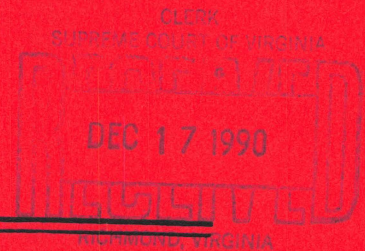


241 Va 462



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 901230

L. MARIE WOLFE, Administratrix of
the Estate of Robbie Shawn Wolfe,

Appellant,

v.

FREDERICK L. BAUBE, III and
ST. PAUL GUARDIAN INSURANCE COMPANY,

Appellees.

JOINT APPENDIX

WILLIAM F. WALL
10511 Judicial Drive
Fairfax, Virginia 22030
Counsel for Appellant

MICHAEL L. ZIMMERMAN
10533 Main Street
Fairfax, Virginia 22030
RANDOLPH H. PERRY
3975 University Drive
Fairfax, Virginia 22030
Counsel for Appellees

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VIRGINIA:

Filed 6/24/87 L. Day
IN THE CIRCUIT COURT OF ARLINGTON COUNTY

JUN 24 PM 2:09

L. MARIE WOLFE,
Administratrix for the
Estate of Robbie Shawn Wolfe
7901 Dasset Court
Annandale, Virginia 22003

WANNIE E. BARRY
CLERK OF THE CIRCUIT COURT
OF FAIRFAX COUNTY, VA.

Plaintiff,

v.

AT LAW NO. 87-520

FREDERICK L. BAUBE, III

SERVE: Commissioner of the
Division of Motor Vehicles
Richmond, Virginia 23219

and

MICHAEL D. CLARK
1912 Columbia Pike
Arlington, Virginia 22204

Defendants.

MOTION FOR JUDGMENT

COMES NOW the Plaintiff, L. Marie Wolfe, by and through her attorney, and for her Motion for Judgment, states the following:

COUNT I

1. Plaintiff is the mother of Robbie Shawn Wolfe, deceased, and as such has qualified as Administratrix of his Estate in the Circuit Court of Fairfax County.

2. On or about the 13th day of November, 1986, Robbie Shawn Wolfe was driving his mother's 1979 Pontiac sedan in an easterly direction on Route 50 near its intersection with Irving Street in Arlington County.

3. Riding as passengers in the Pontiac were Scott Messner, John Michael Murphy, and Michael Anderson.

4. At the same time and place Defendant Frederick L. Baube, III was operating a 1977 Chevrolet van in a westerly direction on Route 50, and Defendant Michael Clark was operating a Datsun sedan in an easterly direction on Route 50.

5. Each defendant owed the common-law and statutory duty to Robbie Shawn Wolfe to operate his motor vehicle with reasonable care and with due regard for the safety of others, to maintain proper control over his vehicle, to keep a proper lookout, to drive at a safe speed, to operate his vehicle to the right of the center of the highway, and to operate his vehicle free from the influence of intoxicants.

6. Notwithstanding the aforesaid duties, Defendant Baube negligently, recklessly and in total, wanton and conscious disregard of the rights of Robbie Shawn Wolfe drove his vehicle while under the influence of alcohol or other intoxicants, failed to keep his vehicle in his designated lanes of travel, failed to operate his vehicle with reasonable care and due regard for the laws of the Commonwealth of Virginia and the safety of others, failed to keep a proper lookout for other vehicular traffic, and failed to maintain control of his vehicle, allowing and causing his vehicle to cross a double yellow line dividing the eastbound and westbound lanes of Route 50 and strike the car Robbie Shawn Wolfe was driving nearly head-on after said defendant had strayed more than 20 feet beyond the aforesaid double yellow line.

7. The plaintiff further avers that Defendant Clark, in violation of the aforesaid duties, failed to operate his vehicle with due regard for the safety of others and, more specifically, was negligent in that he caused his vehicle to strike the rear of

Robbie Shawn Wolfe's vehicle as a result of his failure to maintain a proper lookout, his failure to keep his vehicle under proper control, his failure to pay full time and attention to his driving and his failure to reduce his speed or take other appropriate action to avoid impacting the vehicle Robbie Shawn Wolfe was driving.

8. As a direct and proximate result of the aforesaid negligence and reckless conduct of Defendant Baube and the negligence of Defendant Clark, as aforesaid, Robbie Shawn Wolfe sustained multiple serious injuries and died as a result of such injuries on November 13, 1986.

9. At all times herein Robbie Shawn Wolfe was acting with due regard for his own safety and the safety of others and was not contributorily negligent in causing his death.

10. As a direct and proximate result of the negligence and reckless conduct of Defendant Baube and the negligence of Defendant Clark, the plaintiff has been caused great sorrow and mental anguish, has lost the society, companionship, comfort and advice of her only child, has lost his personal services, protection, care and assistance, financial and otherwise, and has been caused to incur expenses for his care and treatment incident to the injuries resulting in his death and has also incurred reasonable funeral expenses.

WHEREFORE, the plaintiff moves this Honorable Court for judgment against Defendant Frederick L. Baube, III and Defendant Michael Clark, jointly and severally, in the amount of One Million and Five Hundred Thousand Dollars (\$1,500,000.00), plus interest thereon from November 13, 1986 and her costs herein.

COUNT II

1. The plaintiff incorporates herein by reference the matters asserted in Count I hereof.

2. The plaintiff further avers that Robbie Shawn Wolfe's death resulted from Defendant Baube's conscious decision to consume a large quantity of alcoholic beverages and drive upon the highways of Virginia while heavily under the influence of such alcoholic beverages.

3. Defendant Baube made such decision willfully and intentionally, in wanton disregard of a known and obvious risk to others that was so great as to make it highly probable that serious injury would result.

4. All of Defendant Baube's actions leading up to and causing Robbie Shawn Wolfe's death were willful, wanton, grossly negligent and so reckless as to evince a conscious disregard for the safety of others.

WHEREFORE, in addition to compensatory damages in the amount of One Million and Five Hundred Thousand Dollars (\$1,500,000.00), as demanded in Count I hereof, the plaintiff respectfully moves this Honorable Court to enter a judgment in her favor against Defendant Frederick L. Baube, III for punitive damages in the amount of Five Hundred Thousand Dollars (\$500,000.00), plus interest thereon from November 13, 1986 and her costs herein.

L. MARIE WOLFE
Personal Representative and
Administratrix of the Estate
of Robbie Shawn Wolfe, deceased
By Counsel

[Signed: William F. Wall;
Filed: 6-24-87]

V I R G I N I A:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

L. MARIE WOLFE,
Administratrix for the
Estate of R. Shawn Wolfe,

Plaintiff,

vs.

FREDERICK L. BAUBE, III,

Defendant.

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*

AT LAW NO: 87-520

FINAL ORDER

THIS CAUSE came before the Court for trial on the 2nd and 3rd of May, 1990, upon the Motion for Judgment filed by the plaintiff, the Answer and Grounds of Defense filed by the defendant, and all other pleadings and discovery filed in this matter. The parties were present and represented by counsel.

THEREUPON, a panel of thirteen veniremen were duly sworn and examined on their voir dire and counsel for the plaintiff and defendant each exercised their three (3) peremptory strikes, a jury panel of seven (7) veniremen were duly sworn.

WHEREUPON, the jury heard opening arguments of counsel and the evidence of the plaintiff;

WHEREUPON, counsel for the defendant moved the Court to find as a matter of law the plaintiff was negligent, said motion being granted, and counsel for the defendant moved the Court to strike the plaintiff's case on the grounds that the plaintiff was guilty of willful and wanton contributory negligence and said negligence was a proximate cause of the accident as a matter of law, said motion being denied,

WHEREUPON, counsel for the defendant renewed his Motion to Strike, said motion being denied, and counsel for the plaintiff moved the Court to strike the defendant's defense of willful and wanton contributory negligence, said motion being denied, to which ruling the plaintiff duly excepted;

WHEREUPON, the Court after hearing argument on the instructions, duly instructed the jury on all issues and further propounded special interrogatories to the jury and the jury then heard closing arguments of counsel and retired to the jury room to consider the evidence and instructions;

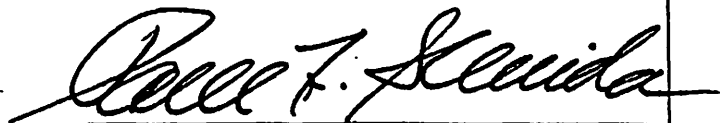
WHEREUPON, the jury returned to open court and rendered a verdict finding the plaintiff's decedent and the defendant willfully and wantonly negligent and ^{EACH'S WILLFUL AND WANTON} ~~the decedent's~~ negligence, a proximate cause of the accident and, accordingly, rendered a verdict in favor of the defendant, Frederick L. Baube, III;

WHEREUPON, counsel for the plaintiff moved the Court to set aside the verdict on the grounds that the issue of willful and wanton negligence of the plaintiff's decedent should not have been submitted to the jury, said motion being denied, and it is

ORDERED that judgment be entered in favor of the defendant, Frederick L. Baube, III, and that the plaintiff recover nothing and this cause is dismissed with prejudice from the docket of this Court.


THIS ORDER IS FINAL.

ENTERED this 7th day of JUNE, 1990.


Judge Paul F. Sheridan

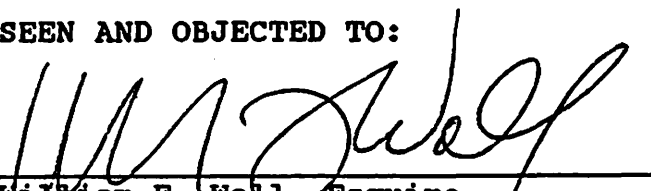
778.
7 JUNE 90

I ASK FOR THIS:



Michael L. Zimmerman, Esquire
BRAULT, PALMER, GROVE & ZIMMERMAN
10533 Main Street, P. O. Box 1010
Fairfax, Virginia 22030-1010
Counsel for Defendant

SEEN AND OBJECTED TO:



William F. Wall, Esquire
10511 Judicial Drive
Fairfax, Virginia 22030
Counsel for Plaintiff

A COPY,

TESTE: DAVID A. BELL, Clerk

By 
Deputy Clerk

TRIAL TRANSCRIPT
May 2, 1990

1 THE COURT: Do I need to hear them or can I
2 just hear them when the jury hears them?

3 MR. HARRIGAN: Yes, I think so. We've
4 talked in the hall and we are stipulating that all the
5 pictures are in. We are stipulating the exhibit of the
6 road is in. They are stipulating that the Defendant had a
7 .18 at the time of the accident and I believe they are
8 stipulating that the death of the decedent was caused by
9 the collision between his car and the Defendant's
10 automobile.

11 Correct me now if I'm wrong.

12 MR. ZIMMERMAN: That's correct.

13 MR. HARRIGAN: I've got an Order here that
14 says all this. I believe there is a stipulation that he
15 pled guilty to DWI; is that true?

16 MR. ZIMMERMAN: Yes, sir.

17 ~~THE COURT: Anything else you want to~~
18 ~~address by way of a preliminary?~~

19 ~~MR. HARRIGAN: No.~~

20 ~~THE COURT: Ready for a jury?~~

21 ~~MR. HARRIGAN: Yes, Your Honor.~~

22 ~~MR. ZIMMERMAN: I have to take that back,~~
23 ~~Judge, we have one other problem. It is my understanding~~

1 Whereupon

2 MATTHEW SMITH,

3 a Witness, was called for examination by counsel on behalf
4 of the Plaintiff, and, after having been previously duly
5 sworn, was examined and testified, as follows:

6 DIRECT EXAMINATION

7 BY MR. HARRIGAN:

8 Q State your name, please.

9 A Matthew Smith.

10 Q What do you do?

11 A Police Officer, Arlington County.

12 Q Matt, how long have you been a police
13 officer?

14 A Four years.

15 Q What sort of duties do you have?

16 A Currently?

17 Q Well, back in '86.

18 A I was in the Midnight Section Patrol and I
19 was on routine patrol that night.

20 Q Did you have occasion to come upon the scene
21 of a motor vehicle accident around Irving Street and
22 Route 50?

23 A Yes, I did.

1 Q Let me show you -- could I have those
2 pictures -- did you look at the cars; did you see the cars
3 at the time?

4 A Yes, I did.

5 Q These have all been stipulated. This is the
6 Pontiac Mr. Wolfe was driving.

7 MR. ZIMMERMAN: Could we have some kind of
8 identification on them, Judge, so we can keep them
9 straight.

10 MR. HARRIGAN: Yeah, maybe we'd better have
11 an identifying number on them.

12 THE COURT: Mr. McQuire, would you sort
13 these out and give them each an identifying mark?

14 THE COURT: Is it agreed that all these
15 pictures come in?

16 MR. ZIMMERMAN: Yes, sir.

17 MR. HARRIGAN: All the pictures have been
18 stipulated to, so we don't have to go into that.

19 BY MR. HARRIGAN:

20 Q Now, when you got there, did you have
21 occasion to see Mr. Baube?

22 A Yes, I did.

23 Q Would you tell us what you did in relation

1 to Mr. Baube?

2 A As I arrived on the scene -- when Mr. Baube
3 went to Arlington Hospital, I was assigned the task of
4 riding in the ambulance and the medic unit to the hospital
5 and I stayed with Mr. Baube throughout the night.

6 Q What, if anything, unusual did you observe
7 about Mr. Baube?

8 A Well, he appeared dazed from the accident, I
9 guess, or possibly alcohol.

10 MR. ZIMMERMAN: I am going to object.

11 BY MR. HARRIGAN:

12 Q Did you smell anything?

13 A Yes, I smelled alcohol.

14 THE COURT: The part that is admissible is
15 that he appeared dazed and the smell of alcohol is also
16 admitted. The other part, possibly, is not to be
17 considered by the jury.

18 BY MR. HARRIGAN:

19 Q On the way up to the hospital, was he doing
20 any talking on the way up?

21 A Yes, he was talking to the medic.

22 Q Now, when you got to the hospital, were you
23 present when a history was taken from him by a Donna

1 Retlich?

2 A Yes.

3 Q Would you tell the jury what was asked and
4 what was said at that point?

5 A Well, she had asked him questions like his
6 name, his address, where he lived, those types of things
7 and then she asked him about the accident and if he had
8 been drinking.

9 Q What was his response to that?

10 A Well, she asked him if he had been drinking
11 and -- first she asked him if he had been drinking and he
12 said -- I believe he said he didn't know and then she
13 asked him later on -- a few minutes later if he had been
14 drinking a little or a lot and he said he'd been drinking
15 a whole lot.

16 MR. HARRIGAN: That's all.

17 THE COURT: Cross-exam?

18 CROSS-EXAMINATION

19 BY MR. ZIMMERMAN:

20 Q This conversation took place in the
21 hospital?

22 A Yes, sir.

23 Q And he did appeared dazed from the accident,

1 did he not?

2 A Yes.

3 Q And you know he was treated at the hospital,
4 do you not?

5 A Yes, I do.

6 MR. ZIMMERMAN: Thank you, no further
7 questions.

8 THE COURT: Might the officer be excused?

9 MR. HARRIGAN: He may be.

10 THE COURT: Mr. Zimmerman?

11 MR. ZIMMERMAN: Yes, sir.

12 THE COURT: You are free to either stay or
13 go now. You are not going to testify any more. Thanks
14 for being with us.

15 (The Witness was excused.)

16 MR. HARRIGAN: Susan Smythe.

17

18

19

20

21

22

23

1 Whereupon

2 SUSAN SMYTHE,

3 a Witness, was called for examination by counsel on behalf
4 of the Plaintiff, and, after having been previously duly
5 sworn, was examined and testified, as follows:

6 DIRECT EXAMINATION

7 BY MR. HARRIGAN:

8 Q Would you state your name, please?

9 A Sue Smythe.

10 Q What is your occupation?

11 A I'm a Registered Nurse at Arlington
12 Hospital.

13 Q How long have you been there?

14 A I'm starting on my eighth year.

15 Q Directing your attention to November 13th,
16 '86, were you on duty that night?

17 A Yes, I was.

18 Q Did you have occasion at that time to see
19 Mr. Baube?

20 A He was admitted to the floor at 6:00 o'clock
21 in the morning.

22 Q You say the floor; would you tell the jury
23 what that means?

1 A I worked on the medical-surgical floor and
2 he was admitted to the floor from the emergency room.

3 Q Would you tell the jury what nurse's notes
4 are?

5 A What nurse's notes are?

6 Q Yes.

7 A Well, when we have an admission, you take a
8 medical history of the patient, a nursing medical history,
9 and you write an admission note, you know, patient arrived
10 from emergency room and what condition, and --

11 Q Did you have occasion to talk to Mr. Baube
12 on that evening about whether or not he had been drinking?

13 A Yes. That was a question I asked him, if he
14 had been drinking alcohol.

15 Q And would you tell the jury what he told you
16 at that time?

17 A He said he had been drinking alcohol for
18 several days.

19 Q Now, at that time, did he know that he was
20 in the hospital?

21 MR. ZIMMERMAN: I object. I don't know how
22 she can know.

23 THE COURT: His state of mind she can't say,

1 but her perception of his state of mind she can say, so
2 objection is sustained because of the form.

3 BY MR. HARRIGAN:

4 Q Your perception of his sobriety, did you
5 write anything in your nurse's notes as to -- let me show
6 you your notes.

7 THE COURT: What, if any, judgment did you
8 make about his degree of alertness?

9 THE WITNESS: One of the questions I asked
10 him was if he knew that he was in the hospital.

11 BY MR. HARRIGAN:

12 Q What did he say?

13 A He said, you know, that he knew he was in
14 the hospital.

15 MR. HARRIGAN: Can we approach the Bench,
16 Your Honor.

17 THE COURT: Sure, come on over to this side.

18 BENCH CONFERENCE

19 MR. HARRIGAN: Your Honor, there's another
20 question there is going to be an objection on. She also
21 asked him if he remembered the accident and he stated, "I
22 plead the 5th." I think that is inconsistent with what
23 has been going on saying, "I don't remember anything."

1 THE COURT: What if he said that to a police
2 officer, it would be inadmissible, wouldn't it?

3 MR. HARRIGAN: Sure.

4 THE COURT: Why is it an admission against
5 interest?

6 MR. HARRIGAN: Well, I think it's in --

7 THE COURT: At worst, it's an evasion, but
8 it is not an admission.

9 MR. HARRIGAN: Okay.

10 THE COURT: Objection sustained.

11 MR. ZIMMERMAN: Thank you.

12 OPEN COURT

13 BY MR. HARRIGAN:

14 Q At the time that you were talking to him at
15 that time, if you recall, do you remember anything about
16 his appearance, odor or anything like that?

17 A Well, there was -- there was a smell of
18 alcohol.

19 Q And we are talking about what time now?

20 A It was 6:00 a.m.

21 Q In the morning?

22 A Uh-huh.

23 MR. HARRIGAN: That's all I have, thank you.

1 MR. ZIMMERMAN: I have no questions of the
2 witness, Your Honor.

3 THE COURT: Thank you, Miss Smythe, for
4 being with us. You are free to go.

5 (The Witness was excused.)

6 MR. HARRIGAN: Dr. Dolan.
7 Whereupon

8 WILLIAM DOLAN, M.D.
9 a Witness, was called for examination by counsel on behalf
10 of the Plaintiff, and, after having been previously duly
11 sworn, was examined and testified, as follows:

12 DIRECT EXAMINATION

13 BY MR. HARRIGAN:

14 Q Would you state your name, please?

15 A William Dolan.

16 Q What is your occupation, please?

17 A I'm a physician.

18 Q Would you give the jury a brief summary of
19 your specialty and what you do and how long you have been
20 doing it?

21 A Yes. I'm a pathologist and I run the
22 laboratory at Arlington Hospital.

23 Q You are a Director there?

1 A Yes, I am.

2 Q How long have you been doing that?

3 MR. ZIMMERMAN: I'll save some time. I'll
4 stipulate that Dr. Dolan is qualified to testify as an
5 expert in the field of pathology and has so qualified many
6 times in the past.

7 THE COURT: Do you accept that agreement?

8 MR. HARRIGAN: Yes. I just want to ask how
9 many years?

10 THE COURT: How long have you been a
11 pathologist, Doctor?

12 THE WITNESS: I thought that he was going to
13 avoid that; forty years.

14 THE COURT: The doctor is qualified as a
15 physician and as a pathologist to give opinions.

16 BY MR. HARRIGAN:

17 Q Now, Doctor, in the course of your daily
18 operation out there, are you familiar with the blood test,
19 blood alcohol content for intoxication?

20 A Yes, I am.

21 Q And do you and your staff do many of these?

22 A We do.

23 Q Doctor, I want you -- there are certain

1 facts in this case that have been stipulated to. One of
2 them is the Defendant in this case has stipulated that at
3 the time of the accident he had a .18 blood alcohol
4 content and Doctor there has been testimony that the
5 Defendant had told a nurse the same evening of this
6 accident that he had been drinking for several days.

7 Now, Doctor, could you tell the jury what
8 effect a .18 blood alcohol content would have on a
9 person's judgment and reflexes and motor skills,
10 perception?

11 A At .18 his coordination is lost. His
12 reaction time is lengthened. His perception of distance,
13 of color, of light, particularly at night is definitely
14 impaired.

15 Q When you say, impaired, do you have a
16 distinction between moderately impaired or severely
17 impaired or --

18 A At .18, severely impaired.

19 Q And in the context of -- if someone saw
20 headlights coming towards him, would someone with a .18 be
21 able to perceive whether they were coming at him or --

22 A Whether he would perceive whether it was
23 coming at him or not, his ability to see that and

1 interpret it and make a judgment is impaired, definitely
2 impaired.

3 Q What is the legal rate of intoxication in
4 Virginia that you normally use.

5 A Point one O; ten.

6 Q Point one eight then would be something shy
7 of about twice that; is that right?

8 A Eighteen would be yes.

9 Q Could you give the jury a brief summary, if
10 you know, how much alcohol one would drink to get to a .18
11 for a person of Mr. Baube's size?

12 A Well, a very easy way to remember that is by
13 the figures 2, 4, 6, 8; 5, 10, 15, 20. That's --

14 Q Tell me, what does that mean?

15 A Well, 2 bottles of beer, 2 drinks of
16 alcohol, whiskey is 5; 4 is 10; 6 is 15; 8 is 20; 2, 4, 6,
17 8; 5, 10, 15, 20. That's the way it goes.

18 Q And over what time frame would you have to
19 drink these to get to that?

20 A Well, the normal functioning liver can
21 remove .02 alcohol or one beer or one shot of whiskey an
22 hour.

23 Q So, if you drink a beer in one hour and

1 that's all you drink, basically your blood alcohol would
2 take it out of your blood in one hour if you have a beer
3 an hour, is that correct?

4 A Yes, that broadly is what it is.

5 MR. HARRIGAN: That's all.

6 ~~THE COURT: Cross exam?~~

7 MR. ZIMMERMAN: Please, Your Honor.

8 CROSS-EXAMINATION

9 BY MR. ZIMMERMAN:

10 Q Dr. Dolan, you were the pathologist back in
11 1986 at Arlington Hospital, were you not?

12 A When?

13 Q 1986, November.

14 A Yes, I was.

15 Q I notice you have some records.
16 Did your office take the blood sample from
17 Mr. Baube?

18 A I understand it was brought in by a
19 policeman.

20 Q Did you examine that, sir?

21 A Yes, there's a record of the continuity of
22 the specimen here.

23 ~~Q Do you know whether any blood tests were~~

1 A F T E R N O O N S E S S I O N

2 (The Court reconvened at 1:56 o'clock p.m.)

3 THE COURT: Bring the jury in.

4 (Whereupon, at approximately 1:57 o'clock
5 p.m., the jury returned to the courtroom and resumed their
6 place in the jury box.)

7 THE COURT: Are you ready to proceed?

8 MR. HARRIGAN: Yes, sir, Michael Clark.

9 Whereupon

10 MICHAEL DEAN CLARK,
11 a Witness, was called for examination by counsel on behalf
12 of the Plaintiff, and, after having been previously duly
13 sworn, was examined and testified, as follows:

14 D I R E C T E X A M I N A T I O N

15 B Y M R . H A R R I G A N :

16 Q Would you state your name, please?

17 A Michael Dean Clark.

18 Q How old are you, Mr. Clark?

19 A Thirty.

20 Q Are you married?

21 A No.

22 Q Mr. Clark, I want to direct your attention
23 to the early morning hours of the 13th day of November,

1 1986.

2 Where were you proceeding earlier that
3 morning, in which direction?

4 A Eastbound on Route 50.

5 Q We have here a drawing of Route 50 and to
6 acclimate you to the drawing, this is eastbound
7 (indicating) --

8 A Right.

9 Q And this is westbound?

10 A Right.

11 Q There is a pedestrian overpass down here
12 (indicating); is that right?

13 A Yes, sir.

14 Q Can you tell the jury whether the road is
15 straight there or dips down in and comes up?

16 A I can tell them that -- I can see it -- from
17 the overpass to the intersection.

18 THE COURT: Would you go down to that
19 diagram and point to what you mean by the overpass and
20 intersection. Why don't you walk down there and stand
21 there so the jury knows what you mean.

22 THE WITNESS: As I am approaching this
23 overpass (indicating) right here I can see all the way

1 down here.

2 Do you still want me to stand here?

3 THE COURT: That's up to counsel.

4 MR. HARRIGAN: Just stand here and then you
5 can point out certain things.

6 BY MR. HARRIGAN:

7 Q Now, as you are proceeding down by this
8 overpass and down 50, did there come a point where you saw
9 something or anything up in the road (indicating) on Route
10 50?

11 A I saw a dark rectangular object.

12 Q Where did you see that object, what lane was
13 it in?

14 A The left-hand lane going eastbound on Route
15 50.

16 Q When you are talking about the left-hand
17 lane of Route 50, are you talking about this (indicating)
18 lane?

19 A Right.

20 Q And that would be the one with the three
21 lanes --

22 A That I am traveling in.

23 Q Would you tell the jury what traffic, if

1 any, you saw in the three westbound lanes; these three
2 lanes here (indicating)?

3 A If there were any other cars?

4 Q Yes.

5 A No, there were no other cars coming.

6 Q Approximately, where did you see this dark
7 object, this van?

8 A I just saw it down the road.

9 Q In this lane (indicating)?

10 A Right.

11 Q Did you see any headlights on?

12 A No, it was a dark rectangular object.

13 Q Did you see any, what you thought, were
14 taillights on it?

15 A I didn't see anything light-wise.

16 Q Did you have any perception at that time
17 which way that van was going?

18 A Well, taking that it was going eastbound, I
19 thought it was going eastbound.

20 Q You thought it was traveling in the same
21 direction you were?

22 A Right, exactly.

23 Q Now, after you saw the van in this lane

1 (indicting) did there come a time when anyone passed you?

2 A Yes, a Pontiac car passed me. After I
3 passed the overpass, it passed me.

4 Q Sometime after you passed the overpass?

5 A Right.

6 Q And the Pontiac was going rapidly?

7 MR. ZIMMERMAN: Your Honor, I am going to
8 object.

9 THE COURT: Sustained.

10 BY MR. HARRIGAN:

11 Q How fast were you going?

12 A About 45 to 50 miles an hour.

13 Q And the Pontiac passed you?

14 A Right.

15 Q When the Pontiac passed you, would you tell
16 the jury what you perceived, what happened, what did the
17 Pontiac do?

18 A It was -- it was doing 80 to 85 miles an
19 hour would be my guess.

20 Q That's your guess?

21 A Right, it flew by me like I was standing
22 still.

23 Q What did it do; that's what I asked you.

1 A (no response.)

2 Q What did it do? What did you see it do?

3 A Well, all of a sudden it veered -- it was in
4 the extreme -- it was in the left lane --

5 Q This lane here (indicating)?

6 A Right, when it passed me and it veered --

7 Q It must have passed you somewhere in here or
8 here (indicating) or where?

9 A Well, somewhere around in here (indicating).
10 I don't know the exact point, but it passed me and it
11 veered to the middle lane slamming its brakes on.

12 Q You saw it go from this lane, like this line
13 (indicating) --

14 MR. ZIMMERMAN: Your Honor, I am going to
15 object to --

16 THE COURT: Sustained. Mr. Harrigan, this
17 is your witness.

18 MR. HARRIGAN: I understand.

19 THE COURT: Don't lead him.

20 BY MR. HARRIGAN:

21 Q I want you to tell the jury from this
22 diagram where you --

23 A He passed me in the left lane. I was in the

1 extreme right lane (indicating). The car slammed its
2 brakes on bearing to the middle lane.

3 Q And the middle lane being this lane here
4 (indicating)?

5 A This one right here (indicating).

6 Q Then what happened?

7 A There was a big explosion. All of a sudden
8 the van that I saw down there which I thought shouldn't
9 have been in the picture was there.

10 Q Was where?

11 A Was right here (indicating), right around in
12 here. I don't know exactly where, but there was a
13 collision.

14 Q In which lane was the collision?

15 A What now?

16 Q In what lane was the collision?

17 A In the middle lane.

18 Q In this lane (indicating) here?

19 A Right; in this lane here (indicating).

20 Q Then when the collision occurred, would you
21 tell the jury what happened; what you did; what happened
22 and --

23 A There was a big explosion, smoke and debris

1 fell on my car and I slammed on my brakes and then the
2 next thing you know, I ran into the back of the car that
3 passed me.

4 Q And you were still riding in this
5 (indicating) lane; is that right?

6 A Exactly, I was staying in the right lane all
7 the way.

8 Q Did you lock down on your brakes?

9 A Yes, I did.

10 Q Could you have avoided the --

11 THE COURT: Sustained.

12 Mr. Harrigan, you are leading this witness.

13 MR. HARRIGAN: All right.

14 BY MR. HARRIGAN:

15 Q What, if anything, could you have done to
16 avoid this?

17 MR. ZIMMERMAN: Your Honor, I would object.

18 It is not relevant what this gentleman might have done.

19 MR. HARRIGAN: I think it is though.

20 THE WITNESS: I didn't --

21 THE COURT: Stop there, sir. Wait until
22 these lawyers finish making their point with me and then I
23 have to make a ruling.

1 Go ahead.

2 MR. ZIMMERMAN: My objection is to
3 relevancy. It is immaterial what this driver could have
4 done.

5 THE COURT: Sustained.

6 You can put in all the time, distance and
7 time factors you want, but that's a conclusion in the
8 interpretation.

9 BY MR. HARRIGAN:

10 Q What would you tell us the time was from the
11 time you saw him put on his brakes until --

12 A I can't even give a time. It happened so
13 quickly.

14 Q Quickly?

15 A Right.

16 Q Where did you finally wind up?

17 A Right here (indicating); right here on the
18 right-hand shoulder. I just kind of drifted over there.

19 Q And how much time -- you estimated what you
20 believe to be the speed; if we are talking in periods of
21 observation, could you tell me how many seconds that
22 observation was made in?

23 THE COURT: Which one?

1 MR. HARRIGAN: Where he made the observation
2 as to the speed and --

3 THE WITNESS: How fast the car was going
4 when he passed me?

5 BY MR. HARRIGAN:

6 Q How many seconds did you see that car before
7 he hit his brakes?

8 A Well, I kind of eyed the car, you know, when
9 I saw it hit the brakes, but I can't tell you in
10 time-wise, second-wise, but it was very quick.

11 Q Very quick?

12 A Yes.

13 MR. HARRIGAN: That's all.

14 THE COURT: Come on back up and make
15 yourself comfortable, sir. They get a chance for
16 cross-exam here.

17 CROSS-EXAMINATION

18 BY MR. ZIMMERMAN:

19 Q Mr. Clark, let me ask you a few questions.

20 This accident occurred a little bit after
21 midnight, did it not?

22 A Right.

23 Q Were you familiar with that section of the

1 road, sir?

2 A Yes, I am.

3 Q And that diagram is correct, there are three
4 lanes of traffic in each direction?

5 A Yes, it is.

6 Q Am I correct that the speed limit in that
7 area is 45 miles an hour?

8 A Exactly.

9 Q And you were in the right-hand lane doing
10 approximately 45 to 50 miles an hour?

11 A Right.

12 Q The only other traffic that you saw on the
13 road was this dark rectangular shaped vehicle up ahead of
14 you someplace?

15 A Right.

16 Q How far up ahead of you was it when you saw
17 it?

18 THE COURT: When he first saw it?

19 MR. ZIMMERMAN: When he first saw it, yes,
20 sir.

21 THE WITNESS: I was just coming under the
22 underpass when I saw it down the road.

23

1 BY MR. ZIMMERMAN:

2 Q And where was it down the road?

3 A It was just down the road. I figured about
4 -- by the intersection, I was -- you know, that's what I
5 figured.

6 Q You testified that from the overpass to the
7 intersection at Irving Street, that's a flat stretch of
8 ground; is it not?

9 A Right.

10 Q Weather conditions that night?

11 A Clear.

12 Q Not raining?

13 A No.

14 Q Anything on the roadway, was the roadway wet
15 or anything?

16 A No, it was a dry, clear night.

17 Q You saw the rectangular shape ahead of you
18 and then you indicated you looked to your left and you saw
19 the Pontiac pass you?

20 A Right.

21 Q Did you see anybody in the Pontiac?

22 A Yes, I did.

23 Q What were they doing?

1 A Meaning?

2 Q What were they doing inside the car when
3 they passed you?

4 A Seeing the silhouettes in the car from the
5 light, well, as I said before, be-bopping to -- looked
6 like music.

7 MR. HARRIGAN: I object to --

8 THE COURT: He can describe their physical
9 movements.

10 MR. HARRIGAN: It might have been --

11 MR. WALL: Which person --

12 MR. ZIMMERMAN: Judge, I apologize, I --

13 THE COURT: Mr. Zimmerman, let me decide how
14 many lawyers can work on you at one time. I am only going
15 to let one lawyer participate on one witness. You can
16 alternate it, but the phrase be-bop could have a lot of
17 different meanings depending upon what vintage person you
18 are, so I am going to ask you to translate that into
19 physical movements and who it was.

20 BY MR. ZIMMERMAN:

21 Q What do you mean by be-bopping, sir.

22 A I guess the kind of music they were playing
23 in the car, you know, kind of --

1 MR. HARRIGAN: Your Honor, I don't want him
2 to speculate and --

3 THE COURT: Mr. Harrigan, the jury
4 understands that there is no testimony that he could hear
5 music. He is trying to describe physical movement and to
6 the extent he was guessing, he can't.

7 But, he can tell what he saw and --

8 MR. HARRIGAN: That's correct.

9 THE COURT: -- the impression it made on
10 him. I think that's what he is trying to do.

11 Go ahead and describe what you sw anybody
12 doing physically in that car.

13 THE WITNESS: There was -- I guess what you
14 would call sit-down dancing; I don't know. Getting into
15 the music.

16 BY MR. ZIMMERMAN:

17 Q And when that car passed you, you estimated
18 it's speed at 80 to 85?

19 A Right.

20 Q And you indicated, "It flew by me like I was
21 standing still."

22 A Right.

23 Q And then you saw the Pontiac put on its

1 brakes?

2 A Slammed -- it slammed -- it came on
3 abruptly.

4 Q Did you actually see the collision between
5 this rectangular shape and the Pontiac?

6 A No.

7 Q Why not?

8 A Because I was slamming on my brakes and the
9 smoke and debris happened all of a sudden. I just heard a
10 big explosion and there was a big explosion.

11 Q At the point that the Pontiac passed you,
12 when did you first hit your brakes after that?

13 A When the smoke and the debris --

14 Q So, you put your brakes on when you first
15 saw the smoke and debris coming?

16 A When the debris hit my car.

17 Q And then your vision was obstructed?

18 A Right.

19 Q And the next thing you saw was the Pontiac
20 again?

21 A Right.

22 Q Where was it coming from?

23 A From right to left.

1 Q From your right to your left?

2 A Right.

3 Q Just so I'm sure, you are in the
4 right-hand lane (indicating) --

5 A Right.

6 Q -- and after the smoke and debris, the next
7 thing you saw is the Wolfe vehicle coming from your right?

8 A Right.

9 THE COURT: How was it aligned in terms of
10 the lanes of the road; it's front end, it's back end, or
11 could you tell?

12 THE WITNESS: (No response).

13 THE COURT: You pick it up again, it is
14 coming from your right to your left; what was the
15 alignment of that car? Was it going in the direction you
16 were, sideways or what?

17 THE WITNESS: It was -- it was -- it was
18 going -- the front was going this way (indicating). It was
19 pointing this way, and I hit the -- the --

20 MR. HARRIGAN: I don't think you are talking
21 about the same thing.

22 THE COURT: Wait a minute. Let him finish.

23 THE WITNESS: The driver's rear end.

1 THE COURT: When you said this way, were you
2 indicating with your hands that the Pontiac appeared to be
3 going sort of half left off your path or were you coming
4 in perpendicular to its direction of travel?

5 THE WITNESS: I was coming in perpendicular.

6 THE COURT: So, the front of the Pontiac as
7 you saw it just before impact was going to your left?

8 THE WITNESS: Exactly.

9 THE COURT: Go ahead.

10 MR. ZIMMERMAN: Those are all the questions
11 I have.

12 REDIRECT EXAMINATION

13 BY MR. HARRIGAN:

14 Q When you collided -- we have some pictures
15 -- you hit the rear of the Pontiac; is that correct?

16 A Yes, sir.

17 Q Let me show you Plaintiff's No. 13.

18 Is that your car?

19 A Yes, sir.

20 THE COURT: If the jury cares to look at
21 that, you can pass it around and let's not do anything
22 else while they are doing that.

23 (The exhibit was published to the jury.)

1 BY MR. HARRIGAN:

2 Q I show you what purports to be the rear end
3 of the Pontiac; is that where you struck him?

4 A Right.

5 THE COURT: Exhibit Number, please.

6 MR. HARRIGAN: It's Exhibit No. 10.

7 THE COURT: You may take it and pass it
8 around the jury box if anybody cares to look at it.

9 (The exhibit was published to the jury.)

10 BY MR. HARRIGAN:

11 Q Mr. Clark, did you have your lights on?

12 A Yes, I did.

13 Q Did the Pontiac have its lights on?

14 A Yes, it did.

15 THE COURT: Did you have high beams or low
16 beams on your car?

17 THE WITNESS: I have both, but I only had my
18 low beams on.

19 THE COURT: You were using low beams?

20 THE WITNESS: Right.

21 THE COURT: Thank you.

22 BY MR. HARRIGAN:

23 Q Now, when you say you saw the car go by, did

1 you hear any music from the car?

2 A No, I didn't.

3 Q When you say you saw somebody in the car
4 moving around, which persons in that car in the front or
5 the back are you talking about, which ones?

6 A Two back.

7 Q Just the two back?

8 A (Nodding head.)

9 Q You didn't see anything unusual that the
10 driver was doing?

11 A No.

12 Q Do you have any kind of an estimate from the
13 time you first saw the van as to when the impact occurred
14 as to how many seconds that was?

15 A No, I can't put any time on it.

16 Q Could you tell us approximately after you
17 locked on your brakes about what speed were you going at
18 impact?

19 A I don't know, 25, 35 miles an hour.

20 Q About 25, 35 miles an hour?

21 A (Nodding head.)

22 Q Did you see the van pull over from the
23 left-hand eastbound lane into the center lane?

1 A No, I didn't.

2 Q Now, even at impact, did you realize which
3 direction the van was coming in, running in?

4 A No, because I was wondering where the van
5 came from, because I thought he should have been out of
6 the picture.

7 Q You mean way down the road?

8 A Right, because I thought it was going
9 eastbound.

10 Q Did you see the van move over into the
11 center lane?

12 MR. ZIMMERMAN: I am going to object.

13 THE COURT: He said no.

14 MR. HARRIGAN: He said no, okay.

15 BY MR. HARRIGAN:

16 Q Did you see it in the lane --

17 THE COURT: Sustained, leading.

18 BY MR. HARRIGAN:

19 Q Just before impact, where was the van, if
20 you know?

21 THE COURT: If he could see.

22 MR. HARRIGAN: If he could see.

23 THE WITNESS: I never saw the impact. I

1 mean, I never saw where the van was at impact. I just saw
2 the car, heard the explosion, there was a big debris.

3 MR. HARRIGAN: That's all.

4 THE COURT: Anything else, Mr. Zimmerman?

5 MR. ZIMMERMAN: No, Your Honor.

6 THE COURT: Might this gentleman be excused?

7 MR. HARRIGAN: Yes, he may.

8 THE COURT: You are free to either stay in
9 the courtroom or leave because you are not going to
10 testify anymore. Thank you for being with us, sir.

11 (The Witness was excused.)

12 THE COURT: Your next witness.

13 MR. HARRIGAN: Officer Norwood.

14 Whereupon

15 KEVIN NORWOOD,
16 a Witness, was called for examination by counsel on behalf
17 of the Plaintiff, and, after having been previously duly
18 sworn, was examined and testified, as follows:

19 DIRECT EXAMINATION

20 BY MR. HARRIGAN:

21 Q State your name, please.

22 A Kevin Norwood.

23 Q And your occupation, sir?

1 A I'm a Police Officer with Arlington County.

2 Q How long have you been a police officer?

3 A Seven years.

4 Q Were you working on the night of November
5 13th, 1986?

6 A Yes, I was.

7 Q Did there come a time around midnight or
8 shortly thereafter you heard anything unusual?

9 A Yes, I did.

10 Q Tell the jury where you were in relation to
11 Irving Street and Arlington Boulevard at that time?

12 A I was just east of that location about two
13 blocks.

14 Q About two blocks?

15 A I was about at Highland Street.

16 Q Would you tell the jury what you heard?

17 A I heard a screeching tire sound and a crash
18 and then a pause for a second or two, then another crash
19 as if there was an automobile accident.

20 Q Did you respond to the scene?

21 A Yes, I did. It was west of my location, so
22 I got on Route 50 and went west and I saw it down at
23 Irving Street.

1 Q Is it your estimate that the two crashes
2 occurred within a second or two of each other?

3 A Approximately, yes.

4 Q When you got there, did you happen to
5 observe the van; was there a van that was involved in that
6 accident?

7 A Yes, there was.

8 Q Where was the damage on that?

9 A I know it had at least front end damage and
10 maybe some on the side, but I can't recall all the damage
11 to it.

12 Q And the Pontiac; did you observe the
13 Pontiac?

14 A Yes, I did. I observed all the vehicles. I
15 don't specifically recall where the damage was on all of
16 them. The one in the center of the highway probably had
17 the heaviest damage, which I believe was the Pontiac.

18 Q And was there a third car also that was
19 damaged there?

20 A Yes, there was.

21 MR. HARRIGAN: That's all I have.

22 THE COURT: Cross-exam?

23

CROSS-EXAMINATION

BY MR. ZIMMERMAN:

Q Officer Norwood, you heard the screeching of tires and the collision?

A Yes.

Q How long did it take you to get to the scene?

A Within a minute, I'd say. It was a very short time.

Q Where did you park when you got to the scene?

A As I recall I was in the westbound lane and I was in an unmarked police vehicle. I had just a small revolving light. I don't recall if I pulled off to just the shoulder of the road or whether I parked right near the accident.

I mean I parked -- are you talking about near the accident -- I parked just east of the accident.

Q Did you get out of your vehicle?

A Yes, I did.

Q Did you check inside the van?

A I walked over to the van, yes.

Q What did you see when you looked inside the

1 van?

2 A It was a subject slumped over the driver's
3 wheel.

4 Q Did you see anybody else at the scene of the
5 accident?

6 A The car that was in the center of the
7 roadway which I believe was the Pontiac, there were
8 several people in that.

9 Q Did you see anybody else at the scene of the
10 accident?

11 A The car that was on the shoulder of the
12 road, I believe it was a red car, there was a subject
13 there that I was talking to.

14 Q Was there anybody else there that you talked
15 to immediately after you arrived at the scene?

16 A As I was talking to the gentleman in the red
17 car, some subject came up to me, which I believe they
18 later determined to be was a cab driver or something and
19 he said he had observed something or other.

20 Q This gentleman that came up to you, did you
21 ask him any questions or did he make a statement to you?

22 MR. HARRIGAN: Your Honor, I believe that's
23 really hearsay.

1 THE COURT: We're not there yet. The
2 question is, did he make a statement, not what was it.
3 Overruled for the moment.

4 THE WITNESS: I believe he did state
5 something to me, yes.

6 BY MR. ZIMMERMAN:

7 Q Was that in response to a question of yours
8 or did he just come out and say it?

9 A As I recall he just came out and stated
10 something.

11 Q How long was that after you had arrived at
12 the scene, sir?

13 A Very shortly, probably thirty seconds to a
14 minute.

15 Q Don't answer this question. Let me ask it,
16 but don't answer it, because this gentleman is going to
17 object.

18 What was the statement?

19 THE COURT: Stop. Come on over here.

20 BENCH CONFERENCE

21 THE COURT: What is the answer?

22 MR. ZIMMERMAN: The answer is the car was
23 going extremely fast.

1 MR. HARRIGAN: Your Honor, I think it is
2 hearsay. I think the transcript is going to show that he
3 went up to the man and asked him, you know, what did you
4 see or what happened.

5 THE COURT: He just said the man volunteered
6 it.

7 MR. HARRIGAN: Yes, I know, but I have it
8 from his other testimony.

9 THE COURT: But based on what is before me
10 it's contemporaneous with or immediately after an exciting
11 event. That sounds like res gestae.

12 MR. HARRIGAN: I think there is also time
13 for reflection too.

14 MR. ZIMMERMAN: Thirty seconds.

15 THE COURT: I think you ought to elicit from
16 the witness what, if anything, is the person's degree of
17 either calm, exciting or any mood sort of thing, but my
18 expectation is I'm going to let it in.

19 MR. HARRIGAN: All right.

20 OPEN COURT

21 THE COURT: A juror has asked me a question.
22 When these lawyers finish their basic questioning, I am
23 going to show them your question and I am going to let

1 them address it.

2 BY MR. ZIMMERMAN:

3 Q Would you describe the demeanor of this
4 individual who came up to you and made this statement to
5 you at the time he made the statement?

6 A As best I can recall, it was -- he was kind
7 of excited and just blurted something out.

8 THE COURT: The objection is overruled. Go
9 ahead and say what the man said to you.

10 THE WITNESS: Could you ask me the question
11 again, please?

12 BY MR. ZIMMERMAN:

13 Q What did this man say to you?

14 A Something to the effect that the car that
15 was in the center of the roadway was going at a high rate
16 of speed, or speeding, something of that nature.

17 Q And which car was that that was in the
18 center of the road?

19 THE COURT: Let's leave that to the jury.

20 MR. ZIMMERMAN: I'll withdraw that question.
21 That's all the questions I have, thank you.

22 THE COURT: Mr. Harrigan, anything else?

23 MR. HARRIGAN: No, sir.

1 THE COURT: At the intersection of Irving
2 and Route 50, what kind of overhead lighting or regularly
3 provided lighting existed at that time?

4 THE WITNESS: I believe there are street
5 lights on the side of the road as I can recall.

6 THE COURT: What kind of street lights?

7 THE WITNESS: The best I can recall they are
8 just normal street lights so far apart. The lighting as I
9 recall it was -- it was fairly well lit.

10 THE COURT: What kind of weather that night?

11 THE WITNESS: Clear and dry, as I recall.

12 THE COURT: When you say standard lighting,
13 tell us the height of poles and lights.

14 THE WITNESS: I don't even -- I'm not even
15 real sure that the -- you know, where the street lights
16 are as opposed to the intersection.

17 THE COURT: Do you have any clear memory of
18 any particular light provided along Route 50 in that
19 general stretch of roadway?

20 THE WITNESS: As best of my knowledge is
21 it's telephone -- I mean, street lights every so many feet
22 on both sides.

23 THE COURT: Do those questions cause the

1 need for any other questions?

2 MR. HARRIGAN: I do, Your Honor.

3 REDIRECT EXAMINATION

4 BY MR. HARRIGAN:

5 Q When you say, to the best of your knowledge
6 -- maybe you could look, we have a diagram that may even
7 show --

8 THE COURT: There's an aerial photo that
9 somebody used in opening statement.

10 MR. HARRIGAN: I know. And I think that is
11 going to show that the only lights were the ones on --

12 THE COURT: Don't tell him what to say. Ask
13 him what he remembers and if he does remember.

14 BY MR. HARRIGAN:

15 Q Take a look at this photo.

16 MR. HARRIGAN: Has this been introduced?

17 THE COURT: No, not yet.

18 MR. HARRIGAN: Well, I'll introduce it then.

19 THE COURT: Let me see it.

20 This is marked as Defendant's No. 5.

21 Mr. Zimmerman, do you have any objection to its use?

22 MR. ZIMMERMAN: No. It was going to be
23 Defendant's No. 1, I think, so I have no objection.

1 THE COURT: Well, that's up to Mr. McQuire
2 to straighten out the numbering and keep us all organized
3 here.

4 Officer, do you recognize what that shows?

5 THE WITNESS: It appears to be Route 50.

6 THE COURT: Does it look like Route 50 near
7 Irving Street?

8 THE WITNESS: Yes.

9 THE COURT: Is it an aerial photo that shows
10 the Washington Monument in the far distance?

11 THE WITNESS: Yes, it is.

12 THE COURT: So, would the viewer in this
13 photo be looking east on Route 50?

14 THE WITNESS: Yes.

15 THE COURT: Does looking at that photo,
16 Number One, does it look like what the conditions were at
17 the time of this accident, recognizing this is daylight
18 and the accident occurred in the night?

19 THE WITNESS: To the best of my knowledge.

20 THE COURT: Does looking at that picture
21 help you more accurately tell the jury what, if any,
22 lighting was on Route 50 near the intersection with Irving
23 Street at the time of this accident?

1 THE WITNESS: Lighting as opposed to street
2 lighting or traffic lighting?

3 THE COURT: By traffic, do you mean
4 vehicles?

5 THE WITNESS: Yes, as opposed to stop lights
6 and --

7 THE COURT: I mean lighting from something
8 other than a motor vehicle.

9 THE WITNESS: Yes, there appears that there
10 is a street light on each side of the intersection.

11 THE COURT: Do you want to ask any other
12 questions?

13 BY MR. HARRIGAN:

14 Q If you look at that picture, there aren't
15 any other street lights --

16 MR. ZIMMERMAN: I am going to object,
17 leading.

18 THE COURT: Sustained.

19 BY MR. HARRIGAN:

20 Q Look at the picture and tell us if you see
21 any street lights on it, the road beyond Irving Street?

22 THE COURT: Well, now, wait a minute. It is
23 his memory that is jogged by the photo. If the photo is

1 going to be the evidence, the photo speaks for itself.

2 MR. HARRIGAN: It's in evidence, Your Honor.

3 THE COURT: This is admitted, presently
4 labeled as Defendant's No. 5. Mr. Zimmerman and
5 Mr. McQuire work out what number it is going to be in the
6 long run, but I am going to initial it now.

7 MR. MCQUIRE: It will be 5, Your Honor.

8 THE COURT: It remains Defendant's No. 5.
9 It is admitted.

10 (The document heretofore marked
11 Defendant's Exhibit No. 5, for
12 identification was received in
13 evidence.)

13 THE COURT: Please give that to the jury.

14 (The exhibit was published to the jury.)

15 THE COURT: Your next witness.

16 MR. HARRIGAN: Officer Rebecca Hackney.

17 THE COURT: Thank you, Officer.

18 MR. HARRIGAN: Thank you, Officer, I'm
19 sorry.

20 THE COURT: May he be excused?

21 MR. HARRIGAN: Yes, sir.

22 MR. ZIMMERMAN: He may.

23 THE COURT: You are through testifying, so

1 it is up to you where you want to be now.

2 (The Witness was excused.)

3 Whereupon

4 REBECCA ANN HACKNEY,
5 a Witness, was called for examination by counsel on behalf
6 of the Plaintiff, and, after having been previously duly
7 sworn, was examined and testified, as follows:

8 DIRECT EXAMINATION

9 BY MR. HARRIGAN:

10 Q State your name, please.

11 A Corporal Rebecca Ann Hackney.

12 Q And you are an Arlington County Police
13 Officer, a Corporal; is that right?

14 A Yes, I am.

15 Q Were you an Arlington County Police Officer
16 back in November of 1986?

17 A Yes, I was.

18 Q Did you have occasion to go to an accident
19 scene at Route 50 and North Irving Street?

20 A Yes.

21 Q What time did you arrive there?

22 A I am going to have to check my notes.

23 Q Roughly.

1 A Approximately 12:55 a.m.

2 Q What was your job in going there, basically?

3 A At that time I was an agent with the
4 Arlington County Police Department and an agent is the
5 crime scene technician that does measurements,
6 photography, collects any evidence on a scene like that.

7 Q Did you take pictures?

8 A Yes, I did.

9 Q A lot of these pictures, then, we are
10 talking about pictures you took; is that right?

11 A Some of them, yes.

12 Q When you got there, where -- do you want to
13 come down to the board.

14 A (The Witness complied with Mr. Harrigan's
15 request.)

16 Q Let me ask you first, is this drawing here,
17 is that a fair and accurate representation of Route 50 and
18 the intersection and the things that you have on there?

19 A Yes, it is.

20 Q We have the position of -- what are these
21 three things (indicating) here?

22 A The cars are color coordinated. Of the
23 three vehicles involved in the accident, the green is the

1 van, the Chevy van, the brown is the Pontiac, and the
2 orange is the Datsun.

3 Q When you got there, did you take pictures of
4 the point of impact or what you perceived to be the point
5 of impact?

6 A Yes, sir.

7 Q Would you tell the jury where that was on
8 this diagram?

9 MR. ZIMMERMAN: Well, Your Honor, if he is
10 going to make some qualifications to qualify her as an
11 expert, I'll stipulate she is an expert, but unless he --
12 if he is not going to qualify her, she can't answer his
13 question.

14 MR. HARRIGAN: She doesn't have to be an
15 expert to say where the point of impact occurred.

16 MR. ZIMMERMAN: You sure do.

17 THE COURT: Well, sometimes it is a layman's
18 observation and sometimes it is an analytical judgment by
19 somebody that is more than just interpreting clear
20 physical signs.

21 I think here it is probably going to be
22 somewhere in the middle, so establish her ability to
23 interpret what she saw.

1 MR. HARRIGAN: All right.

2 BY MR. HARRIGAN:

3 Q Officer, --

4 MR. HARRIGAN: The Plaintiff has already
5 stipulated she's an expert?

6 MR. ZIMMERMAN: I'll stipulate she's an
7 expert in the field of accident reconstruction.

8 MR. HARRIGAN: Fine.

9 BY MR. HARRIGAN:

10 Q You have had training in that; is that
11 right?

12 A Yes, sir.

13 Q And that's what you are there for; that's
14 what you are doing?

15 A That's correct.

16 Q First of all, tell us where the point of
17 impact was and how you arrived at that; tell the jury?

18 A The point of impact -- that I determined as
19 the point of impact is where it is marked "D" on the
20 diagram here. It is right here (indicating).

21 THE COURT: How were you able to determine
22 that, Corporal?

23 THE WITNESS: I was able to determine it by

1 the gouge marks in the roadway. When -- at the point of
2 impact the Pontiac actually went down onto the roadway
3 when the two vehicles collided and it was gouge marks in
4 the roadway where the undercarriage of the vehicle struck
5 the roadway and there was asphalt on the bottom of the
6 Pontiac when it -- at resting place, and it corresponded
7 to the gouge mark area of the roadway.

8 THE COURT: Thank you.

9 BY MR. HARRIGAN:

10 Q And let me show you what is marked as
11 Plaintiff's 14 and tell me, was that taken that night?

12 A Yes, this is a photograph that I took.

13 Q Show the jury.

14 THE COURT: Please walk over and show the
15 jurors. Jurors move around so you can see what she is
16 showing you.

17 THE WITNESS: This is a photograph
18 (indicating) going from -- from the west side of the
19 intersection, Route 50 going --

20 BY MR. HARRIGAN:

21 Q When you say west side, shooting this
22 (indicating) way?

23 A Yes, it is -- no, no, I'm sorry. I was on

1 the west side of the intersection over here (indicating)
2 taking the photographs going east, okay?

3 So, this (indicating) is of the eastbound
4 lanes of Route 50 from the west side of the intersection
5 showing east, okay? This is actually on the other side of
6 the intersection at the resting points of the three
7 vehicles and these (indicating) are the gouge marks in the
8 roadway in the center lane and the -- they come down here.

9 The vehicle, of the Pontiac, is this vehicle
10 right here (indicating).

11 Q Let me show you what is marked as
12 Plaintiff's No. 7 which was taken in daylight and tell the
13 jury what that is.

14 A This photograph was taken the next morning,
15 same view as the other photograph, but in daylight. The
16 same gouge marks still remain the next morning, center
17 lane.

18 Q In addition to that, there's a black line in
19 that photograph, what is that?

20 A That is a skid mark from the Pontiac.

21 Q From the Pontiac?

22 A Yes, it is.

23 Q Did you take some measurements at the scene?

1 A Yes, I did.

2 Q Would you tell us what measurements you
3 took?

4 A Just a moment. I took about 30 different
5 measurements of various roadway markings, as far as the
6 width of the roadways --

7 Q Before you go any further, how far is the
8 width of any of these lanes?

9 A The width of each lane is approximately
10 10 and a half feet.

11 I took measurements of the intersection,
12 measurements of the stop line to the crosswalks. I took
13 measurements of the first visible area where the skid
14 marks began. On Route 50 going eastbound, there was only
15 one mark, one tire impression on the roadway that
16 continued until the point of impact at that number "D"
17 here (indicating).

18 Q This mark starting here (indicating) -- you
19 have a mark from here to "B," is that a "B"?

20 A Yes, it is.

21 Q What do you call that; a skid mark, a yaw
22 mark, or what is the difference between the two?

23 A That is a scuff mark. A scuff mark is when

1 the tires are still rotating and either the vehicle is
2 going slower than the tires or faster than the tires.

3 From Point "B" to the point of impact is a
4 skid mark and a skid mark is when the tires have stopped
5 rotating and they are skidding on the pavement.

6 Q So, from this point here (indicating) to
7 Point "B," that mark was what?

8 A A scuff mark.

9 Q Not a brake mark?

10 A It could be.

11 Q You don't know?

12 A It just doesn't -- it means that the tires
13 were locked, that's what it means.

14 Q Then you have from "B", you stopped at "B"
15 and you go over here to "C"; is that right?

16 A That's correct.

17 Q And you had that as how many feet?

18 A From "B" to "C" is 126 feet.

19 Q What was that mark?

20 A That is a skid mark. The tires had stopped
21 rotating.

22 Q How many tire marks were on the road?

23 A There was one tire mark to the point of

1 impact and at that point of impact, then two -- two tire
2 marks. There were two tire marks over in the -- not the
3 turn lane, but the far-right lane were two tire marks from
4 the Datsun that ended at the stop line and then later on
5 after the intersection they began again and went to the
6 side of the road to where it rested.

7 Q How long were these (indicating) marks?

8 A The longer skid mark is on the left side and
9 is 80 feet and the shorter skid mark on the right -- the
10 right wheel is 57 feet.

11 Q And in addition to that the other skid
12 marks?

13 A On this side (indicating)?

14 Q How long were they? This (indicating) is
15 the Datsun we are talking about?

16 A Yes.

17 Q Mr. Clark's car?

18 A Yes. Approximately 101 feet.

19 THE COURT: Corporal, would you explain to
20 the jury why the left and right skid mark might be
21 different in length?

22 THE WITNESS: It would depend on -- as the
23 wheels are breaking whether both brakes are being put on

1 at the same time as they are trying to lock. It could be
2 that the vehicle was literally shifted as it is being
3 stopped, as you are trying to come to a stop, it may shift
4 to one side or the other depending on the roadway, so you
5 might have one wheel or one set of wheels locking
6 automatically and the other one taking just a few seconds
7 before they totally lock to put down a skid mark.

8 BY MR. HARRIGAN:

9 Q But this vehicle was just a single skid
10 mark, or at least that you observed?

11 A Yes.

12 Q That you measured; is that right?

13 A Yes.

14 Q You have it swinging from -- what tire is
15 this (indicating) or can you tell?

16 A It was the right tire.

17 Q That's the right tire?

18 A Yes.

19 Q So, from your opinion then, would that be
20 that the Wolfe car was in this lane (indicating) and
21 attempted to get to the center lane?

22 MR. ZIMMERMAN: Objection.

23 THE COURT: Sustained. She can analyze what

1 the mark means.

2 BY MR. HARRIGAN:

3 Q Tell me what the mark means, tell the jury.

4 A The mark began -- the mark began in the
5 center lane of -- in the center lane and as we continued
6 measuring it, it veered over into the left-hand lane and
7 then after the -- as they approached the intersection, it
8 veered back over into the center lane again.

9 Q Now tell the jury how much skid marks the
10 Baube vehicle left?

11 A We did not find any skid marks.

12 Q None at all.

13 A No, sir.

14 Q Did you examine the cars?

15 A Yes, I did.

16 Q The Pontiac and the van?

17 A Yes.

18 Q How would you characterize this -- what was
19 the relative position of the cars on impact, if you know?

20 A From the damage it appeared as if the two
21 vehicles as they were coming together were coming at a
22 head-on type of an angle, but literally veered at an angle
23 to one another.

1 So, in other words, as they came in, they
2 swerved to strike each other at an angle on the front
3 side.

4 Q Would that basically be a head-on collision?

5 MR. ZIMMERMAN: I object.

6 THE COURT: Sustained.

7 BY MR. HARRIGAN:

8 Q How would you characterize it, as what type
9 of collision?

10 A It was at an angle collision.

11 Q And when you say angle, tell the jury what
12 kind of an angle we are talking about.

13 A If I could have one of the photograph, it
14 would probably be easier.

15 Q Sure.

16 THE COURT: Let me ask you this, Corporal,
17 regarding the Pontiac, was the left-head light or the
18 right-head light forward at impact?

19 THE WITNESS: Your question again, sir.

20 THE COURT: Was the car at an angle at the
21 moment of impact?

22 THE WITNESS: Yes, both cars were at an
23 angle.

1 THE COURT: Was the left-front of the car or
2 the right front of the car the primary impact point?

3 THE WITNESS: The left front of the Pontiac
4 was the -- had the most damage on it.

5 THE COURT: Where on the Baube van did you
6 find evidence suggesting its initial point of impact?

7 THE WITNESS: On the right side of the van.

8 THE COURT: Over by the right headlight?

9 THE WITNESS: Yes, sir.

10 BY MR. HARRIGAN:

11 Q Where did the Pontiac hit the van, if you
12 can tell us that, first?

13 A As -- as we searched the vehicle, we found
14 that the right headlight of the van had contacted toward
15 the center of the Pontiac and it embedded an impression of
16 the headlight in the front of the Pontiac.

17 Q Is that what that (indicating) is?

18 A Yes, it is.

19 Q Show that to the jury.

20 THE COURT: Please identify the number of
21 the exhibit, Corporal.

22 THE WITNESS: It's No. 1.

23 THE COURT: Now you can go on over. Jurors

1 move around and make sure you can see what she is showing
2 you.

3 THE WITNESS: This (indicting) is the front
4 end of the Pontiac. This was taken the next day and where
5 the black circle is is where there is an impression from
6 the right-front headlight of the van, at that center area.

7 THE COURT: And your interpretation is that
8 the headlight made the impression at the moment of impact?

9 THE WITNESS: Yes.

10 THE COURT: Thank you.

11 BY MR. HARRIGAN:

12 Q Did you ever inspect the brakes on the
13 Pontiac or the van at any time?

14 A No, I did not.

15 Q Do you know what the speed of the van was at
16 the time of impact?

17 A No, I do not.

18 Q Do you know between the van and the Pontiac,
19 what their relative speed was at the time of impact, how
20 far apart it was?

21 A How far apart? I'm sorry, I don't
22 understand you.

23 THE COURT: What, if any, relative speed

1 judgment could you make as to the two vehicles relative
2 speeds?

3 THE WITNESS: At the point of impact, they
4 were in their -- the speed per hour was approximately the
5 same or very close to it.

6 BY MR. HARRIGAN:

7 Q But you cannot tell the jury what that speed
8 is?

9 A No, I cannot.

10 Q Now, there are other skid marks in some of
11 these photos, would you tell the jury from your
12 observations of the skid marks, after the collision, what
13 happened to the Pontiac?

14 A The Pontiac made the groove on the roadway
15 is what happened and then -- if you see in the photograph
16 where the Pontiac -- where the groove is from the Pontiac,
17 you see two skid marks veering off to the right and that's
18 how we determined that was point of impact, when the car
19 veered over.

20 You will see other skid marks coming in here
21 at this area (indicating) around where we determined was
22 past the point of impact. That's from where the car was
23 spinning, the Pontiac was spinning at that point.

1 Q When you say spinning, what do you mean?

2 A The vehicle actually made a turn and was
3 spinning.

4 Q Turning around?

5 A Yes, and I could determine that by what we
6 call spin-off which you can see faintly in the circle area
7 here (indicating).

8 Spin-off is when anytime there is an impact
9 with a radiator of a vehicle, the radiator will start
10 losing its fluid and as the vehicle is spinning, it will
11 leave an arch of some sort from where the water has come
12 out.

13 Q I show you Plaintiff's 2, would you explain
14 to the jury --

15 THE COURT: Please identify the number of
16 the exhibit.

17 MR. HARRIGAN: Plaintiff's 2, I believe I
18 did, Your Honor.

19 THE COURT: Thank you.

20 BY MR. HARRIGAN:

21 Q Explain to the jury what that purports to
22 show.

23 A This is a photograph of the van. The right

1 side of the van and right front area.

2 Q I want to show you Plaintiff's 24, and tell
3 the jury what that purports to show?

4 A The next day we took one of our police
5 vehicles which is a Malibu. It is just short of a
6 Pontiac. It is a little bit shorter and placed it where
7 the gouge marks would have come down on the relative area
8 on the bottom of the carriage of the Pontiac over top of
9 the gouge marks on the street.

10 We had placed the wheels in line with the
11 right skid mark to show the relative position of the
12 Pontiac at impact.

13 Q I show you Plaintiff's 6 which is the
14 Pontiac, damage front and back, would you tell us what
15 that is?

16 A Photograph No. 6, this is a photograph of
17 the Pontiac. The damage from the front and the damage
18 from the rear. The damage from the rear was sustained
19 from the Datsun as it came through the intersection and
20 also spun the vehicle around back the other way.

21 Q I show you Plaintiff's No. 4, explain what
22 that is.

23 A This is a clearer picture of the gouge marks

1 here in the roadway (indicating). It is in the center
2 lane and also where the tire marks veer off and it is also
3 clear from the spin-off how the vehicle was shifted back
4 and forth from the two -- from the second impact.

5 Q I show you Plaintiff's 12, please explain
6 what that is.

7 A This is another photograph of the van after
8 impact and we took it the next day. This shows a crunch
9 factor which is what happens when other parts of a vehicle
10 is being hit, other parts continued -- other parts of the
11 vehicle will still sustain some sort of crush.

12 The vehicle as we determined after we looked
13 over both vehicles the next day, it appeared that the
14 Pontiac, because of the braking factor, it went down
15 underneath the van and pushed the van up on top which
16 would cause this damage here (indicating).

17 We also found green paint from the van up on
18 -- just where the crinkle is here (indicating) on the hood
19 of the Pontiac.

20 Q Officer, when a car -- let's say a car is
21 going 20 miles an hour; how many feet per second is it
22 traveling?

23 A I don't know that off the top of my head.

1 We have it in the code book. I don't know.

2 THE COURT: Would 88 feet per second be the
3 range at 60 miles an hour?

4 MR. HARRIGAN: That's about right.

5 THE COURT: I'm not testifying. I'm just
6 asking.

7 MR. HARRIGAN: That's right.

8 THE COURT: Does that sound right, Corporal?

9 THE WITNESS: That's correct.

10 THE COURT: It would be one-third of that,
11 wouldn't it?

12 THE WITNESS: Yes, that's correct.

13 BY MR. HARRIGAN:

14 Q It's a little shy of one-half feet per mile;
15 is that right? If you are doing 30 --

16 A I think it is 1.3.

17 Q -- you are traveling 45, if you are going
18 50, you are traveling 75 feet or a little shy, if you are
19 going 60, you are shy of 90, that's 88; is that right?

20 A That's right.

21 Q And everything that goes that fast --

22 THE COURT: That's a math problem, that's
23 all that is.

1 MR. HARRIGAN: That's all it is.

2 THE COURT: While counsel consult, let me
3 ask you this, Corporal, before you pick up any mark,
4 brush, scuff, braking skid or anything else, is there in
5 the driver's pre-activity before he can get those marks,
6 what is known as reaction time?

7 THE WITNESS: Yes, there is.

8 THE COURT: What is the typical reaction
9 time?

10 THE WITNESS: Anywhere from, I believe, it
11 is 1.25 seconds to 2 seconds.

12 THE COURT: What is happening in what is
13 called reaction time?

14 THE WITNESS: That's the time when the brain
15 is actually determining whether or not they are seeing
16 whatever it is in front of them and takes that time for
17 them to realize what they are seeing and then to react and
18 to start either braking or accelerating or whatever they
19 need to do at that time.

20 THE COURT: Thank you. Go ahead,
21 Mr. Harrigan.

22 BY MR. HARRIGAN:

23 Q Following up on the judge's question, let's

1 take an easy number, a 40-mile speed, before you can even
2 get your foot on the brakes, about how far down the road
3 are you going to be?

4 A At 40 I'd say -- I have that written down.

5 THE COURT: It's two-thirds of 88.

6 MR. HARRIGAN: That's right.

7 THE COURT: 58 and two-thirds? Go ahead,
8 you testify. I'm not an expert, but I can do the math.

9 MR. ZIMMERMAN: 54.

10 THE WITNESS: 54.

11 BY MR. HARRIGAN:

12 Q You have some other numbers on here also and
13 we might as well -- let's talk about this.

14 What is that number (indicating) there?

15 A (No response.)

16 Q If you remember.

17 A This is the stop line (indicating). I
18 believe it is --

19 Q Let me shorten it up for you. See that
20 Number "H"?

21 A Yes. That's the length, 481 feet.

22 Q And "H" to "J" which is the point of impact?

23 A Is 577 feet 24.

1 Q That's what those number are?

2 A Yes.

3 Q When you look back up this road back up here
4 (indicating), what is the visibility as you go back up?

5 MR. ZIMMERMAN: When? Objection.

6 THE COURT: Sustained.

7 MR. HARRIGAN: Then.

8 THE COURT: Sustained.

9 BY MR. HARRIGAN:

10 Q How far can you see?

11 MR. ZIMMERMAN: Well, Your --

12 THE COURT: No, we can recreate the vision
13 opportunity at midnight on the night of the accident. We
14 can recreate the terrain.

15 MR. HARRIGAN: That's all I'm saying, the
16 terrain, not how far you can see, but --

17 BY MR. HARRIGAN:

18 Q Is the road flat up to a point and then
19 what?

20 A Yes, sir. It is -- it is flat -- it is
21 relatively flat from the pedestrian overpass all the way
22 to just beyond where we have it marked here (indicating),
23 then the road breaks down and then it comes back up

1 towards the east of Route 50.

2 MR. HARRIGAN: That's all.

3 CROSS-EXAMINATION

4 BY MR. ZIMMERMAN:

5 Q I ask you to refer to the diagram, Corporal
6 Hackney.

7 You arrived at approximately 12:55; am I
8 correct?

9 A That's correct.

10 Q And you took some photographs that night
11 or somebody from the Police Department took photographs?

12 A I took the nighttime photographs.

13 Q And then at some point in time some daytime
14 photographs were taken also?

15 A That's correct.

16 Q Let's start with this mark here
17 (indicating). This diagram is not clear, but I see a
18 little red mark here; which lane did this mark
19 (indicating) start in?

20 A It started in the center lane.

21 Q And that is from the right-front wheel of
22 the Pontiac?

23 A Yes, it is.

1 Q What did you call that mark?

2 A A scuff mark.

3 Q What is a scuff mark?

4 A A scuff mark is when the tires have not
5 completely stopped rotating and the different reasons for
6 it. The vehicle may be shifting which would put a mark
7 onto the roadway as it is slowing, because you are
8 shifting lanes your velocity is going to get slower.

9 Or there could have been a slight brake.

10 There are numerous reasons how a scuff mark can be put
11 down.

12 Q This line (indicating) went straight; did it
13 not?

14 A Yes, it did.

15 Q And at some point it led up directly to
16 Point "B"?

17 A Yes, it did.

18 Q And Point "B" from there on is a straight
19 skid mark?

20 A Yes, it is.

21 Q And skid mark is that the wheels have locked
22 up?

23 A That's correct.

1 Q You didn't have a set of left-tire skid
2 marks?

3 A No.

4 Q Just for the right tire was the only mark on
5 the road?

6 A Yes.

7 Q Now, I believe you indicated -- let me ask
8 you to come over here, please, and I am going to refer to
9 Plaintiff Exhibit No. 23.

10 Can you pick out in 23 where that skid mark
11 is, where the mark starts, if you can. I understand it is
12 very difficult. It's got fingerprints all over it too.

13 A And the glare -- they start approximately on
14 this right here (indicating) on the -- can everyone see
15 it, it is towards the left side.

16 Q Now, Corporal, from this point where this
17 mark begins (indicating) to the point of impact, how many
18 feet was that?

19 A That was 288 feet.

20 Q You indicated as far as the impact was
21 concerned you marked on Plaintiff's Exhibit No. 1, the
22 circle and that was for the right-front headlight of
23 Mr. Baube's van which came into contact with the Pontiac;

1 am I correct?

2 A That's correct.

3 Q And from that you indicated that the
4 vehicles were at an angle when they struck?

5 A Yes.

6 Q The right front of Mr. Baube's vehicle
7 with --

8 A The left front of the Pontiac.

9 Q Mr. Harrigan asked you the speed of the van
10 at the moment of impact and you indicated you did not
11 know?

12 A No, I don't.

13 Q Can you calculate the speed of the Pontiac
14 at the point of impact?

15 A Yes, I can.

16 MR. HARRIGAN: Could we approach the Bench?

17 THE COURT: Yes, sir.

18 BENCH CONFERENCE

19 MR. HARRIGAN: Your Honor, what she is going
20 into now is presumably reconstruction.

21 THE COURT: That's what you used her for.

22 MR. HARRIGAN: I didn't ask anything about
23 reconstruction. I asked her about what she measured,

1 facts.

2 THE COURT: You qualified her as a
3 reconstruction expert and then you asked her a lot of
4 opinions which normally are not admissible. There is
5 already more in here than I've ever seen from a police
6 officer by way of accident reconstruction.

7 MR. HARRIGAN: Well, there wasn't any
8 objection to it either.

9 THE COURT: I understand that, but the
10 cross-exam now is developing a subject now that you asked
11 about which was the speeds at impact. It is not only
12 admissible because under the way that you two have elected
13 to proceed and she was allowed to be an accident
14 reconstruction expert, regardless of whether I would have
15 allowed it on my own, but secondarily, it is a cross-exam
16 question of a direct exam question and is, therefore,
17 appropriate cross-exam merely linked to your direct exam.

18 MR. HARRIGAN: Let me say this, I asked her
19 -- I was quite careful what I asked, that you did not know
20 the speed at impact. She said no. I asked her, you did
21 not examine the brakes on either vehicle, right, and she
22 said no.

23 So, I never asked her how fast anybody was

1 going at any particular time. Now, her measurements and
2 that this is a yaw mark, I think that that is something,
3 that's factual that she can testify to.

4 THE COURT: Mr. Harrigan, every other case
5 I've ever seen I would sustain your objection. Because of
6 the way the Plaintiff elected to use this officer as an
7 accident reconstruction expert and because of the same
8 material being covered in direct exam, I overrule the
9 objection.

10 MR. ZIMMERMAN: Thank you.

11 MR. HARRIGAN: I would simply quote you the
12 recent opinion on that of Sweeney versus Overby which --

13 THE COURT: Those cases almost always deal
14 with somebody trying to initiate the use of the expert.
15 This is cross-examining the expert who has already had it
16 initiated by the one who now objects.

17 It's overruled.

18 OPEN COURT

19 BY MR. ZIMMERMAN:

20 Q I believe my next to the last question was,
21 you indicated you didn't know the speed of the van, but
22 you can calculate the speed of the Pontiac at impact?

23 A The minimum speed.

1 Q The minimum speed?

2 A Yes.

3 Q Can you calculate the maximum speed of the
4 Pontiac at impact?

5 A The very maximum no, but I can give it a
6 range between the minimum and the maximum of a range, yes.

7 Q Would you tell the ladies and gentlemen of
8 the jury how you do that?

9 A There is a formula that has been tested and
10 it is the formula that is used to determine speed in an
11 accident or any speed without an accident, speed on a
12 roadway.

13 The formula is that speed equals the square
14 root of 30 which is a given number times the number of
15 feet of skid mark times the coefficient of friction plus
16 or minus the grade of the road.

17 Q Let's take one at a time. The first figure,
18 the 30 is a given?

19 A Yes, it is.

20 Q And what feet of skid mark did you use?

21 A Because there are two sets and when I say
22 two sets, one is a scuff mark, one is a skid mark, so you
23 add the two of them together after you have done the

1 separate formulas for each.

2 You combine them. You do a combining speed
3 which gives you the minimum of the miles per hour.

4 Q You said something about a coefficient of
5 friction?

6 A Yes.

7 Q That sounds good. What is a coefficient of
8 friction?

9 A The coefficient of friction is a measure of
10 the resistance a weight or an object has on the surface as
11 it is trying to be dragged or go along that surface and
12 how much of a force is needed to pull that object along
13 the surface, any kind of a given surface.

14 Q What ranges of coefficient of friction do
15 you use?

16 A I used from the standard chart that we use
17 is .55 to .70. That is for a dry surface more than 30
18 miles per hour on asphalt that has been traveled on.

19 Q And this is a level surface, asphalt, and
20 goodness knows Arlington Boulevard has been traveled on?

21 A That is correct.

22 Q The coefficient, with a .55 gives you the
23 lower speed or the minimum speed or the higher speed?

1 A It is going to give you the lower speed.

2 Q Using the .55, did you arrive at the
3 calculation of what the minimum speed that the Pontiac was
4 going at the moment of impact?

5 A Yes, I did.

6 Q What was that speed?

7 A That is 53.67 miles per hour.

8 Q And just to make clear, that is at the
9 moment of the impact between the van and the Pontiac?

10 A That is correct.

11 Q It is going 53.67 miles an hour?

12 A That is correct.

13 Q Speed limit on that road?

14 A Is 45 miles an hour.

15 Q And that's after how many feet of skid
16 marks?

17 A After 162 scuff marks and 126 skid mark.

18 Q And if you use the, I believe, you said .70
19 was the high coefficient, what would be the maximum speed
20 in your calculations that the Pontiac was going?

21 MR. HARRIGAN: Your Honor, I still have an
22 ongoing objection because all of this is predicated on an
23 assumed brake condition.

1 THE COURT: Mr. Harrigan, usually officers,
2 investigators and experts are not allowed in Virginia to
3 interpret because it often invades the province that the
4 jury has to do and that is interpret things, but in light
5 of the use in direct, this officer is a reconstruction
6 expert and they questioned her about the speed of the van
7 at the moment of impact; that's why I am allowing this.

8 It's appropriate cross-exam on the same kind
9 of use and each side is going to pick and choose what they
10 want from this officer's conclusions and interpretations,
11 but in the long run, the jury has to make these decisions.

12 Objection is overruled.

13 BY MR. ZIMMERMAN:

14 Q The maximum speed using your calculations,
15 using the .70 coefficient?

16 A I need to clarify something just so the jury
17 understands. When I made these -- did the calculations on
18 this, also when we say the drag factor, it is also
19 contingent upon how many tires are actually putting down a
20 skid mark.

21 When there is only one which is what we had
22 to do in the fact -- in this scenario, you take the weight
23 of the vehicle and we determined that it was about 30

1 percent on the front, 20 percent on the back, so this is
2 going very low.

3 Most vehicles are about 60-40 or 50-50, but
4 we did the very lowest speed which would be 30-20, so that
5 had to be factored in there also just to clarify that.

6 With using that as the one, using that --
7 the 30 percent for the front-right tire which was what was
8 putting down the skid marks, the lowest was 53.67 and the
9 highest was 60.55.

10 MR. ZIMMERMAN: Those are all the questions
11 I have, Your Honor.

12 THE COURT: Redirect.

13 REDIRECT EXAMINATION

14 BY MR. HARRIGAN:

15 Q Just to be sure I understand you, Officer,
16 was that -- you have testified that the van and the
17 Pontiac were proceeding at approximately the same speed at
18 impact; is that right?

19 A At impact they were going approximately the
20 same speed; that is correct.

21 Q Did you just say that that was 50 miles an
22 hour?

23 A Minimum speed 53.67, yes, sir.

1 Q That would be the van going 53 too?

2 A Relatively, yes.

3 Q So one thing is for sure, if this van is
4 going along at 53 miles an hour there, he isn't making any
5 left turn?

6 MR. ZIMMERMAN: I object, Your Honor.

7 THE COURT: It is both leading and an
8 argument. Sustained on both grounds.

9 MR. HARRIGAN: That's all.

10 THE COURT: Anything else?

11 MR. ZIMMERMAN: No, sir.

12 THE COURT: Thank you, Corporal, you are
13 free to go.

14 ~~(The Witness was excused.)~~

15 ~~THE COURT: Who is your next witness,~~
16 ~~Mr. Harrigan.~~

17 ~~MR. HARRIGAN: Carelyn Buchanan.~~

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1 THE COURT: They have the right once they
2 have deposed somebody in advance of trial to use the
3 transcript of that deposition, even though he is sitting
4 here, he has the right separately from whatever they read
5 out of his deposition to also elect if he wants to to
6 testify.

7 The Plaintiff elects now to read some or all
8 of a deposition taken on the date Mr. Harrigan just told
9 you. The witness was sworn and was represented by
10 counsel, and then was questioned by various lawyers and
11 that is what is now going to be read to you.

12 Go ahead.

13 MR. HARRIGAN: There was a question, among
14 other questions, Mr. Baube was asked:

15 Question: "Do you remember the accident?"

16 Answer: "No, I don't."

17 Question: "Do you remember anything about
18 the accident?"

19 Answer: "No, I don't."

20 Question: "When I say the accident, I mean
21 the collision."

22 Answer: "No, I don't."

23 "And the thirty seconds preceding it?"

1 "No."

2 "Do you remember anything at all about the
3 immediate aftermath of the accident, from that I mean,
4 from the scene of the accident until you were at the
5 hospital, until you personally were at the hospital?"

6 "No, I don't. I have absolutely no
7 recollection."

8 Then he was asked about the car; the
9 question:

10 "And had you any mechanical problems with
11 that van during the time you owned it?"

12 "No. I'm assuming you mean something
13 significant?"

14 Question: "Did you have any problems
15 regarding the time that you owned the van with respect to
16 steering?"

17 Answer: "No."

18 "Did you have any problems during the time
19 that you owned the van with respect to braking?"

20 Answer: "No."

21 MR. HARRIGAN: That's it.

22 THE COURT: Plaintiff's rests?

23 MR. HARRIGAN: Plaintiff rests.

TRIAL TRANSCRIPT
May 3, 1990

PROCEEDINGS

(The Court Reporter was sworn.)

(The following was had outside the presence of
the Jury.)

THE COURT: Do you have motions?

MR. ZIMMERMAN: Yes, I do, Your Honor.

I have a couple of them. The first motion I
would like to move is to have you to make a ruling as a
matter of law that the decedent Plaintiff in this case was
negligent.

I think the evidence is clear on the evidence
that he was doing a speed -- by the Plaintiff's own
testimony -- a speed in excess of 80 miles a hour, 80 to
85 miles a hour.

THE COURT: Let me hear from the adversary on
that.

MR. WALL: Your Honor, I'm sure you aware
that the Plaintiff in this case is not -- You know, she is
not the person driving the car. She has not testified.
So she is not bound by anything that the witnesses' say.

She is entitled under the law to ask the jury
to adopt the most favorable version of the testimony and
that includes -- you know, they're interrupting the skid

1 marks, the testimony of the officer or anyone else in the
2 case.

3 THE COURT: Why is this Plaintiff --

4 MR. WALL: Pardon?

5 THE COURT: Why is this personal
6 representative not bound by the acts of the deceased
7 Plaintiff?

8 MR. WALL: By the acts? By the testimony
9 or -- We're talking about --

10 THE COURT: Well, the only way we know the
11 acts are through the testimony. We're playing a word
12 game when we start saying acts versus testimony.

13 MR. WALL: No, we're not, Your Honor.

14 What --

15 THE COURT: Why is it that the personal
16 representative can rise higher or preside -- or sit in a
17 courtroom separately from the deceased's acts?

18 What law in Virginia says that?

19 MR. WALL: Your Honor, are we talking about
20 just the question of negligence now or --

21 THE COURT: The only thing that has been
22 raised is the negligence of the young man.

23 MR. WALL: Okay. We're not talking

1 proximate cause yet.

2 Is that correct?

3 THE COURT: Let me say that again. The only
4 thing we're talking about is negligence. Got it?

5 MR. WALL: All right.

6 THE COURT: Go ahead.

7 MR. WALL: Because, you know, the law is
8 clear on that the only --

9 THE COURT: But you're not telling me that
10 the personal representative of the deceased has a
11 different standard for measuring negligence than the
12 deceased's acts which might amount to negligence?

13 MR. WALL: Not a different standard; no,
14 Your Honor.

15 THE COURT: Not a different measure on the
16 motion to strike either?

17 MR. WALL: But as far as interpreting the
18 evidence that has been heard in the case the Plaintiff is
19 entitled -- as it says in Water v. Water, the Plaintiff
20 has the right to ask the jury to accept as true the
21 statements most favorable to her and were made --

22 THE COURT: That's boiler plate. The
23 Plaintiff always at this posture in the motion to strike

1 has the evidence interpreted in the light most favorable
2 to the Plaintiff.

3 Let me come back to the core question. How
4 can any jury find that this young man was not negligent?

5 MR. WALL: I think that's a question that
6 they're entitled to consider, Your Honor.

7 THE COURT: What facts would establish a jury
8 issue for them to decide that he was not negligent?

9 MR. HARRIGAN: May I say something, Your
10 Honor?

11 THE COURT: Yes.

12 MR. HARRIGAN: As I understand what you're
13 saying is what their position is in this is they're taking
14 the position that the evidence is that the Plaintiff
15 decedent was exceeding the speed limit. And as I
16 understand what they're saying that exceeding the speed
17 limit constitutes negligence period.

18 Is that what they're --

19 THE COURT: I think it's more than that. I
20 think it's exceeding the speed limit by the degree to
21 which it was exceeded coupled with 288 feet of skid
22 marks --

23 MR. HARRIGAN: Well, --

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THE COURT: -- coupled with even though the van was dark and not lighted apparently seeing it.

He had to have seen it -- a reaction time before the scuff marks or brush marks, whatever you want to call it -- started. So he saw that van more than 300 feet away.

The Officer talks about a half second to a second of reaction time at 85 miles per hour you were dealing with the feet per second.

There is a feet per second of half a second to a second of 80 to 85 miles per hour which puts the child way outside of 300 feet. When he saw that object, it caused him to go to the brakes. He saw this man.

MR. HARRIGAN: Well, --

THE COURT: If he had gone straight on in to this darkened object traveling the wrong way head up with no lights, that's a different case.

But this young man saw the thing that he was going to hit and he tried to stop.

MR. HARRIGAN: Or tried to avoid it.

THE COURT: And he tried -- And the skidding suggests and the Plaintiff would be entitled to an inference that the young man actually tried to go right.

1 MR. HARRIGAN: What the evidence shows.

2 THE COURT: I mean, it could be that the
3 vehicle did that. That's a million -- There is a million
4 possibilities in that; but, the Plaintiff is entitled to
5 the inference that the young man saw it and tried to break
6 and tried to go right. He was trying all the way up to
7 impact to miss this thing.

8 And they question about that? That's the
9 light most favorable to the Plaintiff.

10 But take it backwards. He is going more than
11 300 feet away from impact at 80 to 85 miles a hour in the
12 evidence. There is no other evidence. There is no
13 evidence saying --

14 MR. HARRIGAN: -- well, not at impact,
15 Your Honor.

16 THE COURT: More than 300 feet from impact.
17 He's going 80 to 85 miles a hour.

18 MR. HARRIGAN: But, Your Honor, --

19 THE COURT: He does everything he can
20 apparently and he can't get this vehicle down. He can't
21 react to that object, whatever it is. But he has seen
22 it. Whatever is going on in that car, however fast it's
23 going. He's sees it and he locks on. He does what he

1 can to stop.

2 MR. HARRIGAN: Well, what I'm really --

3 THE COURT: He is clearly negligent.

4 MR. HARRIGAN: Okay. Let's assume that is
5 negligence. The real issue is proximate cause.

6 THE COURT: I haven't even gotten to it.

7 MR. HARRIGAN: All right.

8 THE COURT: Haven't even touched it.

9 MR. HARRIGAN: If you're saying if you
10 believe as a matter of law speeding is negligence is what
11 you're saying.

12 THE COURT: No, it's speeding as it applied
13 to that roadway.

14 There is -- The testimony is -- There is no
15 outbound traffic in its correct lanes. The three
16 westbound lanes are all pertinent times. Nobody has
17 placed another vehicle to his left.

18 MR. HARRIGAN: That's correct.

19 THE COURT: And if this child had had the
20 chance to go back and do it again, he probably was afraid
21 to go over in that wrong side. And we all grieve for the
22 fact that maybe that left -- Those three left lanes were
23 open. That's too bad because sudden emergencies restrict

1 your time and your opportunity and your chances and
2 everybody is a lot smarter after an event and we didn't
3 have to make that decision.

4 But in terms of the negligence on that roadway
5 it is not just speed alone. It's what the speed did to
6 his chance to save himself. So it's the speed in the
7 context -- There are three vehicles on that highway.

8 MR. HARRIGAN: That's correct.

9 THE COURT: There's Baube, there's Clark and
10 there is this young man. Not a crowded highway. Six
11 lanes wide. Wide shoulders. All kinds of opportunities
12 for things and if God had given him the chance or if the
13 speed and all these other things were different -- So it's
14 not merely the speed. It's the speed and the physical
15 surroundings and the opportunities that speed helped deny
16 him while he was trying so hard to stop.

17 MR. HARRIGAN: Of course, he could have
18 realized at the last second that the van was going the
19 same direction he was too --

20 THE COURT: Why is he laying down 288 feet of
21 skid if he thinks that van is going away from him?

22 MR. HARRIGAN: Well, Your Honor, he's
23 approaching that fast -- the same way that Clark was

1 laying down skids.

2 THE COURT: He knew that he was heading into
3 real danger.

4 MR. HARRIGAN: I think --

5 THE COURT: He was trying desperately to stop
6 that car.

7 MR. WALL: -- we don't have to -- I don't
8 know that we know that 162 scuff marks went that long or
9 whether he was just returning -- It looks like he is
10 returning to his side of the lane. Maybe he thought --
11 and what kind of -- Well, I'm suppose to be on the left
12 lane --

13 Then he sees the van at the head of the road
14 coming around the front of him. Then he makes his
15 reaction.

16 I think the jury can reasonably infer only
17 from point B. They certainly can infer that he was
18 changing lanes because it's just a slight scuff mark. In
19 the photographs you can't even see them they're so slight.
20 The Officer had to look at them with the light.

21 THE COURT: There is no question that he was
22 negligent. No reasonable jury could find that he was not
23 negligent.

1 MR. HARRIGAN: But that doesn't mean --

2 THE COURT: Haven't even gotten there yet.

3 Let me hear the rest of your argument.

4 MR. ZIMMERMAN: The second argument, Judge, I
5 do give proximate cause.

6 I understand the Supreme Court sent this back;
7 but, you've got to remember --

8 THE COURT: The Supreme Court didn't hear the
9 facts that I heard nor has the Supreme Court told me how
10 to rule in this case.

11 MR. ZIMMERMAN: You took the words right out
12 my mouth, Judge.

13 In this particular case I would ask you to
14 move to strike the Plaintiff's evidence on the grounds
15 that Plaintiff's conduct amounts to willful, wanton
16 negligence as a matter of law and it is clear from the
17 evidence as presented yesterday by the Plaintiff's
18 testimony that the proximate cause, a proximate cause, of
19 this accident was the willful and wanton negligence of the
20 decedent driver in this case.

21 I won't repeat the evidence; but, it's clear
22 as you indicate, he's going 80 to 85 miles a hour with no
23 witness. After laying 288 feet of skid marks he's still

1 going eight miles in excess of the speed limit at the time
2 of the impact.

3 There is no testimony to indicate that he's
4 trying to avoid anything. He is in -- When he starts
5 out, he's in the center lane and then moves -- His right
6 tire is in the center and then moves over to the right
7 lane and then there is an impact at the intersection from
8 the center lane.

9 I don't think there is any facts that the jury
10 can disagree on at this point in time that his actions at
11 80 to 85 miles a hour in a well lit, according to their
12 testimony, an area that you could see, testimony by
13 Mr. Clark that you can see -- That's the overpass.
14 That's where he first saw this vehicle on the road.

15 There is no issue to go to the jury on
16 proximate cause and it's willful and wanton negligence as
17 a matter of law on behalf of the Plaintiff decedent.

18 I ask you to strike the Plaintiff's evidence.

19 THE COURT: What's the proximate cause
20 argument for the Plaintiff?

21 MR. HARRIGAN: It's proximate cause --

22 THE COURT: Stop. Because there is a juror
23 walking across.

1 (Pause.)

2 MR. HARRIGAN: The Supreme Court sets up the
3 80 to 85 miles per hour and it says on the Court erred
4 for striking the Plaintiff's evidence -- the grounds of
5 contributory negligence --

6 Let me say secondly even with regard to the
7 questions of the Defendant's willful and wanton negligence
8 it is plain from the record that the question of proximate
9 cause is one for the jury.

10 Willful though speeding at 85 miles per
11 hour, hit his brakes, slowed down -- testimony shows --
12 changed lanes moving out of Baube's path which the
13 testimony is that he was coming -- in the coming lane --

14 Baube, however, instead of veering to the
15 right which he had a duty to do to get over in his own
16 lane to return to the westbound lanes or instead of
17 continuing in a straight line moved into the center
18 eastbound lane which is what the testimony is directly
19 into Wolfe's new path.

20 On these facts the jury could conclude that it
21 was not Wolfe speeding that caused the collision; but, the
22 fact that once Wolfe moved out of danger and Baube moved
23 back into his path.

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THE COURT: That's not the evidence that I heard.

MR. HARRIGAN: Well, when he came over, he attempted to -- The evidence is that Wolfe was in the left lane, the left oncoming lane, that the collision occurred and he attempted to move to the center lane.

I think the jury could conclude that he saw him in that lane. That's when Clark saw him. He saw him about the same time Clark did apparently.

THE COURT: Mr. Harrigan, let me save the argument.

MR. HARRIGAN: All right.

THE COURT: I'm going to send proximate cause to the jury. I think proximate cause in this case -- I think it's a matter of law. But I think also that these people are entitled to a jury verdict and they're also entitled to not have to try this case again.

For right or for wrong rulings we're going to get a ruling from the jury as well as a ruling from this judge; and we'll let the Supreme Court do what they want with all the different choices.

But to me on the evidence that I've heard the closing speed of the Pontiac and the van in terms of the

1 lighting, the weather, the roadway, the opportunities each
2 driver had, I don't believe that the young man had a right
3 once he's on notice that there are no lights on a vehicle
4 moving at him on the wrong side of the road, he no longer
5 had a right to rely on that driver obeying the law or
6 acting reasonably.

7 This old business that you can assume that
8 other drivers going to obey the law -- The reason he goes
9 to his brakes is he knows somebody is not doing something
10 right.

11 Now what it is that he saw -- It may have been
12 just something vague. He just sensed trouble in the road
13 ahead.

14 MR. HARRIGAN: That is correct.

15 THE COURT: He may not have been able to know
16 it was even moving.

17 MR. HARRIGAN: Or may not been able --

18 THE COURT: I understand all that and I'm
19 giving that the inference in favor of the Plaintiff that
20 we're suppose to legally, that the child may have thought
21 that's a stopped something.

22 "I can't tell what it is. There is something
23 stopped in this road and I've got to get this thing

1 stopped myself."

2 I'm going to send that to the jury.

3 Let me hear the rest of your argument.

4 MR. ZIMMERMAN: Well, if I understand you'll
5 send it to the jury on proximate cause?

6 THE COURT: I'm going to send to negligence
7 to the jury too. I'm ruling as a matter of law right now
8 that that young man was negligent, there is no reasonable
9 jury could find that he was not.

10 I'm also ruling -- I should technically say
11 I'm taking under advisement the proximate cause argument.

12 MR. ZIMMERMAN: And the willful and wanton
13 argument?

14 THE COURT: What does willful and wanton do to
15 the two drivers?

16 On the evidence most favorable to the
17 Plaintiff at this point the evidence would have Baube
18 driving in the center lane or maybe even in the left
19 eastbound lane westbound at midnight with no lights on at
20 a speed where he couldn't have possibly been turning left
21 into North Irving Street.

22 He's going straight ahead on Route 50. He's
23 not turning left.

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MR. ZIMMERMAN: I have no disagreement with that.

THE COURT: Coupled with a .18 blood alcohol. The jury is entitled to find that that is willful wanton and total disregard, a callous disregard for the safety of others.

MR. ZIMMERMAN: I agree to that. I agree with --

THE COURT: Now flip that coin. Let's talk about what we have in willful and wanton in regard to the young man driving the Pontiac and what that means lately.

There is no contributory negligence defense to willful and wanton. But is there a willful and wanton defense to willful and wanton?

MR. ZIMMERMAN: There is.

THE COURT: Tell me why.

MR. ZIMMERMAN: Griffin versus Shively at 227 Virginia 317.

THE COURT: Let me see it.

(The aforementioned case was tendered to the Court.)

MR. HARRIGAN: We agree with that, Your Honor, that if both parties are willful and wanton.

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THE COURT: Well, I think it's a jury issue.

MR. HARRIGAN: Well, let me say this. Here is a case that isn't that far off from ours, Your Honor. This is Crawford versus Perdue --

THE COURT: Well, just a second. I'll take that on up in a second, Mr. Harrigan.

(Pause.)

THE COURT: The wording of Griffin v. Shively says -- this is on page 322 -- when the Plaintiff's contributory negligence itself amounts to willful and wanton conduct recovery is barred.

So the wording in this opinion in this case sending it back to this court for trial, the contributory negligence is not a bar to willful and wanton conduct?

MR. HARRIGAN: Exactly.

THE COURT: Is incorrect.

The Supreme Court's choice of words should have been "mere contributory negligence -- is the contributory negligence is just the want of ordinary care does not bar" --

MR. HARRIGAN: Or even address.

THE COURT: Does not bar.

MR. WALL: Well, at that time, Your Honor,

1 that wasn't --

2 THE COURT: Well, I understand what the
3 Supreme Court is saying. They didn't get to an issue,
4 they didn't have to rule on it.

5 But now that we're relooking at it in this
6 context the wording would be that if the contributory
7 negligence rises above a mere want of ordinary care and
8 rises itself to willful and wanton conduct that does bar
9 recovery even if the Defendant was guilty of willful and
10 wanton conduct and we're going to have to frame
11 instructions on that.

12 MR. HARRIGAN: Let me show you this piece.

13 You see, I agree with that, Your Honor, --

14 THE COURT: What case you got there?

15 Let me see it, please.

16 MR. HARRIGAN: And basically this is the case
17 where a guy going 80-85 miles a hour approaching a car,
18 trying to pass it and the Court says as a matter of law
19 that's not even gross negligence.

20 (The aforementioned case was tendered to the
21 Court.)

22 THE COURT: Thank you.

23 MR. HARRIGAN: Speed alone is not willful and

1 wanton.

2 You have to engage in a course of conduct that
3 you consciously know is likely to do harm and being aware
4 of that you can opinion in that. That's the difference
5 between gross and willful and wanton. But that didn't
6 even rise to gross.

7 All you have here is speed, hit the brakes and
8 slow down.

9 THE COURT: That's a jury issue.

10 On the Plaintiff's testimony I find he is
11 negligence as a matter of law and I find as a jury issue
12 as to whether he is guilty of willful and wanton
13 negligence.

14 MR. HARRIGAN: -- on speed --

15 THE COURT: On the total circumstances.

16 Thank you.

17 Crawford and Perdue is 210 Virginia 598.

18 Griffin and Shively, 227 Virginia 317.

19 I thank Counsel for helping me with cases.

20 The motion to strike in essence is in part
21 granted; but, as a practical matter is denied because I'm
22 sending all these issues to the jury which may get us in
23 the area of special finding.

1 I may not do a general verdict. I may do
2 special finding to preserve all our appellate positions.

3 If you're taking the position that gross
4 differing from willful and wanton as a contributory
5 negligence factor is a legally significant matter here, I
6 want you to have that preserved for appellate purposes.

7 MR. HARRIGAN: Well, our position is and I
8 think the cases are clear --

9 (Co-counsel confer.)

10 Ordinary negligence as contributory negligence
11 is not a bar. Gross negligence and contributory
12 negligence is not a bar to willful and wanton.

13 You have to have willful and conscious
14 disregard of the rights of others.

15 THE COURT: Well, I'm come back to that on the
16 instruction.

17 MR. HARRIGAN: And the only thing that's a bar
18 would be on a willful and wanton if the Plaintiff is
19 guilty of willful and wanton, the Defendant has to be
20 guilty of willful and wanton too of conduct that was so
21 gross --

22 THE COURT: We'll take the wording in that in
23 the instructions.

1 In essence I'm sending this case past the
2 motion to strike to a jury.

3 Is the Defendant ready to proceed?

4 MR. ZIMMERMAN: Yes, Your Honor.

5 THE COURT: Let's bring in the jury.

6 (The jury entered the courtroom and took their
7 places in the jury box.)

8 THE COURT: Good morning.

9 The Defendant is going to have an opportunity
10 to put on evidence.

11 The Plaintiff has rested their case.

12 Whom do you wish to call?

13 MR. ZIMMERMAN: I would like first to read
14 parts of the deposition of Michael Anderson.

15 THE COURT: Taken when?

16 MR. ZIMMERMAN: Taken June 9, 1987.

17 THE COURT: The parties were presented and
18 represented -- the parties were represented at the
19 deposition?

20 MR. ZIMMERMAN: Yes, sir.

21 THE COURT: You're going to read all of it or
22 parts of it?

23 MR. ZIMMERMAN: Parts of it.

1 THE COURT: Counsel for the Plaintiff, when
2 he's read his parts, you can have the opportunity, if you
3 wish, to read related parts.

4 MR. ZIMMERMAN: I'm going to start on page
5 four.

6 Mr. Anderson was duly sworn.

7 "Question: State your full name and current
8 address, please?

9 Answer: Michael George Anderson. 7306
10 Mendoda Avenue, Falls Church, Virginia.

11 Question: What is your date of birth?

12 Answer: October 8, 1968."

13 Going to page eight.

14 "Question: Going back to November 13, 1986,
15 do you remember anything about the accident?

16 Answer: There's one thing I always remember
17 is remember is when Shawn was screaming the S-word as loud
18 as he can and holding on to my left shoulder.

19 Question: I'm sorry. I didn't understand
20 you.

21 Answer: Shawn was screaming the S-word as
22 loud as he can and holding on to my left shoulder.

23 Question: Well, we're all big boys and girls

1 here.

2 Shit; is that what he was saying?

3 Answer: Yes, shit.

4 Question: And that's all you remember about
5 the accident?

6 Answer: Yeah, and the headlights right in
7 our face."

8 I'm going to page 20.

9 "Question: Do you remember Shawn driving
10 down the road?

11 Answer: No.

12 Question: You don't remember anything about
13 that at all?

14 Answer: No.

15 Question: You don't recall anything about
16 his driving?

17 Answer: No.

18 Question: All you recall is Shawn screaming,
19 shit, and you saw headlights?

20 Answer: And he was on my left shoulder with
21 his right arm.

22 Question: He was on your left shoulder with
23 his right arm, holding on?

1 Answer: Holding on."

2 That's all I'm going to read of the
3 deposition.

4 THE COURT: Is there anything in that
5 deposition that tells the jury where he was and --

6 MR. ZIMMERMAN: Judge, that unfortunately is
7 not -- since he has no memory. But through the testimony
8 of the police officer I believe it was clear where he was.

9 THE COURT: All right.

10 MR. HARRIGAN: I don't know how you can say
11 through the testimony of the police officer it's clear --

12 THE COURT: I'm going to leave that to the
13 jury as to what it means to them.

14 MR. HARRIGAN: I believe there were a couple
15 of more phrases that we left out.

16 THE COURT: You want to read parts; go ahead.

17 MR. WALL: The same deposition, page 21.

18 "Question: You don't remember anything at
19 the scene of the accident after that?

20 Answer: No.

21 Question: When did you wake up at the
22 hospital?

23 Answer: A week and two days.

1 Question: Have you ever talked to anyone
2 about the accident, how it occurred?

3 Answer: No.

4 I tried to talk to Thomas -- the psychiatrist
5 about it. I couldn't remember anything about it."

6 Page 23.

7 "Question: How long were you in Fairfax
8 Hospital?"

9 MR. ZIMMERMAN: Your Honor, I'm going to
10 object. I don't understand what the relevance of that
11 is. We're not trying his injury case.

12 THE COURT: It goes to his capacity to recall
13 and testify.

14 Go ahead.

15 Overruled.

16 MR. WALL: "Answer: About four months. I
17 believe four months.

18 Question: Four months?

19 Answer: Yeah."

20 Page 24.

21 "Question: Where did you go after you got
22 out of Fairfax Hospital?

23 Answer: I went to Cumberland with that body

1 cast on.

2 Question: Cumberland?

3 Answer: Cumberland Hospital.

4 Question: Why were you taken to Cumberland
5 Hospital?

6 Answer: Depression.

7 Question: How long were you at Cumberland
8 Hospital?

9 Answer: A month.

10 Question: So you were treated at Cumberland
11 for depression?

12 Answer: Yes.

13 Question: When you were released at
14 Cumberland, were you able to walk?

15 Answer: No."

16 I believe that's it, Your Honor.

17 THE COURT: Anything else from that
18 deposition?

19 MR. ZIMMERMAN: No, Your Honor.

20 THE COURT: The deposition, as you know, is
21 sworn testimony taken at another time and place with the
22 lawyers present to ask various questions.

23 The weight you give to that is the same as you

1 give the sworn testimony here; and you apply that as you
2 think it helps you decide this case.

3 Who is your next witness?

4 MR. ZIMMERMAN: Mr. Baube.

5 THE COURT: Mr. Baube, come on over here on
6 this side, sit down and make yourself comfortable.

7 Whereupon,

8 FREDERICK L. BAUBE

9 the Defendant, was called for examination by counsel in
10 his own behalf, and, after having been duly sworn by the
11 Clerk of the Court, was examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. ZIMMERMAN:

14 Q Speak up so the ladies and gentlemen of the
15 jury can hear you.

16 State your name, please?

17 A Frederick Lewis Baube, III.

18 Q And how old are you, Mr. Baube?

19 A Thirty-three.

20 Q Are you presently employed, sir?

21 A Yes, I am.

22 Q Whom are you employed by?

23 A I'm a contract programmer to Arthur B. Little.

1 Q What is the extent of your education?

2 A I have two Bachelor's Degrees in mathematics
3 and logical engineering and a Master's Degree in foreign
4 service.

5 Q Going back to November of 1986, where were you
6 employed at that time?

7 A I was a student at Georgetown University and I
8 was employed as a teaching assistant.

9 Q Where did you live at that time?

10 A At 3511 South Eighth Street in Arlington.

11 Q Where is that in reference to the intersection
12 of Arlington Boulevard and South Irving Street?

13 A It is quite close to that. In reference to
14 that diagram it's above and to the right a few blocks.

15 Q Had you traveled Arlington Boulevard near
16 Irving Street on previous occasions to November 13, 1986?

17 A Yes, I had.

18 MR. HARRIGAN: Your Honor, I don't think
19 that's relevant.

20 THE COURT: Overruled.

21 MR. HARRIGAN: It's sometime before.

22 THE COURT: Overruled.

23 THE WITNESS: Yes, I had.

1 That was route between home and school and I
2 took that route in excess of 300 times.

3 THE COURT: What route?

4 THE WITNESS: Along Arlington Boulevard to --

5 THE COURT: To where?

6 THE WITNESS: To D.C. to my home.

7 THE COURT: Where did you leave Arlington
8 Boulevard in your usual route?

9 THE WITNESS: Generally I turned to either
10 Irving Street or at Highland Street.

11 BY MR. ZIMMERMAN:

12 Q Why was there a difference between Highland
13 Street or Irving Street that you would turn at?

14 A One light. One intersection had a light and
15 one did not and if there was a red light at Irving, I
16 would stop there and turn.

17 Q Would you ever go down to Glebe Road and turn?

18 A Only occasionally.

19 MR. HARRIGAN: Your Honor, what he did
20 usually doesn't add anything.

21 THE COURT: He can give the context for this
22 event through his pattern and practice. The pattern and
23 practice itself sometimes can be persuasive as to what was

1 going on. We haven't reached the level yet where I'm
2 going to rule that he can't describe these things.

3 BY MR. ZIMMERMAN:

4 Q Let's go to the early morning hours of
5 November 13, 1986. Do you recall anything of being in
6 an accident on that day?

7 A No, I do not.

8 Q Were you injured in the accident of
9 November 13, 1986?

10 A Yes, I was. Some incidental abrasions and
11 bruises. The main injury I suffered was a fractured
12 neck.

13 The neurosurgeon placed me in an appliance day
14 and night for four months and I wore a device that kept my
15 neck stable. It was a combination of a plastic vest and
16 a metal framework close to my neck to keep my head and
17 neck absolutely rigid.

18 Q What is the last thing you remember before the
19 accident of November 30, 1986?

20 A I have a very brief recollection of being in
21 an establishment in Georgetown with my friend,
22 Mr. Cleveland.

23 Q And what is your next recollection after that?

1 A The next recollection is when my -- is when I
2 woke up in the morning and my mother had flown down to see
3 me in the hospital.

4 Q Since the accident of November 13, 1986, have
5 you driven an automobile?

6 A Only on one occasion.

7 Q What one occasion have you driven an
8 automobile?

9 A To get a friend of mine who was struck in a
10 snow bank.

11 Q Other than that you haven't driven at all
12 since the accident of November 13, 1986?

13 A No, I have not.

14 Q Mr. Baube, you did plead guilty to driving
15 under the influence on the night of November 13, 1986; did
16 you not?

17 A Yes, I did.

18 MR. ZIMMERMAN: No further questions.

19 THE COURT: Cross-examine?

20 CROSS-EXAMINATION

21 BY MR. HARRIGAN:

22 Q Mr. Baube, you cannot tell us or tell this
23 jury how you got on Route 50 on that night, November 13th?

1 A I can -- I assume --

2 Q No, I want you to tell us, not supposition;
3 but, that you know.

4 A No, I cannot say that I know.

5 Q As a matter of fact, you have previously
6 testified in deposition that you had no recollection of
7 any of the incidents on Route 50; is that right?

8 A That's correct.

9 Q You said the last thing you remember is that
10 you were at an establishment in Georgetown.

11 That was a bar; was it not?

12 A Yes, it was.

13 Q And you were drinking -- what -- beer over
14 there?

15 A That's what I recollect; yes.

16 Q As a matter of fact, that recollection -- You
17 were over there as early as 5:00 o'clock you started
18 drinking; isn't that right?

19 A I'm not sure what time --

20 Q Was it even earlier than that?

21 A I don't know.

22 Q Well, you say your last recollection you were
23 in a bar. What time were you in that bar? Was it early

1 afternoon or was it a little later?

2 A I don't recall.

3 Q You don't recall.

4 The last thing you recall though you were in a
5 bar -- right -- in Georgetown?

6 A Yes.

7 Q Was the sun up? Was it daylight?

8 A I don't believe so; but, I can't say
9 accurately. I can't say with assurance.

10 Q Have you previously testified that you thought
11 it was around 5:00 o'clock?

12 A I may have.

13 Q Huh?

14 A I may have.

15 Q And you were drinking constantly from then
16 until the time you got in your car; right?

17 A I don't know.

18 Q You don't know. You can't even tell us where
19 your car was parked in Georgetown.

20 A No.

21 Q Can you tell us whom you were with earlier
22 drinking?

23 A Again, Mr. Cleveland.

1 Q Where is he today?

2 A He's in Houston, Texas. He's married.

3 Q And did you find that out from Mr. Cleveland
4 that's where you were by talking to him?

5 A Again, I only personally have that -- a very
6 brief recollection. Everything else I know about that
7 day was secondhand from other people.

8 Q So what you're telling us now is second-hand
9 also; right?

10 A I'm telling you that I specifically remember
11 just the episode.

12 Q Can you tell us what you were drinking? Were
13 you drinking alcohol or beer or beer and alcohol, or what?

14 A The recollection I had was that I had a beer.

15 Q You had a beer?

16 A That I had my beer in my hand.

17 Q That's the only recollection that you had --
18 at one point you had a beer in your hand?

19 A Yes.

20 Q Did you -- There has been testimony that you
21 told the nurse that you had been drinking for several days
22 when you were at the hospital.

23 That was accurate; wasn't it?

1 A I -- That's what I understand; yes.

2 Q Now you have told us that you were familiar
3 with Arlington Boulevard when you drive home. You told
4 one officer that you usually get on Arlington Boulevard
5 and turn on to Glebe Road.

6 Isn't that right?

7 A I don't recall saying that and I don't think I
8 would have because I very rarely turn to Glebe.

9 Q So being familiar with Route 50 -- So you
10 don't remember seeing two headlights coming at you at any
11 point.

12 Is that right?

13 A I don't remember anything.

14 Q You say you haven't driven for sometime. You
15 said you pled guilty to DWI?

16 A Yes.

17 Q And you're not driving is not exactly
18 voluntary on your part; is that right?

19 A My license was suspended until approximately a
20 year ago.

21 Q So your driving was because you were told not
22 to drive. That's why you're not driving -- right -- not
23 because you're nervous or anything else? Is that right?

1 A I'm nervous also.

2 Q The other time that you drove down -- drove
3 home -- would you drink very regularly when you drive down
4 that road?

5 MR. ZIMMERMAN: I'm going to object, Your
6 Honor. I don't see the relevance of that.

7 THE COURT: It goes to his capacity to recall
8 on other occasions where he turned.

9 Overruled.

10 THE WITNESS: At that time I was consuming a
11 lot -- or five days a week; yes.

12 BY MR. HARRIGAN:

13 Q So you were driving down that road drunk
14 every --

15 THE COURT: That's sustained.

16 That's an argument.

17 MR. HARRIGAN: Let me approach the Bench.

18 THE COURT: Over on this side, please.

19 BENCH CONFERENCE

20 MR. HARRIGAN: As far as his drinking, he's
21 been convicted before.

22 MR. ZIMMERMAN: That's not exactly true, Your
23 Honor.

1 MR. HARRIGAN: He went to ASAP in California;
2 correct?

3 MR. ZIMMERMAN: I don't think that's exactly
4 true.

5 THE COURT: Are you doing this on liability
6 or on damages?

7 MR. HARRIGAN: On liability. On the grounds
8 that he was conscious, he knew --

9 THE COURT: On the issue of liability you have
10 a willful and wanton issue.

11 MR. HARRIGAN: Yes.

12 THE COURT: And I think that you have already
13 crossed in the jury issue of willful and wanton with the
14 combination of the drinking, the driving and the
15 concession that he has been driving the same route prior.

16 Now what more does this add to it in terms of
17 making it a willful and wanton issue?

18 MR. HARRIGAN: Well, the only thing that adds
19 to it would be that he is taking classes and he knows more
20 than the ordinary person the effect of alcohol. It's a
21 judgment --

22 THE COURT: You can elicit from him that he
23 has classes on the effect of alcohol; but, another charge

1 or another --

2 MR. HARRIGAN: I don't want to get into his
3 charges.

4 THE COURT: -- you will not reference to
5 where he had these classes; just that he has had classes
6 and the effect of driving while drinking and the known
7 effects.

8 MR. HARRIGAN: Suppose he blurts out that --

9 THE COURT: You're going to ask him -- You
10 lead him.

11 MR. HARRIGAN: I'll ask him if you've had
12 classes.

13 THE COURT: And he can just answer yes or no.

14 MR. HARRIGAN: Previous to this incident.

15 THE COURT: Yes.

16 OPEN COURT

17 BY MR. HARRIGAN:

18 Q Would you tell us previous to the date of this
19 accident if you had had classes on the issue of drinking
20 and driving? Yes or no.

21 A (No response.)

22 THE COURT: Yes or no.

23 THE WITNESS: Yes.

1 THE COURT: Let me ask the question for you.

2 So you had awareness through just general
3 common knowledge; plus, classes as to the dangers of
4 drinking and driving.

5 Yes or no?

6 THE WITNESS: Yes, Your Honor.

7 MR. HARRIGAN: One second, please, Your
8 Honor.

9 THE COURT: Take your time.

10 (Pause.)

11 BY MR. HARRIGAN:

12 Q Now I've asked you a short time ago whether
13 you usually went down Arlington Boulevard and turned to
14 Glebe Road which is beyond that overpass. Did you say
15 that earlier?

16 A Yes.

17 Q Now I direct you to deposition, your
18 deposition, --

19 THE COURT: Date, please.

20 MR. HARRIGAN: It was taken on December 16th
21 of '87.

22 BY MR. HARRIGAN:

23 Q And the question was "now --

1 MR. ZIMMERMAN: What page are you on?

2 MR. HARRIGAN: Page 25.

3 BY MR. HARRIGAN:

4 Q "Question: Now as to your usual habit at
5 that time when you were in Georgetown and proceeding home
6 to South Arlington --

7 Answer: Am I driving?

8 Question: Yes.

9 As to your usual habit of driving, yes, what
10 would be the route that you would take?

11 Answer: I would get down to M Street by any
12 of the couple -- by any of the different neighbor streets.
13 From M Street across Key Bridge to Key Bridge to Arlington
14 Boulevard from Arlington Boulevard to Glebe Road."

15 MR. ZIMMERMAN: Would you read the rest of
16 his answer?

17 MR. HARRIGAN: "From Arlington Boulevard to
18 Glebe Road I would take any of three different streets.
19 At times I took the ramp from Arlington Boulevard directly
20 to Glebe Road. Other times I would take the two streets
21 before Glebe Road. I believe Irving and Stewart."

22 BY MR. HARRIGAN:

23 Q So you usually didn't go to Glebe Road; right?

1 A I usually did not.

2 Q You're not telling -- Well, I don't know what
3 you're telling.

4 On this night in question you're not -- Your
5 response to what your doing is "I don't remember."

6 Is that it?

7 A That is correct; yes.

8 MR. HARRIGAN: I think that's all.

9 THE COURT: Any Redirect?

10 MR. ZIMMERMAN: No, Your Honor.

11 THE COURT: Mr. Baube, you can resume your
12 seat with Counsel.

13 Thank you, sir.

14 (The witness stood aside.)

15 THE COURT: What other evidence does the
16 Defense wish to put on?

17 MR. ZIMMERMAN: We rest.

18 ~~That's the Defendant's evidence. I~~
19 understand there is an argument on one of the photographs
20 that is coming down. I guess we can do that outside the
21 presence of the jury. Other than that, that's the
22 Defendant's evidence.

23 ~~THE COURT: Does the Plaintiff wish to put on~~

1 ~~THE COURT: No, I think he's entitled to~~
2 ~~that.~~

3 Don't you already have that before the Jury?

4 MR. WALL: I'm going to call him and tell him
5 not to bother to come because he's got to come all the
6 way --

7 THE COURT: What's your choice? You're going
8 to put him on or not?

9 MR. WALL: No.

10 MR. HARRIGAN: No. He's going to call him
11 and tell him not to come. He's got to come all the way
12 from Maryland.

13 THE COURT: All right. If you're not going
14 to put that Officer on, are you going to put on any other
15 Rebuttal?

16 ~~MR. HARRIGAN: We rest.~~

17 THE COURT: There is no rebuttal evidence.
18 Motions are renewed?

19 MR. ZIMMERMAN: Yes, Your Honor.

20 THE COURT: Any motions by the Plaintiff?

21 MR. HARRIGAN: Yes, Your Honor.

22 I think the -- The other motion, I think, --

23 THE COURT: The Defendant is at least

1 negligent as a matter of law.

2 MR. HARRIGAN: I don't think that the
3 Defendant's conduct in this case -- I don't think there is
4 any jury question of the proximate cause.

5 The Defendant's position is -- he has no --
6 adds nothing to the facts.

7 The only evidence in the case is that he is
8 intoxicated admittedly; that he is riding down the wrong
9 side of the road; apparently going about 50 miles a hour;
10 that he moves from the left lane over to the middle
11 lane --

12 THE COURT: That justifies a jury issue on
13 willful and wanton.

14 He is negligent as a matter of law. He can
15 be found by a reasonable jury to be guilty of willful and
16 wanton negligence also.

17 The proximate cause issue cuts both ways
18 though.

19 The same arguments about the young man trying
20 to stop go back into all these Supreme Court cases about
21 proximate case usually being an issue for the jury.

22 I think there both proximate causes as a
23 matter of law.

1 The question is the degree of negligence
2 willful and wanton or fault that we link to that proximate
3 cause; and as I say, I think these parties are entitled to
4 have this case tried one time here and if there are appeal
5 issues that come out of it, they never have to come back
6 here and live through the testimony and relive this in
7 testimony again. They'll have for good or for bad a
8 decision that the Supreme Court can just pick and choose
9 which they agree with versus what I think the correct
10 legal result ought to be.

11 So I'm sending all these jury issues -- I'm
12 sending all these issues to the jury and I need the
13 cooperation of Counsel here and some help.

14 It seems to me that we ought to ask the jury
15 although the Virginia is a general verdict state -- we
16 ought to ask for special verdicts.

17 MR. ZIMMERMAN: I've got jury instructions
18 that do and I think cover this, Your Honor.

19 THE COURT: And the issues that I see before I
20 even look at any proposed instructions would be with
21 regard to the Defendant; one, was he negligent, two, was
22 he guilty of willful and wanton negligence, and we can
23 define that; three, was his negligence and/or willfully

1 wanton negligence a proximate cause of the collision.

2 The same questions then about the young man
3 driving the Pontiac --

4 MR. ZIMMERMAN: I define it down to two
5 because I have an instruction that you've ruled as a
6 matter of law that both were negligent and then it's just
7 an issue with --

8 MR. HARRIGAN: Well, I don't think that is
9 what the Court has said. I think the Court has said
10 that's the way --

11 THE COURT: Well, let's see its phrasing.

12 I mean, I don't see that either side is hurt
13 in their fair jury issues by ruling that both drivers were
14 negligent.

15 MR. HARRIGAN: That's an proximate cause --

16 THE COURT: And that proximate cause is the
17 issue that they really have to decide.

18 The other issue they really have to decide is
19 what, if any, willful and wanton negligence was each
20 driver guilty of.

21 MR. HARRIGAN: Well, that's -- just let me on
22 our guy his speed alone --

23 THE COURT: Well, I don't think so,

1 Mr. Harrigan, for the ways we've discussed this earlier
2 today. I don't think it's mere speed.

3 I think it's what the speed did to his chance
4 to save himself.

5 MR. HARRIGAN: See, that's not the definition
6 of willful and wanton.

7 You see, you have to recognize you're in
8 danger in a willful and wanton by doing -- and then
9 continuing on after you recognize that and doing nothing
10 about it. That's what the wanton --

11 THE COURT: Mr. Harrigan, the willful and
12 wanton for Mr. Baube starts when he drinks, before he
13 opens the door of that vehicle, when he puts himself at
14 .18. That's the first part of this concept of willful
15 and wanton.

16 He has just signed up for everybody who drives
17 by on the highway to be at risk for their lives and limb
18 because he's going to get drunk and drive.

19 Your young man when he's coming in Route 50 at
20 85 miles a hour at midnight, he has just signed up for
21 some degree of risk for the life and limb of everybody
22 ahead of him on that highway.

23 How does he know that there wasn't a child

1 walking across the highway?

2 Do you see the level of reasoning?

3 Before he ever has the tragic crossing of his
4 path by Baube, he can be found guilty of willful and
5 wanton merely for driving 85 miles a hour inbound on
6 Route 50 at midnight.

7 So it's a jury issue.

8 MR. HARRIGAN: Well, --

9 THE COURT: And the jury can say, no, that
10 wasn't. That's simple negligence --

11 MR. HARRIGAN: -- the jury can say he's going
12 85 miles a hour --

13 THE COURT: -- well, that's true too --

14 MR. HARRIGAN: -- it doesn't --

15 THE COURT: The jury can say look, "he's a
16 kid. It's simple negligence. It doesn't rise to these
17 more ominous sounding words like willful and wanton."

18 I understand that. But as a legal issue it
19 is clear to me that each driver can be found to have been
20 guilty of willful and wanton negligence leading up to
21 those last few moments. And in those last few moments
22 when that boy was putting that brake down or doing
23 whatever he did, the willful and wanton state of mind that

1 produced 80 to 85 miles a hour is now a part of this
2 ultimate collision.

3 The willful and wanton for Mr. Baube is a
4 combination of his deliberate imbibing too much alcohol,
5 getting in a vehicle and then we infer from the conduct,
6 the jury can find no lights, wrong way, midnight, the jury
7 can find from his combination of his alcohol and his
8 conduct that he has a willful and wanton state of mind
9 that leads up again to this fatal meeting of people.

10 Both can be found guilty of willful and wanton
11 conduct.

12 MR. HARRIGAN: Just for the record I would
13 like to put it on the record that I think the Crawford
14 case where that guy was going 80 - 85 the Court ruled that
15 as a matter of law that that did not -- was not even came
16 to gross negligence.

17 THE COURT: But there is a turn involved
18 there. There is a sudden change.

19 In Crawford and Perdue versus Quarterman, 210
20 Virginia 590 -- in all these cases they're very fact
21 specific.

22 MR. HARRIGAN: That's true.

23 A car hit a -- The only difference between

1 that -- I mean, this one is the car hit -- Our guy was
2 coming towards him in the wrong lane and in that one the
3 car was going away from him and he was doing 80 - 85
4 miles a hour. And they said that didn't even amount to
5 gross negligence -- speed alone.

6 And that's why I'm having a problem showing
7 speed alone. He's on the right side of the road. He's
8 going too fast. I've got no problems with that speeding
9 and negligence.

10 But the definition of willful and wanton is
11 acting consciously in disregard of another person's rights
12 or acting with reckless indifference to the consequences
13 and with the Defendant aware from his knowledge of
14 existing circumstances and condition that his conduct
15 would probably would cause injury to another.

16 THE COURT: That describes Wolfe driving the
17 Pontiac.

18 MR. HARRIGAN: All right.

19 His gross negligence is that degree of
20 negligence which shows indifference to others as
21 constitutes an utter disregard for prudence which is
22 if it rises -- utter disregard of prudence amounting to
23 complete neglect for the safety of another.

1 It must be such a degree of negligence as
2 would shock fair-minded men while something less than
3 willful and I don't know of any case where speed alone
4 arose to the level of willful and wanton.

5 I have no doubt that speed alone arises to the
6 level of gross negligence; that it -- And then Duff at 217
7 -- I'd ask the Court to read this. In this one the guy
8 is going 80 miles a hour. Given the testimony together
9 with the principal fact would justify the inference that
10 you -- was proceeding at a rapid rate of speed. However,
11 the evidence fails to establish that the speed of the car
12 was so great that it constitutes gross negligence.

13 It's true that Cambvill -- Here is where they
14 make the distinction. However, in Richter versus
15 Seawell, 183 Virginia 379, they recognized that an
16 automobile traveling 55 miles per hour or less gets out of
17 control it may be demolished when it strikes -- Unlike
18 Arnold versus Reynolds at 215 Virginia 431 where an
19 addition to excessive speed the evidence establishes the
20 impaired condition of the host driver.

21 Here we have only the evidence of speed and
22 such speed is not shown to be a proximate cause of the
23 accident.

1 It is clear -- If you want -- I don't know if
2 you want to read it.

3 THE COURT: Well, I'm having a problem in
4 trying to go with you intellectually to some degree of
5 responsibility legally below willful and wanton.

6 And I just believe the driver of the Pontiac
7 independent of Baube's presence on the roadway could be
8 held to be guilty of willful and wanton.

9 He owed that duty to his passengers alone, let
10 alone other potential occupants of the highway.

11 MR. HARRIGAN: I understand what you're
12 saying; but, if there was drinking and speed --

13 THE COURT: The problem is a compound one and
14 that is, that the speed is not the only way to measure
15 willful and wanton.

16 The speed here in these circumstances is such
17 that he denied himself a little more time to choose how to
18 avoid this. He denied himself the opportunity to scan
19 the rest of the area.

20 His speed was sending him in there at the
21 closing rate so fast and creating such an emergency
22 condition for him that his choices were limited; but, they
23 have been limited by his choice of driving method.

1 He faced something he never should have had to
2 face. He shouldn't have to face somebody on the wrong
3 side of the road, no lights, middle of the night, the
4 drunkenness alone. But you shouldn't have to face -- You
5 shouldn't have to deal with a vehicle that's in your
6 roadway.

7 But his willful and wanton choice to drive at
8 80 to 85 miles a hour and that's a choice the jury can
9 make set up a very limited chance for survival if somebody
10 did what Baube did, if somebody was in the highway, if
11 there was an accident ahead, if there any number of
12 things; and maybe we have to get to be adults to know
13 there out there -- all of us know or ought to know can be
14 head of you.

15 That is not a closed test track.

16 In the state of mind that sent that child in
17 there at that speed justifies a finding of willful and
18 wanton.

19 Let me see your proposed instructions, please.

20 MR. HARRIGAN: I have an instruction on
21 issues here, Your Honor, --

22 MR. WALL: -- or number --

23 THE COURT: Well, gentlemen, I think we got to

1 get to it here.

2 (Pause.)

3 MR. WALL: I numbered them, Your Honor.

4 THE COURT: Okay.

5 The lawyers have to work on these
6 instructions. The parties are free, if they care to, to
7 take breaks, take a stretch.

8 (The aforementioned instructions were tendered
9 to the Court.)

10 THE COURT: Okay. Thank you.

11 Crawford, Perdue and Quarterman turns in large
12 part on the testimony of Mr. Perdue saying that
13 independent of whatever speed the car was going as low as
14 55 or as high as 85 -- the other car -- that he saw it and
15 he left-turned right across where its path was.

16 MR. WALL: That's not the only case on that
17 issue, Your Honor. There are several cases --

18 THE COURT: All I know is you folks have
19 researched it and briefed it and I know that you can give
20 me other authorities; but, I think you've preserved your
21 issue.

22 As I understand your issue, you're saying that
23 the maximum level to which the young man is driving can

1 rise as gross negligence.

2 MR. HARRIGAN: If that.

3 THE COURT: Well, I say "maximum."

4 MR. HARRIGAN: That's a maximum.

5 THE COURT: And you can't get to willful and
6 wanton.

7 I rule that it's a jury issue as to willful
8 and wanton.

9 ~~Well, No. 1 is an outstanding definition of~~
10 ~~issues.~~

11 Have you read it?

12 MR. ZIMMERMAN: Well, it has too many issues
13 in it.

14 THE COURT: I don't think so. It's exactly
15 what I want to do.

16 MR. ZIMMERMAN: Well, I've asked you, Judge,
17 to read my jury instruction F.

18 THE COURT: Well, I like your instructions the
19 way -- I didn't take time with them. I skimmed them; but,
20 I want to send negligence and proximate cause to this jury
21 even though I find as a matter of law they're both
22 negligent and I find as proximate cause that proximate
23 cause is a matter of law.

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~~THE COURT: Yes, sir.~~

~~No. 1 is given.~~

~~No. 2 is given.~~

~~No. 3 is given.~~

~~Let's take up Nos. 4 and 5 together. Nos. 4~~

~~and 5 are given.~~

What's everybody's reaction to No. 9?

MR. WALL: To what?

THE COURT: Well, I know the Plaintiff has asked for it. I guess I'm looking at Mr. Zimmerman?

MR. HARRIGAN: Which instruction, Your Honor?

THE COURT: No. 9.

It sounds like a college professor's writing.

MR. ZIMMERMAN: I don't understand it, Your Honor.

THE COURT: Isn't it really saying that the care depends upon the total circumstances?

MR. WALL: Well, it's more than that, Your Honor. These cases that involve wanton, willful and wanton negligence say that one act alone -- where one act alone is sufficient. What they say -- is all these cases -- is that willful and wanton differs not just in degree the way simple and gross do, but in time from both

1 simple and gross negligence.

2 They go on to say that especially like the
3 voluntary manslaughter cases -- the same principles apply
4 to willful and wanton in the similar case that the
5 cumulative effect of a series of connected or independent
6 acts, whatever, as long as they proximately contribute to
7 the cause of this accident and the cumulative effect of
8 just a whole series of --

9 THE COURT: How does that apply --

10 MR. WALL: -- aggregate the level of --

11 THE COURT: How does that apply in this case?

12 MR. WALL: -- the Defendant in this case.

13 THE COURT: Oh, wait. You're right. It
14 applies to Baube.

15 MR. ZIMMERMAN: -- versus Commonwealth; Bell
16 versus Commonwealth.

17 THE COURT: -- other criminal cases?

18 MR. ZIMMERMAN: I've never tried a criminal
19 case, Judge, so I don't know anything about criminal
20 cases.

21 I just don't believe that's the correct
22 statement of the law as applies to --

23 THE COURT: There is better definition for

1 instruction purposes in criminal than in any other series.

2 Civil cases never have recent Supreme Court
3 cases and criminal have recent Supreme Court cases on
4 every possible issue.

5 Let me see your case.

6 MR. WALL: Me too, Your Honor?

7 THE COURT: Yes.

8 (The aforementioned cases were tendered to the
9 Court.)

10 THE COURT: Thank you.

11 Aside from its potential confusion what is the
12 Defendant's substantive objection?

13 MR. ZIMMERMAN: Well, one, I think it's
14 covered by other jury instructions as far as willful and
15 wanton.

16 That's defined -- You're going into that
17 definition in the jury instructions that you've set aside.

18 You also -- I understand you're going to give
19 jury instruction No. 7 which defines gross negligence.
20 To have jury instructions on negligence -- It's just
21 cumulative with all the others. It's confusing.

22 THE COURT: I'm almost surprised you object to
23 it.

1 MR. ZIMMERMAN: Well, I --

2 THE COURT: I just --

3 MR. ZIMMERMAN: -- I'm not sure why I
4 objected to it either.

5 THE COURT: I'm not sure whom it hurts.

6 MR. ZIMMERMAN: Well, I'll tell you what,
7 Judge, based on that I'll withdraw my objection. Let
8 them argue it. I'll withdraw my objection.

9 I mean, it can be argued both ways.

10 THE COURT: The language in Bell versus the
11 Commonwealth from page 609 is really helpful even though
12 it's a criminal case.

13 MR. ZIMMERMAN: Judge, I can --

14 THE COURT: Where it talks about the
15 cumulative effects of the series of connected or
16 independent negligent acts as showing the attitude of the
17 offender. That's really what we're trying to do.

18 Reckless is a state of mind. Acts can show a
19 state of mind. To some degree discomfort is that it
20 could confuse.

21 MR. HARRIGAN: You have given to what I've
22 objected to.

23 THE COURT: That's right.

1 ~~MR. ZIMMERMAN: Yes.~~

2 ~~MR. HARRIGAN: Yes.~~

3 THE COURT: Mr. McGuire, are you ready for
4 the Jury?

5 I need that issue instruction from you. I'll
6 give it back to you when I finished reading them.

7 Mr. McGuire is going to work out and I assume
8 everybody is agreement on this -- a series of questions
9 and answers to the Jury. Virginia being a general
10 verdict state we normally don't ask special verdicts.

11 In this case I'm going to track Instruction
12 No. 1.

13 Question: Was the Defendant, Driver Baube,
14 willfully or wantonly negligent? Yes or No.

15 Two: If he was willfully or wantonly
16 negligent, was his negligence a proximate cause of the
17 accident? Yes or No.

18 The same yes or no question with regard to the
19 subparagraph three referring to Shawn Wolfe.

20 The same yes or no in regard to No. 4.

21 We would then go down to No. 5. Was the
22 Defendant, Driver Baube, negligent? Yes or No.

23 No. 6. Was his negligence a proximate cause?

1 Yes or No.

2 No. 7. Was the Plaintiff, Decedent Shawn
3 Wolfe, negligent? Yes or No.

4 Then under amount of damages then we're going
5 to give general verdict forms. One as we find for the
6 Plaintiff and set damages at any dollar amount they want;
7 or two, we find for the Defendant.

8 But you will then have your appellate record
9 complete as to how this is decided after being sent to the
10 jury.

11 ~~MR. WALL: We would also like a damage to~~
12 ~~include a sum for interest from the date of the death,~~
13 ~~Your Honor.~~

14 THE COURT: Did you plead it?

15 MR. HARRIGAN: With interest from -- just
16 leave it blank. I think it's up to the Jury to put
17 interest in it.

18 MR. WALL: Yes, we did, Your Honor.

19 THE COURT: You pleaded an interest claim.

20 MR. WALL: I'm sure we did. I can double-
21 check, Your Honor.

22 MR. HARRIGAN: I think the statute allows it.

23 ~~MR. ZIMMERMAN: They pleaded it.~~

1 ~~if you need a break or anything else. Other than that, we~~
2 look forward to your knocking on the door and coming back
3 with a written form of verdict for us.

4 Everybody stay in place while the Jury
5 retires.

6 (Whereupon, at 12:50 o'clock, p.m., the Jury
7 ~~retired to deliberate upon a verdict.~~)

8 (Whereupon, at 4:46 o'clock, p.m., the Jury
9 returned with their verdict.)

10 THE COURT: Thank you.

11 Read the verdict first and then read the
12 questions that they did answer.

13 THE CLERK: Law 87-520. We the Jury on the
14 issue join find for the Defendant, Ann Lockwood,
15 Foreperson, 5390. That's Law 87-520.

16 The Jury answer as follows: Was the
17 Defendant, Frederick Baube, willfully or wantonly
18 negligent? Answer is yes.

19 If the Frederick Baube was willfully or
20 wantonly negligent, was such negligence a proximate cause
21 of the accident? Yes.

22 Was the Plaintiff's decedent, Shawn Wolfe,
23 willfully or wantonly negligent? Yes.

1 If Shawn Wolfe was willfully or wantonly
2 negligent, was such negligence a proximate cause of the
3 accident? Yes.

4 THE COURT: The other questions were not
5 answered. They need not be answered.

6 THE CLERK: No, Judge, they're not answered.

7 THE COURT: Please show the parties and
8 counsel the documents you've just read for me.

9 (The Clerk complied with the request.)

10 THE COURT: Any questions with regard to the
11 form of the verdict?

12 MR. HARRIGAN: No, Your Honor.

13 MR. ZIMMERMAN: No, Your Honor.

14 THE COURT: Any motions addressing matters
15 that we need to address before the Jury is dismissed?

16 MR. HARRIGAN: No.

17 MR. ZIMMERMAN: No.

18 THE COURT: Any request to poll the Jury?

19 MR. HARRIGAN: No.

20 MR. ZIMMERMAN: No.

21 THE COURT: In terms of doing right things and
22 working in a system of justice, the things you have to
23 listen to can be painful. And you can feel the pain in

1 the people who have lived with this case. It's sometimes
2 painful to reach decisions.

3 I wanted to tell you why a November '86 case
4 was being tried in the spring of 1990. This was tried
5 before.

6 Mr. Baube was accused of a form of homicide.
7 He was tried for that and he was convicted of lesser
8 offenses; is that correct?

9 MR. ZIMMERMAN: No, sir.

10 THE COURT: What was the charge against him?

11 MR. ZIMMERMAN: He was charged with
12 involuntary manslaughter and was found not guilty.

13 THE COURT: Which to me is a form of homicide.
14 I was inexact in my wording, but he faced a different
15 charge.

16 So, there's been that trial. The people on
17 both sides of the room have lived through that.

18 There was then a civil trial. And Judge of
19 this Court heard this evidence and ruled that no jury
20 could find for the Plaintiff, that you had to find for the
21 Defendant on this evidence.

22 That went down to the Virginia Supreme Court
23 -- that ruling -- and the Virginia Supreme Court ruled,

1 without getting into all the details scholastically or
2 legally of the issues, that a jury should decide the case.

3 That's why there's been this many years and
4 these people have had to -- both sides -- have had to live
5 through both presentations.

6 And so you can feel the pain and the upset
7 both Mrs. Wolfe and the others have had to live with for
8 -- since November of '86.

9 Your decision ends the litigation battle.

10 The rulings I had made before I sent it to you
11 were that both drivers were negligent as a matter of law.
12 Both drivers as a matter of law proximately caused that
13 collision.

14 The young man's sighting of that van had to
15 have occurred at about 350 to 400 feet away. Whether it
16 had lights on or not, he had to have seen it. Otherwise,
17 there's no other reason he was standing on his brakes for
18 that long.

19 And the tragedy of it all is that whatever
20 time or opportunity he had to miss Baube, he had taken
21 away from himself by 85 miles an hour.

22 So that the verdict you have reached -- and
23 you didn't have to reach the others once you reached that

1 verdict because as a matter of law you had to find both of
2 them negligent and you had to find both of them
3 proximately caused the accident. It was both of them
4 legally and factually coming towards each other in a
5 willful and wanton negligent operation of the vehicles.

6 I thank you very much. Sometimes this is
7 harder than others, but you're free to go.

8 (Whereupon, the Jury was dismissed.)

9 THE COURT: Any request for post verdict
10 motions to be filed or considered?

11 MR. HARRIGAN: We have argued this
12 that -- speed alone -- and you've ruled on it --

13 THE COURT: Your argument would be that I
14 should not have sent willful and wanton on the part of
15 Shawn Wolfe to the Jury?

16 MR. HARRIGAN: That's correct.

17 THE COURT: You have made very thorough
18 argument on that, and you have given me your research and
19 case law. You've given me the analysis you would apply to
20 these facts. Do you wish to add anything to that?

21 MR. HARRIGAN: No, I think it's in the record.
22 I think all it showed was speed involved. And we've given
23 you the cases on that, and that is tantamount to willful

1 and wanton.

2 Your Honor ruled that it's a jury question and
3 it's our position that it's a matter of law. The case law
4 indicates that the cases that we showed as a matter of law
5 that on several cases that -- gross negligence. And
6 there's no alcohol involved on his part. There's no other
7 circumstances other than the speeding. And so we think
8 it's a matter of law that --

9 THE COURT: The dialogue, the comments, the
10 analysis that you worked with me on, the comments I've
11 made, the findings I've made remain the same.

12 I believe that the young man's speed is only a
13 part of the total circumstances that faced him. His speed
14 was a priority in what happened. It denied him the time,
15 distance, and a more timely opportunity to save
16 themselves.

17 And I find that it rose at least to the level
18 of a jury issue as to the willful and wanton conduct or
19 driving of Shawn Wolfe.

20 So, I deny any motion that would be based upon
21 having sent that to the Jury be in error.

22 Anything else?

23 MR. HARRIGAN: No.

1 THE COURT: I therefore find the Jury verdict
2 to be supported by the law and the evidence, would enter a
3 verdict on the Jury verdict.

4 MR. ZIMMERMAN: I'll prepare the order.

5 THE COURT: Everybody is free to go.

6 (Whereupon, at 4:47 o'clock, p.m., the hearing
7 in the above-entitled matter was concluded.)
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ASSIGNMENTS OF ERROR

1. The trial court erred in permitting the jury to consider the defendant's claim that the plaintiff's decedent (Wolfe) was willfully and wantonly negligent when the evidence failed as a matter of law to justify a finding of willful and wanton negligence, especially since the evidence showed no negligent conduct other than speed and established neither:

a. that Wolfe was aware, from his knowledge of existing circumstances and conditions, that his conduct would inevitably or probably result in injury to another; nor

b. that, after becoming aware that his conduct would inevitably or probably result in injury to another, he acted consciously in disregard of and in reckless indifference to the consequences to another person.

2. The trial court erred, for the reasons set forth in Assignment of Error No. 1, in refusing to set aside the jury's finding that Wolfe was willfully and wantonly negligent and in not entering judgment in favor of the plaintiff on the issue of liability.

3. The trial court erred in permitting Corporal Hackney to testify concerning the minimum and maximum speed of the Wolfe vehicle, based upon measurement of the yaw and skid marks on the highway, when the condition of the brakes on the Wolfe vehicle and other facts that were essential to establishing the reliability and admissibility of such opinion were not in evidence and were not within the knowledge of the witness.

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the
City of Richmond on* Friday the 10th day of November, 1989.

L. Marie Wolfe, Administratrix of the
Estate of Robbie Shawn Wolfe,
against Record No. 880577
Circuit Court No. L 87-520

Appellant,

Frederick L. Baube, III,

Appellee.

Upon an appeal from a
judgment rendered by the
Circuit Court of Arlington
County on the 11th day of
February, 1988.

Upon consideration of the record, the briefs filed by the parties, and argument of counsel, the Court is of opinion that error exists in the judgment of the trial court.

The record shows that the trial court struck the plaintiff's evidence at the end of plaintiff's case on the grounds that plaintiff's evidence proved contributory negligence on behalf of plaintiff's decedent as a matter of law. The accident occurred at 12:40 a.m., November 13, 1986, on Route 50 -- a six-lane highway divided by double solid yellow lines -- in Arlington County. Plaintiff's decedent, Robbie Shawn Wolfe, was driving eastbound on Route 50 in the left lane. Defendant Frederick L. Baube, III, was driving westbound on Route 50. Baube had a blood alcohol level of 0.18% by weight by volume. He was driving a van with his lights out. Although Baube was headed west, he had crossed the double solid yellow lines and was driving in the left eastbound lane.

One of plaintiff's witnesses testified that he was driving in the right eastbound lane at the 45 mile per hour speed limit when he saw, ahead of him in the left eastbound lane, the shape of a van with no lights on. Next, he saw Shawn Wolfe's car pass him in the left eastbound lane at what the witness estimated was 80 to 85 miles per hour. Wolfe's vehicle then braked suddenly and moved to the center eastbound lane. The unlit westbound van also moved to the center eastbound lane. A near head-on collision occurred. The witness could not stop before striking Wolfe's car.

The trial court erred, for two reasons, in striking plaintiff's evidence on the grounds of contributory negligence as a matter of law. First, plaintiff pled that Baube's conduct in driving after consuming excessive amounts of alcohol, driving without headlights, and driving in the wrong lane amounted to willful, wanton, reckless conduct in conscious disregard of the rights of others. In Booth v. Robertson, 236 Va. 269, 273, 374 S.E.2d 1, 3 (1988), this Court held that similar conduct, if proven, could support a claim of willful, wanton, reckless negligence. Further, in Griffin v. Shively, 227 Va. 317, 322, 315 S.E.2d 210, 213 (1984), we held that contributory negligence is no defense where a defendant acts with willful and wanton negligence.

Second, even without regard to the question of the defendant's willful and wanton negligence, it is plain from the

record that the question of proximate causation was one for the jury. See Koutsounadis v. England, 238 Va. 128, 132, 380 S.E.2d 644, 646-47 (1989). Wolfe, though speeding, hit his brakes, slowed down, and changed lanes, moving out of Baube's path. Baube, however, instead of veering to the right to return to the westbound lanes or instead of continuing in a straight line, moved into the center eastbound lane, directly into Wolfe's new path. On these facts, a jury could conclude that it was not Wolfe's speeding that caused the collision but the fact that once Wolfe moved out of danger, Baube moved back into his path. See Shelley and Miller v. West, 213 Va. 611, 194 S.E.2d 899 (1973).

Accordingly, the judgment appealed from is reversed and the case remanded for a full trial on all issues upon the appellant's motion for judgment.

This order shall be certified to the said circuit court.

A Copy,

Teste:


Clerk