 from the evidence that it was not an unavoidable
3 accident." Now, that takes us to negligence and
4 probable cause.

5 Third question, who did it?
6 Which of the two parties was negligent, and which
7 was the proximate cause. Of course, if that
8 doesn't matter, the plaintiff has met her burden of
9 showing res ipsa loquita. I wasn't at fault,
10 reasonable men could differ, therefore, it should
11 have gone to the jury. The plaintiff was entitled
12 to a jury determination.

13 Now, based on that, what we
14 have here is, as the Court will recall, is an
15 accident on I95 at the intersection of State Route
16 3. Two cars coming together. One of the defendants
17 said, "The other car crossed my path and forced me
18 off the road." The other defendant said, "No, he
19 crossed my path and forced me off the road." So,
20 there is clearly an accident that is not an
21 unavoidable accident just like in Newton v. Veney.

22 These cases are so close and so
23 parallel, and one so controlling over the other,

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1 that it brought us back to this Court and asked
2 this Court to please reconsider because we believe
3 the Court should reconsider and reset the trial.

4 THE COURT: All right, sir. Mr. Harris,
5 do you wish to be heard, too?

6 MR. HARRIS: No, sir.

7 THE COURT: Either one of you?

8 MR. BRAXTON: Ladies first.

9 MS. GILLIAM: Good morning, Your Honor,
10 my name is Brenda Gilliam, and I represent the
11 defendant, Harry Fulgham. We believe that granting
12 the defendant Fulgham's motion to strike should be
13 sustained, and the reason we fell this way is that
14 it's true, the plaintiff called Mr. Gloeckl and
15 also Mr. Fulgham as witnesses in this case. Each
16 version of, each defendant gave their own version
17 of the accident, and their statements were
18 contradictory. Therefore, according to the case
19 that is cited by the plaintiffs, in that situation,
20 it's true that the plaintiff -- if the jury
21 believed Mr. Gloeckl's version of the accident,
22 then they could find Mr. Fulgham negligent, and
23 vice versa.

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If the plaintiff said nothing, or said that she didn't know what happened, as in the case of Newton v. Veney, then, Your Honor, the motion to strike should be reversed. But that is not what happened here. The plaintiff's testimony did corroborate Mr. Fulgham, and for that reason,

1 we feel that the motion to strike should be
2 sustained as to Mr. Fulgham.

3 THE COURT: All right.

4 MR. BRAXTON: Your Honor, I represent Mr.
5 Gloeckl. As the Court may remember, he was driving
6 on Route 95. As I understand the evidence, Mrs.
7 Payne could not state that Mr. Gloeckl was doing
8 anything wrong. As a matter of fact, she called
9 Mr. Gloeckl, Mr. Gloeckl testified, and I asked her
10 if she could refute any of his testimony. This is
11 in the transcript which has been prepared. She
12 stated that she could not refute anything that he
13 said.

14 The co-defendant, Mr. Fulgham,
15 told the trooper that he didn't know what happened,
16 and he testified at trial that he didn't see the
17 defendant Gloeckl when he pulled out onto
18 Interstate 95.

19 Based on that, I submit there
20 was no and submitted at the time that there was no
21 evidence of any negligence on the part of Mr.
22 Gloeckl. I submit that that is still true, and
23 for that reason, I believe that the Court's ruling

as far as Mr. Gloeckl was proper and correct.

THE COURT: Yes.

MR. BENNETT: Your Honor, all of the testimony that both counsel have eluded to was not testimony on direct examination, and the Court will probably recall that when Mr. Braxton was preparing to cross examine Mrs. Payne, he asked a question, cross examination question regarding how the accident happened. At that time, Mr. Harris objected on the basis that it was beyond direct examination, and the Court actually, while questions were being asked and answers were being made, said, "Okay, I will make her your witness." So, all of that evidence came in on behalf of Mr. Gloeckl, not on her own behalf, and under the Newton case, which is talking about evidence put forth by the plaintiff, there was none. There was absolutely none.

The second point being that under the case that seems to sort of be the basis and the grandfather perhaps of much of what we are talking about, the Massey case, the Court, in the Courts that have construed Massey up until today,

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1 have said that the statement of a party plaintiff
2 in order to be binding on the plaintiff under that
3 case, must be clear and unequivocal. Referring to
4 page seven, and also Mr. Braxton said she is not at
5 all clear, "Do you believe that we pulled out in
6 front of another car? No. Are you able to
7 refute that statement?" She asked what he means.
8 "Are you able to categorically say that you didn't
9 pull out in front of the car?" No, I am not able
10 to say that." She didn't know, she was speculat-
11 ing she said.

12 Even in fact when you go up the
13 standard, "How fast were you going?" I don't
14 know. Did you look to the right or left? No. What
15 were you thinking about? I was thinking about
16 eating breakfast." That was her testimony. If
17 anything, I would find that equivocal.

18 The third thing is if the Court
19 were to decide that she did, in fact, testify in an
20 unequivocal fashion, then it should not strike. It
21 certainly shouldn't strike the evidence against Mr.
22 Gloeckl because her testimony would have been
23 against him. I disagree with what Mr. Braxton

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1 said, because Mr. Fulgham did testify regarding Mr.
2 Gloeckl crossing his path. So, either way --

3 THE COURT: But he also testified or told
4 the trooper that he didn't know what happened.

5 MR. BENNETT: Well, Your Honor, I think
6 he did say that, and since I'm not here really on
7 his behalf, I would -- I think he said he didn't
8 know what happened. People involved in an
9 accident, I think, are frequently dazed and I
10 suspect that is what happened, and he was able to
11 reconstruct it. The case was in fact tried, he
12 testified in an earlier hearing on charges, and I
13 think he did piece it together in the course of
14 that day.

15 So, anyway, you have
16 inconsistencies and there are other pieces of evidence
17 involved that -- there are long skidmarks that the
18 trooper testified to, there is a piece of evidence
19 that I think is extremely strange that if you
20 believe Mr. Gloeckl, you have to believe that Mr.
21 Fulgham took off across a ramp and there is no
22 testimony that he was going fast, ran straight
23 across a road into a barrier. That in itself makes

1 no sense. I mean, there must have been something
2 that happened between those two cars, and the jury,
3 it seems to me, would be entitled to determine that
4 based on the fact that reasonable people can differ
5 with all those things playing against each other.

6 THE COURT: The ruling of the Court will
7 be the same. I believe the cases are distinguish-
8 able between Newton and this case. We think that
9 the Court properly struck the evidence against both
10 defendants, and so we will leave our ruling as it
11 was.

12 Has the original order been
13 entered in this case?

14 MR. HARRIS: It's usually entered by the
15 Clerk.

16 THE COURT: I don't guess I signed one
17 before I left. That is what I don't know. That is
18 not the one I just entered here. That was a
19 criminal one.

20 MR. HARRIS: Yes, sir.

21 THE COURT: The order that you have there
22 is for this hearing today?

23 MR. HARRIS: Yes, sir. This is an order

overruling the motion that you just heard.

1 THE COURT: Do you want this filed in the
2 papers, too?

3 MR. HARRIS: Yes, sir.

4 THE COURT: I'm going to mark it filed
5 and let you take it along with you.

6 MR. HARRIS: Yes, sir. I will take
7 everything back.

8 THE COURT: This was delivered to
9 Heathville yesterday. It wasn't any filed with the
10 papers?

11 MR. HARRIS: Mr. Bennett filed it, and I
12 don't know. Did you file one with the papers?

13 MR. BENNETT: No, I didn't. We can take
14 it back.

15 THE COURT: I'm going to mark it filed on
16 April the 22nd, which was yesterday when I received
17 it, and then you can, maybe, if you don't mind
18 taking it back and put it in the papers along with
19 the other.

20 MR. HARRIS: Yes, sir. And the papers are
21 here. I brought the file.

22 THE COURT: You brought the file?
23

1 MR. HARRIS: Yes, sir, I called the
2 Clerk to see what she wanted me to do, and she
3 wanted me to bring it. That will probably answer
4 the question as to whether the other order is
5 entered.

6 THE COURT: That order was already signed
7 before I left up there. So, when you get back,
8 call attention to the Clerk that I stuck this in
9 there so maybe they might want to mark it filed
10 from their standpoint; and this of course is the
11 order which I will stick in there. I put it back
12 in your charge.

13 MR. HARRIS: Yes, sir. Thank you, Judge.
14

15 -----
16 HEARING CONCLUDED AT 11:41 A.M.
17
18
19
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21
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23

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CERTIFICATE OF COURT REPORTER

I, Cherryl J. Maddox, hereby certify that I, first being duly sworn, was the Court Reporter in the Circuit Court of the County of Tappahannock, Virginia, on April 23, 1986, at the time of the hearing herein.

I further certify that the foregoing transcript is a true and accurate record of the hearing herein.

Given under my hand this 6th day of May, 1986.

Cherryl J. Maddox RPR
CHERRYL J. MADDOX, Court Reporter, RPR

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF FREDERICKSBURG

ELIZABETH ANNE PAYNE

Plaintiff

vs.

ROBERT JOHN GLOECKL

Defendants

and

HARVEY LEON FULGHAM, SR.

ORDER

This day came all the parties to this action, each appearing by counsel, and the plaintiff's motion to reconsider the defendants' motion to strike was argued by counsel. Upon consideration whereof, the Court being of the opinion that the plaintiff's motion is without merit, and the relief prayed for by the plaintiff should be denied, it is

ADJUDGED, ORDERED and DECREED that the plaintiff's motion to reconsider be, and hereby is, overruled.

ENTER:

Dwight L. Foster

Judge

Dated:

April 23, 1986

SEEN AND OBEJCTED TO:

John P. Harris, III
John P. Harris, III, p. q.

SEEN:

H. Harrison Braxton, Jr.
H. Harrison Braxton, Jr., p. d.

SEEN:

Brenda J. Gilliam
Brenda Gilliam, p. d.

ENTERED LAW ORDER BOOK 71 PAGE 120

SUPREME COURT CITY OF FREDERICKSBURG
Received and filed this 24 day of
April 1986 at 3:45
P.M.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF FREDERICKSBURG

ELIZABETH ANNE PAYNE

By John P. Harris, III Plaintiff
Deputy

vs.

ROBERT JOHN GLOECKL

Defendants

and

HARVEY LEON FULGHAM, SR.

NOTICE OF APPEAL

The plaintiff, Elizabeth Anne Payne, hereby gives notice of appeal from the decree of this court entered on April 16, 1986, and further gives notice that the trial transcript covering the testimony and other incidents of trial will be filed, all in compliance with Rule 5:6 of the Rules of the Supreme Court of Virginia.

ELIZABETH ANNE PAYNE

By John P. Harris, III
Of Counsel

Charles D. Bennett, Jr., p. q.

John P. Harris, III, p. q.

HARRIS & HARRIS, P. C.

809 William Street

Fredericksburg, Virginia 22401

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal was mailed, postage pre-paid, or hand delivered, this 25th day of April, 1986, to H. Harrison Braxton, Jr., Esquire, WILLIS, BRAXTON, ASHBY & BASS, 315 William Street, Fredericksburg, Virginia, 22401, and Brenda J. Gilliam, Esquire, BROWN, BROWN AND WATKINS, 320 Fayette Street, Alexandria, Virginia 22314.

John P. Harris, III
John P. Harris, III

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF FREDERICKSBURG

Received and filed this 25 day of April, 19 86 at 10:37 o'clock P. M.

AGNES A. MILLS, CLERK

By [Signature] Deputy

ELIZABETH ANNE PAYNE,

Plaintiff

v.

ROBERT JOHN GLOECKL and
HARVEY LEON FULGHAM, SR.,

Defendants

NOTICE OF APPEAL

The Plaintiff, Elizabeth Anne Payne, hereby gives Notice of Appeal from the decree of this Court entered on April 16, 1986, and from the order overruling Plaintiff's Motion for Reconsideration, entered on April 23, 1986, and further gives notice that the trial transcript covering the testimony and other incidents of trial will be filed, all in compliance with Rule 5:6 of the Rules of the Supreme Court of Virginia.

ELIZABETH ANNE PAYNE

BY: [Signature]
OF COUNSEL

John P. Harris, III
Harris & Harris
Attorneys at Law
809 William Street
Fredericksburg, Virginia 22401

CIRCUIT COURT CITY OF FREDERICKSBURG

Received and filed this 28 day of April, 19 86 at 7:57 o'clock A. M.

AGNES A. MILLS, CLERK


By [Signature] Deputy

Charles D. Bennett, Jr.
Counsel for Plaintiff
1119 Caroline Street/P.O. Box 561
Fredericksburg, Virginia 22404

CHARLES D. BENNETT, JR.
ATTORNEY AT LAW
1119 CAROLINE STREET
P.O. BOX 561
FREDERICKSBURG, VIRGINIA 22404
(703) 371-2907

CERTIFICATE OF SERVICE

I, Charles D. Bennett, Jr., Counsel for Plaintiff, hereby certify that I have delivered, or mailed, postage prepaid, a copy of the foregoing Notice of Appeal to Mr. H. Harrison Braxton, Jr., Esq., Willis, Braxton, Ashby and Bass, Attorneys at Law, 315 William Street, Fredericksburg, Virginia 22401, Counsel for Defendant Robert John Gloeckl, and Mr. Edwin C. Brown, Jr., Esq., and Ms. Brenda J. Gilliam, Esq., Brown, Brown and Watkins, Attorneys at Law, 320 North Fayette Street, Alexandria, Virginia 22214, this 25th of April, 1986.


Charles D. Bennett, Jr.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF FREDERICKSBURG

ELIZABETH ANNE PAYNE)

Appellant,)

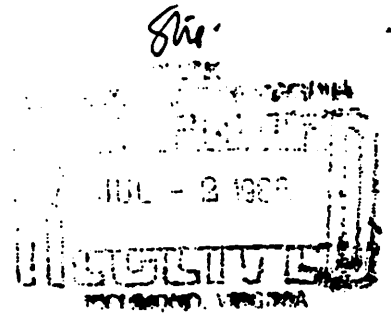
v.)

ROBERT JOHN GLOECKL)

and)

HARVEY LEON FULGHAM)

Appellees.)



Order

This case came on this day to be heard upon the notice of the Appellant, by counsel, objecting to the transcript filed in the Office of the Clerk of this Court, and was argued by counsel.

UPON CONSIDERATION WHEREOF, it appearing to the court that the record on page 57, line 18, of said record is incomplete and should be corrected, it is

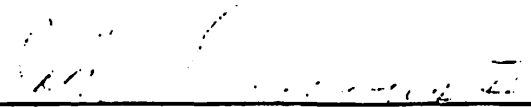
ORDERED, ADJUDGED & DECREED that the record as submitted to the clerk of this court shall be corrected as follows: page 57, line 17 and 18 as presently recorded, stating "THE COURT: Overrule the objection and she can answer the question", shall be corrected to read instead: "THE COURT: Overrule the objection, and she can answer the question, but I will make her your witness."

Entered this 1st day of July, 1986.


CHARLES D. BENNETT, JR.
ATTORNEY AT LAW
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P.O. BOX 581
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(703) 371-2807


Judge

I ask for this:




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Fredericksburg, VA 22401
Counsel for Appellant



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ENTERED LAW ORDER BOOK 30 PAGE 23-24

ASSIGNMENT OF ERROR

The Court erred in granting the motions of
defendants to strike the plaintiff's evidence

QUESTION PRESENTED

Did the Court err in granting the motions
of defendants to strike the plaintiff's evidence?