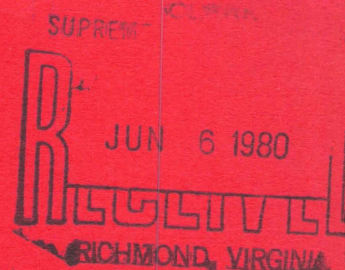


223 Va H 99



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 791594

ROY C. SWISHER

Appellant

v.

BEULAH C. SWISHER

Appellee

JOINT APPENDIX

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Staunton, Virginia 24401

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TABLE OF CONTENTS

	<u>Appendix Page</u>
Motion for Judgment filed 5-10-77	1
Grounds of Defense filed 5-25-77	3
 <u>Excerpts of Transcript of Testimony</u>	
Testimony of Trooper J. E. Dodson	5
Testimony of Dana Sue Craun	11
Testimony of Roy C. Swisher	12
Testimony of Beulah C. Swisher	16
Objection to Motion to Dismiss	19
Defendant Swisher's Objection to Instructions	20
Objection to Instruction 12	21
Objections to Instruction B	22
Objection to Instruction C	26
Objections to Instructions D & E	27
 Instruction No. 12	 29
Instruction No. B	30
Instruction No. C	31
Instruction No. D	32
Instruction No. E	33
Order entered 8-17-79	35
Assignments of Error	36

MOTION FOR JUDGMENT

The plaintiff demands judgment against the defendants, jointly and severally, on the grounds and in the amount hereinafter set forth.

1. On May 19, 1975, plaintiff was a passenger in a vehicle owned and operated by the defendant, Roy C. Swisher. At the time aforesaid, said vehicle was being operated in a northerly direction on Robin Hood Road in Augusta County, Virginia at its interesection with Norwood Avenue.

2. At the time and place aforesaid, the defendant, Dana Sue Craun, was operating a motor vehicle in an easterly direction on Norwood Avenue in Augusta County, Virginia, at its intersection with Robin Hood Road.

3. At the time and place aforesaid, the defendant, Roy C. Swisher, operated his vehicle in a careless, reckless and negligent mannèr, causing it to collide with great force and violence with the motor vehicle operated by Dana Sue Craun.

4. At the time and place aforesaid, Dana Sue Craun operated her motor vehicle in a careless, reckless and negligent mannèr, causing it to collide with great force and violence

with the motor vehicle operated by Roy C. Swisher.

5. As a direct and proximate result of the joint and concurrent negligence of each of the said defendants, plaintiff was caused to sustain serious and permanent injuries, has been prevented from transacting her business, has suffered and will continue to suffer great pain of body and mind; has sustained permanent disability, deformity and loss of earning capacity; has incurred and will incur in the future medical and other related expenses in an effort to be cured of said injuries.

WHEREFORE, plaintiff demands judgment against both defendants and each of them, jointly and severally, in the sum of EIGHTY-FIVE THOUSAND DOLLARS (\$85,000.00) and costs.

BEULAH L. SWISHER

By Counsel

Nelson, McPherson, Summers, Wood & Bishop

By

James H. Wood
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Staunton, Virginia 24401

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002

Filed in the Clerk's Office of the Circuit Court of Augusta County
the 16th day of May, 1977

Writ Tax \$ 15.00

Teste:

Fee 30.00

Total Paid \$ 45.00

Clerk

James L. Stodder D. C.

GROUND'S OF DEFENSE

The grounds of defense of the defendant, Roy C. Swisher, to a motion for judgment filed in the Circuit Court of Augusta County, Virginia, by the plaintiff, Beulah L. Swisher:

1. This defendant denies each and every material allegation of the plaintiff's motion for judgment.
2. This defendant denies that he was guilty of any act or acts of negligence that proximately caused the accident complained of.
3. This defendant says that he and the plaintiff were engaged in a joint enterprise at the time and place of said accident and that the plaintiff is therefore barred from recovery against him.
4. This defendant says that, at the time and place of said accident, a principal and agent relationship existed between him and the plaintiff and that the plaintiff is therefore barred from recovery against him in this action.
5. This defendant denies that the plaintiff was injured and damaged in the manner and to the extent alleged in said motion for judgment.

Respectfully submitted,

ROY C. SWISHER

BY COUNSEL

Timberlake, Smith, Thomas & Moses

By

W. H. Wood
P. O. Box 2566

Staunton, Virginia 24401

p.d.

Copies mailed to Thomas H. Wood, Esquire, Nelson, McPherson,
Summers, Wood & Bishop, P. O. Box 1287, Staunton, Virginia, 24401;
and Harrison May, Esquire, 1 Lawyers Row, Staunton, Virginia, 24401
this 24th day of May, 1977.

W. H. Wood

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

May 25, 1977

Teste:

Rudolph L. Stookey Dep. Clk.

1. (Jury selection.)

2. (Witnesses called and sworn, and excluded from Courtroom.)

3. (Opening statements by counsel.)

4. Presentation of evidence:

5.

6. WITNESS - TROOPER J. E. DODSON

7. Direct Examination by Mr. Wood:

8. Q. Mr. Dodson, would you please state your name and your
9. occupation?

10. A. J. E. Dodson, Trooper with the Virginia State Police.

11. Q. How long have you been with the State Police?

12. A. Sixteen years, the first of November.

13. Q. All right, sir; and were you on duty on May nineteenth of
14. 1975?

15. A. Yes, sir, I was.

16. Q. Did you investigate a collision of two automobiles at
17. the intersection of Norwood Road and Robin Hood Road?

18. A. I have Route 1415 and 1410. I think that's the same
19. location.

20. MR. TIMBERLAKE: I can't hear you, Mr. Dodson.

21. A. I have Route 1415 and Route 1410, which I think is the
22. same location.

23. Q. All right. On the date that I asked you about, did you
24. investigate a collision of two vehicles, driven, one, by

1. Mr. Roy Swisher, and one by Mrs. Dana Craun? I assume
2. her name would have been Dana James at that time.
3. A. Dana James, at that time; yes, sir.
4. Q. At this . . . Describe, if you would . . . Well, what time
5. did you arrive?
6. A. I arrived at eight-fifty p.m., and received the call at
7. eight twenty-five.
8. Q. All right, sir. What was the condition of the highway?
9. A. It was on a . . . well, I have a curve, level. It was
10. more of a grade coming down through on 1410, I believe it
11. is, that runs across 1415. And . . .
12. Q. Do you know what street Number 1410 was--what the name
13. of it is?
14. A. No, sir, I do not. We just use route numbers, and don't
15. use the names.
16. Q. All right.
17. A. The surface was dry; there were no defects in the roadway;
18. there was no traffic control. It was a residential
19. district. I have darkness, street or highway lighted.
20. The weather was clear, and it was blacktop surface.
21. Q. All right. Mr. Dodson, you say it was 1410 and 1415.
22. What was the topography of 1415? Was it flat, or hilly,
23. or curved, or what was it?
24. A. As I recall, 1415 is pretty flat going through that

1. intersection there. It's a slight grade probably.

2. Q. All right, sir. And what highway, or route number, was
3. the Swisher car on?

4. A. 1415.

5. Q. Okay. And what . . . How was 1410? Was it flat, or was
6. it . . . what?

7. A. 1410, in the direction that Mrs. Craun's vehicle would
8. have been traveling, would have been downgrade, coming
9. down into the intersection.

10. Q. Where were the cars when you got there?

11. A. Mr. Swisher's vehicle was partially into the intersection,
12. and Mrs. Craun's vehicle had been knocked around and
13. headed back in the opposite direction from the way it was
14. headed.

15. Q. Did you make any measurements of any kind?

16. A. No, sir, I did not.

17. Q. What damages did you observe on the cars?

18. A. The Swisher vehicle had damage to the front, and the
19. grille, and the bumper. It was approximately two hundred
20. dollars (\$200.00) damage, estimate.

21. And the Craun vehicle had approximately three hundred
22. dollars (\$300.00) damage to the right rear fender.

23. Q. What type of car was Mrs. Craun driving?

24. A. A 1968 Volkswagen.

1. Q. What is the approximate distance from the right front
2. from the headlight, on the Volkswagen--a '68 Volkswagen--
3. to the right rear fender?

4. A. No more than twelve to fifteen feet, at the most.

5. Q. Did you . . . Was Mrs. Swisher at the scene when you
6. arrived?

7. A. I really don't recall whether she was or not.

8. Q. All right. Did you talk to either driver?

9. A. Yes, sir; both drivers were at the scene.

10. Q. You did talk to both drivers?

11. A. Yes, sir.

12. Q. What did they tell you? What did Mr. Swisher tell you
13. about the accident? Did he make any statement?

14. A. I don't have any statement written down, and I don't really
15. recall what was said at the time.

16. Q. You don't recall what either driver said in their state-
17. ment?

18. A. No, sir. Well, I do recall that the young lady said that
19. she had come into the intersection and didn't see him
20. until they hit.

21. Q. So Dana Craun told you that she did not see the Swisher
22. car until they hit?

23. A. Yes, sir.

24. Q. Is that what she said?

1. A. Yes, sir.

2. Q. All right, sir; am I correct--is it your testimony that
3. you do not recall whether Mr. Swisher made any statements
4. to you or not?

5. A. No, sir; I really don't.

6. Q. All right, sir.

7. MR. WOOD: That's all the questions we have.

8. MR. TIMBERLAKE: I have no questions.

9.
10. Cross Examination by Mr. Wallinger:

11. Q. Trooper Dodson, was there any evidence that you could
12. find when you arrived at the scene of the accident which
13. would tend to indicate which of the vehicles was in the
14. intersection first?

15. A. Well, the only evidence . . .

16. MR. TIMBERLAKE: I'd like for this witness to be
17. limited to facts, and not to any assumption that he may
18. have made. He has already testified he didn't make any
19. measurements; and he has testified as to the location of
20. the cars when he got there. And I don't think . . .
21. Based upon that, I don't think he's in a position to
22. express an opinion as to which vehicle was in the inter-
23. section first.

24. COURT: Mr. Wallinger?

1. gentlemen, because it would vary with the relative speed
2. of the cars.

3. MR. TIMBERLAKE: Yes, sir.

4. MR. WOOD: Yes, sir.

5. COURT: So I would ask the members of the
6. jury to disregard that statement.

7. MR. WALLINGER: I have no other questions.

8. MR. WOOD: I'd like to ask just one question on
9. re-direct.

10.

11. Cross Examination by Mr. Timberlake:

12. Q. As I understand it . . .

13. MR. TIMBERLAKE: Could I . . .

14. MR. WOOD: Go ahead, Mr. Timberlake.

15. Q. As I understand it, you did not make any measurements,
16. or determine the location of any marks in the street?

17. A. No, sir, I did not.

18. Q. And it was dark when you got there, was it not?

19. A. As I recall, it was, yes, sir.

20. MR. TIMBERLAKE: That's all.

21.

22. Re-Direct Examination by Mr. Wood:

23. Q. Trooper Dodson, where exactly . . . Where was the Swisher
24. car sitting when you arrived?

1. COURT: Any objection to excusing the Trooper?

2. MR. TIMBERLAKE: No, sir.

3. MR. WALLINGER: No, sir.

4. (Witness excused.)

5. MR. WOOD: Your Honor, we'd like to call the
6. Defendant, Mrs. Craun. We'd like the Court to have her
7. classified as an adverse witness.

8. COURT: I would assume she would be adverse.

9. MR. WOOD: All right, sir.

10.

11. WITNESS - DANA SUE CRAUN

12. Direct Examination by Mr. Wood:

13. Q. Mrs. Craun, would you please state your name and age?

14. A. Dana Sue Craun.

15. Q. Where . . . Exactly where was the Swisher car when you
16. first saw it?

17. A. I did not see it.

18. MR. WOOD: That's all the questions we have.

19. MR. TIMBERLAKE: I'd just like to . . . No, I don't
20. have any questions.

21. MR. WALLINGER: No questions.

22. MR. WOOD: We'd like to call Mr. Swisher. Also,
23. Your Honor, would the Court classify him as an adverse
24. witness.

1. one same question again. When you first observed . . .
2. I'm not sure I understood you. Did you say she was almost
3. in front of you?

4. A. No. She was to my left, coming in . . . coming from my
5. left, in towards me.

6. Q. How far to your left would she have been?

7. A. She was about . . . I'd say . . . I would say eight paces,
8. which is probably . . .

9. Q. All right.

10. A. But I was already in the intersection when I seen her.
11. I was already in the intersection.

12. Q. All right.

13. MR. WOOD: I have no further questions.

14. COURT: Mr. Timberlake?

15. MR. TIMBERLAKE: No questions. Well . . .

16.

17. Cross Examination by Mr. Timberlake:

18. Q. Mr. Swisher, did I understand that you had entered the
19. intersection when you saw her some eight paces to your
20. left?

21. A. Yes.

22. Q. And . . .

23. MR. TIMBERLAKE: I don't think I have any further
24. questions at this time.

1. didn't do as much as we had done.

2. Q. Everywhere you go, you have to take the stimulator?

3. A. Oh, yeah. Ever since she's got it . . . You're right.

4. Q. What about her ability to do her housework, and things of
5. that nature?

6. A. How's that?

7. Q. Can she still do her housework?

8. A. She does some. She messes around and does some of it.

9. But it takes her a long time to do it. She just messes
10. along doing it, and goes easy on it.

11. Q. Do you do some of it now?

12. A. Yes, I do.

13. MR. WOOD: That's all the questions we have.

14.

15. Cross Examination by Mr. Timberlake:

16. Q. Mr. Swisher, have you gone over the area, the place, where
17. this accident happened, with me?

18. A. Yes, sir.

19. Q. And did you point out, and fix, the approximate place
20. where these two cars came together?

21. A. Yes, sir.

22. Q. And did you . . . Were any measurements made, as to the
23. distance from that point back on Robin Hood Road to the
24. entrance, or the intersection . . .

1. A. Yes, sir.
2. Q. . . . that you had traveled?
3. A. Yes, sir.
4. Q. What was that distance? Did you make any . . . Do you
5. have any notes on that?
6. A. Yes, I have some notes. I was eight paces, or twenty-
7. four feet, in the intersection.
8. Q. And that was measured off by you and me?
9. A. That's right.
10. Q. And how far into the intersection was this Craun car?
11. A. It was five paces, or fifteen feet.
12. Q. And how far did your car travel after these two vehicles
13. came together?
14. A. From the time I . . .
15. Q. Well, I don't know that we made any measurement--but did
16. it travel as far as a car length?
17. A. You mean how far . . .
18. Q. Your car--after the . . .
19. A. From the time I seen her, and put on my brakes to get
20. stopped, my front wheels slid . . . From where my front
21. wheels started sliding, it slid exactly . . . The hind
22. wheels stopped exactly where the front ones started sliding.
23. All four of them sat right . . .
24. Q. The length of your car?

1. A. Yes, sir.
2. Q. Or the distance between the two wheels?
3. A. The distance between the two wheels; that's right.
4. Q. And how far did her car go after the two vehicles came
5. together?
6. A. Twenty-two paces, which would be . . .
7. Q. Roughly what would that be in feet?
8. A. That would be sixty-six feet.
9. Q. And in which direction was it headed after it came to
10. rest?
11. A. It was headed in exactly the opposite direction from where
12. it was traveling to begin with.
13. Q. Headed back up Norwood?
14. A. Yeah. That's right.
15. Q. Sixty-six feet from where the two vehicles came together?
16. A. That's right.
17. Q. It made a circle?
18. A. That's right.
19. Q. What was the highest speed that you were traveling as you
20. reached that intersection?
21. A. How fast I was going?
22. Q. Yes, sir.
23. A. I'd say not to exceed twenty miles an hour, no way.
24. MR. TIMBERLAKE: I think that's all.

1. Q. Three houses?
2. A. Three houses.
3. Q. All right. And you said ~~seventy-five~~ feet. Do you mean
4. ~~seventy-five~~ yards, approximately?
5. A. ~~Seventy-five~~ yards. Yes. That's more like it.
6. Q. All right. What direction does Robin Hood Road run at
7. this point?
8. A. It runs to the north, like.
9. Q. North?
10. A. Yes.
11. Q. All right. And how far from the intersection of Robin
12. Hood Road and Norwood Road do you live?
13. A. Four houses.
14. Q. Four houses?
15. A. Four houses.
16. Q. On the other side?
17. A. Yes.
18. Q. All right. And where were you-all headed at the time
19. this happened?
20. A. We were headed home.
21. Q. What was the weather?
22. A. It was warm. I think the sun was almost down, but not
23. quite. It was nice out.
24. Q. Was it clear, daylight . . .

1. A. Clear. Yes, it was clear.

2. Q. Was the road dry?

3. A. Yes.

4. Q. All right. And what happened?

5. A. Well, we had turned off, and were starting out Robin Hood.
6. And then it just looked like all of a sudden, that the
7. car was there in front of us. When I first seen it, it
8. looked like it was laying up on the hood of our car. But
9. it threw me to the floor. But when I got up, it had
10. moved so fast, that I didn't even see what it was, until
11. I asked him what it was, and he said it was a car. But . . .

12. MR. TIMBERLAKE: Did I understand you to say that this
13. Craun car was moving so fast . . .

14. A. It was moving so fast that when I seen it, I just seen
15. something that looked like it went over the dashboard,
16. or over the hood of our car. And it was moving fast, that
17. I couldn't even tell that it was even a car.

18. Q. What happened to you when the . . .

19. A. Well . . .

20. Q. First of all, did these two cars collide? Did they hit
21. each other?

22. A. Yes. It was an awful racket; and it seemed like our car
23. - gave kind of a big jerk, and a lunge, like. And I started
24. going forward. It throwed me around to my left, like.

1. the floor.

2. Q. But the cars were actually hitting when you saw it?

3. A. When I seen it, yes. But I didn't see the car any before
4. that.

5. Q. You didn't?

6. A. No, I didn't.

7. Q. Have you discussed the accident with your husband?

8. A. You mean since the accident?

9. Q. Yes, ma'am.

10. A. At times.

11. Q. Has he ever told you when he first saw the car?

12. A. He . . . I know he didn't see it when we entered the
13. intersection. And he told me that he didn't see it before
14. he entered the intersection.

15. Q. How do you know that?

16. A. Well, the intersection was so big, I think if the car had
17. of been anywhere there close, we would have seen it.

18. Q. There should have been an opportunity to see it, if it
19. had been there; is that what you're . . .

20. A. If it had been . . . Yes. Of course, the shrubbery
21. knocked off some of the view. But I think if she had been
22. there--if the car had of been there close enough, we would
23. have seen her.

24. Q. You have alleged in your Motion for Judgment that your

1. and, obviously, too late to be able to get his car to a
2. stop--that certainly is evidence of improper lookout,
3. which contributed to the fact that the cars ran together.
4. If either one had seen the other in time to stop, I
5. assume they would have stopped. And neither one did.
6. So I suggest that, concurring with Mr. Wood, it is a
7. jury question, as to whether he kept a proper lookout
8. under these circumstances--particularly with the increased
9. duty incumbent upon him on account of knowing about the
10. intersection and the bushes.

11. COURT: Thank you. Mr. Wallinger?

12. MR. WALLINGER: May it please the Court, I . . .

13. MR. TIMBERLAKE: Your Honor, I'd like for the record
14. to show that I object to the co-Defendant participating
15. in this argument. There's no cross-claim against me in
16. this. And my motion is purely and simply directed to the
17. Plaintiff's claim against me.

18. MR. WALLINGER: May it please the Court, I concur
19. with what has already been said by Mr. Wood and Mr. May.
20. And I would like to say, in addition, that I feel that
21. there are two jury issues before the Court with respect
22. to Mr. Swisher, the first being whether or not Mr. Swisher
23. had the right of way. The Trooper testified that the
24. damages were to the right rear fender of Mrs. Crown's car,

1. MR. TIMBERLAKE: It's all right as far as I'm
2. concerned.

3. COURT: Mr. Wallinger.

4. MR. WALLINGER: No objection.

5. COURT: Now, gentlemen, number four . . .

6. MR. TIMBERLAKE: Now, Your Honor, I would like for
7. a blanket objection to be made to all of the plaintiff's in-
8. structions as far as Mr. Swisher is concerned on the grounds
9. that there is no evidence on behalf of the plaintiff that
10. would show negligence on the part of the defendant, Swisher,
11. that was a proximate cause of this accident.

12. COURT: Do you want to withdraw your four?

13. MR. MAY: Yes sir.

14. MR. TIMBERLAKE: That's withdrawn?

15. COURT: Yes, because it's covered in Mr. Wallinger's
16. A. Number five?

17. MR. TIMBERLAKE: Your Honor, I think this instruc-
18. tion applies to cases where there is an issue as to whether
19. or not the accident was the cause of the injuries of which
20. the plaintiff complains. Whether or not the injuries arose
21. from some other cause, and I don't believe aside from my
22. general objection to all instructions as far as Mr. Swisher
23. is concerned, I don't believe that this instruction would
24. apply to this case. It undertakes to tie up this instruction

1. MR. TIMBERLAKE: Well, I'll challenge the record
2. on that. And that she did not see the other car until it
3. flashed in front of her at a fast rate of speed.

4. COURT: Let's talk about twelve, gentlemen.

5. MR. TIMBERLAKE: I object to twelve on the same
6. grounds, Your Honor. In the first place, they apparently are
7. undertaking to double up on eleven and twelve. In the second
8. place, there is no evidence on behalf of the plaintiff that
9. Roy Swisher did not exercise ordinary care to maintain a
10. proper lookout. His testimony on behalf of the plaintiff
11. was that he looked in both directions before entering, and
12. that the other car was not in his line of vision. And that
13. it was only when he was approximately in the intersection
14. that he saw this car approaching to enter. It was twenty-four
15. feet according to the only evidence on behalf of the plain-
16. tiff to the left of him when he was partially in the inter-
17. section, and would be eighteen feet at most from where the
18. collision occurred. And I submit, Your Honor, that the
19. plaintiff is bound by that evidence. He can't turn around
20. now and offer an instruction that would permit the jury to
21. find in derogation of or in conflict with the plaintiff's
22. own evidence as far as Roy Swisher is concerned.

23. MR. WOOD: Your Honor, the point I want to make
24. is, instruction eleven explained what the duty of lookout

1. notes the fact that they could have actually approached it
2. at approximately the same time and yet she still got physical-
3. ly in it just before he did, therefore he's still approaching.
4. So, I think that this incorrectly states the right of way
5. rule.

6. MR. WALLINGER: Your Honor, the case of Yellow Cab
7. Company v. Eden, 178 Va. 325, decided in 1941 set out that
8. instruction in the footnotes, the language that's in that
9. paragraph two, in the footnotes of the case. It's taken
10. from an instruction that was quoted by the Court with approv-
11. al. It's our contention that it's not an absolute duty be-
12. cause the opening paragraph of the instruction says that he
13. had the duty to exercise reasonable care to do the things
14. listed in one, two and three. And the closing paragraph re-
15. peats that, saying that if the jury believes that he failed
16. to exercise reasonable care in the performance of any of the
17. foregoing duties . . .

18. MR. MAY: Do you have a typo in that?

19. MR. WALLINGER: That should be reasonable.

20. MR. TIMBERLAKE: Your Honor, I have a far more
21. far reaching objection to that. My objection is, in the
22. first place, aside from all my general objections to all
23. instructions directed against Mr. Swisher, is that the co-
24. defendant has no right to offer an instruction against the

1. co-defendant, a finding instruction in favor of the plaintiff
2. against the co-defendant. It's not the co-defendant's place
3. in this case to undertake to make out a case for the plaintiff
4. against me; it's incumbent upon the co-defendant to defend
5. himself or herself. And this instruction is an instruction
6. offered by the co-defendant against the other defendant. In
7. the first place, that's the one objection. The second ob-
8. jection is that it's not based upon any evidence that was
9. introduced in this case prior to the resting of the case
10. by both the plaintiff and the co-defendant, Swisher. And
11. here this Johnny-come-lately--I'm through with my case and
12. the plaintiff is through with me--he comes in and undertakes
13. to introduce evidence and offer an instruction against me.
14. And it's not in accordance with the rules of procedure. Now,
15. he can offer an instruction that absolves him from negligence,
16. a proper instruction based upon the evidence, and he can base
17. that instruction on the evidence that he has introduced. But
18. to come around and introduce an instruction as to my negli-
19. gence rather than an instruction freeing his client of liabil-
20. ity, is just not right. He's offering an instruction against
21. me in favor of the plaintiff. He's not offering an instruc-
22. tion in defense of Mrs. Craun, except by inference.

23. ~~MR. WALLINGER: Your Honor, I think the Court has~~
24. ~~ruled on that very question in the case in which Mr. Natkin~~

1. represented the plaintiff and Mr. Timberlake and Mr. Wharton
2. and I represented the two defendants involved in the accident
3. that occurred on Route 11. And the Court allowed us to ten-
4. der instructions as to the speed limit that was in effect
5. there, an instruction directed specifically at Mr. Chandler
6. who was Mr. Timberlake's client in that case.

7. MR. TIMBERLAKE: That instruction, Bruce, was
8. directed to absolve you. The instruction on the speed limit
9. was to free you.

10. MR. WALLINGER: That particular instruction was,
11. but instructions were given by us, offered by us and given
12. as to what Mr. Chandler's duty was in backing out onto the
13. highway.

14. MR. MAY: Your Honor, as Mr. Timberlake says, Mr.
15. Wallinger is attempting to help the plaintiff here, but I
16. think he's helping us too much. I think the instruction
17. would better state the law if it said, "To avoid a collision
18. with Mrs. Craun's car if the cars did not approach or enter
19. the intersection at approximately the same time." The trouble
20. I have with this is that the Court is telling the jury that
21. if Mrs. Craun got there, actually got into the intersection
22. just a split second before, therefore Swisher was obviously
23. still approaching it, that it's absolute he had a duty to
24. not hit her. And that's not the law. That ignores the ap-

1. proximately the same time approaching and approximately the
2. same time entering. This is absolute and I think it better
3. states the law if you would change that last language, and
4. the plaintiff would ask you to if you are planning to give
5. this instruction, to leave out "if it was already within the
6. intersection," and change that to "if you believe from the
7. evidence they did not approach the intersection or enter
8. the intersection at approximately the same time."

9. MR. WALLINGER: Your Honor, the question of
10. whether they entered the intersection or approached the
11. intersection at the same time speaks only to who has the
12. right of way. It doesn't answer the question of Mr. Swish-
13. er's duty to keep a proper lookout and to keep his car under
14. proper control. I don't think this puts an absolute duty
15. on him because of the qualification that it only requires
16. him to exercise reasonable care to keep his car under con-
17. trol if Mrs. Craun's car was already in the intersection.
18. It doesn't speak to right of way, it speaks to control and
19. lookout.

20. MR. MAY: But, Your Honor, the point is that if
21. he had the right of way then he's not under a duty to exer-
22. cise reasonable care to keep his car under such control as
23. necessary that he could stop it or turn it aside. I don't
24. think if he had the right of way he has the duty to exercise

1. that much reasonable care.

2. MR. WALLINGER: I would refer to that Yellow Cab
3. case.

4. COURT: Gentlemen, let's talk about C.

5. MR. TIMBERLAKE: Your Honor, I would like to
6. voice another objection to B, and that is that there is no
7. scintilla of evidence in this case, either by the plaintiff
8. or introduced by the co-defendant after the plaintiff's case
9. had been completed against the defendant, Swisher, upon which
10. the jury could find that there was any failure to keep his
11. vehicle under proper control. The only hint or suggestion
12. that the plaintiff has made is on the question of lookout.

13. MR. MAY: We would like to simply further add,
14. Your Honor, that in our instruction--I forget which number
15. it was--that we think we have fairly framed the issues. And
16. to that extent this instruction is also repetitious. We have
17. no objection to C. In fact, Mr. Wood, we have no objection
18. to any of the others offered by Mr. Wallinger. Is that
19. correct?

20. MR. WOOD: Yes.

21. MR. TIMBERLAKE: I object to C on my general
22. objection and the further objection that the defendant,
23. Craun, has no right to introduce instructions that tend to
24. establish liability on the part of the defendant, Swisher,

1. to the plaintiff, Swisher.

2. ~~COURT: All right, now about D.~~

3. MR. TIMBERLAKE: My same objection applies there.
4. The co-defendant, Your Honor, has undertaken as a subtle means
5. of defense, has undertaken to join the plaintiff in prosecut-
6. ing the defendant, Swisher. There are not instructions to
7. absolve Mrs. Craun from liability, but they are instructions
8. directed against--offered by the co-defendant directed again-
9. st Swisher.

10. COURT: Other than your two standard objections,
11. do you have any other objection?

12. MR. TIMBERLAKE: No sir. I mean, I think that
13. for instance this instruction offered by the plaintiff on the
14. basis of the plaintiff's evidence . . .

15. COURT: How about E?

16. MR. TIMBERLAKE: Again, Your Honor, this has be-
17. come a suit by the co-defendant apparently on a cross-claim
18. that doesn't exist against Mr. Swisher. It's not a defensive
19. instruction at all. It's an offensive instruction by one
20. co-defendant against the other.

21. MR. WALLINGER: Your Honor, I would like to add
22. to what I have previously said on that. I think that's en-
23. tirely proper where the effect of a verdict against both de-
24. fendants as opposed to one would lessen the liability of the

1. one defendant by half, which I would consider a proper defense
2. to the case. Certainly I couldn't file a cross-claim on a
3. right of contribution which doesn't accrue until a judgment
4. has been entered against my client and been paid. And these
5. instructions are a part of our defense in an attempt to min-
6. imize as much as possible the exposure.

7. COURT: All right, how about F? Mr. Timberlake,
8. other than the two standard objections, general objections.

9. MR. TIMBERLAKE: Outside of my general objections,
10. Your Honor.

11. COURT: G?

12. MR. TIMBERLAKE: The one that's F, do you have
13. that as G?

14. COURT: Yes sir, I think so.

15. MR. TIMBERLAKE: Your Honor, I think this instruc-
16. tion again should be couched in language defensive to the
17. defendant, Craun. It's offered by Craun. I don't want to be
18. included in the co-defendant's instruction. I'm not partici-
19. pating with the co-defendant in this matter. I feel like
20. I'm entitled to my instruction E1, and if the co-defendant
21. wants a similar instruction, it should be made to apply to
22. the co-defendant.

23. COURT: All right. Now, gentlemen, that leaves
24. us with F1. Is there anything further to be said about

INSTRUCTION NO. 12

The Court instructs the jury that if you believe from the evidence and the other instructions of the Court that the defendant, Roy C. Swisher, had the right of way, this did not relieve him of the duty to exercise ordinary care to keep a proper lookout for vehicles entering the intersection from the side thereof and to exercise ordinary care to avoid a collision.

And if you believe from a preponderance of the evidence that the defendant, Roy C. Swisher, failed to exercise ordinary care in the performance of the foregoing duty, then he was negligent; and if you further believe from such evidence that any such negligence was a proximate cause of the collision, or that it concurred with any negligence of the defendant, Dana J. Craun, to proximately cause the collision, then you shall find your verdict in favor of the plaintiff against the defendant, Roy C. Swisher.

J. S. A.

INSTRUCTION NO. B

The Court instructs the jury that it was the duty of Mr. Swisher, when approaching the intersection of Norwood Road and Robin Hood Road, to exercise reasonable care:

1) To keep a proper lookout for vehicles entering the intersection from either side and take reasonably prudent action to avoid any danger thereby disclosed;

2) To keep his car under such control that he could, if necessary, stop his car or turn it aside in order to avoid a collision with Mrs. Craun's car if it was already within the intersection as he approached it;

3) To employ every reasonable and practical means to avoid a collision after he saw, or by the exercise of ordinary care should have seen, that Mrs. Craun's car was going to enter or had entered the intersection;

And if you believe from a preponderance of the evidence that Mr. Swisher failed to exercise ~~un~~reasonable care in the performance of any of the foregoing duties, then he was negligent.

JWS, Jr.

INSTRUCTION NO. C

If you believe from the evidence that the two automobiles involved herein did not approach or enter the intersection at approximately the same time and that the automobile operated by Mrs. Craun entered the intersection substantially first, then neither driver had the right of way and each was under a duty to exercise ordinary care under all the existing circumstances.

James H.

INSTRUCTION NO. D

If the jury believe from the evidence that Mr. Swisher had the right of way over the automobile being operated by Mrs. Craun and if the jury believe that it appeared to Mr. Swisher, or by the exercise of ordinary care should have appeared to him, that Mrs. Craun did not intend to yield that right of way, then it became the duty of Mr. Swisher to exercise ordinary care under the circumstances to avoid a collision; and if you believe from the evidence that Mr. Swisher failed to exercise ordinary care in the performance of the foregoing duty, then he was negligent.

J. S. Mc

INSTRUCTION NO. E

If you believe from the evidence that the view of Mr. Swisher as his car was about to enter the intersection was obstructed or partially obstructed by an object, it was his duty to exercise that degree of care commensurate with the danger in entering the intersection that a reasonably prudent person would exercise under all the existing circumstances; and if you believe from a preponderance of the evidence that Mr. Swisher failed to exercise ordinary care in the performance of the foregoing duty, then he was negligent.

John E. Mc

O R D E R

THIS DAY came again the parties, by counsel, and the motions of the defendants, Roy C. Swisher and Dana Sue Craun, to set aside the verdict of the jury on the grounds heretofore assigned in writing; and filed with the papers in this action and was argued by counsel.

UPON CONSIDERATION WHEREOF, the Court having maturely considered said motion and all the grounds thereof, and the authorities submitted in support thereof, and the Court being of the opinion that both of said motions should be overruled, it is ADJUDGED, and ORDERED that said motions be, and the same hereby are overruled. Therefore, pursuant to the verdict of the jury, the Court doth ADJUDGE and ORDER that the plaintiff, Beulah L. Swisher, recover of the defendants, Roy C. Swisher and Dana Sue Craun, jointly and severally, the sum of Thirty-Five Thousand Dollars (\$35,000.00) as well as her costs in this behalf expended, together with interest from May 14, 1979 until paid, to which action of the Court the defendants, by counsel, excepted.

And defendants, Roy C. Swisher and Dana Sue Craun, by counsel, having indicated their intention to take appeals from this judgment and having moved for a suspension of execution of this judgment pending action thereon by the Supreme Court, it is further ORDERED that execution of this judgment be, and it is hereby, suspended for 30 days from the date of this order and thereafter until the Supreme Court acts on the petitions for appeal which each defendant may file, provided that within said period of 30 days the defendant or defendants ,who may give

notice of appeal, file with the Clerk of this Court an appeal bond in the penalty of One-Thousand Dollars (\$1,000.00) with surety to be approved by the Court, conditioned according to law; and it is further ORDERED that the transcript of testimony taken at the trial before this Court in this matter on May 14, 1979, including the transcript of all other incidents of said trial, and the letter of the Court to counsel dated July 13, 1979, be made a part of the record in this case, provided that said transcript or transcripts be filed in the office of the Clerk of this Court within 60 days from the date of this Order.

ENTER:

James S. Haffey Jr.
Judge

Date:

8/17/79

Requested:

Harrison May (by ALE)
Harrison May

Thomas H. Wood
Thomas H. Wood

Seen and objected to:

W.B. Timberlake, Jr.
W.B. Timberlake, Jr.

M. Bruce Wallinger
M. Bruce Wallinger

ASSIGNMENTS OF ERROR

1.

The overruling by the trial court of the motion to dismiss the defendant Swisher at the conclusion of the evidence of the plaintiff and said defendant.

2.

The granting of any instructions by the trial court tendered by the plaintiff against defendant Swisher.

3.

The overruling by the trial court of the motion of defendant Swisher to set aside the verdict in favor of the plaintiff, as to him.

4.

The granting by the trial court of instructions tendered by defendant Craun predicated solely upon the rights of the plaintiff to recover against defendant Swisher.

5.

The granting by the trial court of plaintiff's Instruction 12.

6.

The granting by the trial court of Instruction B tendered by defendant Craun against defendant Swisher.

7.

The granting by the trial court of Instruction C
tendered by the defendant Craun.

8.

The granting by the trial court of Instruction D
tendered by the defendant Craun.

9.

The granting by the trial court of Instruction E
tendered by defendant Craun.

10.

The granting by the trial court of Instruction G
tendered by the defendant Craun.