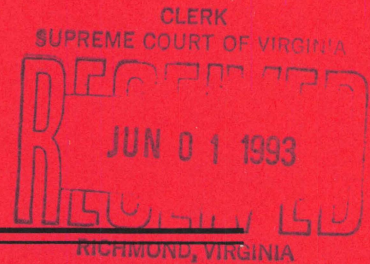


246 Va 454



IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 930071

GWENDOLYN S. REID,

Appellant,

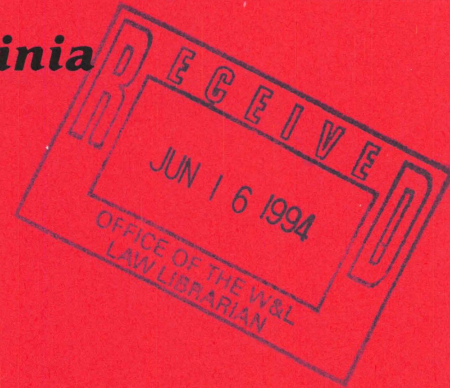
v.

RALPH LEE AYSCUE

and

ALLEGHENY PEPSI-COLA BOTTLING COMPANY,

Appellees.



APPENDIX

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MOTION FOR JUDGMENT, filed May 21, 1986

Now comes the plaintiff, Ronald D. Reid, Administrator of the Estate of Gladys C. Reid, deceased, and moves the Court for judgment and award of execution against the defendants, jointly and severally, in the amount of THREE MILLION TWENTY-SIX THOUSAND NINE HUNDRED THIRTY AND 28/100 (\$3,026,930.28) DOLLARS, for this, to-wit:

1. That on or about April 5, 1985, defendant, Ralph Lee Ayscue, was the operator of a motor vehicle, owned by, defendant, Allegheny Pepsi-Cola Bottling Company, which was involved in an accident with a motor vehicle operated by Gwendolyn S. Reid and occupied by Gladys C. Reid, plaintiff's decedent, as a passenger, on Route I-264 in the City of Norfolk, Virginia.

2. That at the aforesaid time and place Ralph Lee Ayscue was an agent, servant or employee of the Allegheny Pepsi-Cola Bottling Company and was acting within the scope of such agency, service or employment.

3. That the aforesaid accident was caused by the negligence of Ralph Lee Ayscue in his operation of the said motor vehicle owned by the Allegheny Pepsi-Cola Bottling Company, for which negligence both defendants herein are liable jointly and severally.

4. That the aforesaid negligence of Ralph Lee Ayscue proximately caused the death of Gladys C. Reid.

5. That on April 25, 1985, plaintiff duly qualified as Administrator of the Estate of Gladys C. Reid, deceased, in the Clerk's Office of the Circuit Court of the City of Virginia

Beach, Virginia.

6. That Gladys C. Reid, deceased, is survived by the following persons who, as beneficiaries under Section 8.01-53 of the Code of Virginia, are entitled to distribution of damages on account of the wrongful death of Gladys C. Reid as provided in Section 8.01-52 of the Code of Virginia:

- (a) John W. Reid, age 50, surviving spouse;
- (b) Ronald D. Reid, age 28, surviving son; and
- (c) Gwendolyn S. Reid, age 26, surviving daughter.

7. That the care, treatment and hospitalization of Gladys C. Reid for the injuries sustained in the said accident and resulting in her death amount to \$25,875.63.

8. That the funeral expenses pertaining to Gladys C. Reid amount to \$1,054.65.

WHEREFORE, the plaintiff, Ronald D. Reid, Administrator of the Estate of Gladys C. Reid, deceased, moves for a judgment and award of execution against the defendants, jointly and severally, in the amount of THREE MILLION TWENTY-SIX THOUSAND NINE HUNDRED THIRTY AND 28/100 (\$3,026,930.28) DOLLARS, plus interest as provided in Section 8.01-382 of the Code of Virginia, plus costs.

RONALD D. REID, Administrator of
the Estate of Gladys C. Reid,
Deceased

BY  _____
Of Counsel

PRESTON, WILSON & CRANDLEY
Birdneck Office Park
1112 Laskin Road
Virginia Beach, VA 23451

NOW COME the defendants, by counsel, and for Grounds of Defense to the Motion for Judgment herein state:

1. It is denied that the defendants or either of them were negligent in any manner.

2. It is alleged that the accident in question was caused solely by the negligence of plaintiff decedent's driver, Gwendolyn S. Reid, and that as to these defendants the accident was unavoidable.

3. Even if these defendants or either of them were negligent which is expressly denied, it is further denied that any such negligence proximately caused or contributed to the death of plaintiff's decedent.

4. The defenses of contributory negligence and assumption of risk will be relied upon if disclosed by the evidence in the trial of this cause.

5. Not being aware of the nature of damages alleged, strict proof thereof is called for.

6. It is denied that the defendants or either of them are indebted to the plaintiff or the statutory beneficiaries of Gladys C. Reid in any manner.

RALPH LEE AYSCUE and
ALLEGHENY PEPSI-COLA BOTTLING
COMPANY

By 
Of Counsel

Palmer S. Rutherford, Jr.
WILLCOX & SAVAGE, P.C.
1800 Sovran Center
Norfolk, Virginia 23510

THIRD PARTY MOTION FOR JUDGMENT, filed June 4, 1986

NOW COME Ralph Lee Ayscue and Allegheny Pepsi-Cola Bottling Company, by counsel, and for their Third Party Motion for Judgment state:

1. That Ronald D. Reid, Administrator of the Estate of Gladys C. Reid has filed a Motion for Judgment in the Circuit Court of the City of Norfolk against Ralph Lee Ayscue and Allegheny Pepsi-Cola Bottling Company, a copy of which is attached as Exhibit A hereto.

2. That the Motion for Judgment alleges the the defendants were negligent which negligence proximately caused the death of Gladys C. Reid and resulting damages to the estate and beneficiaries of Gladys C. Reid.

3. That the accident in which Gladys C. Reid was killed was the sole proximate result of the negligence of Gwendolyn S. Reid.

4. That in the event that judgment is rendered against one or both defendants in favor of the Administrator of the Estate of Gladys C. Reid and her statutory beneficiaries, then in that event Gwendolyn S. Reid is or may be liable to the defendants for all or part of the plaintiff's claim by way of indemnity or contribution.

WHEREFORE, your third party plaintiffs demand judgment against Gwendolyn S. Reid, third party defendant, for any such sums that they may be caused to pay as a result of the death of Gladys C. Reid.

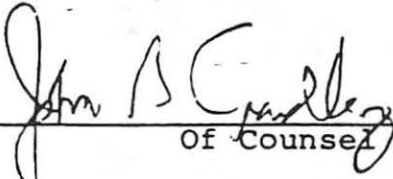
GROUND OF DEFENSE OF
GWENDOLYN S. REID
TO THIRD-PARTY MOTION FOR JUDGMENT, filed June 9, 1986

Now comes the Third-Party Defendant, Gwendolyn S. Reid, by counsel, and for her Grounds of Defense to the Third-Party Motion for Judgment herein says:

1. That she admits the allegations of paragraphs 1 and 2 of the Third-Party Motion for Judgment.
2. That she denies all other allegations of the Third-Party Motion for Judgment.
3. That she denies that the Third-Party Plaintiffs are entitled to recover any sum of money from her.

GWENDOLYN S. REID

BY



Of Counsel

ORDER, entered March 6, 1987


On motion of counsel for plaintiff and for good cause shown, it is ordered that the third party claim herein be, and it hereby is, severed from the trial of the claim of Ronald D. Reid, Administrator, v. Ralph Lee Ayscue, et al.

ENTER:



JUDGE
3/6/87

WE ASK FOR THIS:



Counsel for Plaintiff and
Third Party Defendant

CM
SEEN:

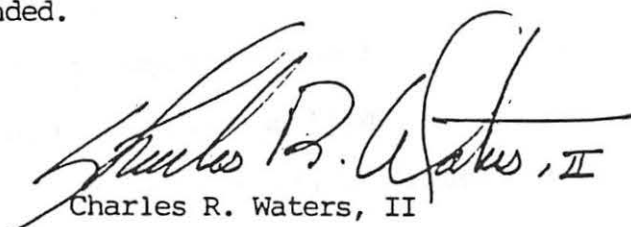


Counsel for Defendants

This day came the Plaintiff, Ronald D. Reid, in person and by counsel, and the Defendants Ralph Lee Ayscue in person, and by counsel and Allegheny Pepsi-Cola Bottling Company by representative, and by counsel and thereupon came a Jury to wit: Mary Ann Kramer Bailey, William E. Bush, Charlotte H. Chaffin, Lee E. Clinkscales, Shirley C. Lamb, Patricia N. Musk and Donald H. Scholten, who were duly sworn the truth to speak upon the issue joined.

Now the Jury having heard all of the evidence and arguments of the parties, by counsel retired to its chamber to consider its verdict and after sometime returned into Court with a verdict in the following words and figures: "We, the Jury, find for the Plaintiff against both Defendants and fix his damages at \$76,633.29, and apportion those damages as follows: \$50,000.00 to Ronald D. Reid, \$0.00 to Gwendolyn Reid, \$26,633.29 medical and funeral expenses".

Whereupon it is considered and ordered by the Court that the Plaintiff Ronald D. Reid recover of and have judgment against the Defendants, Ralph Lee Ayscue and Allegheny Pepsi-Cola Bottling Company in the sum of Seventy Six Thousand Six Hundred Thirty Three Dollars and Twenty Nine Cents, (\$76,633.29) with interest thereon at the rate of twelve percentum (12%) per annum from the 9th day of March, 1987, until paid, together with his costs about his suit herein expended.


Charles R. Waters, II
Judge

A COPY, TESTE: WILLIAM T. RYAN, CLERK

BY: , D.C.

Office of
WILLIAM T. RYAN
Clerk of the
Circuit Court
Norfolk, Virginia

NOW COME the defendants and third party plaintiffs and move the Court for judgment against Gwendolyn S. Reid for this to-wit:

1. That on March 9, 1987, the case of Ronald D. Reid, Administrator v. Ralph Lee Ayscue, et al., was tried in the Circuit Court of the City of Norfolk.
2. That the jury was instructed as to the duties of Ralph Lee Ayscue and Gwendolyn S. Reid in the operation of their motor vehicles at the time and place of the accident herein.
3. That the jury was further instructed that if Gwendolyn S. Reid was guilty of any negligence which was a proximate cause of the death of Gladys Reid, they should not award any damages to Gwendolyn Reid.
4. That the jury returned a verdict in favor of Ronald D. Reid, Administrator and specified that Gwendolyn S. Reid should receive no damages.
5. That the verdict of the jury found Gwendolyn Reid guilty of negligence which was a proximate cause of the death of Gladys Reid.
6. That the defendants and third party plaintiffs have satisfied the judgment of \$76,633.29 plus costs;
7. That as joint tortfeasors, the defendants are entitled to contribution from Gwendolyn Reid in the sum of \$38,316.65 plus interest and costs;

WHEREFORE the defendants and third party plaintiffs move the court for the entry of an order awarding judgment in their favor in the sum of \$38,316.65 and interest and costs.

Re: Ronald D. Reid, Administrator of the Estate
of Gladys C. Reid, Deceased
v. Ralph Lee Ayscue and Allegheny Pepsi-Cola
Bottling Company
At Law No. L-86-1187

PROCEDURAL HISTORY

The administrator of the estate of Gladys C. Reid brought a wrongful death action against Ralph Lee Ayscue (hereafter "Ayscue") and his employer, Allegheny Pepsi-Cola Bottling Company (hereafter "Allegheny"), claiming that Ayscue negligently collided the pickup truck he was operating--and which was owned by Allegheny--with a vehicle in which Gladys Reid was a passenger. The defendants' grounds of defense stated that Gwendolyn Reid, the driver of the vehicle in which the decedent was a passenger and the daughter of the decedent, was guilty of contributory or concurring negligence. Although she was a statutory beneficiary under the wrongful death statute, § 8.01-54, she was barred from any recovery under that statute, defendants contended.

Defendants Ayscue and Allegheny also impleaded Gwendolyn Reid as a third-party defendant, claiming that, if a judgment were rendered against one or both of them in favor of the plaintiff administrator and the statutory beneficiaries of the decedent, then Gwendolyn Reid would be liable to the defendants for contribution. This third-party claim was severed on plaintiff's motion, pursuant to § 8.01-281(B).

The principal case was tried to a jury, which rendered a verdict in favor of the administrator. Specifically, the jury found Ayscue and Allegheny guilty of negligence that proximately caused the death of the decedent. The two statutory beneficiaries between whom the jury could apportion damages were Ronald Reid, the surviving son, and Gwendolyn Reid, the surviving daughter and operator of the vehicle that collided with defendants' pickup truck.¹ The verdict specified--at the request of all of the parties and pursuant to § 8.01-54 (B)--the distribution of an award as follows:

We, the jury, find for the plaintiff against
both defendants and fix his damages at

¹ John Reid, the surviving spouse, was the only other beneficiary pursuant to § 8.01-52, and he waived any right to benefit from any award under the wrongful death statute.

\$76,633.29, and apportion those damages as follows: \$50,000.00 to Ronald D. Reid; \$0.00 to Gwendolyn Reid; \$16,633.29 medical and funeral expenses.

No motions were made by any party, and the late Judge Charles R. Waters, II entered judgment on the verdict that same day, March 9, 1987. Nine days after the trial, on March 18, 1987, the defendants paid plaintiff's counsel in full satisfaction of the judgment.

Ayscue and Allegheny, acting as third-party plaintiffs, then filed a motion for summary judgment in their third-party contribution claim, asserting that the jury's verdict in the principal action encompassed a finding that Gwendolyn Reid was guilty of contributory negligence that proximately caused the death of Gladys Reid. With this motion, which is before this Court today, Ayscue and Allegheny assert that the jury's finding in the prior action collaterally estops Gwendolyn Reid from seeking to prove by evidence that she was not negligent in the accident or that her negligence was not a proximate cause of the death of Gladys Reid. They ask this Court to enter summary judgment and order contribution by Gwendolyn Reid in the amount of one-half of the prior judgment, equal to \$38,316.65 with costs and interest. Gwendolyn Reid opposes the motion for summary judgment and disputes the applicability of collateral estoppel to the third-party contribution case.

Ayscue and Allegheny maintain that the jury's apportionment of damages reflects a finding that Gwendolyn Reid was contributorily negligent in the operation of her vehicle. They rely on the mandatory language of Jury Instruction 14, which barred Gwendolyn Reid from recovery if she contributed to the accident by her negligence.² Gwendolyn Reid, however, argues that the jury could have apportioned the damages as it did based on Jury

² Instruction 14 read:

The Court instructs the jury that Gwendolyn Reid is one of two lawful beneficiaries of the Estate of Gladys Reid. You are further instructed, however, that if Gwendolyn Reid was guilty of any negligence which proximately caused or contributed to the accident in which Gladys Reid died, then any such negligence would bar a recovery by Gwendolyn Reid.

Therefore if you find from the evidence in the instructions of the Court that Gwendolyn Reid was guilty of negligence which proximately caused or contributed to the accident, you should not award any damages to Gwendolyn Reid.

Instruction 13, which set out sorrow, mental anguish, and loss of solace as grounds for recovery, and which stated that the jury "may distribute" among the two beneficiaries.³ Gwendolyn Reid argues that this instruction being permissive rather than mandatory, it allows the jury to apportion damages any way it sees fit, consistent with the other instructions of the Court.

FACTS

The facts must be taken in the light most favorable to Gwendolyn Reid with regard to the jury verdict insofar as it awarded funeral expenses to the administrator and damages to the statutory beneficiary Ronald Reid. However, because the jury found against Gwendolyn Reid, awarding her zero damages as a statutory beneficiary, the facts as between her and Ayscue and Allegheny will be taken in the light most favorable to the latter parties.

1. The Accident

Gwendolyn Reid testified that on April 15, 1985, she proceeded in the car she was driving on Interstate 264 toward Virginia Beach, and upon reaching the exit for Richmond, switched into the right lane of two lanes, continuing toward Virginia Beach. Transcript of proceedings, March 9, 1987, at 4-5. She testified that her speed of travel was almost 50 miles per hour at that time because traffic had earlier slowed for a car that had been pulled to the side by a police officer.

At that point, she tried to accelerate to 55 miles per hour. Id. at 5. The next closest car to her in her lane was approximately 30 to 40 feet ahead of her. Id. At that point, she testified that she noticed a white pickup truck, driven by Ayscue, beside her in her driver's side mirror with its right turn signal

³ Instruction 13 read:

If you find your verdict for the plaintiff, then in determining the damages to which he is entitled, you may consider, but are not limited to any of the following which you believe by the greater weight of the evidence were caused by the negligence of the defendant, Ralph Lee Ayscue, as damages suffered by the beneficiaries:

(1) any sorrow, mental anguish, and loss of solace suffered by the beneficiaries. Solace may include society, companionship, comfort, guidance, kindly offices, and advice of the decedent.

If you award damages, you may distribute these damages between Ronald D. Reid and Gwendolyn S. Reid, subject to the other instructions of this Court.

on. The truck speeded up and then pulled right in front of her, cutting her off; the pickup was one and a half to two feet in front of her when it pulled into her lane. Id. at 6. Ayscue's truck was half-way up the side of Gwendolyn Reid's vehicle when she first noticed him, and he had his turn signal on. Id. at 19. The traffic behind her was "kinda heavy," but she did not see how close that traffic actually was to her. Id. at 19. When the pickup speeded up and pulled in front of her, it almost hit her but did not: "he [Ayscue] just barely cleared the front end of the car." Id. at 20.

Gwendolyn Reid had slowed down after she saw the pickup but before Ayscue pulled in front of her. Because her foot was already off the accelerator, she did not apply the brakes to slow down further; she felt that her car was slowing down fast enough. Id. at 22. She testified that even after she took her foot off the accelerator and was dropping back, Ayscue's pickup was still only one and a half to two feet in front of her, but she never hit her brakes. Id. at 22. She thought at the time that she would not need to apply her brakes because she had started to drop back and could almost see underneath his truck; she was still traveling at 50 miles per hour. Id. at 23-24.

At that time, she testified, she saw the pickup's brake lights go on, at which point she hit her brakes and swerved her car "real sharp" to the left. Id. at 25. This action caused her to lose control of the vehicle, which hit a barrier on the left and turned over. She then lost consciousness. Id. at 26. She added that she had earlier looked away from the road, glancing down at the speedometer to see how fast she was going after the pickup had pulled in front of her, and, when she looked back up, saw the truck's brake lights go on. Id. at 27. She testified that her speed of travel was 45 miles per hour at that point. Id. at 27-28. She said she would have had no problem had Ayscue not applied his brakes. Id. at 28.

2. Impact on Decedent's Children

The evidence presented to the jury regarding the damages suffered by each surviving child was almost identical. It showed similar reactions of love and deep concern on the part of both children, and each testified to being similarly devastated by the accident.

Gwendolyn Reid became aware of her mother's injuries when she recovered consciousness and saw her mother lying upside down in the car with her arms straight down. Id. at 7. When she was able to get herself out of the car, Gwendolyn went to the other side and saw a significant amount of blood. Her mother did not respond to her and she realized her mother was unconscious. Id. at 8. The decedent was taken by air ambulance to the hospital, while Gwendolyn was taken to the hospital by ambulance. She was not

admitted, although "they wanted to admit me,...because I thought my mother would need me." Gwendolyn Reid had lumps on her head, a swollen nose, a cut-up arm, and a deep cut on her chin. Id. at 9. She did know how serious her mother's condition was at the time, but "just wanted to be near her." She found her worse than she expected. Id. at 10.

Ronald Reid testified that he first learned of the accident involving his mother and sister at about 12:00 noon or 1:00 p.m. on the day of the accident from one of the men with whom he was working on the base at Oceana. Id. at 29-30. After discovering from the police dispatcher which hospital his mother and sister had been taken to, he arrived at Norfolk General at about 2:00 p.m. to find his sister, who was injured, upset, and "really worried about her mother." Id. at 30-31. An hour later, he was permitted to see his mother in intensive care. Id. at 31.

Both children testified that when they saw their mother in the hospital, her face was swollen, her head was bandaged, she wore a cervical collar, and she was receiving medication through an intravenous device. Id. at 10, 31-32. Ronald stated that although he attempted to communicate with his mother, there was virtually no response or movement on the part of Gladys Reid, not even under her eyelids. Id. at 32. Gwendolyn testified that when she told her mother that she, Gwendolyn, was okay and nearby, that her mother squeezed her hand, although she admitted that she could not really say whether her mother was truly responding to her. Id. at 10-11.

Both children testified that they saw their mother every day of the eleven days she was in the hospital. Id. at 10, 32. Her son testified that he and his sister usually had to be chased out when visiting hours were over. Id. at 32. The son testified that he never lost hope until April 17th. He stated that he still hurts and feels that a big part of him died with his mother. Id. at 34. He stated that he had wanted to take her place when he saw that she had been injured. Id. at 33.

Gwendolyn described her mother as a homebody whose interest lay in her children. Because no one was more central or more important to her than her mother, the accident had caused Gwendolyn many problems. Id. at 14. She stated that her mother was the only person that Gwendolyn liked to shop with, go on trips with, and generally talk to. Id. at 15. During the holidays, she, Ronald, and their mother would get together and cook dinner. Id. at 15, 37-38. Although they did not have much money, id. at 13, one of the ways her mother showed affection on holidays was by cooking with Gwendolyn for the three of them. Id. at 15.

Ronald stated that he had never been closer to anyone in his life than to his mother and sister. Id. at 37. He testified that in March of 1985, the month before his mother died, he and

Gwendolyn and their mother had talked about taking a trip so that Gladys Reid could see some of her family. Id. at 38. Ronald testified that what he missed most about his mother was her influence on his life, id. at 38, and that he probably would never get rid of the effect of her death, that it was something he would have to live with and that would probably affect him in future relationships. Id. at 38-39.

Gwendolyn testified that she never thought that her plans with her mother would end the way they did, id. at 16, that no one could come close to replacing her during the rest of Gwendolyn's life, id. at 16, and that her mother had always been there when they needed her, was understanding, and "you could always talk to her about anything," id. at 15.

Both children described a triangular relationship between mother and siblings that was loving and close. They stated that their mother had raised them alone and that they did not know their father until Gwendolyn was approximately eleven or twelve years old and Ronald was thirteen. Id. at 35. Their father never lived at home with the two children and their mother. Id. at 12, 35. They lived with their maternal grandparents and their mother when they were young children. Id. at 12, 35. At the time of trial, Gwendolyn was 27 and Ronald was 28 years old. Id. at 12, 29. Neither had ever lived away from their mother until she died, and their mother had never stayed away from them for any extended period of time except once when she was in the hospital for a partial hysterectomy. Id. at 34. Their mother was 48 year old when she died. Id. at 38.

They both testified that before they started school, their mother had worked odd jobs to support them, and then went to work at Norfolk State University as a clerk stenographer. Id. at 12-13, 35. Ronald testified that she would get up an hour before they did and make sure they had breakfast and were dressed properly and ready to go to school. When they got home from school she usually was not there, but she checked on their homework when she got home. Id. at 35-36.

Gwendolyn added that their mother would play games and read and talk to them when she was home. Id. at 13. She and Ronald also added that they went to the park and went regularly to the movies and shopping with their mother. Id. at 14, 37. The decedent, a college graduate, talked to her children often about college when they were young and encouraged both of them to go to college to obtain an education. Id. at 13, 36.

Virtually the entire testimony of both Gwendolyn and Ronald was given in terms of "we." Each constantly referred to his or her sibling, including that sibling in the answers given to questions by plaintiff's attorney as to their activities, plans, thoughts, and attachments to their mother. Neither child ever

described any special relationship with their mother that did not include the other child.

ISSUE

The question confronting this Court is whether Gwendolyn Reid is precluded by the doctrine of collateral estoppel from alleging that she was not negligent in the operation of her vehicle on April 15, 1985.

This, in turn, requires the Court to examine the more difficult question of whether the judgment entered in the principal case denying recovery to Gwendolyn Reid was based on a jury determination that she was contributorily negligent, where the jury received: (1) a mandatory instruction denying recovery to Gwendolyn Reid if she was contributorily negligent and (2) a permissive instruction placing the decision of damage apportionment in the hands of the jury.

ANALYSIS

The clearest and most recent full discussion by the Virginia Supreme Court of the general doctrine of res judicata is contained in Bates v. Devers, 214 Va. 667 (1974).⁴ "Res judicata-bar" is the preclusive effect which an earlier valid judgment on the merits has upon the relitigation of the same cause of action between the same parties or their privies in a later suit. Id. at 671. "Collateral estoppel" is the use of an issue decided by an earlier final judgment⁵ to preclude the relitigation of that issue in a second law suit involving a different cause of action. In the subsequent action, the parties to the first action and their privies "are precluded from litigating any issue of fact actually litigated and essential to a valid and final personal judgment in the first action." Id. (emphasis in original).

The three fundamental requirements for application of the doctrine of res judicata, be it by res judicata-bar or collateral estoppel, are: (1) identity of persons and parties, (2) identity of issues, and (3) mutuality of the operation of the estoppel. Byrum v. Ames and Webb, Inc., 196 Va. 597, 600 (1955) (citing

⁴ The Supreme Court of Virginia has employed several different names in referring to the doctrine of collateral estoppel. See, e.g., Gordon v. Board of Supervisors, 207 Va. 827 (1967) (res judicata); Petris v. Robins, 196 Va. 322 (1954) (estoppel of record); Virginia Railway and Power Co. v. Leland, 143 Va. 920 (1925) (estoppel by judgment).

⁵ Faison v. Hudson, 243 Va. 413, 419 (1992). Here, there is no issue as to the finality of the judgment rendered in the earlier wrongful death action by Gladys Reid's administrator.

Ferebee v. Hungate, 192 Va. 32 (1951). This opinion will examine each of these elements separately, dealing with the more difficult "identity of issues" element last.

1. Identity of Parties

The rule of collateral estoppel is only operative where the second action is between the same persons who were parties to the prior action.⁶ Restatement (Second) of Judgments, § 27, Comment a, at 250 (1982). Gwendolyn Reid argues that collateral estoppel is inapplicable in the third-party contribution case at bar in part because she was not a party in the prior wrongful death action.

It is true that the principal suit was brought in the name of the administrator, Ronald N. Reid. However, the effect of res judicata or collateral estoppel is that either "bars any future suit between the same parties or their privies." Judgments, § 598 at 16 (emphasis supplied). The purpose of the rule is one of elemental fairness. The "party to be affected or some other with whom he is in privity," having had an opportunity to litigate the same matter in a former action, should not be permitted to litigate it again to the harassment and vexation of his opponent. 30 AM. JUR. Judgments § 165 at 911 (emphasis supplied).

For purposes of res judicata or collateral estoppel, Virginia cases clearly look beyond who is the nominal party plaintiff to determine who are the real parties at interest in a law suit.⁷ The

⁶ This general rule, however, may be waived in exceptional circumstances. See, e.g., Eagle Star, etc. v. Heller, 149 Va. 82 (1927).

⁷ In Patterson v. Anderson, 194 Va. 557, cert. denied, 345 U.S. 965 (1953), the court, in discussing an earlier tort action at law by a beneficiary against the administratrix, stated that an administratrix, in a wrongful death suit, acts "not for the benefit of the estate, but primarily and substantially as trustee for certain kindred of the deceased, who are designated in the statute," Id. at 567 (citation omitted). Analogously, when a parent sues as next of friend of a child, that parent is the nominal party plaintiff but the real party plaintiff, for collateral estoppel analysis, is the child itself, who stands to win or lose. Anderson v. Sisson, 170 Va. 178 (1938). Even when a person sues in his own right, he may, at the same time, also be protecting the rights of another. The case of Kessler v. Fentress, 223 Va. 14 (1982), involved two suits, the first an action for trespass against a husband and the second a title action filed by the wife against the plaintiff of the prior suit following her husband's death. The court viewed the prior action for trespass as implicating the interests of both the husband and his wife, and thus, the determination of the title issue in the first suit

case most on point to the issue of identity of parties is a Federal court decision applying Virginia law. In Taylor v. Anderson, 303 F.2d 546 (4th Cir. 1962), there was a judgment in favor of the defendant in a wrongful death action under Virginia law. That judgment barred the beneficiaries in the wrongful death action from bringing a later tort action for damages, even though one of the beneficiaries had disclaimed as a taker in the earlier wrongful death action. Id. at 548-49. The Court expressly found that a statutory beneficiary in a Virginia wrongful death action is not just a nominal party but is bound by the verdict that is rendered in that action. Id. at 549.

Thus, it is abundantly clear that the real plaintiffs in the Reid v. Ayscue wrongful death action were the statutory beneficiaries, Ronald and Gwendolyn Reid, the surviving children of the decedent. Therefore, all parties in the present contribution action are deemed to have been parties or privies in the prior action as well and the identity of parties requirement is satisfied.⁸

2. Mutuality

Virginia belongs to a minority of jurisdictions that require mutuality for the application of collateral estoppel.⁹ See Restatement (First) of Judgments, § 60A, and Restatement (Second) of Judgments, § 27. The Virginia Supreme Court explained in Bates, supra, at 671 n. 7: "We have applied the doctrine of 'mutuality,' i.e., the doctrine that one cannot assert collateral estoppel unless he would have been similarly precluded had the prior litigation in issue reached the opposite result." The court explained that the policy of mutuality exists to "insure a litigant that he will have a full and fair day in court on any issue essential to an action in which he is a party." Id. However, the

precluded the wife from litigating it in the second suit. Id. at 17.

⁸ The Virginia Supreme Court has denied the use of collateral estoppel where the parties in the present action were not adverse parties in the prior action. See Chrismans, Administratrix, v. Harmon, 70 Va. (29 Gratt.) 494 (1877); Capps v. Whitson, 157 Va. 46 (1931); Owen v. Dixon and Savage, 162 Va. 601 (1934); Bond v. Ames and Webb, 196 Va. 597 (1955). This rule does not pose a problem for Ayscue and Allegheny in the case at bar since the parties to the present dispute were clearly adverse parties in the wrongful death action.

⁹ See, e.g., Norfolk and Western Railway Co. v. Bailey Lumber Co., 221 Va. 638 (1980) (the principle of mutuality is especially persuasive when estoppel is used "offensively"), and Anderson v. Sisson, supra (mutuality is still a requirement in Virginia).

court stated that the rule will not be "mechanistically applied when it is compellingly clear from the prior record that the party in the subsequent civil action against whom collateral estoppel is asserted has fully and fairly litigated a fact which is essential to the prior judgment." Id. (citation omitted) (emphasis in original).

Here, it is clear that, had there been an award in favor of Gwendolyn Reid in the wrongful death suit, she could have used that judgment in her favor against Ayscue and Allegheny; it would have served as a defense against the third-party claim for contribution. The award of any damages to her would have conclusively shown that the jury, guided by Instruction 14, had found her conduct on the day of the accident free from any negligence. This Court would have allowed Gwendolyn Reid to use such a judgment from the previous action as a shield with which to bar Ayscue and Allegheny from obtaining contribution from her. Mutuality, therefore, is clearly present in this case.

3. Identity of Issues

The most difficult determination here, as in most suits involving collateral estoppel, is identifying precisely what issues were decided in the prior action. In Chrisman's, Administratrix v. Harman, 70 Va. (29 Gratt.) 494 (1877), the court cited Justice Seal of the United States Supreme Court outlining the "identity of issues" problem:

It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit, inconclusive as to that question in another suit between the same parties. But for this operation of the judgment, it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment was rendered, the whole subject matter of the action will be at large and open to a new contention, unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined.

Id. at 499 (citation omitted) (emphasis supplied).¹⁰

¹⁰ Accord, Jones v. Commonwealth, 223 Va. 619 (1976); Clodfelter v. Commonwealth, 218 Va. 98, 106, rev'd on other grounds, 218 Va. 619 (1977) (emphasis supplied); Levy v. Commonwealth, 291 Va. 1108, 1111-12 (1979); Rhodes v. Commonwealth, 223 Va. 743, 749 (1982).

a. Was the Issue of Contributory Negligence Raised in the Prior Suit?

In the instant case, it is beyond question that the issue of the negligence of Gwendolyn Reid was raised in the pleadings. In the statement of grounds of defense filed by the defendant, second paragraph, it was alleged "that the accident in question was caused solely by the negligence of plaintiff decedent's driver Gwendolyn S. Reid,..." The grounds of defense added that contributory negligence would be relied upon at trial.

The jury was presented with sufficient evidence to find that Gwendolyn Reid was contributorily negligent and that her contributory negligence was a proximate cause of the accident in which her mother died. Gwendolyn herself testified at trial that she did not apply her brakes when Ayscue pulled in front of her, even though only one-and-a-half to two feet remained between the vehicles and she was traveling between 45 and 50 miles per hour. She also stated that she glanced away from the road during this time and down at her speedometer. Only upon looking up again did she see that the pickup was braking, at which point she veered her car sharply to the left, causing her to lose control of the vehicle and the vehicle to hit a barrier and overturn. Transcript, supra, at 5-28. Instruction 14 told the jury that, if it found from the evidence that "Gwendolyn Reid was guilty of negligence which proximately caused or contributed to the accident, you should not award any damages to Gwendolyn Reid."

Thus, the pleadings, evidence, and jury instructions in the wrongful death action all raised the issue of contributory negligence of Gwendolyn Reid that proximately contributed to the accident.¹¹ The more difficult question, however, is whether this issue which was raised in the prior suit was determined by the resulting judgment that was entered. That is, did the jury

¹¹ Although earlier Virginia cases state that parol evidence is inadmissible except to identify the subject matter of a prior judgment, the more recent cases have stated that it can be used to identify what the issues of a previous action were. Compare Chesapeake and Ohio Ry. v. Rison, 99 Va. 18, 36 (1900), with Kessler v. Fentress, 223 Va. 14, 18 (1982), and Patterson v. Anderson, 194 Va. 557, 565, cert. denied, 345 U.S. 965 (1953). Certainly recent cases have allowed the pleadings, evidence, jury instructions, and the judgment to be used to determine the scope of collateral estoppel. Kessler, supra, at 18. Cases outside of Virginia have held that parol evidence is admissible to determine what issues were litigated, Restatement (First) of Judgments, § 68, Comment K (1942) at 305; Restatement (Second) of Judgments, § 27, Comment F (1982). There is no question in this particular case, however, that contributory negligence by Gwendolyn Reid was an issue in the prior action.

determine that Gwendolyn Reid's conduct was negligent and that such conduct proximately caused the accident?

b. Was the Issue of Contributory Negligence Determined by the Prior Judgment?

An issue raised in a previous action has been determined, for purposes of collateral estoppel, when the prior judgment decides that issue. That is, a specific determination of the issue must have been "essential to a valid and final personal judgment in the first action." Bates, supra, at 671.¹² The jury in the wrongful death action decided that Gwendolyn Reid was contributorily negligent if such a determination was essential to the verdict it rendered, upon which judgment was entered. Thus, the question arises: did the jury's verdict have to be based on a finding of contributory negligence?

As noted earlier, Ayscue and Allegheny argue that the trial court's mandatory Instruction 14, prohibiting recovery for Gwendolyn Reid if the jury found her to be contributorily negligent, taken together with the jury's eventual award of \$0.00 damages to Gwendolyn Reid, is proof that Gwendolyn Reid's negligence was necessarily determined by the jury in the prior suit. Gwendolyn Reid, on the other hand, points to Instruction 13, which permitted the jury to apportion damages among the beneficiaries as it saw fit. This, she claims, is an alternative explanation for the jury's decision to deny recovery to her. Such an alternative explanation, she claims, precludes this Court from finding that the prior judgment was necessarily based upon a finding of contributory negligence.

In discussing the burden of proof on this issue, the Virginia Supreme Court has stated that "the one asserting the defense of res judicata-bar or collateral estoppel must show by a preponderance of the evidence that the claim or issue should be precluded by the

¹² For example, in Hairston v. Hairston, 117 Va. 207 (1915), a husband sued his wife for divorce, claiming she had deserted him. Two years earlier, a court had dismissed a similar action by the husband specifically because the time period between the alleged desertion and the filing of the bill had not reached the required three years; that court made clear that it had not decided the desertion issue. When the wife sought to defend against the later suit on the grounds of res judicata, the Supreme Court held that the issue of desertion had not been definitively determined in the first suit, and therefore that the husband was not precluded from litigating it in the later action. A determination on the desertion issue was not essential to the court's holding in the prior action.

prior judgment." Bates, supra, at 671 (emphasis supplied).¹³ Therefore, the burden in this case is upon Ayscue and Allegheny to present evidence showing it more probable than not that the jury's denial of recovery to Gwendolyn Reid was necessarily based upon a finding that she was contributorily negligent.

Had the prior wrongful death action not involved an apportionment of damages issue, the matter before this Court today would have fit almost precisely within the classic illustration of defensive use of collateral estoppel: a judgment for the plaintiff would have been a judgment for Gwendolyn Reid, which in turn would have precluded Ayscue from seeking to show Gwendolyn Reid contributorily negligent and liable for contribution in a later action.¹⁴ However, because the jury denied any recovery at all to

¹³ It is noted that the language used assumes that the person who is attempting to invoke res judicata-bar or collateral estoppel will be invoking it as a defense, or shield, against a succeeding action by a party to the prior proceeding. No Virginia Supreme Court case has yet allowed the offensive use of collateral estoppel or res judicata-bar. However, those cases where its use has been denied as a shield have not distinguished that defensive use from its use as a sword. See Anderson v. Sisson, 170 Va. 178 (1938), Rhines v. Bond, 159 Va. 279 (1932), and W & W v. Bailey, 221 Va. 639 (1980), where the offensive use of collateral estoppel was denied due to lack of mutuality.

No suggestion has been made in any Virginia Supreme Court case, however, that the Court would not allow res judicata-bar or collateral estoppel to be used as a sword as well as a shield. In fact, the very notion of mutuality presupposes that, if it may be used by one party defensively in a subsequent action, then the other party to the prior action must have been in the position to have made offensive use of the prior judgment or issue had there been an opposite outcome.

Cases from other jurisdictions have so held, and there is no reason to believe that Virginia would not so hold. Boyd, Graves and Middleditch, Virginia Civil Procedure, § 12.11 at 472-73. The United States Supreme Court, for example, allowed such a use in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

¹⁴ The First Restatement of Judgments provides an illustration of a suit between the drivers of two automobiles that collide. A sues B alleging B's negligence, which B denies, alleging that the collision was due to A's negligence. After judgment for A in the first action, B brings a second action against A for damages to his automobile. "The prior judgment is a defense to the action, since it is conclusive that the collision was caused by the negligence of B and was not caused by the negligence of A." Restatement (First) of Judgments, § 68, Comment m, Illustration 6, at 307

Gwendolyn Reid, the judgment entered was for the administrator and Ronald Reid but against her. Had the trial court's only instruction to the jury on damages been mandatory Instruction 14, denying recovery to Gwendolyn Reid if she was found negligent, the jury's determination that she was contributorily negligent would be clear. The matter is clouded, however, by the existence of Illustration 13, which permitted the jury to determine how damages should be apportioned. Had a special interrogatory been submitted to the jury on the issue of contributory negligence, the task facing this Court also would have been much easier.¹⁵ The problem, of course, is that the jury never explicitly stated why it denied Gwendolyn Reid any recovery. Consequently, Gwendolyn Reid argues that it is at least theoretically possible that the award of \$0.00 damages to her and \$50,000.00 to her brother was based on some reason other than a finding of contributory negligence.

Where there is more than one possible explanation for a prior judgment and the party seeking to invoke collateral estoppel cannot satisfactorily demonstrate that the judgment turned on a determination of the specific issue in question, the prior judgment will have no preclusive effect as to that issue. Restatement (Second) of Judgments, § 27, Comment g at 257 (1982); Restatement (First) of Judgments, § 68, Comment 1 at 306 (1942).¹⁶

(1942). See Faison v. Hudson, 243 Va. 413 (1992).

¹⁵ When the specific grounds for a decision or verdict are clearly set out in the record, the question of whether an issue was necessarily determined by the resulting judgment is fairly clear-cut. See Petris v. Robbins, 196 Va. 322 (1954) (Supreme Court upheld defendant's use of collateral estoppel to bar a suit for personal injury by the plaintiff where the judge in a prior action between the parties for property damages arising out of the same accident had stated on the record that neither party was entitled to a recovery because both had been negligent); Virginia Railway Co. v. Leland, 143 Va. 921 (1925) (Supreme Court allowed defendant to invoke res judicata to bar suit by plaintiff for personal injuries sustained in accident where the court in a previous action between the parties for property damages had "conclusively determined" that the accident was proximately caused by the negligence of the plaintiff and his co-plaintiff).

¹⁶ For example, in Chakales v. Djiovanides, 161 Va. 48 (1933), the defendant had earlier recovered a verdict in a suit on an allegedly usurious loan. When the plaintiff sought to foreclose on the subject property of the loan for failure of defendant to pay interest, defendant claimed that the first action had established the loan as usurious and that no interest was owed. The Virginia Supreme Court held that because there were two issues upon which

Significantly, Instruction 13 told the jury that it could decide how to apportion damages "subject to the other instructions of this Court." That is, the jury could not ignore the mandatory requirement of Instruction 14. This lends some strength to the argument of Ayscue and Allegheny that denial of recovery to Gwendolyn Reid was pursuant to the mandatory instruction. Upon close scrutiny of the evidence presented at trial, this Court is convinced that the contention that the jury could have apportioned damages as it did by following Instruction 13 is implausible.

The evidence shows that Ronald and Gwendolyn Reid were equally close to the decedent: according to each, both expressed the same concern and demonstrated the same love and devotion to their mother following the accident. Both suffered virtually identical sorrow, mental anguish, and loss of solace. If anything, it is arguable that the jury could have found Gwendolyn Reid to have suffered greater mental anguish and to be entitled to a greater recovery given that she was in the vehicle that collided with Ayscue's pickup, she actually saw her mother injured, and she herself was injured in the accident. She, arguably, was more susceptible and suffered greater mental anguish and sorrow over her mother's hospitalization.

In sum, there is no evidence to suggest that Ronald Reid was the least bit more entitled to recover for his losses than was his sister, much less that he should receive \$50,000.00 while Gwendolyn received \$0.00. The only evidence presented to the jury that could rationally justify such an apportionment of damages is the evidence suggesting that Gwendolyn Reid was contributorily negligent on the day of the accident.

Gwendolyn Reid's own testimony arguably makes her guilty of contributory negligence as a matter of law. She herself testified that she failed to apply her brakes after Ayscue pulled his pickup truck in front of her on the highway, despite the facts that there

the earlier verdict could have been rendered, and it could not tell which one formed the basis of the jury's decision, the prior action could not be used to bar relitigation of the usury issue. Id. at 81-82.

Similarly, in Washington, Alexandria and Georgetown v. Cisickles, 65 U.S. (24 Howard) 333 (1860), the plaintiffs--patent holders of a fuel saving device for steamships--sued the steamship owners on both special and general counts. The jury verdict did not state whether it was on the special or general counts. Consequently, the United States Supreme Court refused to allow the plaintiffs to use that verdict to invoke res judicata in a second suit for special counts only, stating that the jury verdict could have been on either the special counts or the general counts. Id. at 344-45.

was no more than two feet between the vehicles and that the vehicles were traveling at approximately 45 miles per hour. She also testified that she looked away from the road, at her speedometer, after Ayscue pulled in front of her, only to discover that Ayscue had applied the brakes of his pickup when she looked back at the road. It was at this point that she veered her vehicle sharply to the left, which resulted in a collision with the left barrier and injury to her mother and herself.

Gwendolyn Reid cites the Court to Graddy v. Hatchett, 233 Va. 65 (1987), in which the jury in a wrongful death action involving the death of a young boy awarded, in addition to funeral and hospital expenses, \$400,000.00 to his father and nothing to his mother, brothers, or sisters. Gwendolyn Reid apparently argues that this case demonstrates that a jury may apportion a wrongful death award any way it chooses, and that the jury in the instant case could have acted similarly in its apportionment of damages.

First, it should be noted that none of the plaintiffs in the Graddy case appealed the award itself. Therefore, the issue of whether the jury should have apportioned damages amongst the plaintiffs, rather than granting them all to the father--apparently as the paterfamilias, or head of family--was never before the Virginia Supreme Court. Second, the father in the Graddy case was awarded \$400,000.00 and no other mark was made on the page. One could assume that the jury simply neglected to fill in all of the blanks, or that it determined that the father, as head of the family, should recover for the entire family. The jury might have been reluctant to judge among the various siblings' relationships with the decedent, which would have been required had the jury apportioned the damages among all of the family members. In the instant case, in contrast, the jury was faced with two children, both in almost identical situations vis a vis the decedent. It chose to award one a very large sum of money and, rather than neglecting to award the other, it specifically set out by hand a printed "\$0.00," making clear its deliberate and total denial of any award to Gwendolyn Reid.

Graddy, therefore, does not stand for the proposition that the Supreme Court has upheld, after specific arguments on the point, a jury verdict that apportions damages to only one beneficiary and not to others, similarly situated, as that issue was not before the Court. Even if that had been the Court's ruling, it would not stand for the proposition that such a decision under the facts of the Graddy case would mean that the jury in the case at bar would have been justified in apportioning damages between the decedent's two children in such a patently unreasonable manner.

Had Gwendolyn Reid not been the driver of the vehicle that collided with Ayscue's pickup and the jury still brought back the same verdict, this Court would be dealing with the issue that was

never presented in Graddy: can a jury in a wrongful death case apportion damages in such a way that a court could find that no rational jury could make such an apportionment? Had Gwendolyn Reid not been the driver, thereby eliminating the possibility that she was contributorily negligent, would a court have set aside the failure of a jury to award a verdict to Gwendolyn Reid, in the face of her brother's recovery of \$50,000.00 and the almost identical evidence of the relationship each had with the mother, on post trial motion? The answer appears clear: a rational jury could not, on the evidence that was presented at trial, have determined that Gwendolyn Reid was any less entitled to recover than her brother Ronald Reid, and a trial court would have set aside such an apportionment under these facts as not the product of rational-minded jurors.

A rational jury, on the other hand, could have determined that Gwendolyn Reid was contributorily negligent on these facts and, thus, such a verdict would have been upheld even had there been a motion by the plaintiff to set aside the verdict as contrary to the law and the evidence on that issue. It is clear from the evidence presented at trial that there was sufficient evidence, even out of the mouth of Gwendolyn Reid herself, to convict her of negligence that proximately contributed to the accident. The preponderance of the evidence, therefore, indicates that the prior judgment denying a recovery to Gwendolyn Reid was based on a determination by the jury that she was contributorily negligent and that such negligence proximately contributed to the accident that occurred on April 15, 1985.

CONCLUSION

All of the requirements for a valid invocation of collateral estoppel under Virginia law have been satisfied in this case: there is identity of parties, mutuality, and identity of issues. This Court will assume that the jury in the prior action acted as a rational jury would act, and reached its determination to award \$0.00 to Gwendolyn Reid and \$50,000.00 to her brother based on its finding that Gwendolyn Reid was negligent in a way that contributed to the death of her mother. Defendants, therefore, are entitled in the contribution action to use the prior judgment against Gwendolyn Reid in the wrongful death action offensively as collateral estoppel on the issue of the contributory negligence of Gwendolyn Reid.

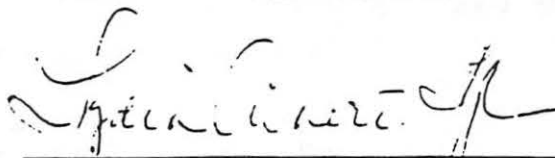
All of the elements needed for contribution having been satisfied--a judgment having been entered on a verdict against defendants growing out of the same accident and that judgment having been paid in full--the motion for summary judgment by Ayscue and Allegheny in their third-party contribution action against Gwendolyn Reid is granted.

As was stated by the defendants in the memorandum in support

of their motion for summary judgment, "Gwendolyn Reid, represented by the same counsel that now represents her, had a full and fair opportunity to demonstrate that she was not guilty of negligence which caused the death of her mother. She was unsuccessful in that attempt and the jury found that she was negligent. The defendants and third-party plaintiffs ought not have to prove again that same issue. Judgment for contribution as a matter of law should be entered here."

Judgment here should be granted Ayscue and Allegheny against Gwendolyn Reid for \$38,316.65, with costs. Counsel for Ayscue and Allegheny are directed to prepare an order in accordance with this opinion.

ENTERED: August 11, 1992

A handwritten signature in cursive script, appearing to read "Lydia Calvert Taylor", written over a horizontal line.

Lydia Calvert Taylor, Judge

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

RONALD D. REID, Administrator
of the Estate of Gladys C. Reid,
Deceased,

Plaintiff,

v.

AT LAW NO. L86-1187

RALPH LEE AYSCUE and
ALLEGHENY PEPSI-COLA
BOTTLING COMPANY,

Defendants and Third
Party Plaintiffs,

v.

GWENDOLYN S. REID,

Third Party Defendant.

ORDER, entered October 13, 1992

THIS DAY came the defendants and third-party plaintiffs, Ralph Lee Ayscue and Allegheny Pepsi-Cola Bottling Company, by counsel, on their Motion for Summary Judgment on the third-party motion for judgment filed by them in the above-referenced matter, and upon the consideration of briefs submitted by the parties and argument of counsel,

THE COURT FINDING, for reasons more particularly stated in its letter opinion of August 11, 1992, which letter opinion is incorporated herein by reference, that all the elements needed for contribution have been satisfied in that a judgment has been entered on a verdict against the defendants/third-party plaintiffs growing out of the same acts, and that the judgment has been paid in full by the defendants/third-party plaintiffs, and it

FURTHER FINDING THAT all the requirements for valid application of the doctrine of collateral estoppel under Virginia law have been satisfied in this case in that there is identity of parties, mutuality and identity of issues, it is therefore ORDERED that

The Motion for Summary Judgment filed by the defendants/third-party plaintiffs in their third party contribution action against Gwendolyn Reid is hereby granted, it is further ORDERED that

Judgment is hereby granted in favor of the defendants/third-party plaintiffs, Ralph Lee Ayscue and Allegheny Pepsi-Cola Bottling Company, against Gwendolyn Reid, the third-party defendant, in the amount of \$38,316.65 with costs and interest, at the judgment rate of interest, from the date of entry of this Order until this judgment is satisfied. The third-party defendant's objections to rulings of the Court are noted.

This matter is ORDERED removed from the Court's docket.

ENTER: 10/13/92

[Signature]
Judge


A COPY TESTE:

WILLIAM T. RYAN, CLERK
NORFOLK CIRCUIT COURT
BY *[Signature]*
Deputy Clerk authorized to sign
on behalf of William T. Ryan.

WE ASK FOR THIS: but this
ORDER is directed to us to the
denial of pre-judgment interest.

[Signature]
S. Bernard Goodwyn, Esquire
WILLCOX & SAVAGE, P.C.
1800 NationsBank Center
Norfolk, VA 23510
(804) 628-5500

SEEN AND OBJECTED TO:



John G. Crandley, Esquire
PRESTON, WILSON & CRANDLEY
Birdneck Office Park
1112 Laskin Road
Virginia Beach, VA 23451

57000.1

* * *

7 JOSEPH J. DELLAVECCHIO, being first duly sworn,
8 was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. CRANDLEY:

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

12 A. Joseph J. Dellavecchio,

13 D-e-l-l-a-v-e-c-c-h-i-o.

14 Q. And are you a member of the Virginia State
15 Police?

16 A. I am.

17 Q. And how long have you been a member of the
18 Virginia State Police?

19 A. Seven years.

20 Q. Did you have occasion on April 5, 1985 to
21 investigate an automobile accident which happened in the
22 eastbound lane of the I-264 interstate, east of the I-64
23 overpass in Norfolk?

1 A. Yes, I did.

2 Q. When you arrived at the scene, Officer, or
3 Trooper, what did you see? r

4 A. I observed a vehicle flipped upside down in the
5 right-hand lane.

6 Q. I am going to show you a photograph, Trooper, and
7 ask you if that is the vehicle you observed on your
8 arrival?

9 A. Yes, sir, it is.

10 Q. Did you --

11 MR. CRANDLEY: Your Honor, I offer this as
12 Plaintiff's Exhibit Number One.

13 MR. RUTHERFORD: No objection. Do you want to do
14 all of them at the same time, Mr. Crandley? I have no
15 objection to any of them.

16 THE COURT: All right. I will receive it as
17 P-1.

18 (Photograph was marked Exhibit P-1.)

19 MR. CRANDLEY: Let me offer two additional
20 photographs at this time, Your Honor.

21 BY MR. CRANDLEY:

22 A. I show you two additional photographs or two more
23 photographs, Trooper, and ask if you can identify these?

1 Are these also photographs of the scene?

2 Q. Yes, they are.

3 MR. CRANDLEY: Your Honor, I would offer these as
4 Plaintiff's Exhibits Two and Three.

5 THE COURT: If there is no objection, they will
6 be received as P-2 and P-3.

7 (Two photographs marked Exhibit P-2 and
8 P-3.)

9 BY MR. CRANDLEY:

10 Q. Were you able in your investigation to determine
11 who the operator of the vehicle overturned in the road was?

12 A. Yes, sir.

13 Q. And who was that?

14 A. It was Gwendolyn Reid.

15 Q. All right. Did your investigation reveal any
16 other occupants in that vehicle?

17 A. Yes, Gladys Reid.

18 Q. Was Gladys Reid at the scene when you arrived,
19 Trooper?

20 A. Yes, she was.

21 Q. What was her condition as observed by you?

22 A. She was being treated by the paramedics. She had
23 head injuries and there was a lot of blood from the scene.

24 Q. Do you know how she was removed from the scene?

1 A. She was transported by the Nightingale
2 helicopter.

3 Q. In your investigation of the accident did you
4 observe the scene, the area leading up to the scene, for
5 evidence of skid marks and things like that?

6 A. Yes, I did.

7 Q. Did you observe such marks in the highway, and if
8 so, what were they?

9 A. Do you want to go from where the car was resting
10 or from the start where the first marks were?

11 Q. Why don't you start where the first marks began.

12 A. There were tire marks that were coming out of the
13 right lane. It's a two-lane roadway. The vehicle's tires
14 were sliding sideways making an evasive swerve as in an
15 angle position. This traveled for a hundred and sixteen
16 feet. The tire marks were going over to the right toward
17 the barrier -- the concrete barrier on the side of the
18 roadway. The tire marks went up where there was blue paint
19 on the barrier and tire marks -- in line with the tire
20 marks.

21 Q. Let me show you this for a moment, Trooper. I'm
22 going to show you what has been marked as Plaintiff's
23 Exhibit Three and ask you if that depicts any of what you
24 have described so far?

25 A. Yes. It has the tire marks coming from the

1 right-hand lane going into and over toward the concrete
2 barrier.

3 Q. So that would be the beginning of those marks, as
4 you testified, coming from the vehicle and toward the
5 vehicle?

6 A. Yes.

7 Q. I am going to show you what has been marked as
8 Plaintiff's Exhibit Two and ask if that shows any of the
9 marks?

10 A. Yes. This is the end of the marks where the tire
11 marks are going over toward the barrier, striking the
12 concrete barrier off to the right.

13 Q. Did you notice any marks on the barrier to the
14 left as you see in this picture?

15 A. No, sir.

16 Q. Were there any other marks you observed after the
17 marks on the barrier, Trooper?

18 A. After the marks on the barrier there were scrape
19 and gouge marks in the roadway coming from where the blue
20 paint -- tire marks on the barrier leading up to the
21 position of the vehicle where the vehicle was flipped over
22 in the roadway.

23 Q. And how long were those marks?

24 A. Those marks were a hundred and forty-six feet,
25 eleven inches.

1 Q. So you had a hundred and sixteen feet of tire
2 marks. Did you have any length of tire marks along the
3 barrier where the car itself --

4 A. Approximately eight feet from where it started to
5 where it came off.

6 Q. And then a hundred and forty-six of scraping
7 marks on the concrete?

8 A. Yes, sir.

9 Q. So approximately two hundred and seventy feet of
10 marks leading up to where the car was resting?

11 A. Yes.

12 MR. CRANDLEY: May I show these photographs to the
13 jury?

14 THE COURT: Yes.

15 BY MR. CRANDLEY:

16 Q. Trooper, did your investigation reveal any other
17 vehicle involved in this accident other than the Reid
18 vehicle?

19 A. At the scene?

20 Q. Yes.

21 A. Not at the scene.

22 Q. All right. Did you ultimately learn the name of
23 another person involved in the accident?

24 A. Yes, I did.

1 Q. And who was that?

2 A. That gentleman.

3 Q. Mr. Ayscue?

4 A. Who told me, or who was it?

5 Q. Who was the person you ultimately determined was
6 also involved in the accident?

7 A. Mr. Ayscue.

8 Q. Is that this gentleman here?

9 A. Yes, sir.

10 Q. Was he at the accident scene when you arrived?

11 A. No, sir.

12 Q. How long were you there?

13 A. How long was I there?

14 Q. Yes.

15 A. I was there approximately an hour and a half.

16 Q. When did you finally track Mr. Ayscue down?

17 MR. RUTHERFORD: Let's ask Counsel not to be so
18 judgmental about his language. Tracking him down is
19 probably a --

20 THE COURT: Well, to the extent that that
21 indicates some kind of Dick Tracy movie you can disregard
22 it. But the question is how long it took the officer to
23 find Mr. Ayscue.

24 BY MR. CRANDLEY:

1 Q. How long did it take you to find Mr. Ayscue?

2 A. Approximately 4:00 p.m. that day on the phone.

3 Q. And when did you first meet him in person?

4 A. I went by his house. I told him I would come by
5 his house later on that week, and I went by his house on
6 Sunday evening.

7 Q. Now, on these photographs -- let me show you what
8 has been marked Plaintiff's Exhibit Two. I think this
9 gives us -- I will give you them all.

10 I think these photographs reveal that there are
11 barriers actually on both sides of those two lanes in that
12 vicinity of the highway, are they not?

13 A. The barriers are on the left side. On the right
14 side is a permanent wall.

15 Q. What you have on the right are temporary barriers
16 that were up there for construction.

17 A. Yes, sir.

18 Q. On the right side of those photographs where the
19 barriers are, what is to the right of those barriers?

20 A. There was another set of barriers.

21 Q. And then to the right of the right of that other
22 set?

23 A. There is another set of two lanes of 264.

24 Q. And that traffic runs parallel with the two lanes
25 in the center of that picture?

1 A. Yes, sir.

2 Q. How far -- and use Plaintiff's Exhibit One, the
3 one with the close up of the car if you would. Can you see
4 the barrier? In fact, if you will step down here next to
5 the jury I think it might be easier.

6 (Witness complied.)

7 Q. On Plaintiff's Exhibit One, this barrier here
8 which is to the right of the road, this is the direction of
9 travel, right?

10 A. Yes.

11 Q. In the picture this right barrier here from the
12 point where this car is resting, how far up the road does
13 that extend until it ends?

14 A. At least three hundred and thirtysome feet.

15 Q. Three hundred thirty feet from where this car is
16 resting here?

17 A. Yes, sir.

18 Q. And the barrier to the left, what was that there
19 for, do you know?

20 A. That is a retainer wall. That is the permanent
21 wall from the flyover.

22 Q. Was the flyover in at that time?

23 A. No, sir; they were doing construction. At that
24 time they were still building and grading.

1 Q. So the vehicle on April 5, 1985, traveling
2 eastbound on this road, would have no worries about traffic
3 coming from the left at any time, would he?

4 A. No, sir.

5 Q. And from this point here the first problem with
6 traffic would be what, three hundred and fifty feet away?

7 A. Three hundred feet away. The wall here extends
8 further beyond the permanent wall here. So this wall
9 barrier here extends beyond that.

10 Q. The temporary barrier went further?

11 A. Yes.

12 Q. All right. Thank you, Trooper.

13 MR. CRANDLEY: No further questions, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. RUTHERFORD:

16 Q. Trooper, did you have occasion to talk to
17 Gwendolyn Reid?

18 A. Yes, sir, I did.

19 Q. Did you ask her what happened?

20 A. Yes, sir, I did.

21 Q. What did she say happened?

22 A. At the scene she stated that she was driving a
23 Datson that her mother owned. Her mother was a passenger.
24 She stated she was coming up on the Richmond ramp, and

1 changed from the left to the right lane, and was continuing
2 down interstate 264 when a white pick-up truck with a
3 camper shell with Pepsi written on the doors came up beside
4 her and put on his right turn signal. And after speeding
5 up a little, he cut in front of her vehicle, then
6 immediately put on his brake. She swerved to avoid hitting
7 the pick-up truck, swerved to her left and then back over
8 to the right where she lost control of the car hitting the
9 concrete barrier.

10 Q. She told you that she got back over to the right
11 before she lost control of the car?

12 A. Well, she said she swerved to avoid it to the
13 left, and turned the wheel back over to the right. At
14 that point the car was sliding and she lost control of it.

15 Q. Okay. But she told you about going from the left
16 back over to the right?

17 A. Yes, sir.

18 Q. Did she tell you she was knocked out or anything,
19 or couldn't remember?

20 A. No, she didn't.

21 Q. Did you ask her how fast she was going?

22 A. Yes.

23 Q. What did she tell you?

24 A. About forty-eight to fifty miles per hour when
25 she had to swerve.

1 Q. And I believe you talked to Ms. Hames at the
2 scene?

3 A. No, sir.

4 Q. Was she no longer there at the scene?

5 A. No, she was not at the scene.

6 Q. Had she given her name?

7 A. She had gone to a phone and called and left her
8 name with our dispatcher, and I contacted her a little bit
9 later.

10 Q. By and by you caught up with Mr. Ayscue, did you
11 not, talked to him?

12 A. Yes, sir.

13 Q. He told you he stopped at the scene and called
14 Gwendolyn Reid's brother for her?

15 A. Yes.

16 Q. Did he tell you whether or not he thought he was
17 involved --

18 MR. CRANDLEY: Objection, Your Honor. This is
19 hearsay. It is self serving as to Mr. Rutherford's client.

20 Q. Did he give you any explanation --

21 MR. CRANDLEY: I don't believe the Court has
22 ruled.

23 MR. RUTHERFORD: I changed the question.

24 MR. CRANDLEY: Any statements made by Mr.
25 Rutherford's client cannot be elicited through this

1 witness.

2 MR. RUTHERFORD: Your Honor, please, I thought
3 the issue had been brought up, the issue of why Mr. Ayscue
4 wasn't there. I hadn't introduced that issue.

5 THE COURT: I'll allow it.

6 BY MR. RUTHERFORD:

7 Q. Did he tell you why he hadn't remained at the
8 scene?

9 A. Yes, sir.

10 Q. What did he tell you?

11 A. He stated that he didn't feel he was involved in
12 the accident and went to the phone to call Gwendolyn's
13 brother at her request.

14 MR. RUTHERFORD: I have no further questions.
15 Thank you, Trooper.

16 REDIRECT EXAMINATION

17 BY MR. CRANDLEY:

18 Q. Trooper, let me show you Plaintiff's Exhibit
19 Number One again. On the right edge of that picture, the
20 woman in the white shirt, do you know who that is?

21 A. That's Gwendolyn Reid.

22 Q. The one with blood all over her and a cervical
23 collar on?

24 A. Yes, sir.

1 Q. Is that the condition she was in when you talked
2 to her?

3 A. Yes, sir. Her arm was cut.

4 MR. CRANDLEY: No further questions, Your Honor.

* * *

12 MARY C. HAMES, being first duly sworn, was
13 examined and testified as follows:

14 DIRECT EXAMINATION

15 BY MR. CRANDLEY:

16 Q. Would you state your full name, please?

17 A. Mary C. Hames.

18 Q. How old are you, Ms. Hames?

19 A. I'm twenty-eight.

20 THE COURT: How do you spell your last name?

21 THE WITNESS: H-a-m-e-s.

22 BY MR. CRANDLEY:

23 Q. Where do you live, Ms. Hames?

1 A. 532 Marguerite Drive.

2 Q. Do you work or are you unemployed?

3 A. I am self employed. I'm a real estate sales
4 agent.

5 Q. Did you have occasion on April 5, 1985 to witness
6 an automobile accident in the eastbound lane of I-264 just
7 beyond the I-64 overpass?

8 A. Yes, I did.

9 Q. Do you recall what time of day it was?

10 A. It was around noon time.

11 Q. And where were you coming from at the time?

12 A. I was coming from the downtown Norfolk area.

13 Q. And where were you headed?

14 A. I was headed towards the Kempsville area where I
15 lived at the time.

16 Q. Had you been on I-264 from Waterfront Drive?

17 A. To the best of my memory, yes.

18 Q. The last several miles immediately proceeding
19 this accident, how fast was traffic?

20 A. Normal flow of traffic, not heavy, not too light.

21 Q. As you got up to where the accident occurred, was
22 there any traffic immediately in front of you in your lane?

23 A. Not stopped traffic, not a lot of traffic.

24 Q. Were there any cars in the lane preceding ahead
25 of you as you got up to where the accident occurred?

- 1 A. There was.
- 2 Q. What car was ahead of you?
- 3 A. The Reid vehicle.
- 4 Q. Describe that car.
- 5 A. It was a small, blue import car.
- 6 Q. And how far ahead of you was that vehicle?
- 7 A. About fifty feet.
- 8 Q. And what was your speed at the time, Ms. Hames?
- 9 A. About fifty-five miles an hour.
- 10 Q. And how long had that distance of fifty feet been
- 11 maintained between you and the Reid vehicle?
- 12 A. For quite some time.
- 13 Q. Up through the time that the accident occurred,
- 14 was there any significance between that distance between
- 15 you and the Reid vehicle?
- 16 A. No.
- 17 Q. Now did I ask you about the weather?
- 18 A. The weather was fine, beautiful.
- 19 Q. Was the Reid vehicle -- the vehicle you would
- 20 call the Reid vehicle -- the blue vehicle involved in the
- 21 accident?
- 22 A. Yes.
- 23 Q. Was there any other vehicle involved in the
- 24 accident?
- 25 A. It was a one-car accident.

1 Q. Was there any other car that was connected in any
2 way with that car at the time?

3 A. Yes.

4 Q. What was that?

5 A. It was a small import type truck, pick-up truck.

6 Q. And when did you first observe that truck?

7 A. Right about where the interstate started to
8 split.

9 Q. Split to go where?

10 A. For the Chesapeake on ramp for I-64 versus the
11 264 turning into 44.

12 Q. When you first observed that truck, where was it?

13 A. It came from behind me.

14 Q. In what lane was it in?

15 A. I don't recall.

16 Q. What lane were you in?

17 A. The right lane after the split.

18 Q. And after the split how many lanes remained?

19 A. Two.

20 Q. Did that vehicle pass you?

21 A. Yes, it did, on my left.

22 Q. Passed you in the left lane?

23 A. Yes.

24 Q. You were going fifty-five at the time?

25 A. Yes.

1 Q. How quickly did he pass you?

2 A. Well, he passed me -- I don't know.

3 Q. And did there come a time when you saw that
4 vehicle along side the Reid vehicle?

5 A. Yes.

6 Q. What did you observe about the -- what did you
7 call it, a pick-up truck?

8 A. Yes.

9 Q. What did you observe as he passed you?

10 A. It appeared he was trying to get into the right
11 lane. He turned his signal on. It looked like he was
12 trying to judge the speed as to whether he could go in
13 behind or in front of the Reid vehicle.

14 Q. All right. But from what position was he trying
15 to do that?

16 A. From either right next to her or slightly in
17 front of her.

18 Q. Tell me, was there room enough between your car
19 and Ms. Reid's car for him to slip into that distance?

20 A. Sure, there was about fifty feet.

21 Q. Had Mr. -- is that the gentleman that was driving
22 the truck, do you know?

23 A. I think so.

24 Mr. Rutherford: We will stipulate that it was,
25 but the witness doesn't seem to know.

1 Q. Had that truck operator, in fact, pulled into the
2 middle of that distance between you and the Reid vehicle
3 would that have caused you any hardship, difficulty in
4 driving?

5 A. No, not me.

6 Q. Now, you say he was along side the Reid vehicle
7 and it appeared he was trying to get behind her or in front
8 of her?

9 A. Correct.

10 Q. What did he ultimately do?

11 A. Ultimately he ended up in front of her.

12 Q. At one point what happened?

13 A. He tried to get over in the lane and I don't know
14 whether he didn't see her, or maybe she was in his blind
15 spot. He did cross the dotted line at one point and went
16 back when he caught her in his blind spot, or his mirror or
17 whatever.

18 Q. And then what happened?

19 A. Then he proceeded to get in front of her.

20 Q. Did you see any traffic immediately in front of
21 the Reid vehicle while this was occurring?

22 A. No.

23 Q. How far up the road could you see in front of her
24 car?

25 A. A couple of hundred feet maybe.

1 Q. When this vehicle, this white pick-up truck
2 pulled in front of the Reid vehicle, how close in front of
3 the Reid vehicle did it pull?

4 A. I'd say as close as it possibly could without
5 touching it.

6 Q. Can you estimate in feet?

7 A. Around five feet.

8 Q. Five feet?

9 A. (Witness nodded head).

10 Q. And what did you observe as it pulled in front of
11 the Reid vehicle?

12 A. I saw his brake lights.

13 Q. At five feet he put his brake lights on?

14 A. Yes.

15 Q. What did the Reid vehicle do? What did you see
16 when his brake lights went on?

17 A. Well, she immediately turned the wheel of her car
18 very hard to the left and then over to the right, and
19 that's when the car flipped over.

20 Q. As a result of the activity of the Reid vehicle,
21 the blue car, were you forced to take emergency action to
22 avoid running into its rear?

23 A. Not an emergency action, no.

24 Q. Did you bring your car to a stop?

25 A. Yes, I did.

1 Q. After the accident what happened?

2 A. After the accident I stopped my car somewhat
3 short of the Reid vehicle. I offered a tow or some
4 assistance, and then I went and got help off the
5 interstate.

6 Q. Did you see the truck after the accident, the
7 truck that had cut in front of the Reid vehicle?

8 A. Yes.

9 Q. Where was it?

10 A. Quite some distance past the accident. It pulled
11 over to the side of the road and was looking back toward
12 where the accident happened.

13 Q. Now when you say, "quite some distance past the
14 accident", do you mean where the car came to rest?

15 A. Yes.

16 Q. And how far up the road would you estimate that
17 truck came to a stop from where the car came to rest?

18 A. Fifty -- a hundred feet.

19 Q. Did you see anybody get out of that truck?

20 A. Yes.

21 Q. Did anyone come back to the scene?

22 A. At that time I was in my car and I wouldn't know.

23 Q. Did you identify yourself to a police officer or
24 a state trooper as a witness to the accident?

25 A. Yes, I did.

1 Q. And how did you do that?

2 A. In two ways. I went to the Denny's Restaurant,
3 which is right off the interstate, and as I was calling the
4 911 number to identify myself there happened to be a couple
5 of police officers dining there. And I told them at that
6 time what had happened.

7 MR. CRANDLEY: All right. No further questions,
8 Your Honor.

9 CROSS-EXAMINATION

10 BY MR. RUTHERFORD:

11 Q. Ms. Hames, as you were following behind the Reid
12 car you had noticed something about the driver, had you
13 not?

14 A. Noticed --

15 Q. You noticed that she was busily engaged in
16 talking to the other person in the car.

17 A. Yes, she seemed to be engaged in conversation.

18 Q. And you also noticed before the accident that she
19 was driving erratically, did you not?

20 A. She was at some point in time slower than she was
21 at other times.

22 Q. All right. Her speed wasn't constant?

23 A. Correct.

24 Q. From the time you first saw the pick-up

1 truck -- and I believe it was a Chevrolet, you think it was
2 a foreign car.

3 A. It appeared to be a small import not a Ford pick-
4 up?

5 Q. From the time you first saw that vehicle on your
6 left, did you see it's turn signal on?

7 A. Soon after I saw it, yes, it had a turn signal
8 on.

9 Q. And it was on for quite a while?

10 A. Yes, it was.

11 Q. I believe you said he was trying to get over in
12 the right lane?

13 A. Yes.

14 Q. And did it occur to you, Ms. Hames, that he was
15 having trouble getting in, that the car ahead of you wasn't
16 either going up, or going back, or making some space for
17 him?

18 A. Yes.

19 Q. As a matter of fact, at one point before this
20 happened you saw some smoke coming out of the blue car as
21 it had accelerated, did you not?

22 A. Yes.

23 Q. I believe that you got the strong feeling that
24 the blue car didn't notice the car trying to get in.

25 MR. CRANDLEY: I don't know how anyone can

1 testify to what a car noticed and how something can --

2 THE COURT: I don't think she can either.

3 However, her feelings are relevant.

4 MR. RUTHERFORD: All right, sir.

5 THE COURT: You can testify, of course, to
6 everything that you saw.

7 BY MR. RUTHERFORD:

8 Q. After you saw the pick-up truck start to come
9 over, and you saw the puff of blue smoke coming out of the
10 Reid car that looked like it had speeded up, did you see
11 the pick-up truck go back into the left lane for a little
12 bit?

13 A. Yes, I did.

14 Q. And then he went on and speeded up even more to
15 get ahead of her?

16 A. Yes, he did.

17 Q. And then I believe your testimony is that he
18 pulled over in front of her, and I believe that you said he
19 pulled ahead of her enough to get in front of her; did you
20 not?

21 A. Yes, he did.

22 Q. And you said it was a close distance, but it was
23 enough to get in front without hitting the car?

24 A. It was close.

1 Q. Do you know whether or not the vehicle in front
2 of you increased or decreased its speed after the pick-up
3 truck pulled into the right lane?

4 A. Definitely decreased speed. Her brake lights
5 went on.

6 Q. We're talking about the blue car now, the Reid
7 car immediately in front of you?

8 A. Right.

9 Q. You saw her brake lights come on?

10 A. Right after his did.

11 Q. How about before his did?

12 A. The first time I saw brake lights was after the
13 Ayscue car -- was after the Reid car.

14 Q. What kind of a car were you driving?

15 A. A Honda Prelude.

16 Q. Kind of a small import. Was the car in front of
17 you even smaller? Were you able to see beyond it easily?

18 A. I wasn't really looking beyond it. I was looking
19 at what was happening in front of me.

20 Q. I guess the pick-up truck was beyond the blue
21 car?

22 A. Yes.

23 Q. But the tail wasn't blocked by the Reid car?

24 A. We were going up a hill. It was much easier to
25 see.

1 Q. And did you ever make that distance any shorter
2 than five feet?

3 A. It could have been more.

4 Q. Could have been more.

5 A. It could have been less.

6 Q. It was close?

7 A. I would say it is as close as he could get in
8 without hitting her.

9 Q. And my question is, after he had pulled in did
10 you notice that the Reid car had slowed down or speeded up
11 and gotten even closer?

12 A. She hit the brake. I would say she slowed down.

13 Q. But I thought you said you didn't see her do that
14 until after the truck had hit his brake?

15 A. The truck went immediately in front of her, and
16 right away he hit his brakes, and right away she hit her
17 brakes.

18 Q. Right away you saw his brake lights?

19 A. Right away.

20 Q. Now, when you saw the Reid car put on its brakes,
21 did it stay in the right lane?

22 A. No.

23 Q. What did the Reid car do at that point?

24 A. It made almost a ninety-degree turn into the left
25 lane.

1 Q. The wheel turned just hard over --

2 A. Exactly.

3 Q. Did her car ever hit or touch the pick-up truck?

4 A. No.

5 Q. The two cars never touched either?

6 A. No.

7 Q. And she came out of the right lane at about
8 ninety degrees?

9 A. Yes.

10 Q. Miss Reid tells us she thinks she was moving
11 along there before this started to happen about fifty --

12 MR. CRANDLEY: I object, Your Honor. That fact
13 is not in evidence.

14 MR. RUTHERFORD: Let me ask it another way.

15 BY MR. RUTHERFORD:

16 Q. If other witnesses testified they were going
17 fifty-five or fifty would you agree that maybe you were
18 going less than fifty-five?

19 A. No.

20 Q. Are you sure of your speed?

21 A. I never travel less than fifty-five on the
22 interstate.

23 Q. And are you telling us that is how fast you were
24 going that day because of what you normally do, or do you

1 have a specific recollection of that day?

2 A. That is my normal speed on the interstate.

3 Q. Well, of course, I guess you would have to go
4 slower if other cars were going slower wouldn't you?

5 A. Not if I was fifty feet behind her.

6 Q. So you think you were going fifty-five?

7 A. (Witness nodded head.)

8 Q. And were you also changing your speed up and down
9 as she was changing her speed up and down?

10 A. No.

11 Q. So your interval would change a little bit as she
12 was going faster and slower?

13 A. Correct.

14 MR. RUTHERFORD: I have no further questions at
15 this time.

16 REDIRECT-EXAMINATION

17 BY MR. CRANDLEY:

18 Q. Was there anything apparent to you to cause this
19 white truck to pull in front of the Reid vehicle and
20 immediately brake, any reason up ahead in the road that you
21 could see?

22 A. Well, I am from that area. I would know if
23 you're in the left lane and you want to get over on the
24 Newtown exit, you better start getting off over in the

1 right lane soon.

2 Q. At that point was there any reason to put brakes
3 on that you could see?

4 A. No.

* * *

1 WENDY JOAN MARSHALL, M.D., being first duly
2 sworn, was examined and testified as follows:

3 DIRECT EXAMINATION

4 BY MR. CRANDLEY:

5 Q. Would you state your full name, please.

6 A. Wendy Joan Marshal.

7 Q. And are you a doctor?

8 MR. RUTHERFORD: Excuse me, if Your Honor,
9 please. Does the jury understand what we're doing?

10 THE COURT: The doctor is not here, so he's
11 taking the place of the doctor. That's all. So this is to
12 be received as evidence just as though a live witness was
13 here.

14 BY MR. CRANDLEY:

15 Q. And you are a doctor?

16 A. A medical doctor; that's right.

17 Q. What is your area of specialization?

18 A. General surgery --

19 Q. Would you --

20 A. -- and critical care and trauma surgery.

21 Q. Would you briefly describe your educational
22 background from college through medical school, and any
23 professional societies you are a member of now.

24 A. Okay. I trained in England where we don't have

1 a college system, so I went from school to the University
2 of London and did a four year B.S. From there went to
3 Vermont, did my medical school training at the University
4 of Vermont. Stayed on at the Medical Center Hospital at
5 Vermont for five years as a surgical resident, then wet to
6 Maryland where I did a trauma and critical care at Johns
7 Hopkins and the University of Maryland shock trauma center.
8 Then came here in 1984 as a traumatologist, critical care
9 physician and have been chief of trauma center ever since
10 September, 1984.

11 Q. You say "chief of trauma center" for what
12 organization?

13 A. For Norfolk General.

14 Q. Are you a member of any professional society?

15 A. I'm a member of the American Trauma Society,
16 American College of Surgeons, member of American Medical
17 Association, Virginia Surgical Society, Virginia Medical
18 Society, Norfolk Society of Medicine, Internal Association
19 of Emergency Surgery, that's probably it.

20 Q. All right. Did you have occasion on April 5,
21 1985 to treat a patient brought to Norfolk General Hospital
22 by the name of Gladys Reid?

23 A. Yes. I have a report or the record of a chart in
24 front of me of a patient called Gladys Reid that I was
25 involved in her care.

1 Q. Were you involved in her care as a general
2 surgeon of the trauma team?

3 A. Yes. I was the trauma attending on that day when
4 this patient was seen.

5 Q. What history did you receive as causing Mrs. Reid
6 to come to the hospital?

7 A. The history that is written down here is the
8 history that would have come from the rescue squad
9 themselves, because the patient was not telling us any
10 history. So that would have been hearsay evidence from the
11 rescue squad.

12 Q. All right. Did that indicate to you that the
13 woman had been involved in an automobile accident?

14 A. That's correct.

15 Q. You stated that the patient was not in a
16 condition to respond to your questions. What was her
17 physical condition when you saw Mrs. Reid on April 5, 1985?

18 A. Okay. She had a major head injury and was
19 unresponsive to either verbal or painful stimuli, and had
20 no response at all. And she had very low blood pressure,
21 which subsequently came up, and she was in shock when she
22 arrived.

23 Q. All right. What was your decision in respect to
24 further care for Mrs. Reid?

25 A. When she arrived in the emergency room she was in

1 extremely -- she was resuscitated in terms of her injuries.
2 Intravenous lines were placed. She was given medicine to
3 get her blood pressure back up. She responded
4 appropriately to all these things.

5 And after she has been resuscitated, which means bring
6 her blood pressure back up, we were left with a lady who
7 really had a very bad head injury, significant brain
8 contusions and at that time no upper cortical function.
9 Which means that you don't have the three thought
10 processes, you can't communicate, things like that.

11 Because as well as that, she had no brain stem
12 reflexes, which means that she didn't move her arms. She
13 didn't move her eyes. Even to put ice water in her eyes
14 she didn't move her eyes, and that's a major head injury
15 when you don't have that.

16 Q. What course of treatment was administered to Mrs.
17 Reid in the next several days of her hospitalization?

18 A. Supportive care because we felt that her head
19 injury was so bad that there was nothing we had to offer
20 from a surgical nature. And that was maintained on
21 ventilator, on appropriate fluids, and to basically see
22 what the outcome was. We had little doubt that she had a
23 major head injury and probably was not going to survive.
24 If she did survive the head injury we felt that she would
25 have a major deficit in terms of quality of life, ability

1 to do things.

2 Q. Were there operations performed on Mrs. Reid
3 while she was in the hospital?

4 A. Yes. And I don't have the date shown down here,
5 but she did have a craniotomy and elevation of her
6 depressed skull fracture. I don't have the date that was
7 done. That was not done on admission.

8 Q. Do you have the record there, Doctor? I think if
9 you flip over to page two you might see a reference to the
10 date.

11 A. Okay. The 10th of April.

12 Q. Of 1985?

13 A. Right.

14 Q. You say a craniotomy was performed on that day?

15 A. That's correct.

16 Q. What is that?

17 A. That is when you make an incision through the
18 skin and bones of the skull and take out a bone flap and
19 elevate it. And if there is any blood or anything
20 underneath that, you will drain that out to relieve any
21 compression that there might be on the brain. And then you
22 may or may not put that bone flap back depending on what
23 the brain looks like.

24 Q. Was that performed in the area of the skull
25 fracture?

1 A. That's correct.

2 Q. What was Mrs. Reid's progress following the
3 craniotomy?

4 A. She did not do well at all. She stayed at a very
5 low neurological area. She had an infection going on at
6 that point for which she was on antibiotics. And she has
7 had what we call -- a condition called diabetes insipidus,
8 which is when, because of the brain injury you have got
9 involvement in the part of the brain that makes you not
10 able to handle your fluids and electrolytes well. And so
11 she started to have some electrolyte abnormalities because
12 of that. And then some three or four days after the
13 craniotomy, and I think it was on the 16th, she became
14 acutely or suddenly very high blood pressure, deteriorated
15 at the time neurologically, and then had a cardiac arrest
16 and was not able to be resuscitated.

17 Q. Cardiac arrest would be in common terms a heart
18 attack?

19 A. Her heart stopped. And it stopped probably
20 because of a neurological event. That's what we felt at
21 the time, and that's what is written in here. And what she
22 did to cause the cardiac arrest, she probably had a brain
23 herniation. This is a severity of a major head injury.

24 Q. Doctor, did there come a time when you reached a
25 conclusion that further medical efforts to resuscitate Mrs.

1 Reid would be fruitless?

2 A. Yes.

3 Q. And when did that occur, do you know?

4 A. When she had the cardiac arrest secondary to
5 herniation of the brain, which was secondary to the
6 severity of the herniation. And at that point, with the
7 fact she had a severe head injury bad enough to cause it to
8 herniate to lead to a cardiac arrest, we felt it will be
9 fruitless to pursue the resuscitation to her, so we did
10 not.

11 Q. And as a result what happened to Mrs. Reid?

12 A. She died.

13 CROSS-EXAMINATION

14 BY MR. RUTHERFORD:

15 Q. Dr. Marshall, did Mrs. Reid ever regain
16 consciousness?

17 A. No, sir.

1 JOHN W. REID, being first duly sworn, was
2 examined and testified as follows:

3 DIRECT EXAMINATION

4 BY MR. CRANDLEY:

5 Q. Would you state your full name, please.

6 A. John W. Reid.

7 Q. Are you having difficulty with your voice this
8 morning, Mr. Reid?

9 A. I have a sore throat.

10 Q. Let me ask you again, will you state your name,
11 please?

12 A. John W. Reid.

13 Q. Mr. Reid, how old are you?

14 A. Fifty-one years old.

15 Q. Where do you live, sir?

16 A. In Norfolk.

17 Q. And how long have you lived in this area, the
18 Norfolk or the Virginia Beach --

19 A. Off and on in Chesapeake, Norfolk and Virginia
20 Beach.

21 Q. For how long? Is this all your life?

22 A. All my life.

23 Q. Are you the husband of Gladys Reid?

24 A. Yes.

1 Q. Did there come a time when you separated from
2 her?

3 A. Yes, sir.

4 Q. Are you also the father of Ronald Reid and
5 Gwendolyn Reid?

6 A. Yes, sir.

7 Q. When was it that you separated from Gladys?

8 A. I guess about eighteen years ago.

9 Q. All right. How old was Ronald when you
10 separated?

11 A. When we separated maybe he was -- and I can't
12 remember -- around nine.

13 Q. How often have you seen your children since you
14 separated?

15 A. Off and on for the past ten years.

16 Q. Can you say how many times?

17 A. Not right off hand I can't.

18 Q. Mr. Reid, when you left the home of your wife and
19 the children, did you support them?

20 A. Off and on.

21 Q. Were you able to support them?

22 MR. RUTHERFORD: Your Honor, please. That's not
23 part of this case. I'm puzzled at the line of inquiry
24 here. We're dealing with Gladys Reid and any support she
25 might have given to the children, but Mr. Reid's support

1 activities strike me as beyond --

2 MR. CRANDLEY: Well, Your Honor, that was in my
3 next question. Because the line of questioning is intended
4 to show that Gladys Reid raised these children at a very
5 young age without his aid.

6 THE COURT: I think it's appropriate for that
7 purpose.

8 BY MR. CRANDLEY:

9 Q. Did your wife, Gladys, raise your children --

10 A. Yes, sir.

11 Q. -- largely on her own?

12 A. Yes, sir.

13 MR. CRANDLEY: No further questions, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. RUTHERFORD:

16 Q. It has been accepted that maybe you've been gone
17 twenty-eight years, how long have you been married?

18 A. I think about twenty-eight years.

19 Q. You have been married twenty-eight years?

20 A. No, I got married when she first got pregnant, so
21 that would be twenty-six, twenty-eight years.

22 Q. But you haven't been gone that long?

23 A. No.

1 Q. You stayed in the marriage for about ten years?

2 A. Yes, sir.

3 Q. But you left? You really kind of left for good,
4 they didn't even know where you were?

5 A. Part of the time they didn't

6 Q. A lot of times they didn't.

7 A. Off and on for a few years they did.

8 Q. But lately they didn't know where you were?

9 A. Yes, sir.

10 Q. Until after Gladys died?

11 A. Yes, sir.

12 Q. And then you came forward?

13 A. Yes.

14 REDIRECT-EXAMINATION

15 BY MR. CRANDLEY:

16 Q. Mr. Reid, I believe you have been admitted by me
17 as that connection under the law you have a right to claim
18 yourself as a beneficiary, but you have decided to waive
19 that right and not assert it; is that not correct?

20 A. Yes, sir.

21 Q. Thank you.

22 MR. CRANDLEY: No further questions.

23 MR. RUTHERFORD: Let me ask a question, Your

1 Honor, please, for the record.

2 RECROSS-EXAMINATION

3 BY MR. RUTHERFORD:

4 Q. Does that mean, Mr. Reid, you're asking for no
5 money from this jury?

6 A. No, Mr. Ronald Reid, my son, is taking care of
7 that.

8 Q. But you're not asking for any money from this
9 jury as the dependant of Gladys Reid?

10 A. No, sir.

11 Q. Have you signed anything that said that you don't
12 want to take anything?

13 A. Yes, sir. I signed it that he could take over.
14 You know, I wouldn't move in on it; yes, sir.

15 MR. RUTHERFORD: No further questions, Your
16 Honor.

17 THE COURT: Let me just ask this for the record.
18 That was a voluntary choice on your part, was it
19 not?

20 THE WITNESS: Yes, sir.

21 THE COURT: And nobody put any pressure on you or
22 threatened or forced you to make that choice; is that
23 correct?

24 THE WITNESS: Yes, sir.

1 THE COURT: Thank you.
2 May this witness be excused?
3 MR. CRANDLEY: Yes, sir.

* * *

11 GWENDOLYN S. REID, being first duly sworn, was
12 examined and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. CRANDLEY:

15 Q. Would you state your full name, please?

16 A. Gwendolyn S. Reid.

17 Q. How old are you, Gwendolyn?

18 THE COURT: Speak up loud enough for the last
19 person right down there to hear you.

20 Q. Would you state your name?

21 A. Gwendolyn S. Reid.

22 Q. How old are you?

23 A. I'm twenty-seven.

1 Q. Are you the sister of Ronald Reid?

2 A. Yes, sir.

3 Q. On April 15, 1985 were you operating an
4 automobile that was involved in an accident on interstate
5 264?

6 A. Yes.

7 Q. All right. Who else was in the automobile with
8 you?

9 A. My mother.

10 Q. What kind of car was it?

11 A. A Datson B-210 sedan.

12 Q. Were you familiar with the car?

13 A. Yes.

14 Q. Had you driven it a number of times in the past?

15 A. Yes.

16 Q. On that particular day where were you intending
17 to go just before the accident happened? Where were you
18 going?

19 A. Going to pay a bill at Cox Cable.

20 Q. Where had you been earlier that day?

21 A. Well, first we went to Green Gifford to have the
22 seal put on the transmission, and then we went to the bank.

23 Q. Now, as you proceeded down toward Virginia Beach
24 on I-264, as you got to the point where the accident
25 happened, or started to get near where the accident

1 happened, what lane were you in?

2 A. I switched over from the center lane to the right
3 lane.

4 Q. All right. And in the highway is there an exit
5 or a landmark that you could point us to where you made
6 that switch to the right lane?

7 A. To the left, the Richmond lane.

8 Q. That was the leftmost lane, and then you were in
9 the center lane. And then you moved into the right lane?

10 A. Yes.

11 Q. After that Richmond exit, how many lanes continue
12 on toward Virginia Beach?

13 A. Two.

14 Q. And in which of those lanes were you in?

15 A. In the far right.

16 Q. All right. From that point forward did you ever
17 change out of that lane up to the point where the accident
18 happened?

19 A. No.

20 Q. How fast were you traveling at that time?

21 A. I was beginning to pick up speed, because traffic
22 had slowed down earlier, and I was trying to get up to
23 fifty-five.

24 Q. All right. What speed were you up to at that
25 point right there at the Richmond exit?

1 A. Almost fifty.

2 Q. You mentioned the traffic had slowed down
3 earlier, why?

4 A. A policeman had pulled a car further back.

5 Q. As you proceeded there down that road, where was
6 traffic in your lane, the next closest car to you in your
7 lane?

8 A. Ahead of me about thirty to forty feet.

9 Q. All right. Was there another automobile, vehicle
10 involved in this accident with you?

11 A. I never touched the car.

12 Q. Well, what I mean, another vehicle was involved?

13 A. Yes.

14 Q. What kind of vehicle was that?

15 A. A white pick-up with a camper shell.

16 Q. When did you first see that?

17 A. When he was beside me I noticed him in my mirror.
18 He had a signal light on.

19 Q. What mirror did you see him in?

20 A. Driver's mirror, side mirror.

21 Q. So he had his right signal light on?

22 A. Yes.

23 Q. How fast were you going at that point?

24 A. Around fifty.

25 Q. Okay. What did the truck do?

1 A. He speeded up and proceeded to cut me off.

2 Q. All right. And what do you mean by that, he
3 proceeded to cut you off?

4 A. He just speeded and just pulled right in front of
5 me.

6 Q. How closely in front of you did he pull?

7 A. One and a half to two feet.

8 Q. As he pulled in did he do anything else?

9 A. He hit his brake.

10 Q. Hit his brake?

11 A. Yes.

12 Q. What did you do in reaction to it?

13 A. Hit my brakes and swerved to the left.

14 Q. Then what happened?

15 A. I lost control of the car.

16 Q. What happened to the car?

17 A. The only thing I remember is hitting a barrier,
18 and when I woke up it was upside down.

19 Q. Were you knocked out in the accident?

20 A. Yes.

21 Q. What happened to your mother?

22 A. When I came to she was laying facing -- her face
23 was facing that way. She was laying with her arms straight
24 down facing this way, and she was unconscious.

25 Q. Upside down in the car. Were you upside down in

1 the car?

2 A. Yes.

3 Q. Were you able to get yourself out of the car?

4 A. Yes.

5 Q. How did you do that?

6 A. I unlocked the door and climbed my way out.

7 Q. Did your mother respond to you?

8 A. No, she did not.

9 Q. What did you see?

10 A. Well, after I got out of the car I went around
11 and I saw a lot of blood, and she was unconscious.

12 Q. Did you know any reason -- was there any apparent
13 reason in front of you in the road for that truck to put
14 its brakes on?

15 A. No.

16 Q. If you had not put your brakes on and swerved to
17 the left, what would have happened to your car?

18 MR. RUTHERFORD: If, Your Honor, please. It
19 seems to me like it calls for speculation. I think she can
20 tell us why she did what she did.

21 THE COURT: Sustained.

22 BY MR. CRANDLEY:

23 Q. Why did you put your brakes on and swerve to the
24 left?

1 A. Because I would have hit him in the rear.

2 Q. Were you taken from the scene --

3 A. Yes.

4 Q. -- to the hospital?

5 A. Yes.

6 Q. Was your mother taken before you left or not?

7 A. Yes, she was taken before I left.

8 Q. All right. Did the truck that was involved in
9 this accident stop?

10 A. Okay. When I first got out of the car, he was
11 there. When the police got there, he was gone.

12 Q. How long did he remain?

13 A. It's hard to tell.

14 Q. How was your mother taken from the scene, do you
15 remember?

16 A. By Nightingale air ambulance.

17 Q. And how were you transported to the hospital?

18 A. By ambulance.

19 Q. At the hospital were you asked to be admitted or
20 to admit yourself?

21 A. Well, they wanted to admit me, but I said no.

22 Q. Why wouldn't you permit yourself to be admitted?

23 A. Because I thought my mother would need me.

24 Q. Were you hurt?

25 A. I had a few lumps on my head, my nose was

1 swollen, my arm was pretty badly cut up. I had a deep cut
2 on my chin.

3 Q. What were you thinking about your mother's
4 condition at that time? Did you know how it was?

5 A. Not to what degree.

6 Q. What were you feeling?

7 A. I really don't know. At that moment I just
8 wanted to be near her.

9 Q. Did you ultimately see her that day?

10 A. Yes.

11 Q. Was she worse than you expected?

12 A. Yes.

13 Q. What did you see when you went in?

14 A. Her face was badly swollen. She had a bandage on
15 the side of her head. She had a cervical collar, and they
16 had her hooked up on medicines.

17 Q. How many days was your mother in the hospital
18 before she died?

19 A. Eleven.

20 Q. How many times did you see her in that
21 eleven-day period?

22 A. Every day.

23 Q. At any time during that period did your mother
24 ever make any response to you, or give any indication that
25 she knew you were there?

1 A. When I told her I was okay, and I told her that
2 I was near, she squeezed my hand.

3 Q. Are you sure that that was her talking to you, or
4 can you really say?

5 A. I can't really say.

6 Q. You just like to believe it was?

7 A. Yes.

8 Q. Just prior to your testimony a man by the name of
9 John W. Reid testified here. Before today when was the
10 last time you had seen him?

11 A. In '76, and then I saw him again after the
12 accident.

13 Q. He is your father, isn't he?

14 A. Yes.

15 Q. All right. Before 1976 when did you first see
16 him?

17 MR. RUTHERFORD: Your Honor, please. In light of
18 this agreement of Mr. Reid's not to be involved in this, I
19 don't understand why we're asking these.

20 THE COURT: Well, I'm going to allow it on the
21 same basis that Mr. Crandley did it before, and that is to
22 show the degree of support that the mother gave to these
23 children.

24 MR. RUTHERFORD: I see.

25 BY MR. CRANDLEY:

1 Q. Before '76 when had you last seen your father?

2 A. When I was around eleven or twelve.

3 Q. All right. And when you saw him, when you were
4 around eleven or twelve, was he living at the home, or was
5 that for a visit?

6 A. For a visit.

7 Q. All right. To your knowledge did your father
8 ever live at home with you and your brother and your
9 mother?

10 A. No.

11 Q. And what do you understand about when he left?
12 When did he leave?

13 A. I never really met him until I was told he was
14 my father.

15 Q. All right. When you were a young child where did
16 you live?

17 A. With my grandparents.

18 Q. Were they your mother's parents?

19 A. Yes.

20 Q. And how old are you, Gwendolyn?

21 A. Twenty-seven.

22 Q. So your brother, Ronald, is a year older?

23 A. Yes.

24 Q. How did your mother support you?

25 A. Before I started elementary school she worked odd

1 jobs during the day.

2 Q. What kind of odd jobs?

3 A. Housekeeping, laundry, things like that.

4 Q. All right. And what would she do with you and
5 Ronald when she was home?

6 A. She would play games with us, read to us, mostly
7 she was just there and she would talk to us.

8 Q. After you kids got into school, what did your
9 mother do about supporting you and Ronald?

10 A. She went to work at Norfolk State. It was
11 Norfolk State College at that time.

12 Q. All right. And what type of work did she do
13 there?

14 A. It started off as a clerk stenographer.

15 Q. Was your mother a college graduate?

16 A. Yes.

17 Q. And as you went through grade school, what kind
18 of encouragement and support did your mother give you about
19 your own personal enrichment?

20 A. She wanted me to go to college and graduate.

21 Q. How about your brother, Ronald, what would she do
22 for him?

23 A. She wanted him to do the same thing.

24 Q. Was there much money around the house when you
25 were kids?

- 1 A. Not much.
- 2 Q. How did you enjoy yourself, you and your mother,
- 3 and Ronald when you were young?
- 4 A. Occasionally movies, we would go shopping,
- 5 sometimes we would go to the amusement park, things like
- 6 that.
- 7 Q. What amusement park?
- 8 A. Well, Ocean View.
- 9 Q. Was this a regular thing for you, Gwen?
- 10 A. Well, we went to the park twice, but going to
- 11 movies and shopping was kind of regular.
- 12 Q. Would your mother take you along pretty much when
- 13 she left the house?
- 14 A. Yes.
- 15 Q. Would you characterize her as much of a home
- 16 body?
- 17 A. Yes.
- 18 Q. Where did her interest lay as far as you could
- 19 see?
- 20 A. With us.
- 21 Q. In your life is there any person more central,
- 22 more important to you than Gladys Reid?
- 23 A. No.
- 24 Q. What has this accident done to you?
- 25 A. Caused me a lot of problems.

1 Q. How?

2 A. With my job. Really she was the only person I
3 could have like talked to, go shopping with, go on trips,
4 just generally talk to her about anything.

5 Q. Before your mother was killed, did you ever have
6 any thought of leaving home?

7 A. Not really.

8 Q. How about Ronald?

9 A. Not that I know of.

10 Q. What would you do during the holidays?

11 A. We would get together, cook dinner, just have fun

12 .

13 Q. Who would do the cooking?

14 A. Me and my mother would get together and do the
15 cooking.

16 Q. Was cooking one of your mother's special ways of
17 showing her affection for you and Ronald?

18 A. Yes.

19 Q. And is this something that goes back from when
20 you were a young child?

21 A. Yes.

22 Q. Tell us some of the things that you remember best
23 about your mother.

24 A. She was always there when we needed her. She was
25 understanding, and you could always talk to her about

1 anything.

2 Q. All right. Is there any chance that anyone can
3 come close to replacing her in your life?

4 A. No.

5 Q. How old was she, Gwen, when she died?

6 A. Forty-eight.

7 Q. Before she died, what were your plans? What were
8 your thoughts about you and your brother and your mother?
9 Did you think they would end?

10 A. Not like that.

11 Q. All right.

12 MR. CRANDLEY: I have no further questions, Your
13 Honor.

14 CROSS-EXAMINATION

15 BY MR. RUTHERFORD:

16 Q. Miss Reid, I believe you were twenty-eight at the
17 time of the accident?

18 A. Twenty-five.

19 Q. I'm wrong then. You were twenty-five. How long
20 had you been driving?

21 A. Since '76.

22 Q. Since '76. Had you gotten your license as soon
23 as you were old enough, at sixteen?

24 A. Yes.

1 Q. So you had been driving about nine years?

2 A. Yes.

3 Q. Okay. As I understand the way this accident
4 happened, and what you have told us here this morning, you
5 were going down the right lane, going up the right lane, I
6 guess, it is a sort of an incline at this point, isn't
7 there? From the Richmond exit on up it kind of inclines a
8 little bit, doesn't it?

9 A. Yes.

10 Q. And you were in the right lane that whole time?

11 A. I switched right before I got to the Richmond
12 exit.

13 Q. From the Richmond exit on up to where the
14 accident happened, you were in the right lane the whole
15 time?

16 A. Yes.

17 Q. And you think you were going forty-five or fifty,
18 less than the speed limit?

19 A. Yes.

20 Q. And you think other traffic in your lane was also
21 going less than the speed limit?

22 A. Yes.

23 Q. So a car could have come by you on the left at
24 fifty-five and would have been going faster than you?

25 A. Yes.

1 Q. Did you ever see the pick-up truck trying to get
2 in ahead of you at some point back down the road?

3 A. No.

4 Q. Do you ever remember changing your speed at any
5 time from the Richmond exit on up to where the accident
6 happened?

7 A. No.

8 Q. Don't remember either going faster or slower?

9 A. No.

10 Q. Do you remember talking to your mother?

11 A. Yes.

12 Q. And were you all in an argument, or were you
13 discussing anything in particular?

14 A. We were planning our Easter party.

15 Q. You were planning a party?

16 A. Yes.

17 Q. Now, when you first noticed the pick-up truck,
18 where was it?

19 A. He was beside me.

20 Q. Was he moving faster than you were at that point?

21 A. No, he was just beside me.

22 Q. Just suddenly. You don't know how long he had
23 been there? You didn't see him come up?

24 A. Saw him in my mirror when he was coming up.

25 Q. Well, let me ask you again then, when did you

1 first see him?

2 A. Well, he got halfway of the car that I was in.

3 That is when I saw him.

4 Q. When he was halfway up beside you?

5 A. Yes.

6 Q. Is this the first time you noticed him?

7 A. Yes.

8 Q. And you saw that he had a turn signal on?

9 A. Yes.

10 Q. Did you notice what the condition was of traffic
11 behind you at that point?

12 A. It was kind of heavy.

13 Q. Do you know how close behind you the car was
14 immediately behind you at that point?

15 A. It's hard to tell.

16 Q. You don't know whether there was room behind you
17 or not for the pick-up truck to kind of just drop back that
18 half a car length and pull up behind you?

19 A. I really didn't pay that much attention to
20 traffic behind me.

21 Q. Okay. So the pick-up truck -- you say, there was
22 traffic a distance ahead of you thirty or forty feet or
23 something?

24 A. Yes.

25 Q. Some witnesses have had it at two hundred feet.

1 Do you remember there being traffic thirty or forty feet?

2 A. Yes.

3 Q. No more than that?

4 A. No more.

5 Q. But plenty of room for a car to move out?

6 A. Yes.

7 Q. And then I believe it is your testimony, Miss
8 Reid, that the pick-up truck did pull up, go faster than
9 you, get in front of you, and pull into the lane?

10 A. Yes.

11 Q. Now, did he hit you when he pulled into the lane?

12 A. He almost did.

13 Q. Did he hit you when he pulled into the lane?

14 A. No, he did not.

15 Q. Did he come into the lane the way cars normally
16 come into the lane?

17 A. No.

18 Q. Describe how he came into your lane.

19 A. He just --

20 Q. If it wasn't normal.

21 A. He just pulled over in front of me, and he just
22 barely cleared the front end of the car.

23 Q. Okay. At the time he started that maneuver and
24 started in in front of you, you thought he was too close,
25 didn't you?

1 A. Yes.

2 Q. Before he had ever gotten into the lane you
3 thought he was too close?

4 A. Yes.

5 Q. What did you do in response to that?

6 A. Got off the gas.

7 Q. Did you hit your brakes at that point?

8 A. No.

9 Q. But you say that you did slow yourself down?

10 A. Yes.

11 Q. And you slowed yourself down by letting up off
12 the accelerator, is that what you're saying?

13 A. Yes.

14 Q. And this is before he ever gets totally in the
15 lane?

16 A. Yes.

17 Q. Okay. And even though you slowed down, you say
18 when he pulled over in front of you we're still talking a
19 foot to a foot and a half?

20 A. One and a half to two.

21 Q. I'm sorry. That is what you said, one and a half
22 to two feet in front of you when he pulled in?

23 A. Yes.

24 Q. Well, you've already got your foot off the
25 accelerator according to what you tell us, and now do you

1 hit your brake to slow down even further?

2 A. No.

3 Q. Why not?

4 A. Because when I hit -- let my foot off the gas,
5 the car started to slow down immediately.

6 Q. And you felt it was slowing down fast enough?

7 A. Yes.

8 Q. Because you were dropping back. How much of a
9 gap did there get to be between your cars?

10 A. I would say maybe one to one and a half feet.

11 Q. Well, so you don't think that your letting off
12 the accelerator was making you drop back any more because
13 that's the distance you said he was when you pulled --

14 A. One and a half to two.

15 Q. And you don't think it ever got any more than
16 that?

17 A. No.

18 Q. And you didn't ever hit your brake?

19 A. He hit his.

20 Q. Until you saw his -- well, you thought you were
21 pulling back. Did you, before you saw him, hit your brake
22 lights?

23 A. Yes.

24 Q. But you thought you were pulling back just
25 because you let your foot off the gas, and not because of

1 touching your brakes?

2 A. I didn't understand the question.

3 Q. You thought you were pulling back because you let
4 off of the gas, not because you applied your brakes?

5 A. Yes.

6 Q. Was there some reason you didn't apply your
7 brakes at that point?

8 A. Because at that time I thought I wouldn't need to
9 apply my brakes.

10 Q. Didn't seem that close to you?

11 A. When I started to drop back I could almost see
12 underneath his truck.

13 Q. So it got more than one and a half to two feet,
14 didn't it, Miss Reid?

15 A. Well, he was one and a half to two feet when he
16 cut in.

17 Q. So there was one and a half to two feet is that
18 what you're talking about?

19 A. Uh-huh.

20 Q. And at fifty miles an hour he pulled up in front
21 of you, but you slowed back far enough?

22 A. One and a half.

23 Q. And you say you dropped back far enough to see
24 from under his truck?

25 A. Yes.

1 Q. And what is that distance now? How far do you
2 think you dropped back with your foot off the gas?

3 A. About another one and a half.

4 Q. Another one and a half. Okay. Now, because you
5 suddenly started going a lot slower, do you know what the
6 car behind you is going?

7 A. I have no idea.

8 Q. Don't know whether she was traveling up with you
9 then?

10 A. No.

11 Q. And while you are dropping back far enough so
12 that you could see up under his truck, after you took your
13 foot off, you are not accelerating, you are sort of
14 coasting?

15 A. Yes.

16 Q. In your four-cylinder Datson B-210?

17 A. Yes.

18 Q. Then what happened?

19 A. He hit his brakes.

20 Q. You saw brake lights go on?

21 A. Yes.

22 Q. And what did you do in response to seeing that?

23 A. Hit my brakes.

24 Q. When you hit your brakes, what happened?

25 A. I had to swerve sharply to the left.

1 Q. Okay. That swerving -- tell me about your brake.

2 What happened when you hit your brakes?

3 A. I heard them squeal.

4 Q. Did you leave skidmarks there you think?

5 A. I have no idea.

6 Q. You jammed on your brakes?

7 A. Yes.

8 Q. Did it slow you down any?

9 A. Yes.

10 Q. Is that before you left the lane?

11 A. Well, I left the lane and hit my brakes at the
12 same time.

13 Q. I see. When you turned your wheel can you
14 describe for this jury how you did it, what you did? Did
15 you just turn it a little bit to get into the other lane?
16 Did you pull it all the way over? What did you do?

17 A. It was just a real sharp turn.

18 Q. And do you know about what angle you turned your
19 car to get out of that lane? Don't know?

20 A. No.

21 Q. Where did your car go?

22 A. It just hit -- I lost control and it hit a
23 barrier.

24 Q. Did you lose control before you hit the barrier?

25 A. Yes.

1 Q. And we're talking about the barrier on the left?

2 A. Yes.

3 Q. And you know what you did after you hit the
4 barrier on the left?

5 A. No.

6 Q. Do you remember telling the trooper what happened
7 after you hit the barrier on the left?

8 A. I told him the last thing I remember is hitting
9 a barrier, and then I woke up and I was on my mother's
10 legs.

11 Q. You told the trooper you were knocked
12 unconscious?

13 A. Yes.

14 Q. At some point before this started, I believe you
15 had looked down, hadn't you?

16 A. Yes.

17 Q. What caused you to look away from the road and
18 look down?

19 A. I glanced down to see how fast I was going.

20 Q. At what time in the proceeding did you choose to
21 look away and look down at your speedometer? What was
22 happening at that point? Was that after the pick-up truck
23 had gotten in your lane?

24 A. Yes.

25 Q. Then you looked down to see how fast you were

1 going?

2 A. Yes.

3 Q. And then when you looked back up, that is when
4 you saw the brake lights?

5 A. No.

6 Q. That is not true?

7 A. I glanced down, and when I looked up and then I
8 saw his brake lights light up.

9 Q. Right. That is what I thought I had asked you.
10 You looked down, checked your speedometer, and then you
11 looked back up, and that is when you saw his brake lights
12 come on?

13 A. Yes.

14 Q. And when you looked down at your speedometer, at
15 that point, Miss Reid, what do you remember your speed was?

16 A. Forty-five.

17 Q. Although he came into your lane, according to
18 your testimony, at a distance that was real close to you,
19 he didn't hit you?

20 A. No.

21 Q. And if he had kept on going I hear you say
22 everything would have been fine?

23 A. Yes.

24 Q. And it wasn't until you saw the brake lights that
25 there was trouble?

1 A. Yes.

2 Q. Is that correct?

3 A. Yes.

4 MR. RUTHERFORD: I have no further questions.

5 REDIRECT EXAMINATION

6 BY MR. CRANDLEY:

7 Q. Do you know why he should put his brakes on?

8 A. No.

9 Q. How much time from the moment he pulled in front
10 of you until you saw his brake lights elapsed?

11 A. A matter of seconds.

12 MR. CRANDLEY: No further questions, Your Honor.

13 MR. RUTHERFORD: Nothing further.

14 THE COURT: May the witness be excused?

15 MR. CRANDLEY: Yes.

* * *

5 RONALD D. REID, being first duly sworn, was
6 examined and testified as follows:

7 DIRECT EXAMINATION

8 BY MR. CRANDLEY:

9 Q. Would you state your name, please?

10 A. Ronald Duane Reid.

11 Q. How old are you, Mr. Reid?

12 A. Twenty-eight.

13 Q. You, of course, are the surviving son of Gladys
14 Reid?

15 A. Yes, I am.

16 Q. The brother of Gwen?

17 A. Yes.

18 Q. The son of John W. Reid?

19 A. Yes.

20 Q. Mr. Reid, when did you first learn of an accident
21 involving your mother and your sister on April 15, 1985?

22 A. It was probably about 12:00 to 1:00.

23 Q. Who did you hear from?

1 A. One of the guys that I was working with. I had
2 been on the base evidently and came back to work, taken
3 care of some paperwork.

4 Q. Where were you working at the time?

5 A. NAS Oceana.

6 Q. Okay. Are you still working there now?

7 A. No, I'm not.

8 Q. What kind of work do you do now?

9 A. Right now I'm an appointment setter for a home
10 improvement firm out in Virginia Beach.

11 Q. When you got word that there was an accident,
12 what did you do?

13 A. The first thing I did was call the police
14 dispatch to find out where they had been take.

15 Q. All right.

16 A. And once I found out which hospital, I proceeded
17 to call the hospital several times to find out who had been
18 taken where and by what.

19 Q. Which hospital did you call?

20 A. Norfolk General.

21 Q. All right. Do you know what time of day it was
22 you finally arrived at Norfolk General?

23 A. Probably about 2:00.

24 Q. All right. When you got there, how soon were you
25 able to see your mother, or who did you see?

1 A. First of all, I found my sister, and at the time
2 she was with the state trooper.

3 Q. All right. And what kind of shape was she in?

4 A. She was upset. I could see some of her injuries,
5 and she was, you know, really worried about her mother.

6 Q. All right. And how soon were you able to see
7 your mother?

8 A. Approximately about another hour.

9 Q. Where was she when you saw her?

10 A. I believe in intensive care.

11 Q. Okay. Describe what you saw when you went into
12 the room.

13 A. When I went into the room she had a cervical
14 collar on.

15 Q. Is that a neck collar?

16 A. Yes.

17 Q. All right.

18 A. She was bandaged on one side of her head.

19 Q. What did her face look like?

20 A. It had blown up about two sizes larger that it
21 was.

22 Q. What else did you see?

23 A. Just a pained expression on her face.

24 Q. Any equipment around her or on her?

25 A. They had her hooked up to various types of

1 equipment also.

2 Q. Did you attempt to communicate with your mother,
3 talk to her, touch her, or anything like that?

4 A. Yes, I did.

5 Q. Was there any response from her?

6 A. There wasn't virtually any movement at all, not
7 even under the eyelid because I watched it.

8 Q. When you went up there, did anyone go with you?

9 A. No. She was still down in emergency.

10 Q. All right. How long did you stay with your
11 mother that night?

12 A. I stayed all night.

13 Q. All right. How long was your mother in the
14 hospital?

15 A. Eleven days.

16 Q. How often did you see her?

17 A. We were there every day when visiting hours were
18 permitted, and they usually had to chase up out when the
19 hours were over.

20 Q. Did your mother even show you any sign of
21 movement during those eleven days?

22 A. When I first talked to Dr. Marshall she had said
23 that if her brain would continue or would start not to
24 swell, or the swelling would go down on it that she may --

25 MR. RUTHERFORD: Judge, we've had Dr. Marshall's

1 testimony, and there is no way to really check on how, you
2 know, our interpretations, and I think we ought to be
3 limited to what Dr. Marshall told us in her deposition.
4 This is hearsay. And without Dr. Marshall being here, I
5 guess I have to object to it.

6 MR. CRANDLEY: Your Honor, it does go to the
7 issue of this man's concern, and upset, and what he was
8 encountering at the hospital as he saw his mother and spoke
9 to the doctor.

10 MR. RUTHERFORD: If, Your Honor, please --

11 THE COURT: Well, I don't think it's offered for
12 the purpose of the truth of it, and I'm going to allow it.

13 BY MR. CRANDLEY:

14 Q. What was your reaction, Ronald, when you first
15 saw your mother that first day?

16 A. Extreme pain, and the first thing I really wanted
17 to do was take her place if at all possible.

18 Q. Now, as you went back on a daily basis, did you
19 have any hope of improvement?

20 A. Yes, I did.

21 Q. Did you ever lose that hope?

22 A. No.

23 Q. There came a time, however, when you were advised
24 that there was no hope, isn't that true?

25 A. Yes.

1 Q. On April 17th.

2 A. Yes.

3 Q. How has that affected you today?

4 A. I still hurt, and I still feel a big part of me
5 died with her.

6 Q. All right. Now, on April 15th, 1985, where were
7 you living?

8 A. With her. We were living in Danbury Court in
9 Virginia Beach.

10 Q. Have you ever lived away from your mother, or
11 had you any time in your life?

12 A. No.

13 Q. Had your mother ever stayed away from you and
14 your sister for any extended period of time?

15 A. Only when she was in the hospital once before.

16 Q. And what was that for?

17 A. I believe it was a partial hysterectomy.

18 Q. All right. Did you know your father?

19 A. Not really until I was about thirteen.

20 Q. All right. And when had you last seen him before
21 you were thirteen years old?

22 A. I really can't say.

23 Q. All right. In your early childhood do you recall
24 your father being around?

25 A. No.

1 Q. All right. Who did you live with?

2 A. My mother, and my grandmother, and grandfather.

3 Q. All right. How did your mother support you and
4 Gwen?

5 A. Before we started to school she worked odd jobs
6 such as in the laundry, housekeeping so forth. And once we
7 started to school, since I was the oldest I had a year
8 behind me, and then she started school. Then she got a job
9 at Norfolk State University or college at that time.

10 Q. Doing what?

11 A. As a clerk stenographer.

12 Q. What were the days like with you, and your
13 mother, and Gwen in those early childhood days?

14 A. In the early days when we were in school, in the
15 morning she would get up probably about an hour before we
16 would and make sure that we had breakfast, and we were
17 dressed properly, and make sure that we were ready to go to
18 school. And when we got home from school, she usually
19 wasn't there, but we knew we had to do our homework. And
20 when she got home she helped us with it if we needed help.
21 She checked it, and basically spent quality time with us.

22 Q. Was your mother a college graduate?

23 A. Yes, she was.

24 Q. What did she have to say to you about improving
25 yourself?

1 A. Basically what she wanted me to do was to go to
2 college and get an education.

3 Q. Did you do that?

4 A. Yes, I did.

5 Q. Where did you go?

6 A. Norfolk State University.

7 Q. What was your mother's feelings on that if at
8 all?

9 A. She talked to us about it a lot while we were
10 young. And as we got older she didn't talk to us as much
11 about it, but what she would do, she would point out the
12 advantages of going.

13 Q. She was a very self-sufficient woman herself,
14 wasn't she?

15 A. Yes, she was.

16 Q. How would you and Gwen, when you were children,
17 and your mother spend your time during your free time, your
18 entertainment time?

19 A. As children she would take us shopping, or she
20 would take us to a movie, maybe to Ocean View Amusement
21 Park when it was opened. And basically she spent quality
22 time with us as far as teaching us and talking to us.

23 Q. Have you ever been close to anyone else in your
24 life other than your mother and your sister?

25 A. No one else comes that close.

1 Q. All right. Was there ever a time when you, as
2 you came of age, wished to strike out on your own, get your
3 own place, and carry on your own affairs separate from your
4 mother?

5 A. I'd given it thought maybe once or twice, but I
6 basically decided not to. I decided to wait maybe a few
7 more years, because she really sacrificed a lot to raise us
8 by herself, and really encouraged us and pushed us at times
9 to go through school and get an education.

10 Q. All right. During the special times of the year,
11 holidays and birthdays, and anything of that nature, how
12 would your mother celebrate those with you and Gwen?

13 A. Basically it was the three of us. We would
14 celebrate it together, and as young children during those
15 times there wasn't a lot of extra money, and so she did it
16 by cooking our favorite meals, and we just spent the day
17 together as a family.

18 Q. All right. Did that continue up until the time
19 she died?

20 A. Yes, it did.

21 Q. Ronald, what is it that you miss most about your
22 mother today?

23 A. Her influence on my life.

24 Q. How old was she when she died?

25 A. Forty-eight.

1 Q. What plans, what hopes, what aspirations did you
2 have for you, and Gwen, and your mother in, say, March of
3 '85, the month before she died?

4 A. We had talked sometime before about taking a
5 trip, seeing some of the relatives.

6 Q. Was that a wish of hers to see her family?

7 A. She would have liked to see some of them, yes.

8 Q. You were going to help her do it?

9 A. I was going to take her.

10 Q. Has anyone else come close to replacing your
11 mother?

12 A. No.

13 Q. How has that affected you personally?

14 A. It's apparent that I'll probably never get rid of
15 it. It is something I'll have to live with, and it will
16 probably affect me with future relationships.

17 Q. I'm going to show you a packet of bills, Mr.
18 Reid, and ask you if these are the bills associated with
19 the care and treatment of your mother leading up to her
20 death, and also for the funeral expenses?

21 A. Yes.

22 MR. RUTHERFORD: If Your Honor, please -- I have
23 no objection.

24 MR. CRANDLEY: Your Honor, these are all
25 together. They can be one exhibit.

1 THE COURT: It will be 4 if there are no
2 objections. All of these are received as P-4.

3 (Packet of hospital bills and funeral
4 expenses were marked Exhibit P-4.)

5 CROSS-EXAMINATION

6 BY MR. RUTHERFORD:

7 Q. Mr. Reid, following the advice of your mother you
8 went to college and graduated, did you not?

9 A. Yes, I did.

10 Q. You've been working ever since?

11 A. Yes.

12 Q. You had a job with the government, and I guess
13 got a job you thought was better than that?

14 A. I decided it was maybe time for a change.

15 Q. And as I understand it, you, and your mother,
16 and your sister lived together?

17 A. Yes.

18 Q. And your sister also had a job?

19 A. Yes.

20 Q. And has had a job for some time?

21 A. Yes.

22 Q. And I understand you all sort of pooled your
23 resources, the three of you, to live together?

24 A. Yes, we did.

1 Q. You've had girl friends I guess over the time,
2 Mr. Reid?

3 A. Yes.

4 Q. No special person now?

5 A. There never really was anyone, any very special
6 person.

7 Q. And so marriage is not something you've got in
8 front of you imminently?

9 A. It is still in front of me, hopefully.

10 Q. You don't have a girl in mind at this point?

11 A. Not specially, no.

12 Q. Are you dating someone now, Mr. Reid?

13 A. I go out occasionally.

14 Q. Is there somebody you're contemplating marrying?

15 A. No.

16 Q. And I assume that your sister also dates?

17 A. I assume she does.

18 Q. You don't know?

19 A. I really haven't asked her.

20 Q. Do you know where she works?

21 A. Yes.

22 Q. Where is that?

23 A. She works at Virginia Pilot-Ledger Star.

24 MR. RUTHERFORD: I have no further questions.

25 MR. CRANDLEY: Nothing further, Your Honor.

* * *

5 RALPH LEE AYSCUE, being first duly sworn, was
6 examined and testified as follows:

7 DIRECT EXAMINATION

8 BY MR. RUTHERFORD:

9 Q. Would you state your full name, please?

10 A. Ralph Lee Ayscue.

11 Q. And how old are you?

12 A. Forty-seven.

13 Q. Are you married?

14 A. Yes, sir.

15 Q. Have you got any children?

16 A. Yes, two.

17 Q. What are their ages?

18 A. Eleven and seventeen.

19 Q. Where do you work?

20 A. Allegheny Pepsi-Cola.

21 Q. How long have you worked for them?

22 A. Twenty-one and a half years.

23 Q. What do you do for them?

1 A. I'm a salesman, sir.

2 Q. Okay. What does that entail?

3 A. It entails going to the grocery stores and
4 writing orders. In other words, whatever stock they need
5 in the store to supply the shelves or the displays I write
6 the order for them.

7 Q. On this day you were engaged in that job?

8 A. Yes, sir.

9 Q. And what were you driving?

10 A. I was driving an S10 Chevrolet pick-up truck.

11 Q. Provided by Pepsi-Cola?

12 A. Yes.

13 Q. Had a cab on the back?

14 A. Yes, camper shell.

15 Q. Where had you been before the accident?

16 A. I had been to Giant Open-Air Market on Colonial
17 Avenue in the Ghent section.

18 Q. And where were you going?

19 A. I was going to the Farm Fresh Supermarket at
20 Arrowhead Shopping Center.

21 Q. And you had gotten on the 264-44 whereabout?

22 A. Waterside.

23 Q. And where were you going to exit that?

24 A. Newtown Road.

25 Q. And the old Newtown Road, was that a loop around

1 exit?

2 A. Yes, sir.

3 Q. You would come down to Newtown and turn left?

4 A. Yes, sir.

5 Q. As you approached the place where this accident
6 happened, tell the jury just what the traffic conditions
7 were in those two lanes of eastbound 264.

8 A. This particular day it was very heavy traffic.

9 Q. Do you recall what the speed of traffic was?

10 A. I'd say -- I'd have to guess probably
11 fifty-five; right at the speed limit.

12 Q. What is the first thing you remember doing before
13 this accident happened? What is your memory on this
14 occasion?

15 A. I had my signal light on attempting to get into
16 the right lane knowing I had to exit at Newtown Road. And
17 it had been quite a distance I had been trying to change
18 lanes, but traffic was heavy and I couldn't change.

19 Q. What was the situation with the lanes there? Was
20 there a barrier between these two lanes of eastbound 264?

21 A. Yes.

22 Q. And at that time what happened at the top of the
23 hill to the road?

24 A. Well, at the top of the hill the barriers ended
25 and the I-64 off ramp comes in with two more lanes of

1 traffic there that engages with 264 east.

2 Q. And at that time in order to work your way over
3 and exit at Newtown, what were you required to do?

4 A. I had to -- after I passed the barriers, I had to
5 maneuver through two more lanes of traffic to get into the
6 exit lane at Newtown.

7 Q. Okay. After you started giving your turn signal
8 -- this is an electronic blinking signal; is that correct?

9 A. Yes.

10 Q. Did you notice any traffic in the lane beside
11 you?

12 A. Yes, I did. It was pretty much heavy right
13 along, and I finally decided to -- you know, I came up to
14 the first car in the line of traffic, and I had my signal
15 on all the time so I was going to attempt to change lanes
16 then.

17 Q. Did there come a time when you thought you had
18 room to move over into that lane?

19 A. Yes, sir.

20 Q. What happened at that point?

21 A. Well, at this particular time I was maybe a car
22 length or so, or just a little bit past what was later to
23 be the Reid car. And as I got up enough room to change
24 lanes, it seemed that she picked up speed and I couldn't
25 change lanes. I had to get back in my lane.

1 Q. And after you did that what did you do?

2 A. I decelerated hoping that I could drop back
3 behind her.

4 Q. And what happened then?

5 A. Well, it seems that she also slowed up at that
6 particular time.

7 Q. And didn't move out ahead of you?

8 A. No, sir.

9 Q. What were your actions then?

10 A. Well, I proceeded to pick up enough speed again
11 to where I could change lanes, which I did. I got up
12 enough speed to where I could change lanes.

13 Q. What was ahead of Miss Reid's car in the right
14 lane?

15 A. Well, there was traffic further up the hill. I
16 can't say how far.

17 Q. Do you know how big the opening was ahead of her
18 car?

19 A. It was a pretty good distance. It was -- I'd
20 have to guess it would probably be fifty, seventy-five feet
21 maybe.

22 Q. You heard Miss Reid say maybe thirty to forty
23 feet. You agreed with at least that?

24 A. Yes.

25 Q. How far up past Miss Reid do you believe you got

1 before you moved into the right lane?

2 A. Well, I would say I was at least a good car
3 length or car length and a half ahead of her when I decided
4 to change lanes.

5 Q. Why did you choose to go in at that point; was
6 there any reason?

7 A. With the exception of the lane barrier ending and
8 having to go across two more lanes of traffic, that was the
9 reason.

10 Q. Did you get all the way over into that lane?

11 A. Yes.

12 Q. And then what did you do, Mr. Ayscue?

13 A. Well, I touched my accelerator. I decelerated
14 and I rested my foot on the brake. Evidently the light
15 came on, and then I engaged the gas again and went on up
16 the hill.

17 Q. Why did you do that?

18 A. Well, as a precautionary measure as having to
19 pick up a little extra speed to get in the lane. And
20 second, with the construction area there, there was a lot
21 of construction going on and so it was kind of a congested
22 area at that time.

23 Q. Did you see Miss Reid behind you after you pulled
24 into that lane?

25 A. Yes, sir.

1 Q. Where was she when you saw her?

2 A. Well, as I was pulling in I saw in my right rear-
3 view mirror, and then I looked --

4 Q. Well, how far behind you?

5 A. I would say a car length or a car length and a
6 half, sir.

7 Q. And did you see her any more after that?

8 A. Yes.

9 Q. When did you see her next?

10 A. Then I heard the sound of tires squealing on the
11 pavement. And I looked in the rear-view mirror, and I saw
12 the car going out of control.

13 Q. Okay. What did you see the car do?

14 A. Well, I saw it -- it swerved to the left to the
15 best of my knowledge, because I was going on up the road
16 and I looked in the mirror. I saw it swerve to the left,
17 and then the car came back and to the right.

18 Q. Why did you think that car had done that?

19 A. I'm not really sure.

20 Q. What were your actions at that point?

21 A. My actions were as I saw the car hit the barrier
22 and start turning over I proceeded to stop.

23 Q. What did you do?

24 A. I backed up.

25 Q. How far did you back up?

1 A. It would have to be a guess, only probably
2 seventy-five feet maybe.

3 Q. What did you do then?

4 A. I got out of my vehicle and ran back to the
5 overturned vehicle in the street.

6 Q. Go ahead and tell us what you did after that.

7 A. I went back there and observed the lady coming
8 out of the -- one of the windows there.

9 Q. Was that Gwendolyn Reid?

10 A. Yes, it was.

11 Q. All right.

12 A. And she had blood on her. I couldn't tell the
13 extent of the injuries, but we ran around on the other side
14 of the car.

15 Q. Were there other people there at that time?

16 A. Yes, there was people arriving, because the
17 construction crews working on the street and all were there
18 by this time.

19 Q. What happened after that?

20 A. Well, we went around the car and there was this
21 lady. Mrs. Reid was lying partially in and out of the car.

22 Q. Did Gwendolyn Reid ask for any assistance?

23 A. She made the statement to phone -- to no one in
24 particular that I could see -- she said, "I wish someone
25 would call my brother".

1 Q. Did she give a phone number?

2 A. Yes, she did. She opened her wallet and gave me
3 the number.

4 Q. And you volunteered to call her brother?

5 A. Yes, I did.

6 Q. And did you do that?

7 A. Yes, I did.

8 Q. And you heard the trooper say you talked to him
9 later in the day?

10 A. Yes, sir.

11 Q. I don't have any further questions, Mr. Ayscue.
12 Answer counsel's questions.

13 CROSS-EXAMINATION

14 BY MR. CRANDLEY:

15 Q. Mr. Ayscue, when did your workday begin on April
16 5, 1985?

17 A. Approximately 6:00 a.m.

18 Q. And when was it due to end?

19 A. When I finished my run, finished my work for the
20 day. Plus I would go back to the plant and do my paperwork.
21 And also there was a time limit. You couldn't get into the
22 plant to quit your day's work until 3:00.

23 Q. Was that a union provision?

24 A. No, sir, management.

1 Q. Your day was dictated by the number of stops you
2 had to make, right?

3 A. In a way, yes.

4 Q. Well, when you were out on the road what were you
5 doing other than making stops at various stores where
6 Pepsis were served?

7 A. I was between the traffic back between the
8 stores.

9 Q. You were going from one store to the other?

10 A. Yes, sir.

11 Q. And your time out on the road and the length of
12 your day was directly correlated to the time it took you to
13 go from store to store?

14 A. Yes.

15 Q. And where was the Arrowhead Shopping Center on
16 your list for the day?

17 A. It was the fourth or fifth stop.

18 Q. How many stops did you have?

19 A. Five or six that day.

20 Q. So you're normally at the end of your run at
21 11:30 in the morning, right?

22 A. Yes.

23 Q. You had gotten onto I-264 at Waterfront Drive; is
24 that correct?

25 A. Yes, sir.

1 Q. And you drove in the leftmost lane of I-264 all
2 the way out until the point you got in front of Gwendolyn's
3 car; isn't that correct?

4 A. No, sir.

5 Q. Pardon me?

6 A. No, sir, it was the middle lane at that time.

7 Q. Middle lane where?

8 A. Middle lane of 264.

9 Q. And that became the left lane at the Richmond
10 exit, right?

11 A. Yes, sir; right.

12 Q. All right. How many times had you taken that
13 route from downtown Norfolk to Newtown Road for the purpose
14 of going to the Arrowhead Shopping Center?

15 A. Quite a few, sir.

16 Q. And quit a few times before April 5th, 1985,
17 correct?

18 A. Yes, sir.

19 Q. So there were quite a few times before April 5th,
20 1985 that you knew that you had to be in that right lane as
21 you came up to Newtown Road, correct?

22 A. Yes.

23 Q. It's your testimony that you stayed in that
24 middle lane, which became the left lane near the end of
25 your trip, constantly from Waterfront Drive; is that

1 correct?

2 A. Yes, sir.

3 Q. Are you saying that there was not one opportunity
4 at all from Downtown Norfolk until the I-64 overpass for
5 you to get into the right lane?

6 A. No, I'm not saying there wasn't an opportunity,
7 no.

8 Q. Was traffic not going fast enough for your liking
9 that day?

10 A. Traffic was just fine with me; yes, sir.

11 Q. Now, you say that you were hampered from getting
12 into the right lane because traffic was very congested?

13 A. Very heavy, yes.

14 Q. How close behind Gwendolyn Reid's car was the car
15 next behind her when you passed?

16 A. I can't say how close it was. It was close
17 enough to where I couldn't get in there. I know that I
18 couldn't get in.

19 Q. Well, how close is that? Is it a car length, two
20 car lengths, what?

21 A. Probably a car length and a half or so.

22 Q. And that is the distance that you pulled in front
23 of Gwendolyn Reid's car, right, a car length and a half?
24 How long is a car length in your estimation, Mr. Reid?

25 A. Mr. Ayscue.

1 Q. I'm sorry. How long is a car length in your
2 estimation?

3 A. Probably eight feet.

4 Q. Have you ever estimated at six feet?

5 A. Could possibly.

6 Q. Could possibly. Well, you remember giving a
7 deposition --

8 MR. RUTHERFORD: He hasn't denied it; if Your
9 Honor, please. I don't know why the deposition matters.

10 Q. Are you saying whether, in fact, you have
11 estimated a car length as little as six feet?

12 A. I'm saying I could have.

13 Q. Could have. All right. Do you remember me
14 asking you this question --

15 MR. RUTHERFORD: Are you referring to a
16 deposition?

17 MR. CRANDLEY: Page sixty-eight, line sixteen.

18 Q. Well, let me ask you another question before
19 that. The distance between your car -- I'm sorry. Strike
20 that.

21 The distance between the Reid car and the car
22 next ahead of it in the right lane as you pulled in
23 was -- you guessed to be what, fifty to seventy-five feet.

24 A. Approximately -- I can't say for sure, because I
25 really don't know. But it was up the hill further.

1 Q. Do you recall testifying to a fact larger than
2 that, or a distance larger to that in the past?

3 A. Could be. It's just a guess. I don't know.

4 Q. Let me refer you to your deposition that was
5 taken back on November 4th, 1986, page sixty-eight, line
6 two. When I asked you, "So you are saying that you pulled
7 in front of Miss Reid's car when the lane, the right
8 lane --"

9 MR. RUTHERFORD: Your Honor, please. I don't
10 understand the procedure here.

11 THE COURT: Just state the grounds for your
12 objection.

13 MR. RUTHERFORD: I object to counsel reading out
14 of this deposition. There has been no foundation for
15 reading out of the deposition.

16 BY MR. CRANDLEY:

17 Q. Did you ever testify, Mr. Ayscue, that the
18 distance between the Reid car and the car immediately in
19 front of it was a hundred to a hundred and fifty feet?

20 A. Possibly.

21 Q. Possibly. All right. Well, let me ask you if, in
22 fact, this was your answer back on November 4, 1986, page
23 sixty-eight, line two when I asked you the question, "So,
24 you are saying that you pulled in front of Miss Reid's car
25 when the lane, the right lane of eastbound 264 was clear as

1 far as you could see?"

2 And then you responded, "There was traffic going over
3 the hill, but that was a ways."

4 And I asked, "How far away was that traffic?"

5 And your answer was, "I would say a hundred and fifty
6 feet."

7 Do you recall giving that answer?

8 A. Possibly, yes.

9 Q. Possibly, yes?

10 A. Yes.

11 Q. Do you deny giving that answer?

12 A. No, sir, I do not deny it.

13 Q. You don't deny it?

14 A. No, sir.

15 Q. And then do you remember me asking you if you had
16 to put that into car lengths --

17 MR. RUTHERFORD: Your Honor, please. I object
18 again.

19 THE COURT: Well, there is nothing to impeach
20 here. I sustain the objection.

21 MR. CRANDLEY: Your Honor, I'm getting to the
22 point of the measurement of car lengths.

23 THE COURT: Well, that's fine. You can use the
24 deposition to impeach the testimony of the witness, but
25 there is nothing to impeach because he hasn't denied that

1 he said these things.

2 MR. CRANDLEY: Well, I'll just bring in the court
3 reporter, Your Honor. I mean I can't get the man to admit
4 to what he says "possibly" to.

5 THE COURT: You asked him did he deny saying
6 that, and he said, no, he didn't deny it.

7 MR. CRANDLEY: The next question I'm going to ask
8 is in respect to car lengths. I have previously as little
9 as six feet, and he's denied it.

10 MR. RUTHERFORD: I beg your pardon?

11 THE COURT: I don't think he has, sir.

12 BY MR. CRANDLEY:

13 Q. Have you denied it?

14 A. No, sir.

15 Q. You don't deny that you've estimated a car length
16 as little as six feet in the past?

17 A. No, sir.

18 Q. Okay. All right.

19 This one hundred to one hundred and fifty feet,
20 how many six foot car lengths would you have?

21 MR. RUTHERFORD: Your Honor, please. I don't
22 believe the witness is called on to make mathematical
23 computations.

24 Q. Would you agree that's about fifteen to twenty?

25 A. Probably, yes.

1 Q. Probably fifteen to twenty car lengths. All
2 right.

3 In fact, have you testified in the past that it was
4 fifteen to twenty car lengths separating the Reid vehicle
5 from the next vehicle ahead of it in that right lane?

6 A. Probably, maybe.

7 Q. Probably, maybe. Do you deny that you've
8 testified to that?

9 A. No, sir.

10 Q. So by your estimation, a car length is either six
11 to eight feet. You pulled in front of Gwendolyn Reid's car
12 at a distance of a car length to a car length and a half,
13 or about six to fifteen feet, right?

14 A. Yes.

15 Q. How fast were you going at that time?

16 A. I would estimate I was going right at the speed
17 limit, around fifty-five.

18 Q. Well, you've testified on direct examination that
19 traffic was moving on the speed limit.

20 A. I was traveling with the traffic. If it was
21 going fifty-five, I was going fifty-five.

22 Q. Well, how did you overtake the Reid vehicle if
23 she was traveling with traffic?

24 A. As I testified before, I had to increase my speed
25 to get in front of her.

1 Q. So you had to get up to about sixty, didn't you?

2 A. Probably sixty, but no more than that.

3 Q. Then you pulled in front of her?

4 A. Yes.

5 Q. And you did touch the brake peddle?

6 A. I decelerated and put my foot on the brake
7 peddle, yes.

8 Q. All right. Why?

9 A. As I testified before, as a precautionary
10 measure.

11 Q. What were you concerned about?

12 A. The little extra speed I might have been going,
13 or the construction in the area as a safety precaution.

14 Q. You did that when you were six to fifteen feet in
15 front of her car going fifty-five to sixty miles per hour?

16 A. Yes.

17 Q. How was your speed a hazard to you? What were
18 you concerned about in the safety of the operation of your
19 vehicle?

20 A. I really can't answer that question. I don't
21 understand what you're saying.

22 Q. Well, why was it necessary for you, at that point
23 in the road, to apply pressure to your brake peddle that
24 close in front of the Reid car?

25 A. I never testified that I applied pressure. I

1 said I touched my brake peddle. I didn't say I applied
2 pressure.

3 Q. Did your brake lights come on?

4 A. As far as I know they did.

5 Q. What is your reaction, Mr. Ayscue, when you're
6 driving behind someone and their brake lights come on?

7 MR. RUTHERFORD: Your Honor, please. I don't
8 think that's a proper question. It calls for speculation.

9 THE COURT: Objection sustained.

10 BY MR. CRANDLEY:

11 Q. You put your foot on the peddle, but you didn't
12 apply any pressure?

13 A. Right.

14 Q. But it was your intention to decelerate as you
15 said on direct examination?

16 A. Yes, sir.

17 Q. What did you want to decelerate to, a half a mile
18 an hour?

19 A. If that's what was safe.

20 Q. What would determine whether it was safe or not,
21 Mr. Ayscue?

22 A. I guess what I saw in my own eyes as far as
23 safety.

24 Q. All right. Tell us what you saw in your own eyes
25 as far as safety at the time you put your foot on that

1 brake peddle six to fifteen feet in front of Miss Reid.

2 What were you seeing in your own mind?

3 A. Like I said before, I was just trying to get back
4 to the normal speed, back down a couple of miles an hour
5 that I had to speed up to get in front of her to start
6 with.

7 Q. What happens when you release your foot off the
8 accelerator under normal circumstances?

9 A. You quit going the speed you're going, and you
10 start slowing down.

11 Q. Right. Were you concerned about merging traffic
12 somewhere?

13 A. In a few seconds, yes; up the road I was.

14 Q. How far up the road, Mr. Ayscue, was the next
15 point where you had to be concerned about traffic moving
16 from either your right or your left?

17 A. I would have to guess and say probably a hundred
18 and fifty to two hundred feet. And that's probably just a
19 guess.

20 Q. A hundred and fifty to two hundred feet?

21 A. Right.

22 Q. And where would that traffic be coming from?

23 A. It would be coming from the other two eastbound
24 lanes on 264, also the off ramp traffic on I-64.

25 Q. Now, immediately after applying your foot with

1 that minimal pressure to your brake peddle you heard a
2 car's tires squealing behind you, right?

3 A. Yes.

4 Q. And you saw in your rear-view mirror the Reid
5 vehicle going out of control, didn't you?

6 A. Yes.

7 Q. How far? What distance did it travel out of
8 control?

9 A. I can't answer that. I don't have the slightest
10 idea at all.

11 Q. You don't?

12 A. If I had to guess I would say seventy-five to a
13 hundred feet. That's a guess.

14 Q. All right.

15 A. That's a guess.

16 Q. And we know from that point where you just
17 lightly touched your brake peddle you were a hundred to a
18 hundred and fifty feet from traffic going to your right,
19 right?

20 A. Yes.

21 Q. By your best guess?

22 A. Yes.

23 Q. But you traveled up, stopped your truck and then
24 backed down seventy-five feet to get to the point of the
25 accident, didn't you, after the car came to rest?

1 A. Yes.

2 Q. Well, how far did the car roll and tumble?

3 MR. RUTHERFORD: Your Honor, please. He said he
4 didn't know. He guessed for counsel, and counsel didn't
5 like his guess.

6 THE COURT: I don't think it was the exact same
7 question. I'm not going to allow repetitive questions, but
8 I don't think the question was relative in this instance.

9 MR. CRANDLEY: I'm going to ask leave of the
10 Court to ask it again.

11 THE COURT: You may ask it again.

12 BY MR. CRANDLEY:

13 Q. After the accident you've testified you brought
14 your truck to a stop and you backed it down seventy-five
15 feet to get to the accident. You've testified that the car
16 was out of control to a distance of seventy-five feet. And
17 all this initially began when you were a hundred to a
18 hundred and fifty feet from merging traffic up there on the
19 crest of the hill?

20 A. Yes.

21 Q. Is that your testimony?

22 A. Yes, sir.

23 Q. Did any traffic -- did you notice any vehicles
24 slam into or have a near miss with the Reid vehicle as the
25 Reid vehicle was careening out of control?

1 A. I didn't notice that, no.

2 Q. What happened to that car, which by your
3 testimony, was a car length to a car length and a half
4 behind Gwendolyn Reid's car, when you passed that car prior
5 to cutting in front of Gwendolyn Reid? What happened to
6 that car right behind her?

7 A. I couldn't answer that because I don't know.

8 Q. There was only one car that had any damage to it
9 in this accident, right?

10 A. Yes, sir.

11 Q. All right. Now, we have it here today that you
12 estimate that you had fifty to seventy-five feet from the
13 Reid vehicle and the vehicle immediately ahead of it in the
14 lane in front of it. In order to move in to make your lane
15 change -- and you've admitted that. Once prior you
16 testified that that distance was a hundred to a hundred and
17 fifty feet, correct?

18 A. Yes, sir.

19 Q. You know you've guessed those two estimates so
20 far.

21 A. I'm not sure.

22 Q. Right.

23 A. Probably.

24 Q. Why was it, Mr. Ayscue, that it was necessary for
25 you to use that first six to fifteen feet of that fifty

1 feet, or that first six to fifteen feet of that hundred and
2 fifty feet in order to pull in front of Gwen Reid's car?
3 Why did you have to cut in at that point?

4 A. At fifty-five miles an hour you're traveling two
5 hundred feet in a very short time.

6 Q. How much time?

7 A. Couldn't say. I don't know, sir.

8 Q. Well, where would two hundred feet have taken
9 you?

10 A. Well, whatever the distance was to the end of the
11 barrier. You move fast out there.

12 Q. Well, how far was that?

13 A. It's just a guess. I just guessed what a hundred
14 and fifty to two hundred feet.

15 Q. Have you ever testified -- and you've also
16 testified that your car length distance is what, six to
17 eight feet?

18 A. I said I guessed.

19 Q. Have you ever testified in the past that the
20 actual gap between Gwendolyn Reid's car and the car in
21 front of her was approximately four car lengths?

22 A. I don't recall. I could have. I don't remember.

23 Q. Do you deny that you haven't?

24 A. No, sir, I don't deny it.

25 Q. You don't deny it?

1 A. No.

2 Q. That by your arithmetic would be twenty-four to
3 thirty-two feet, would you agree with that?

4 A. I think that's the distance, yes.

5 Q. So now we have it today that in respect to the
6 area that you had to pull in front of Gwendolyn Reid -- at
7 one time you said it was a hundred to a hundred and fifty
8 feet. Today on direct you say it was fifty to seventy-five
9 feet. And now you're acknowledging that on a third
10 occasion you said it was four car lengths or twenty-four to
11 thirty-two feet?

12 MR. RUTHERFORD: Well, Your Honor, please. I
13 don't think that's fair. The witness said he didn't deny
14 it. He doesn't remember saying it.

15 THE COURT: I think the jury has heard it, and
16 they can judge that for themselves.

17 MR. CRANDLEY: I'll be more general if you wish.
18 BY MR. CRANDLEY:

19 Q. Mr. Ayscue, I'm going to show you a document that
20 had been signed by you under oath -- and if you have seen
21 it before --

22 MR. RUTHERFORD: Your Honor, please. May I
23 approach the bench?

24 THE COURT: I don't see any reason to approach
25 the bench, but if you want to you can come on.

1 MR. RUTHERFORD: It's not the document I thought
2 it was, and I withdraw my objection.

3 THE COURT: All right.

4 BY MR. CRANDLEY:

5 Q. Do you recall seeing this document in the past,
6 Mr. Ayscue? And if you'll check on the last page I think
7 you'll see your signature underneath. I'll help you. On
8 the last page there. Let me show you where you signed it.

9 A. I was just reading to see what it was. I didn't
10 even know what it was.

11 Q. If you go to the last page there. Does that bare
12 your signature underneath, Mr. Ayscue?

13 A. Yes.

14 Q. When was that signed by the way?

15 A. Twenty-fifth of August, 1986.

16 Q. All right. Would you go back to question number
17 seven and read that question and answer, please.

18 A. State roughly observations as to how the subject
19 accident occurred. He had approximately four car lengths -
20 -

21 Q. That is your answer now. "He had" designates it
22 as your answer to it.

23 A. I did. Okay. I'm sorry. "He had approximately
24 four car lengths in between the car in the right lane and
25 the car ahead. He changed lanes safely and was established

1 in the right lane. Immediately after he heard tires
2 squealing, checked his right mirror and saw a car that was
3 skidding out of control and struck the concrete barrier."

4 Q. All right. That's your answer, isn't it?

5 A. I was looking here. Has something been whited
6 out on here?

7 Q. Would you like to look at your counsel's copy?

8 A. No, I was looking --

9 MR. CRANDLEY: Can I have your copy, counsel?

10 MR. RUTHERFORD: I don't have any reason to think
11 that's not accurate.

12 THE WITNESS: That's fine. I said approximately
13 four car lengths.

14 MR. CRANDLEY: We'll wait, Mr. Ayscue. We'll
15 give you the benefit.

16 THE WITNESS: No problem.

17 MR. RUTHERFORD: It says the same thing, Mr.
18 Ayscue.

19 THE WITNESS: Okay.

20 MR. RUTHERFORD: Thank you for being careful.

21 BY MR. CRANDLEY:

22 Q. Do you want to disavow that answer?

23 A. No, sir.

24 Q. Do you want to disavow your direct testimony

1 regarding that estimate?

2 A. No, sir.

3 Q. Do you want to disavow the statement that you
4 gave in depositions?

5 A. No, sir.

6 Q. Do you have a choice that you'd prefer the jury
7 to believe in regard to that?

8 A. I said everything was approximate.

9 MR. RUTHERFORD: He's arguing with the witness.
10 I object.

11 MR. CRANDLEY: I disagree.

12 BY MR. CRANDLEY:

13 Q. You don't mention in there at all, Mr. Ayscue,
14 that you touched your brake. Why not?

15 A. I don't know.

16 Q. But you did, in fact, touch your brake, didn't
17 you?

18 A. I touched the brake peddle.

19 Q. Touched the brake peddle.

20 A. Yes, sir.

21 Q. Did you mention this in there that you touched
22 the brake peddle?

23 A. I haven't read it. I don't know, sir.

24 Q. Look through it.

1 A. I don't see it.

2 Q. Did you mention in there that you decelerated
3 your vehicle as a precautionary measure?

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

5 Q. Thank you, Mr. Ayscue.

6 MR. CRANDLEY: Your Honor, I have no further
7 questions of this witness.

8 MR. RUTHERFORD: I have nothing in follow up.

9 Come down, Mr. Ayscue.

10 We have nothing further, Your Honor.

The Court Instructs the Jury:

You are the judges of the facts, the credibility of the witnesses, and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any have been shown, their prior inconsistent statements.

While you have no right to disregard arbitrarily the believable testimony of any witnesses, you may discard or accept, in whole or in part, the testimony of any witness when you consider it in connection with the other evidence in the case. You are entitled to use your common sense in judgment any testimony.

From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

INSTRUCTION NO. 2

The Court instructs the jury that your verdict must not be based on surmise, conjecture or sympathy for either of the parties but must be based solely on the evidence and the instructions of the Court.

The Court Instructs the Jury:

Any fact that may be proved by direct evidence may be proved by circumstantial evidence; that is, you may draw all reasonable and legitimate inferences and deductions from the evidence.

The Court instructs the jury that this case is based on negligence and you cannot infer negligence on the part of the defendants from the mere happening of the accident.

The burden is on the plaintiff to prove by a preponderance of the evidence that the defendants were negligent and that any such negligence proximately caused or contributed to the accident.

If, after hearing all the evidence, you are uncertain as to whether the defendants were guilty of negligence which proximately caused or contributed to the accident, and if it appears just as probable that the defendants were not guilty of any such negligence as it is that they were, then the plaintiff cannot recover and your verdict must be in favor of the defendants.

The Court instructs the Jury:

You shall find your verdict for the plaintiff if he has proved by the greater weight of the evidence that:

- (1) defendant Ralph Lee Ayscue was negligent; and that
- (2) defendant Ralph Lee Ayscue's negligence was a proximate cause of the death of plaintiff's decedent, Gladys C. Reid.

You shall find your verdict for the defendants if:

- (1) the plaintiff failed to prove either or both of the two elements above.

INSTRUCTION NO. 6

The Court instructs the jury that if you believe from the evidence that the accident in question was proximately caused solely by the negligence of Gwendolyn Reid, then the plaintiff cannot recover and your verdict must be in favor of the defendants.

The Court Instructs the Jury:

Negligence is the failure to use ordinary care. Ordinary care is the care a reasonable person would have used under the circumstances of this case.

The Court Instructs the Jury:

A proximate cause of an accident, injury, or damage is the cause which in natural and continuous sequence produces the accident, injury, or damage. It is a cause without which the accident, injury, or damage would not have occurred.

INSTRUCTION NO. 9

The Court Instructs the Jury:

The driver of a vehicle has a duty to use ordinary care:

- (1) to keep a proper lookout;
- (2) to keep his vehicle under proper control; and
- (3) to operate his or her vehicle at a reasonable speed under the existing conditions.

If a driver fails to perform any one or more of these duties, then he or she is negligent.

INSTRUCTION NO. 10

The Court Instructs the Jury:

The duty to keep a proper lookout requires a driver to use ordinary care to look in all directions for vehicles that would affect his or her driving, to see what a reasonable person would have seen, and to react as a reasonable person would have acted to avoid an accident under the circumstances.

The Court Instructs the Jury:

The driver of a vehicle has a duty to drive as nearly as practicable within a single lane and not to move from that lane until he has used ordinary care to see that the movement can be made with safety.

If a driver fails to perform this duty, then he is negligent.

INSTRUCTION NO. 12

The Court Instructs the Jury:

The driver of a vehicle has a right to assume that the driver of another vehicle will operate it in a lawful manner until he or she realizes, or in the exercise of ordinary care should realize, that the other driver is not going to do so.

INSTRUCTION NO. 13

The Court instructs the Jury:

If you find your verdict for the plaintiff, then in determining the damages to which he is entitled, you may consider, but are not limited to, any of the following which you believe by the greater weight of the evidence were caused by the negligence of defendant, Ralph Lee Ayscue, as damages suffered by the beneficiaries:

- (1) any sorrow, mental anguish, and loss of solace suffered by the beneficiaries. Solace may include society, companionship, comfort, guidance, kindly offices, and advice of the decedent.

If you award damages, you may distribute these damages between Ronald D. Reid and Gwendolyn S. Reid, subject to the other instructions of this Court.

If you find your verdict for the plaintiff, you shall award damages for:

- (1) any expenses for the care, treatment, and hospitalization of Gladys C. Reid incident to the injury resulting in her death; and
- (2) reasonable funeral expenses.

INSTRUCTION NO. 14

The Court instructs the jury that Gwendolyn Reid is one of two lawful beneficiaries of the estate of Gladys Reid. You are further instructed, however, that if Gwendolyn Reid was guilty of any negligence which proximately caused or contributed to the accident in which Gladys Reid died, then any such negligence would bar a recovery by Gwendolyn Reid.

Therefore if you find from the evidence and the instructions of the Court that Gwendolyn Reid was guilty of negligence which proximately caused or contributed to the accident, you should not award any damages to Gwendolyn Reid.

INSTRUCTION NO. 15

The Court Instructs the Jury:

The burden is on the plaintiff to prove by the greater weight of the evidence each item of damage he claims and to prove that each item was caused by the defendant's negligence. He is not required to prove the exact amount of his damages, but he must show sufficient facts and circumstances to permit you to make a reasonable estimate of each item. If the plaintiff fails to do so, then he cannot recover for that item.

INSTRUCTION NO. 16

The Court instructs the jury that the amount sued for in the Motion for Judgment is not evidence and should not be considered by you in arriving at your verdict.

The Court instructs the Jury: -

The Allegheny Pepsi-Cola Bottling Company is, as a matter of law, liable for any damages proximately caused by the negligence of its employee, Ralph Lee Ayscue. Therefore, if you find your verdict for the plaintiff, you shall find such verdict against both defendants.

1 MR. GOODWYN: We've got a discrepancy on
2 one point, and that is whether or not interest should
3 be granted on the amount of the award.

4 THE COURT: This is Reid versus Ayscue?

5 MR. GOODWYN: Yes, ma'am.

6 MR. CRANDLEY: The point, Your Honor --

7 THE COURT: Let me ask you something
8 about -- first, this is Reid versus Ayscue, it came
9 to trial before the late Judge Waters, then there was
10 a motion -- and that was in the principal case --
11 then there was a motion in the third-party case by
12 the third-party defendant for contribution against
13 the third-party -- I mean against the defendant in
14 the principal action. I wrote an opinion on it
15 granting contribution. The question is whether there
16 should be interest granted on your contribution?

17 MR. GOODWYN: Correct, Your Honor.

18 THE COURT: Okay. Let me ask you just
19 the law before I even think about it. In general,
20 for instance, if you went to a jury, the law says
21 that they can grant interest or not grant interest if
22 what you're looking at is a tort; isn't that
23 correct? That the jury could if they wanted to --

24 MR. CRANDLEY: Right.

25 THE COURT: -- have granted interest? I

1 know we're dealing with a third-party suit, we're not
2 dealing with a principal, but I'm just asking the
3 general rule.

4 MR. CRANDLEY: It's found under
5 8.01-332. I think the way the law reads is that the
6 jury may award interest from the date of the tort if
7 the judgment order is silent.

8 THE COURT: Right. It's from the date
9 of judgment.

10 MR. CRANDLEY: From the date of verdict
11 on a jury verdict.

12 THE COURT: From the date of verdict,
13 yes.

14 MR. CRANDLEY: On a jury verdict.

15 THE COURT: 332, did you say, Jack?

16 MR. CRANDLEY: Yes, ma'am. - I don't
17 think we have the circumstances here, and that's what
18 we're fighting over.

19 THE COURT: "Except as otherwise
20 provided in any action at law or suit in equity, the
21 verdict of the jury, or if no jury, the judgment or
22 decree of the Court, may provide for interest on any
23 principal sum awarded, or any part thereof, and fix
24 the period at which the interest shall commence."

25 So, in other words, it gives me the

1 discretion to award it or not award it. I did not --
2 I wrote an opinion, but I didn't draw up a judgment
3 order. I assume you did, and what you did was to
4 provide for interest?

5 MR. GOODWYN: Correct, Your Honor.

6 THE COURT: And you oppose it, and what
7 you'd like to argue to me today is whether or not
8 interest is awarded on the contribution; is that the
9 idea?

10 MR. GOODWYN: Yes, ma'am.

11 THE COURT: I think it's clear that the
12 third-party plaintiff would be entitled to judgment
13 interest from the date of entry of the judgment,
14 which would be today if I signed it.

15 MR. CRANDLEY: What I'm complaining
16 about is prejudgment interest.

17 THE COURT: Nobody even asked for
18 prejudgment interest. I didn't state in my opinion I
19 was going to grant prejudgment interest. Frankly, I
20 have ill-served both of you by taking so long to
21 grant the opinion, and, of course, you could argue,
22 Bernard, that by doing so I've denied you interest
23 for that length of time.

24 And, Jack, of course, you could argue
25 that by delaying it, I stuck you with some interest

1 that -- you know, you might have paid it, gotten it
2 off, and not had to pay the interest. And, frankly,
3 I feel badly for both of you. I apologized before,
4 and let me apologize again. I have never, ever taken
5 anything like that long in getting around to
6 rendering an opinion.

7 I'm awfully glad it's done, but I'm not
8 inclined, Bernard, to grant interest on it. I feel
9 as if I was the one responsible for the delay. If I
10 could make it out of pocket, I would, but at this
11 point, I didn't say anything about it in the opinion,
12 did not frankly intend to grant it. It never really
13 became an issue in the principal case, because, as I
14 understand it, you went ahead and paid the judgment.

15 MR. GOODWYN: My client went ahead and
16 paid the judgment.

17 THE COURT: You went ahead and paid it
18 immediately, so interest didn't become an issue. At
19 any rate, you may certainly put your objection to my
20 failure to grant interest on the record, if you
21 like. I think it's in the discretion of the Court,
22 since it was a tightly contested case. If interest
23 is certain and the liability is certain, as I recall
24 the case law, then you are supposed to at least
25 consider granting interest from the moment in which

1 that clear liability attaches. This was not, God
2 knows, a clear issue.

3 MR. CRANDLEY: No.

4 THE COURT: Therefore, I think the
5 fairest I can do is to allow it from the date of
6 judgment. To the extent that I've denied you
7 interest by delaying the judgment, I do apologize.

8 MR. GOODWYN: Yes, ma'am. Please note
9 our objection.

10 THE COURT: To the denial of interest?

11 MR. GOODWYN: Yes, ma'am.

12 THE COURT: And, Jack, I'm sure yours to
13 the opinion in general?

14 MR. CRANDLEY: Yes, ma'am.

15 THE COURT: You know you must be either
16 wrong or right if you make everybody equally unhappy,
17 I'm not sure which.

18 MR. CRANDLEY: Sometimes a little bit of
19 delay serves a lot of purpose in law.

20 THE COURT: Sometimes they settle it,
21 but not always.

22 MR. CRANDLEY: Do you have an order?

23 MR. GOODWYN: Your Honor, I guess -- I
24 have a question, I guess I should sign this order
25 "seen and objected to?"

1 THE COURT: Well, you need to preserve
2 for appeal, I think, if either one of you decides to
3 appeal, you probably need to preserve on there --
4 although, probably by having the court reporter
5 you've done it -- that your objection is as to the
6 lack of interest or the denial of prejudgment
7 interest.

8 MR. GOODWYN: Okay.

9 THE COURT: So if you specify what it is
10 -- Jack's is just "seen and objected to," period.
11 Yours is "seen and objected to as to denial of
12 pretrial interest -- or prejudgment interest."

13 MR. GOODWYN: Yes, ma'am.

14 MR. CRANDLEY: What was the amount of
15 the judgment of the verdict in the first case? Do we
16 have that handy? I'm sure that's probably it.

17 THE COURT: If we have it -- you have to
18 bear in mind, I only have one arm. You guys have got
19 to go through the record.

20 MR. GOODWYN: Do you need some help?

21 THE COURT: Oh, do I need help.

22 MR. CRANDLEY: I think it's probably
23 right.

24 THE COURT: It does say it in my
25 opinion, if you've got a copy of it.

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1 MR. CRANDLEY: I think it's probably at
2 the very bottom before the motions start coming in.

3 THE COURT: At the very end, it should
4 be.

5 MR. CRANDLEY: Well, I guess that's been
6 pulled -- off the record.

7 (Discussion off the record.)

8 MR. GOODWYN: Your Honor, this is how I
9 executed the order. We asked for this, but this
10 order is amended as to the amount of the prejudgment
11 order.

12 THE COURT: That takes care of it, and
13 I'm sure yours is --

14 MR. CRANDLEY: My objection is as to the
15 ruling on the award of judgment on the contribution
16 theory, Your Honor.

17 THE COURT: Yes, okay.

18 MR. GOODWYN: Thank you, Your Honor.

19
20 (The hearing was concluded at 9:30 a.m.)
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ASSIGNMENT OF ERROR

The trial court erred in granting appellees' Motion for Summary Judgment, specifically in applying the doctrine of collateral estoppel on appellees' third-party claim.

ASSIGNMENT OF CROSS-ERROR

The trial court erred in not awarding prejudgment interest to Ralph C. Ayscue and Allegheny Pepsi-Cola Bottling Company from the date that they paid the judgment rendered against them for which they were found to be entitled to contribution.

