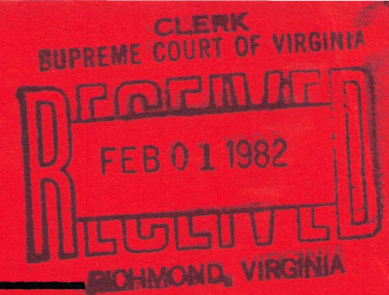


226VA 342



IN THE
Supreme Court of Virginia
AT RICHMOND

WASHINGTON & LEE
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Record Nos. 81-0396
and 81-0405

JAN 31 1984

WOODROW WILSON PULLEN
and
MICHAEL LEE MCCOY

Appellants

vs.

FREDERICK F. NICKENS

JOINT APPENDIX

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VIRGINIA

IN THE CIRCUIT COURT OF FAUQUIER COUNTY,

FREDERICK F. NICKENS

Plaintiff

vs.

AT LAW No. 4463

MICHAEL LEE McCOY

137 F Street

Carlisle, Pennsylvania 17013

Serve: Commissioner

Division of Motor Vehicles

Richmond, Virginia

pursuant to Sec. 8.01-308, 310

and

WOODROW WILSON PULLEN

General Delivery

Warrenton, Virginia 22186

Serve: Secretary of the Commonwealth

Richmond, Virginia

pursuant to Sec. 8.01-328.1, 329

Defendants

MOTION FOR JUDGMENT

COMES NOW Plaintiff, by counsel, and respectfully represents unto the Court as follows:

1. That on or about the 24th day of May, 1978, at approximately 2:00 p.m., Plaintiff was lawfully operating a 1975 Dodge Dart in a southerly direction on Route 17, approximately two miles south of its intersection with Route 245 in Fauquier County, Virginia.

2. That at that time and place, Defendant, Michael Lee McCoy, was operating his 1970 Ford pick-up truck in a northerly direction, and negligently caused his said pick-up truck to enter the southbound travel lane in which Plaintiff was traveling.

3. That at that time and place, Defendant, Woodrow Wilson Pullen, was operating a 1975 Dodge vehicle, and did negligently stop the said vehicle on the travel portion of the highway.

4. That at that time and place, it was the duty of the aforesaid Defendants to pay full time and attention to their driving, and to keep a proper lookout for traffic on the highway.

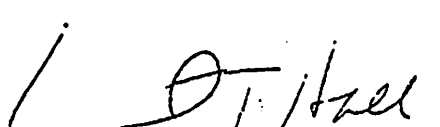
Defendant McCoy owed a duty to keep his vehicle under proper control, maintain a reasonable speed under the circumstances, and maintain a safe stopping distance. It was Defendant Pullen's duty to give ample warning of his position on the highway by the placement of warning signs, flags or flares. However, notwithstanding their duties aforesaid, the Defendants did drive their vehicles in such a careless, reckless and negligent manner as to cause Defendant McCoy's vehicle to collide with great force and violence into Plaintiff's vehicle.

5. That as a direct and proximate result of Defendants' negligence aforesaid, Plaintiff was seriously damaged and injured in that he in the past has incurred, is presently incurring and/or will incur in the future:

- a. Medical expenses, including doctors, hospital, nursing, medication and rehabilitation expenses;
- b. Pain and suffering, both physical and emotional;
- c. Loss of earnings and loss of future earning capacity;
- d. Temporary total disability and permanent partial disability, both physical and emotional;
- e. Great inconvenience and loss of the enjoyment of a normal life.

WHEREFORE, Plaintiff prays for judgment against the Defendants, jointly and severally, in the sum of \$ 50,000.00, together with costs and interest from the date of judgment.

FREDERICK F. NICKENS
By Counsel


Robert T. Hall
HALL, SUROVELL, JACKSON & COLTEN, P.C.
3930 University Drive
Fairfax, Virginia 22030
Counsel for Plaintiff

THEREUPON, the jury was instructed as to the law in the case, oral argument was made by the parties, and the jury retired to consider its verdict.

WHEREUPON, after due deliberation, the jury returned to open court and rendered its verdict as follows:

We, the jury, on the issues joined, find for the Plaintiff, Frederick F. Nickens, against the Defendants, Michael Lee McCoy and Woodrow Wilson Pullen, and fix his damages at \$30,000.


Foreman

WHEREUPON, the Defendants requested leave to file post-verdict motions and were granted twenty-one days within which to do so.

AND IT APPEARING TO THE COURT that ~~no~~ post-verdict motions have been filed hereint *joined in by McCoy, which motions were denied.*

WHEREFORE, in consideration of the foregoing, it is hereby ADJUDGED and ORDERED that the Plaintiff recover from the Defendants Michael McCoy and Woodrow Wilson Pullen the sum of \$30,000, with interest from November 3, 1980, and costs in the amount of \$ 52.00.

ENTERED THIS 9th DAY OF December, 1980.


W. SHORE ROBERTSON, JUDGE

FINAL JUDGMENT ORDER

THIS ACTION came on to be heard the 3rd day of November, 1980, for trial with a jury, there appearing the Plaintiff in person and by counsel, and each of the Defendants in person and by counsel.

THEREUPON came a panel of thirteen veniremen, who were examined on their voir dire, and the parties exercised their pre-emptory strikes, alternately, commencing with counsel for the Plaintiff, until there were seven veniremen remaining who, after being duly sworn, served as the jury.

THEREUPON, Plaintiff presented his evidence in support of his Motion for Judgment and rested.

THEREUPON, Defendant McCoy moved the Court to strike Plaintiff's evidence as to him, which motion, after argument, was denied by the Court, to which ruling Defendant McCoy duly noted his objection.

THEREUPON, Defendant Pullen moved the Court to strike Plaintiff's evidence as to him, which motion, after argument, was denied by the Court, to which ruling Defendant Pullen duly noted his objection.

THEREUPON, Defendant McCoy presented his evidence and rested.

THEREUPON, Defendant Pullen presented his evidence and rested.

Thereupon both defendants renewed their motions to strike plaintiff's evidence, which motions the Court denied.

PULLEN'S
ASSIGNMENT OF ERRORS

1. The Court erred as a matter of law in permitting the plaintiff to introduce into evidence guidelines which have neither the force nor effect of law.

2. The trial court erred as a matter of law in its denial of the defendant Pullen's Motion to Strike at the conclusion of the plaintiff's case in its interpretation of Section 46.1-248, Code of Virginia (1950) as amended.

3. The trial court erred as a matter of law in submitting the case against the defendant Pullen to the jury.

4. The jury verdict was contrary to the law and evidence in the present case.

5. The trial court erred as a matter of law in granting Instruction 10 over the objection of counsel for the defendant Pullen.

6. The trial court erred as a matter of law in failing to grant a mistrial when plaintiff's counsel argued to the jury that the trial court would apportion the liability of each defendant if the jury returned a verdict against both defendants.

MCCOY'S
ASSIGNMENT OF ERROR

Petitioner, Michael L. McCoy, assigns as error the failure of the trial court to grant a mistrial or to otherwise instruct the jury to disregard certain statements of counsel for the plaintiff made during closing argument.

Pullen?

A. Yes, sir, I did.

Q. Was that May 24 of 1978?

A. Yes, sir.

Q. Could you generally, for us, using the blackboard, outline the configuration of the roadway in the vicinity of this accident?

(WHEREUPON, the witness complied with counsel's request.)

Q. Could you locate north on there for us?

(WHEREUPON, the witness complied with counsel's request.)

Q. How did you happen to come on this scene?

A. I was southbound on Route 17; I had just actually ran up on the accident. I'd say it happened probably a minute or two minutes before I arrived. I just ran up on it, frankly.

Q. Where was the state highway equipment when you arrived at the scene?

A. The Court at the opening stated that the accident occurred two miles south of State Route 245, but it was two-tenths of a mile.

Q. Two-tenths of a mile.

A. So actually, 245 is somewhere in the vicinity of here (indicating). The state vehicle was parked, stopped

[Transcript Pg. 3]
EXCERPT OF PROCEEDINGS

* * * * *

TROOPER MICHAEL E. FRANK, having been duly sworn by the Clerk, was examined and testified as follows:

EXAMINATION
BY MR. HALL:

Q. Trooper, before taking the stand, I wonder if you might come over to the blackboard and help me there first, and then I'll give you an opportunity to sit down.

First of all, could we have your full name and your occupation for the record, please?

A. Michael E. Frank. I'm a sergeant with the Virginia State Police.

Q. How long have you been so employed?

A. 10 years.

Q. Where are you stationed at the present time?

A. Supervisor for Chesterfield and Powhatan counties.

Q. In May of 1978, where were you working out of as a state policeman?

A. I was assigned as a trooper here in Fauquier County.

Q. Did you have occasion to come up on the scene of an accident involving the vehicles driven by Frederick Nickens, Mr. McCoy and a state truck operated by Mr.

on the road in about this location right here (indicating).

Q. What kind of vehicle was that?

A. It was a 1970 Dodge dump truck.

Q. Where was the Nickens vehicle when you arrived?

A. Mr. Nickens' vehicle was off of the road. It was somewhere in this vicinity right here, this location (indicating).

Q. Where was the McCoy vehicle?

A. Roughly there (indicating).

Q. Could we just put a number 3 on the state truck, a number 2 on the Nickens' vehicle, and a number 1 on the McCoy vehicle?

(WHEREUPON, the witness complied with counsel's request.)

Q. What kind of a roadway is this, macadam or asphalt?

A. It's an asphalt highway, two lanes.

Q. Is it a primary road or secondary road?

A. Primary.

Q. The object you have drawn in the middle, is that a double yellow line?

A. Yes, sir, it is.

Q. What were the road conditions on that day?

A. The surface of the road was wet at the time. It had

been raining on and off. I don't recall if it was raining at the time that I arrived. I know that it had been. I had my windshield wipers on from time to time.

Q. Was the surface of the roadway wet or dry when you arrived?

A. Wet.

Q. Did you have an occasion to talk with Mr. McCoy at the scene?

A. Yes, sir, I did.

Q. What, if anything, did he tell you about this occurrence?

A. Mr. McCoy stated that he was coming down the road at approximately 55 miles an hour. 'When I came around the curve, I saw a truck stopped. Applied brakes and with pavement wet and dirt on the road, I couldn't stop. Swerved into the other lane and hit vehicle, which was the Nickens vehicle. When I saw it, it was too late, it was right there'; indicating Mr. Nickens' vehicle.

Q. Where was the damage on the Nickens car?

A. Mr. Nickens received most of the impact. I would say approximately halfway from about where the tire is.

You could see most of the damage in and around the center drive, door post, mostly where he would be seated in the automobile.

Q. Where was the damage to vehicle number 1, the McCoy vehicle?

A. It would have been the left front area.

Q. From what is depicted, number 1 is now turning somewhat southbound on 17?

A. Right; yes, sir.

Q. From which direction on this chart had vehicle number 1 been coming?

A. Going north, this way (indicating).

Q. Did you have occasion to determine how far back in distance, in feet, one could see from the rear of this state truck, vehicle number 3?

A. I walked down in this area right here (indicating) after the accident. Basically, what I could determine, what I could see, I measured approximately 381 feet.

Q. Did you have occasion to observe any signs on the road indicating that there was road work in progress?

A. Yes, sir. After the accident, I proceeded south to... into Warrenton looking for signs you're asking about. Approximately eight and a half miles south of that

location, the town limits of Warrenton, one sign that said, road work ahead.

Q. What were the approximate dimensions of that sign? Just show me with your hands, if you can.

A. About like this (indicating).

Q. Two, two and a half...

A. It was a triangular-shaped, diamond-shaped sign.

Q. Was it on a permanent stand?

A. It was on a tripod type of permanent stand.

Q. Between that point and the town limits of Warrenton and the scene of this accident coming northbound on 17, was there any other sign indicating road work?

A. No, sir.

Q. Were there any cones?

A. No, sir.

Q. Any orange flags or other indications?

A. No, sir.

Q. Were there any lights on the state vehicle?

A. I have in my notes that the truck had four-way flashers on. To the best of my knowledge, the lip, the upper portion of the dump truck, has an area that's cut out and has a wire mesh. I specifically recall seeing a yellow beacon light in that area.

Q. Where was Mr. Nickens when you arrived?

A. Mr. Nickens was still in his vehicle, and I administered first aid to him.

Q. What did you observe about his physical condition at that time?

A. He had some severe lacerations about the shoulder, arm, and some lacerations, I believe, on his face. He appeared to me...of course, I'm not a physician, but he appeared to have some...

MR. PALMER: I'm going to object, Your Honor.

MR. HALL: It's just as lay observation, Your Honor. I'm not asking for a medical conclusion.

THE COURT: I think it would be proper to give a lay observation.

A. He appeared to have first signs of shock.

Q. Were there any skid marks left by any of the vehicles?

A. I was unable to determine or detect any, no, sir.

Q. You weren't able to see any coming northbound in Mr. McCoy's lane?

A. No, sir.

Q. Did Mr. Pullen give you any statement about the

accident?

A. All he said was, 'All I heard was a bang and saw the red car,' which he's referring to Mr. Nickens' vehicle, 'go in the ditch.' That's all he said.

Q. He said nothing about any signs or flags or cones?

A. No, sir.

Q. What time of day was this, approximately?

A. The accident occurred approximately 2 p.m.

Q. I'm going to show you a series of pictures and see if you can identify them.

A. This appears to be the vehicle operated by Mr. Nickens. Other than it's consistent with the damage, I would say that that's the vehicle operated by Mr. Nickens.

(WHEREUPON, the photographs were proffered to counsel.)

Q. Trooper, would you answer any questions these two gentlemen have?

A. Yes, sir.

MR. HALL: Your Honor, I understand there's no objection to these being marked and admitted as Plaintiff's Exhibit #4.

THE COURT: They will be received as Plaintiff's Exhibit #4.

(WHEREUPON, the photographs were marked Plaintiff's Exhibit #4 for identification and received in evidence.)

MR. PALMER: Trooper, you may have a seat.

EXAMINATION
BY MR. PALMER:

Q. When you arrived on the scene, sir, did you have any reason to believe that the vehicles had been moved from the time of the accident until you got there?

A. No, sir.

Q. Where was Mr. Pullen when you arrived at the scene, do you recall?

A. No, sir, I don't recall. As I stated, I arrived on the scene, I parked my vehicle on the shoulder, and just at a glance, I knew that there were some injuries. I immediately got the first aid kit and went to assist Mr. Nickens.

Q. Trooper, as we go south from where the accident occurred, that is, towards Warrenton, is it correct that along the edge of the highway or several feet back is a fence line?

A. Yes, sir, it is.

Q. That fence line has some cedars and scrub pines and that sort of thing along this?

A. Honeysuckle that's grown up quite a bit. At least it was at this particular time.

Q. That would obstruct your vision as you went around this curve; is that correct?

A. Yes, sir.

Q. You indicated that you measured about 381 feet of sight distance.

A. Yes, sir.

Q. You walked back here (indicating), looked down the road until you got out of sight of the truck to determine how far that was; is that right?

A. Yes, sir.

Q. The speed limit in this area is 55 miles per hour; is that correct?

A. That is correct.

Q. When you arrived, your recollection is that the road was wet?

A. Yes, sir.

Q. There was also loose material on the surface of the road?

A. Not actually loose material. The dump truck, the vehicle operated by Mr. Pullen, was behind the road grader that was leveling the shoulder of the road.

The state vehicle, the dump truck, had a...like a snow blade on the front of it. Any excess material that was pushed up on the hard surface, he was pushing it back off. There was like a film of dirt. I wouldn't say excessive gravel dirt, but there was a film of dirt along the edge of that shoulder.

Q. That would have been on the traveled portion of the road, would it not?

A. Yes, sir.

Q. Is it unusual not to find skids when it's raining or the road is wet?

MR. DYER: Your Honor, I'm going to object to that. I don't think that what's usual; I think just what the trooper found is what's important to the jury.

MR. PALMER: I think he can testify, based upon his experience in investigating accidents, as to whether or not one would expect to find skid marks on a wet road, Your Honor.

THE COURT: What's the relevance?

MR. PALMER: Apparently, the plaintiff thinks it's relevant in that he brought out the testimony that there were no skid marks on the

roadway. I just would like to elicit from the trooper, if he knows, whether or not this is customary when we have wet roads.

THE COURT: Objection overruled.

You may answer the question.

A. As a general rule, skid marks are difficult to detect. If the brakes, I think, are applied hard enough, sometimes it will leave a skid mark. As a general rule, it will leave more like a squeegee mark on the surface of the road.

Q. You indicated that there were four-way flashers on this truck?

A. Yes, sir.

Q. There was a beacon on the top. Was this a beacon that you would see right on top of the cab?

A. Yes, sir. It would be on top of the cab, but if you were behind the vehicle...as I stated, the lip on the bed itself had a portion that was cut out with a wire mesh, so you would have to actually see the beacon through that wire mesh. The light was on top of the truck.

Q. I'm going to erase this as soon as I do it. Assume this is the cab and the beacon is up here (indicating).

There's a lip that would go over, going to the bed of the truck like that (indicating); is that what you're speaking of?

A. Yes, sir.

Q. Then there's a hole cut through here with a grille in it that protects the beacon; is that right?

A. Yes, sir.

Q. When you went back and looked, was this difficult to see this vehicle?

A. Yes, sir, it was to me.

Q. The damage that you testified to and the pictures shown to the vehicle that was being driven by Mr. Nickens, would you describe this damage as being a head-on collision or a sideswipe-type collision?

A. I would say it would be more of a sideswipe due to the angle of the damage itself.

Q. Where did you find the damage on the McCoy vehicle, if you recall?

A. To the left front and the left side.

Q. Did you find any damage to the highway department vehicle?

A. No, sir, there was no contact between the McCoy vehicle and Nickens' vehicle and the state truck.

Q. Getting back to the lights on this truck again, were there any of those lights that one sees sticking out of the sides of the truck, of the highway department truck?

A. I didn't see any, no, sir.

Q. Did you notice any yellow flags on the rear of the truck, or orange flags?

A. No, sir.

Q. The shoulder there, sir, would it be fair to say it's a rather narrow shoulder?

A. Extremely so.

Q. And slopes off down?

A. Yes, sir.

Q. That shoulder would be composed of dirt and gravel?

A. That's correct.

Q. Do you have any reason to believe that Mr. McCoy was traveling more than 55 miles an hour?

MR. DYER: I'm going to object, Your Honor. That calls for a conclusion on the part of the officer.

MR. PALMER: I'll withdraw the question, Your Honor.

Q. Did you make any measurements, Trooper, about the

distance between the vehicles as they were sitting where they ended up?

A. No, sir, I did not.

MR. PALMER: That's all I have,
Your Honor. Thank you.

THE COURT: Mr. Dyer?

EXAMINATION
BY MR. DYER:

Q. Trooper Frank, could we one more time go to the blackboard, and I think we'll wrap it up.

A. Sure.

Q. Could you simply draw with an x or something where the point that the line of sight distance was 381 feet back from the truck?

A. It would have to be in this curve right here (indicating). All I simply did was walk down, stand in the road itself, stand and judge where I felt I could see this truck, from here to here (indicating).

Q. Would you put along the side of the diagram, then, with brackets or something the 381 feet?

(WHEREUPON, the witness complied with counsel's request.)

Q. That's fine. Why don't you go back to the stand?
You were just asked a minute or two ago about

the beacon light on the truck. That was actually covered by a wire mesh; is that correct?

A. There's a wire mesh that covers that hole, so you would have to actually look through the wire mesh to see the light.

Q. I understand, but it's not closed in by anything other than that wire mesh?

A. No, sir.

Q. When you were looking back, you could see the flashing lights on the truck as well as the beacon; is that correct?

A. That's correct.

Q. You were asked if you saw any flags on the back. Do you have any specific recollection, one way or the other, just whether you did...

A. No, I don't recall. I don't have anything in my notes to indicate that flags were there. I don't recall seeing any. I'm not saying that there weren't some there, but they weren't to the point that they're vivid in my memory.

Q. Did you, when you were investigating, Trooper Frank, take a written...or write down a statement from Mr. McCoy?

A. Right; that's the statement that I just gave.

Q. Do you have a copy of that?

A. Other than the one I have in my accident pad here.

Q. This was taken...

A. At the scene.

Q. This was taken as soon as you commenced your investigation?

A. Once I got the scene secured, Mr. Nickens was taken from the scene by rescue squad; the statement I received from him and Mr. Pullen.

Q. Let me ask you a couple of questions about that statement. The first thing that Mr. McCoy stated was, 'Coming down the road at 55 miles per hour'; is that correct, sir?

A. Yes, sir.

Q. The next thing was, 'When I came around the curve, I saw the truck stopped'; is that correct?

A. Right.

Q. 'Applied my brakes, and with the pavement wet and the dirt along the edge of the road, I couldn't stop'; is that the next thing?

A. Yes, sir.

Q. 'Swerved into other lane and hit the vehicle.'

A. Yes, sir.

Q. 'When I saw it,' referring to the Nickens vehicle, 'it was too late, it was right there.'

A. Yes, sir.

Q. Is that the extent of the statement that he gave you?

A. That's almost verbatim.

Q. Mr. McCoy never made any statement to you, did he, that his right wheels went into the ditch and that he was thrown across the road by the ditch, anything like that?

A. I don't have anything on it, no, sir.

Q. How would you describe that curve? In describing it for your investigation, is it fair to call it a slight grade?

MR. PALMER: Your Honor, I'm going to object to it being totally an opinion; as counsel indicated, the trooper can't testify as to opinion.

MR. DYER: No, I'm trying to get his characterization as a witness as to the degree of the curve.

THE COURT: I think it's proper for him to testify as to what normal observation would

reveal and use words that characterize it in a communicative way. Objection overruled.

MR. DYER: Thank you, Your Honor.

Q. Was your characterization that that curve we've been describing there was a slight curve, Trooper Frank?

A. To a degree. I think with the obstruction that is along the shoulder of the road, it's somewhat of a blind curve, due to the fact that the sight distance is reduced tremendously, particularly even at night. You can see vehicles; you know that they're approaching, but you can't see them. You can see the lights, but once you round the curve, they're there. It's a slight curve, but due to the fact of the configuration of the shoulder, the growth and this type of thing, it's a rather sharp curve.

Q. Mr. Palmer asked you about the effect of the brakes on the highway surface, and you indicated that usually there are squeegee marks when brakes are applied.

A. Yes.

Q. As I understand your testimony from earlier, when you walked back that road, you did not see any evidence of either skids or squeegee marks; is that correct?

A. That's right, I did not.

Q. That would be going back in the direction that the McCoy vehicle had been coming?

A. Right.

MR. DYER: I have no further questions of the trooper.

THE COURT: Any redirect?

MR. HALL: Just one.

EXAMINATION
BY MR. HALL:

Q. Trooper, coming northbound where you placed the x where you stood, from there to the point of the accident is that level, or slightly downgrade of slightly...

A. It's a slight downgrade, a slight grade, yes, sir.

Q. Is that roadway level, or is it banked for the turn, if you recall?

A. I don't recall.

MR. DYER: That's all.

MR. PALMER: If I could, Your Honor.

THE COURT: Mr. Palmer.

EXAMINATION
BY MR. PALMER:

Q. Trooper, when you arrived, did you have the highway department driver move the truck?

A. I did eventually, but I don't recall if I had him move it immediately. I think the first thing that I did was to render assistance to Mr. Nickens, and then once that was pretty much under control, I had him move the truck.

Q. You would have had him move the truck before you went back to measure the sight distance; is that right?

A. That is correct.

Q. How did you measure the sight distance, then, with regard to where the truck was?

A. Another trooper arrived on the scene to assist me, and his vehicle was parked in the exact location where the dump truck was parked.

MR. PALMER: Thank you.

THE COURT: Any further questions for Sergeant Frank?

MR. HALL: No, sir, Your Honor.

THE COURT: May he be excused?

MR. HALL: Yes, Your Honor.

JOHN FRANKLIN COATES, having been duly sworn by the Clerk, was examined and testified as follows:

EXAMINATION

BY MR. HALL:

Q. Mr. Coates, sir, could we have your full name?

A. John Franklin Coates.

Q. By whom are you employed?

A. The Virginia Department of Highways and Transportation in Culpeper.

Q. How long have you been so employed?

A. I've been employed by the Commonwealth of Virginia for 16 years.

Q. All of those 16 years with the Virginia Department of Highways and Transportation?

A. Yes, sir.

Q. What is your position with the Department?

A. I'm a traffic engineer assigned to the District office in Culpeper.

Q. What's the relationship between the Culpeper office and the Fauquier County resident highway engineer?

A. I basically work 11 counties, and Fauquier happens to be one of the counties.

Q. In the course of working these counties you work, does the State Department of Highways and Transportation

have any guidelines for posting signs and putting up warning devices about work in progress?

A. Yes, we do, sir.

Q. Are those guidelines available for both primary and secondary highways?

A. Limited access highways, primary highways and secondary highways.

Q. What is Route 17 between the town limits of Warrenton and Route 245, Old Tavern?

A. Route 17 is a primary highway.

Q. What do we mean when we talk about pulling shoulders as a part of maintenance work on a primary highway?

A. Basically pulling the stone, the loose stone, to the edge of the pavement, and in doing so, a certain amount of this material might fall out onto, or flow out onto the pavement. Then another vehicle has to come along and clear the pavement; if that answers your question.

Q. These guidelines for signing and warning devices, are they applicable on primary highways to both stationary and moving work?

A. Yes, we have different guidelines for different types of assignments or duties or what have you.

Q. Do you have guidelines, for example, for work described

as working the area between the ditch and the shoulder?

A. Yes, we do.

Q. Are these guidelines published?

A. Yes, they are, sir.

Q. What is the name of the publication?

A. The name of the publication is 'Typical Traffic Control for Work Area Protection.'

Q. Are these guidelines applicable throughout the 11 counties that you work?

A. Throughout the State of Virginia.

Q. Do you happen to have a copy of those guidelines with you?

A. Yes, I do.

Q. With respect to working between the pavement and the ditch line on primary highways, is there a guideline that you have in that document for that work?

A. Yes, it is, sir.

Q. Does that appear on page 20 of that document?

A. Page 20, yes, sir.

Q. With respect to such work, what are the guidelines for the distance of signs indicating to the motoring public that there is roadwork ahead?

MR. DYER: Objection, Your Honor,

could we approach the Bench?

THE COURT: Yes.

BENCH CONFERENCE

MR. DYER: Your Honor, I would object to the use or introduction of these guidelines. I think the witness has indicated that these are just called typical guidelines. These don't have the points of law in the Commonwealth of Virginia. The witness, I think, if questioned further, will indicate that he doesn't know whether these are disseminated to the men or not, but that they just leave it up to the foreman or superintendent on the various jobs to find whether people are doing things in the way they set it up typically.

Since we're getting to an area that's probably the only basis of any liability on Mr. Pullen, I think that the Court should look at those and see whether or not they constitute something, a violation of which could be admissible to the jury. The evidence will show that the foreman on the job is personally in charge of the signs; further, that these things are misleading because they have no maximum distance. The document that he has there will show that the

warning sign is to be placed 500 to 800 feet before, but there's no maximum distance. In other words, in a moving operation it can be introduced. The jury is going to look at these, and because what they've got as their static display...I've seen the guideline; it's simply one that they call a typical situation... they've got the road cones out and they've got all these things. If the jury were to see that, they'd think, well, they didn't put cones out, or well, they didn't put these signs every 500 feet. In reality, that is just a typical situation. A person working over a limited stretch of highway, they don't require the cones.

I think if you look at the mowing operation, they don't have the cones on those because they traverse such a large section of the highway. I don't think that they should be introduced to the jury because the jury would simply be allowed to speculate that because they didn't follow this general or typical guideline, that they're guilty of negligence.

I don't think it's a standard negligence. Therefore, I'd ask the Court to exclude the guidelines and any testimony on them.

THE COURT: Mr. Palmer, do you wish to be heard before Mr. Hall?

MR. PALMER: Go ahead, Mr. Hall.

MR. HALL: Your Honor, these are offered as evidence of the standard of care within the Virginia Department of Highways and Transportation. Most of what Mr. Dyer says goes to their weight. They're not like a regulation or statute, the violation of which might be negligence per se, but they are evidence of the standard.

Mr. Dyer, everything he said would indicate that these are inapplicable to this situation. They do create and they are very specific on what the standard of care for signing is.

For example, they say 500 or 800 feet before the project, you should have the Road Work Ahead sign. They provide the placement of cones so many feet immediately prior to the work, and they provide in the general preface that these standards or guidelines will apply to moving work and should be moved with the work. That's in the face sheet of the guidelines. To the degree of deficiencies, it can be attacked on cross-examination or other testimony.

MR. PALMER: I don't see any difference in trying to establish a standard of care between introduction of these standards. For example, an industry standard, it might be put in by some lab which would indicate the use of some electrical wires or something of that nature, or recommended under certain circumstances. It does not have the force of law, it is not in the force of a regulation, but it's an indication of the standard within the industry.

I think that what we have here is a standard within the Virginia Department of Highways. It's up to, I think, the Defendant Pullen to indicate that he was not bound by that standard, or was not aware of it, or something of that nature.

THE COURT: I think that's the trouble with that question, to the Court at least, as to even assuming these regulations set a standard of care; do they apply to this particular defendant?

MR. HALL: They apply to this project, which this defendant was working on.

THE COURT: Wouldn't that be applicable if this suit were against the Virginia Department of Highways and Transportation? How does

that apply to this defendant?

MR. HALL: I think Mr. Pullen could testify that he wasn't aware of it, didn't know about it and wasn't aware he was bound by them.

THE COURT: What kind of instruction are you going to ask for on that?

MR. HALL: I don't know what, really, Mr. Pullen is going to say about that because that wasn't part of his deposition, or whether they plan to offer any evidence. I'd have to wait to see what the evidence was.

MR. DYER: The problem is, Your Honor, what the plaintiff is saying, well, let's shift the burden. We'll shift the burden, we'll throw these into evidence, and we'll ask him to come forward and show why they don't apply or anything like that.

I think the only way the testimony can come in is if the highway man...if we want to talk about an industry standard, and this might be the solution, if the highway man were asked that under the shoulder operation that was being run on Route 17, whether it was a violation of the regulation to have one sign at the corporate limits of Warrenton and another one

in Marshall, and if there's any requirement for cones or the other things depicted in this typical or static display that they have in their book. It's not a regulation, the violation of which would be a violation of the Highway Department rules. It's simply a guideline.

If they bring them in, the jury is going to think that we did something wrong, we violated some type of law or regulation. Usually where there's an industry standard, you take a product or something like that, you'll bring someone in who will talk about that standard in conjunction with the product. I think the only way, if the Court feels they're admissible under that theory of industry standard, the only way would be if the witness were prepared to evaluate this operation on 17 and say whether or not it fit him.

What this is going to do is bring in this static display and then argue from it without eliciting testimony from the witness whether or not what they were doing that day was in violation of it. It's misleading to the jury if it's just taken out of context like that.

MR. PALMER: Your Honor, I might say, for example, if a manufacturer of a product comes into court and says, this is the way we always do it, we don't know about any industry standards, and then you bring all these other people in who say there are industry standards...obviously it goes to the jury in doing a job. I think it's to be assumed that anybody working for the Virginia Department of Highways is going to follow their regulations with regard to signs.

I think that clearly is in evidence. It's probative, it has probative value, and it's up to the defendant, if it has no probative value, to say so. But I think it's clearly probative to show that the Highway Department has these standards; they're statewide, and for counsel to say that this man might not know about them, I think that's a question for the jury to determine, whether or not it's reasonable for him not to know about them.

MR. DYER: The State Highway Department is not on trial. I don't concede, Your Honor, even for argument, that that's a violation. What this is is a typical markup of what they would

like to see...

THE COURT: Let's go to that point. Are these or are they not standards?

MR. DYER: I think that they're suggestions.

THE COURT: What do you say?

MR. HALL: The State Highway Department characterizes them as guidelines.

THE COURT: What's the difference between a guideline and a regulation to be followed by an employee?

MR. HALL: A regulation, of necessity, has to be promulgated in accordance with the administrative procedures of the state to be a regulation. Standards can be adopted by the employer, be it private or public.

THE COURT: Are they variable under circumstances?

MR. HALL: With respect to this situation, this fact situation, they have a typical traffic control for work between pavement and ditch line and set out the parameters, what kinds of lines, the sides and size, the distances, and then the

general considerations that are portrayed are for where a work zone is not stationary in nature. 'All traffic control devices shall be moved accordingly as the work zone moves.'

THE COURT: Who has the responsibility for seeing to those matters?

MR. HALL: The man on the scene is the only one that has that responsibility.

MR. DYER: I'll tell you it's the superintendent of the job. That's the problem; it's another man.

THE COURT: Why can't you cross-examine him and determine that?

MR. DYER: Because that's the threshold: Should they be admitted if they aren't his responsibility? That's the point, because once you get them in there, the jury's going to think, well, maybe he didn't know about it, maybe it wasn't his job, but they really were doing something wrong.

That display, that's the problem. Counsel wants to read from the general regulations, and maybe if Your Honor looked at the one...this is, as far as I can tell, a stationary project. They have an additional

one for mowing operations, and they have them for various other things.

MR. HALL: That's not the full text of all of them. Those are the ones I was examining him on, Your Honor.

THE COURT: Do we have one that deals with this particular type of operation, shoulder operation?

MR. HALL: This is a ditch to shoulder. I thought I'd ask him that, if it does not apply to bringing up the shoulder, pulling the shoulder.

MR. PALMER: Pulling shoulders, that would apply.

MR. DYER: I think that's the threshold. The question is, I think he'll tell you, you don't use cones and there are cones depicted.

MR. HALL: I'm making representations, but like I say, I don't know that for a fact. I can't stipulate that that's what he's going to testify to. That's why all of this goes to the weight, what these guidelines are, but they ought to come in as the guidelines of this employer.

THE COURT: If I were to allow these to come in, I'm certainly not going to allow any instruction that sets any sort of standard. I think I'll allow you to argue from the facts.

MR. PALMER: That's the thing, Your Honor. Counsel has indicated and suggested that unless there is some kind of standard, there's no liability. He's got to exercise reasonable and ordinary care, and in determining what reasonable and ordinary care is, they can take that into consideration.

THE COURT: That's my thinking. We're not setting a special duty standard here, and we have to have an instruction to say that we aren't if that comes out to be confusing.

MR. HALL: I'd proffer no instruction on that; a general standard to post signs and warnings, but I didn't offer any regulatory...

MR. DYER: That's where I was coming from. In reading his general instruction, and then you look at that...

THE COURT: He may have one less instruction if I let this in here.

MR. DYER: The problem is that...

I agree, once that's in, you can't eradicate that from...

THE COURT: If the man shows that he didn't have any knowledge, I'll allow an instruction to deal with the evidence as it comes out, but it seems to me you could cross-examine him and ask him about it, and he says he had no knowledge and ask this man who's responsible. I don't know who's responsible.

MR. DYER: I think it's up to the plaintiff to establish that before he proffers it and the position of getting it in, and then at the end telling the jury, now, don't you remember all those things about signs and cones and everything.

THE COURT: Do you think he should call your client as an adverse witness and put him on the stand and have him testify as to what he knew about these regulations before he offers this witness?

MR. DYER: No, sir. What I think he ought to establish is, from this witness or some other witness, that that diagram, those standards apply to that particular job that they were doing

on Route 17 that day. That would be fair. In other words, I don't think...

THE COURT: Can't you do that?

MR. HALL: I'll do the best I can.

MR. PALMER: Your Honor, the plaintiff says that these are standards that this man has testified to that are statewide. This man is a part of the class to which they're supposed to apply. It seems to me all the plaintiff has to do is show that he's a part of that class and that he falls under those guidelines, and then the defense has got to want to show either he's totally ignorant of the existence of these standards. This man has testified these are standards that apply statewide... or guidelines, excuse me, I don't want to stay standards...and once you have a class of people to which he belongs, it seems to me very clear that he's got to presume knowledge, but if he doesn't, then it's up to him to show it.

MR. DYER: Your Honor, I don't believe that guidelines are admissible. They just aren't. Specifically on this one, Your Honor, you

were saying, I think he has to establish from the witness that this would apply to that particular job.

THE COURT: Are you going to do that?

MR. HALL: I'm endeavoring to.

MR. PALMER: I think he's already done that, Your Honor. He's indicated that this is for the standard, or these guidelines would apply.

THE COURT: I'm going to note your objection and exception to the Court's ruling. I'm going to allow these to come in, but you're going to have to relate them to the type of project that was being conducted on Route 17 on this particular occasion. I'm not going to allow an instruction later that's going to lift these up and give these sanctity of law or anything more than what they are. They relate to the ordinary duties that are applicable to all people in this type of situation.

EXCEPTION NOTED
IN OPEN COURT

CONTINUATION OF EXAMINATION
BY MR. HALL:

Q. Mr. Coates, before we left for the Bench conference I've forgotten the precise question that I posed that brought the objection. Let me approach it this way.

You have before you the guidelines for highway work on a primary highway.

A. Yes, I do.

Q. Including the guideline for work from ditch to shoulder.

A. Yes, I do.

Q. Pulling the shoulder is work in the area from the ditch to the shoulder?

A. Doing the ditch, yes.

Q. That guideline sets forth the size of the Road Work Ahead sign, does it not?

A. Yes, it does.

Q. And gives a range or distance back from the commencement of the work where this sign should appear?

A. Yes, it does.

Q. And the distance back from the work for approaching motorists is dependent in part on the speed limit?

A. The actual speed limit; yes, sir.

Q. I believe for speed limits of 45 miles per hour or less for work on primary highways, ditch to shoulder, the guideline suggests a road work sign 500 to 800 feet prior to the work area?

MR. DYER: Objection, Your Honor.

He's leading the witness.

THE COURT: Mr. Hall, try not to lead the witness on this point.

Q. Mr. Coates, make reference, if you would, sir, to the guideline for ditch to shoulder work for primary highways.

A. On roads with a speed greater than 45, the distance is 500 to 800 feet prior to the work area. On roads where the speed is less than 45, the distance is 350 to 500 feet.

Q. What is the dimension of sign that is to be placed?

A. A minimum of 30 by 30. In some cases we do use larger signs. In other words, it would be up to the superintendent as to which sign he wanted to use.

Q. Is it a diamond-shaped sign?

A. Yes, it is.

Q. 30 inches on each side?

A. Yes.

Q. Really a square turned on its...

A. Yes.

Q. What, if anything, is attached to that sign?

A. We provide...I guess you would say holsters, in the top of the back of the sign panel for flags.

Q. By the pictorial display in the guidelines, the flags are to be attached to the signs?

MR. DYER: Objection, Your Honor.

He's leading the witness again.

THE COURT: Objection sustained.

Q. Do you have in front of you, sir, Figure P.1, typical traffic control for work between pavement and ditch line, primary highways?

A. Yes, I do.

MR. DYER: Could I have the benefit of the page that you're looking at, sir?

(WHEREUPON, counsel examined the document referred to.)

Q. While Mr. Dyer is looking at that page, sir, these guidelines, as they apply to this work, what, if anything, do they require with moving, relocating the signs as the work moves?

A. In this particular case it would be up to the person

in charge of the operation, whether it be the foreman, the maintenance superintendent who was actually responsible for this particular area, the maintenance supervisor or resident engineer, its chain of command, but the man in the field would actually be responsible, and I would think it would be the person in charge of the operation, whoever he or she might be.

- Q. The operator on the scene of this particular work would be the one that you would think, at least in the first instance, would make the decision how and when to move the signs when the work moves?

MR. DYER: Objection, Your honor. He's leading the witness again. The witness has testified that it was up to the person in charge.

MR. HALL: Your Honor, the witness testified to a number of people, and what the question was directed towards is, did I understand that the man on the scene would be the threshold of the first person.

THE COURT: Objection sustained. Restate the question, please.

- Q. Sir, given a situation in which you have a grader operator and a man operating the dump truck and blade

behind, would one of those men be the kind of person who would make the decision on putting up warnings and signs on that particular project?

A. It is a possibility that possibly the foreman or operator, whoever he or she might be in charge of it, yes, could be operating one of those vehicles. It's a tough question.

Q. You used the expression, the person in the field, and I'm trying to correlate in the field to be on the scene working the project. Is that what you meant, sir?

A. Yes, that's what I meant. In other words, yes, the person in charge could be operating one of the pieces of equipment.

Q. As that work moves, the signs and other warning devices are to be moved, as you understand the guidelines?

A. Yes.

MR. HALL: If the Court please, I would move that they be marked and admitted as Plaintiff's #6, the Typical Traffic Control for Work Area Protection, Virginia Department of Highways and Transportation.

THE COURT: Are there any other objections than already interposed?

MR. DYER: Yes, Your Honor. He is putting in the whole book, and he's questioned the witness from one particular diagram, I believe.

MR. HALL: I don't have any objection to pulling out the face sheet and pulling out page 20 and putting that in. It didn't seem necessary.

THE COURT: Does that satisfy the objection?

MR. DYER: I object to the whole thing going in, and also that it hasn't been authenticated as the official highway document.

MR. HALL: Does Your Honor want me to examine on that?

THE COURT: Yes.

CONTINUATION OF EXAMINATION
BY MR. HALL:

Q. Can you identify this document and tell us where you obtained it?

A. This document was put together in the central office in Richmond, I believe under the direction of the

highway commissioner, with his approval, of course, and sent to the districts for distribution, to the residency in this case, on the residency level, to be put into use as a guideline for work along the roadway.

Q. Is the document that you have in front of you a true copy of the Virginia guidelines that came into your possession and custody?

A. Yes.

THE COURT: Any further objection?

MR. DYER: No, Your Honor.

THE COURT: Any questions on authentication?

MR. DYER: Yes.

VOIR DIRE EXAMINATION
BY MR. DYER:

Q. Mr. Coates, that document that you have there has nothing shown as promulgated by the commissioner; is that correct?

A. I do not have anything with me. I do not have a cover letter or any document.

MR. DYER: That would be the

basis of my objection, Your Honor, as to its authenticity.

THE COURT: The witness has testified that these were received from the central office in Richmond. The Court is satisfied as to their authenticity, and for this reason it will be received. As to that particular objection, your exception will be noted.

EXCEPTION NOTED

THE COURT: With reference to whether or not the whole document will be received or the extracted portion testified to, the Court is of the opinion that only the cover page and the applicable page, I believe was 23, Mr. Hall, that was testified to should properly be received, and the Court would ask you to separate the document and submit those as an exhibit.

MR. HALL: Pages 20 and 21 would be those that I referred to.

THE COURT: Let counsel see those pages and ascertain whether or not they are the applicable pages.

(WHEREUPON, counsel examined the document referred to.)

MR. HALL: I think counsel, in concurrence, is reserving his objections as previously stated.

THE COURT: Yes.

MR. HALL: I'm going to offer the face sheet, pages 20 and 21 at this time.

THE COURT: Noting the objections. Anything further?

MR. DYER: Is 21 the shoulder diagram?

MR. HALL: Right, and 20 is a sheet that says '...not limited access, primary roads.'

THE COURT: We'll separate those for you.

(WHEREUPON, the document referred to was marked Plaintiff's Exhibit #6 for identification and received in evidence.)

MR. HALL: Mr. Coates, would you answer any questions that either Mr. Dyer or Mr. Palmer has for you?

MR. PALMER: I have no questions, Your Honor.

THE COURT: Mr. Dyer?

MR. DYER: Yes, sir, could I

wait until the Clerk has the exhibit corrected, Your Honor?

THE COURT: All right, sir.

EXAMINATION
BY MR. DYER:

Q. Mr. Coates, let me show you what has been marked as Plaintiff's Exhibit #6, which is page 21 of the document that you brought with you. Looking at that, Mr. Coates, that only applies, doesn't it, to a static operation, one that's not moving, that diagram on page 21?

A. Yes; however, if you look at the next page, it gives you an illustration, which is page 22, of a moving operation, which shows a mowing operation, but it's still a mobile operation, it's a moving operation. So yes, the signing would cover a moving operation.

Q. I understand, but this one, number 22, has all those cones.

A. That particular one, with the cones, would be for a defined area where it would not be moving, yes. In other words, a short section, it might be a couple hundred feet.

Q. You wouldn't use cones if you were using, say, an

eight-mile area to pull the shoulder, would you?

A. No, not normally.

MR. DYER: Your Honor, I'd ask that that document be excluded from evidence, since it doesn't apply to the facts in this case.

THE COURT: Mr. Hall, do you wish to be heard?

MR. HALL: The only question I heard Mr. Dyer ask was about the cones, whether they would apply over eight miles, whether you'd have to cone eight miles of shoulder work, and I understood the witness to say no. I didn't hear that making this guideline inapplicable to the facts of this case.

MR. DYER: The guideline shows cones. That's why I thought it would be misleading to the jury, Your Honor.

THE COURT: The jury has heard the testimony as to the exhibit, that the cones that are shown on page 22 of that exhibit do not apply in a moving situation, but only in a static situation. I don't know whether the rest of the exhibit is applicable or not; it may be, deleting the cones.

CONTINUATION OF EXAMINATION
BY MR. DYER:

Q. All of the writing here, under Notes, paragraphs numbered 1, 2 and 3, those deal with the cones, too, don't they, Mr. Coates?

A. Item number 1 deals with cones. Item number 2 does not. Number 2 is basically just the advance sign, which I've indicated is based on the actual speed of the road.

Q. Does number 2 refer to...

A. 2 does not refer to the cones.

Q. Could you read number 2 for the jury, just the first sentence?

A. 'Item number 2: distance between advance warning signs and beginning of cone taper...'

Q. That's what I was talking about, sir. There is a reference in there.

A. I beg your pardon?

Q. Number 3 refers to traffic cones?

A. Number 3 also refers to the traffic cones.

MR. DYER: Your Honor, I'd ask that the entire document, since it's all predicated on another type of operation, it refers to cones and

the entire document, basically, is devoted to the placement of the cones, that it be excluded from evidence.

MR. PALMER: Your Honor, I've got to say that I can't agree. The man has qualified somewhat by saying that on the page following 21, on page 22, we have a reference to mowing operations. He somewhat correlates the mowing operation to a moving operation, but his testimony has been positively ...on direct examination, he testified that with regard to a moving job, it's up to the person in charge of the job, that the man in the field would be responsible as to whether or not to follow what is on that diagram. I think that that's the qualification and the distinction. Going to the mowing operation, obviously in a mowing operation, you're not working on a highway, necessarily. You're over there in the median strip or you're off on the shoulder, and you're mowing what's alongside the shoulder.

But here we have a situation where the truck is stopped in the middle of the roadway. I think, based upon the facts and circumstances, it's up to the jury to make the determination as to what is reasonable

under the circumstances. He has stated that the guidelines indicate that figure 21 applies to moving jobs.

THE COURT: The Court has ruled on the admissibility of this particular exhibit, and the witness has qualified its probative value in terms of indicating that certain items contained on this exhibit are not applicable to a moving type operation, similar to the one that is the subject of this case, or similar to a moving or mowing operation. But that doesn't necessarily mean that the exhibit is inappropriate evidence. It simply goes to its weight, and that's a question that lies in the province of the jury.

For this reason your exception will be noted, your objection overruled, and the exhibit will stand. You may argue its probative value to the jury.

EXCEPTION NOTED

CONTINUATION OF EXAMINATION
BY MR. DYER:

Q. Mr. Coates, is it fair to say, however, that that exhibit does not apply to the pulling of the shoulder operation that was going on on Route 17 on the day of

this accident other than the fact that there's a requirement that a sign be posted?

A. Yes, the requirement that a sign had to be posted advising motorists that men were working.

Q. But other than that, the rest of the exhibit does not apply to that shoulder pulling operation; is that fair to say?

A. This particular diagram is the one that we use for pulling shoulders, and this diagram is presently being used today.

Q. But as far as an actual shoulder pulling operation, there's a requirement that there be a sign indicating road work ahead; is that correct?

A. Yes, because the motor grader is pulling the material to the edge of pavement, which I think I've indicated, and the necessity for the second vehicle was to clear the material from the pavement, the surplus material.

Q. You've testified that there's a distance there of, I believe, 500 to 800 feet that would apply where the speed limit is over 45; is that correct?

A. Yes, sir, 500 to 800 feet.

Q. Is that a minimum requirement or a maximum requirement?

A. The minimum would be 500, of course, and the maximum

would be 800. The reason for the 500 to 800 feet, it gives the man in the field to put the sign where it's most appropriate. It may be the sign should be 600 feet instead of 500 feet in advance of his work area. But the minimum would be 500 feet.

Q. That means that you can't put it any closer to the road grader and dump truck than 500 to 800 feet; is that correct?

A. That's true.

Q. But the guidelines do not say, do they, how far back from the vehicle you can have your sign? In other words, it could be one mile, five miles, eight miles.

MR. PALMER: Your Honor, I've got to object. The man has testified it's 500 to 800 feet in the guidelines. For counsel to stand here and say, is it okay to have it eight miles down the road, the guidelines say 500 to 800 feet. That's not a minimum; it doesn't say a minimum.

MR. DYER: That's why I wanted the witness...

THE COURT: I think counsel, in cross-examination, has a right to clarify the testimony elicited on direct, and that's what counsel is

doing. The objection is overruled. You may continue that line of questioning.

MR. DYER: Thank you, Your Honor.

CONTINUATION OF EXAMINATION
BY MR. DYER:

Q. Mr. Coates, isn't that the closest to the truck that the warning signs can be?

A. Yes, the closest.

Q. Would you tell the jury, isn't it within the guidelines, as you understand them as a highway engineer, that you can have the signs back a mile, three miles, as much as eight miles and still be within the guidelines, as long as it's no closer than 500 to 800 feet?

A. This is true.

Q. There's no requirement in the guidelines for the pulling of the highway operation that the sign be moved, is there?

A. If the sign was to be moved, it would be up to the person in the field to make that decision to move it.

Q. I'm sorry. My question was, in the guidelines, there is nothing in the guidelines that indicates that on a shoulder pulling operation the sign must be moved,

is there?

A. I don't believe so.

Q. Is it normally your experience that the superintendent in charge of the road clearing or grading operation is responsible for the placement of the signs?

A. Yes, it would be up to him or someone that he's delegated the authority to.

Q. Under the Virginia Department of Highways regulations and rules, it is permissible for a highway truck to stop on the traveled portion of the highway while it is performing a road maintenance operation, isn't it?

A. Yes, I believe you'll find it in the code.

MR. DYER: I have no further questions of Mr. Coates, Your Honor.

MR. PALMER: If I might, Your Honor.

THE COURT: Yes.

EXAMINATION
BY MR. PALMER:

Q. Mr. Coates, it's permissible to stop but there are supposed to be proper signs put out, aren't there?

MR. DYER: Your Honor, I think the witness ought to be asked if the code requires

CONTINUATION OF EXAMINATION
BY MR. PALMER:

Q. Mr. Coates, would it be fair to say that if a highway department vehicle stops in the roadway for any period of time that proper signs should be put out?

A. Yes.

Q. Sir, you have testified as to these guidelines; is that right?

A. Yes.

Q. You've testified as to the provision for the placing of signs 500 to 800 feet from where the work is being done; is that correct?

A. Yes, on a road where the speed is greater than 45.

Q. I understand, greater than 45 miles per hour. Tell me, or read to me, if you will, where the provision is for the 500 to 800 feet of signs.

A. It's under Item number 2.

Q. What does it say?

A. 'Distance between advance warning signs and beginning of the cone taper shall be 350 to 500 feet where the posted speed limit is 45 miles or less, and 500 to 800 feet where posted speed limit is greater than 45 miles per hour.'

Q. Where does it say in there that 500 to 800 is a minimum?

A. It does not say.

Q. Does it say it's a maximum?

A. No, it does not.

Q. Would it not be a fair interpretation of that, if you are talking about posting signs, that the sign has got to be somewhere between 500 and 800 feet, that that's a minimum and a maximum?

A. In advance of the actual work area.

Q. Yes, sir.

A. The work area could be a mile in length, it could be two miles in length, the starting point of the work area.

Q. As the work moves along, do you think it's reasonable that no signs be put out?

MR. DYER: Your Honor, I object. It's not a question of whether it's reasonable. I think he can testify what the guidelines are.

MR. PALMER: Your Honor, he's testifying now as somebody who's familiar with the guidelines and somebody who's familiar with the highway department. I think he can testify as to whether

or not it's reasonable.

THE COURT: I'm not sure, Mr. Palmer, that this witness's perception of what is reasonable is relevant. We'll leave that to the jury.

MR. PALMER: I'll withdraw the question, Your Honor.

CONTINUATION OF EXAMINATION
BY MR. PALMER:

- Q. Mr. Coates, you indicated that there's some latitude given in the distance for putting out these signs because of the fact that it depends on where the work might happen to be being done; is that right?
- A. Yes, I think I said between 500 and 800 feet it would be up to the person in the field to decide the actual placement of the sign prior to the work area, and the reason for that was to allow him to put the sign at the most appropriate place.
- Q. In other words, you wouldn't want to put it right in a curve and all of a sudden somebody comes around the curve and there's a sign and 300 feet down the road somebody's working; is that right?
- A. This is true. In other words, it could be a vertical

curve, a horizontal curve.

Q. Any number of reasons. You'd want to place it in an appropriate position?

A. Yes.

Q. The reason for those guidelines is to protect the workers and to protect the traveling public; is that not right?

A. It's to warn the motoring public.

Q. The reason that they have different speed limits, that is, 350 to 500 feet and 500 feet to 800 feet for different speed limits, is because it takes a longer period of time to either stop a vehicle or take appropriate action at greater speeds, isn't it?

A. This is true.

Q. Is there not a provision in these guidelines that indicates that Figure 21 applies to moving operations?

A. Where is the cover sheet? I think it's been introduced into evidence.

(WHEREUPON, the witness examined the document referred to.)

A. Primary highways, and this again, nonlimited access, which Route 17 is a primary highway; however, it is not limited access. Primary, and we're looking at this particular...it says, mobile maintenance operation.

It's P.2 and P.1 is work between pavement and ditch line.

Q. Pavement between work and ditch line, that is what they were doing actually on this job, were they not?

A. That's true.

Q. I wonder if you would show me the diagram that you indicated refers to a mowing operation.

A. That's on page 22.

Q. Let's assume we're talking about a mowing operation, you consider mobile. As a matter of fact, you referred to this, didn't you?

A. I believe I did, yes.

Q. Does that not also indicate that in a mobile operation those signs in a 55 miles an hour zone shall be 500 to 800 feet from the work?

A. 'Distance between advance warning signs and beginning of work zone shall be 350 to 500 where the posted speed limit is 45 miles per hour or less, and 500 to 800 feet where a posted speed limit is greater than 45 miles per hour'; yes, sir.

Q. That refers to a mowing operation, doesn't it?

A. That particular illustration does refer to a mowing operation.

7 ,

Q. Do you know how fast pulling the ditches moves along?

Do you have a standard for that?

A. I cannot answer that question. I'm not a maintenance engineer. But it is a moving operation, and that's...

Q. But you don't know how fast it would move. I mean, like a mile an hour, or two miles an hour?

A. I could not answer that question.

FREDERICK F. NICKENS, having been duly sworn by the Clerk,
was examined and testified as follows:

EXAMINATION
BY MR. HALL:

Q. Mr. Nickens, would you give us your full name, please,

sir?

A. Frederick F. Nickens.

Q. What's your occupation?

A. I'm a courier for The Peoples National Bank.

Q. Here in Warrenton?

A. Yes, sir.

Q. What's your age?

A. 62 years old.

Q. How old were you at the time of this accident; were you 59?

A. Yes, sir.

Q. How long have you been a courier for Peoples National?

A. Since March of '78.

Q. What did a courier do back then? What do you do today?

A. I pick up the work from the branch in Marshall and also the branch in the Northern Virginia Shopping Center, The Peoples National Bank. I carry coins from the main branch of the bank to the branch banks.

Q. What are the sizes and dimensions of these things? Do you carry them in your trunk or in your back seat or where?

A. Usually I put the coin bags in the truck. They're not so large; it's all coin. I would say, roughly,

guessing at the weight, I've never weighed one, they weigh somewhere around 45, between 40 and 50 pounds.

Q. On the day of May 24, 1978, you had been to the main office earlier?

A. Yes, sir.

Q. Had you made a run to Marshall yet that day?

A. Yes, sir. I made a run to Marshall. I usually try to be in Marshall by around 11 o'clock.

Q. Had you then come back to the main office?

A. Came back to the main office; yes, sir.

Q. And dropped off what you brought from Marshall?

A. Yes, sir.

Q. Then later that day you were heading back to Marshall?

A. That's right.

Q. Did you get there?

A. Yes, sir, I got there. I got there roughly around 1 o'clock or a little after.

Q. What were you driving?

A. I was driving a Dodge Dart.

Q. Was that the bank's car?

A. Yes, sir.

Q. After you did your business in Marshall, where were you going to go?

A. I was coming from Marshall by the branch office in Northern Virginia Shopping Center and from there to the main office.

Q. As you came down to Route 17, how did you get there?

A. As I came down Route 17, when I got at Highway 245 I noticed the state motor grader and dump truck, and I began to slow my vehicle down. About opposite of the dump truck, this pickup truck came across the road right at my vehicle. I knew that there wasn't any way for me to get anywhere because there's a bank on the right-hand side, and I was over as far as I could get over. He struck the vehicle at the left front fender. It felt to me as though it was two impacts, that he hit it and bounced back and then hit it the second time and went all the way down the left side on past my vehicle and turned around in the road and headed back south. He was headed north at the time.

Q. You've seen Trooper Frank put up a pictorial display of this scene. Are you in agreement as to the location of the vehicles after they came to rest?

A. I wouldn't say that that pickup truck was where Trooper Frank has it, although it seemed like to me that the pickup truck was over all the way in my lane, in the

southbound lane.

Q. After the collision?

A. After the collision, yes, sir.

Q. When was the first time that you saw these two state highway trucks?

A. The first time I saw them was when I was on my way to Marshall. They were...well, for me to describe them, that's all I've been used to hearing or whatnot, about at the end of what they call the Meadowville Stretch, it's between two and three miles south of 245. I followed them a ways until I could get around them on my way up.

Q. In other words, they were moving up. The grader was in the shoulder and the dump truck was on the roadway?

A. Yes.

Q. Did you ever see a sign that said, Road Work Ahead on your way to Marshall, that trip?

A. On my way to Marshall I saw a sign out about the town limits.

Q. How far, roughly, did you travel between that sign and your coming up on the rear end of the dump truck?

A. I would say probably five miles.

Q. Did you see or observe any other signs indicating

road work in that stretch?

A. No, I did not.

Q. When you came up upon the back of the dump truck, was there anybody outside the dump truck?

A. No, sir, I didn't see anyone.

Q. Wasn't anybody there with flags?

A. No, sir.

Q. Or cones or anything like that?

A. No, sir.

Q. Do you recall what, if anything, you observed about the lights on the dump truck when you came up on it on the way to Marshall?

A. Nothing in particular; no more than there were just some flashing lights on the truck, and the revolving light on top of the cab part.

Q. When you came up on it, was it on the straightaway when you first saw it or on a curve?

A. When I first came up on the truck heading north to Marshall, it was on a straightaway.

Q. You didn't have any difficulty seeing it at that time?

A. No, sir.

Q. How long did you follow it before you could get past to go to Marshall?

A. Guessing it, probably a mile.

Q. How did you determine that it was then safe to pass?

A. I could see that it wasn't any oncoming vehicles, and I knew I had distance enough to get by both of them.

Q. There wasn't anybody trying to signal you past?

A. No, sir.

Q. You went to Marshall and you did the bank's business, and you turned around and came back?

A. Yes, sir.

Q. When you first saw the vehicles on your return, approximately how far had they progressed northbound on 17?

A. I would say somewhere between two and three miles, roughly.

Q. How long had you been gone since you last saw them?

A. I would say that it wasn't over 20 minutes. I never looked at any particular clock to say exact time.

Q. When you passed them then you went to Marshall and got your banking business done and roughly 20 minutes later you came back and saw them?

A. I would say somewhere between 20 and 25 minutes.

Q. What time did you get to Marshall, if you recall?

A. I don't know the exact time, but as well as I can

remember, it was somewhere around...between 10 and 15 after 1.

Q. This accident happened sometime, I think, between 1:30 and 2.

A. Yes, sir.

Q. Your recollection would be closer to 1:30 or closer to 2?

A. I would say, yes, sir, it would be closer to 1:30 because normally I have to be back at the main office before 2 o'clock and then come back to the branch office at the Northern Virginia Shopping Center and pick up there and be back up to the main office by at least 2:30.

Q. As you came down back from Marshall, south on 17, and approached these highway department vehicles, what speed were you traveling?

A. About 50 miles an hour.

Q. As you pulled up and saw those vehicles coming north, what, if anything, did you do with your speed?

A. When I saw the state vehicles, I immediately applied my brakes and commenced to slowing down because when I saw the vehicles, I knew what operation was going on by me seeing them on my way north to the Marshall

branch.

Q. As you came abreast of the grader and dump truck, do you remember how far apart they were?

A. The grader and the dump truck?

Q. Yes.

A. Actually, I do not know, sir.

Q. As you came abreast of the dump truck, approximately what speed were you going?

A. I would say approximately 30 miles an hour at that time.

Q. When were you first aware that there was another vehicle, in this case the pickup truck, coming into your lane of travel?

A. I don't know, sir, but it was awful close. I would say, just roughly guessing it, about 15 feet.

Q. How did it come at you? Was it head-on, or was it on an angle?

A. When I first saw the pickup come out, it was kind of coming kind of straight across the road. Then it kind of went on an angle.

Q. It came across straight almost, what, like head-on first?

A. Yes, it looked like to me at the time that it would

have been head-on when he first came across there.

Q. Then he swerved back to the right?

A. Right.

Q. That's before he made contact with you, that he swerved back?

A. Yes.

Q. Swerved back to the right; then there was the collision?

A. Right.

Q. It hit along the left side, and you see Trooper Frank has put damage on his left front. Does that sound about right?

A. Yes, sir, it sounds about right to me.

Q. What happened to you in the collision?

A. When the collision occurred, the windshield popped out and glass started to fly. I threw my arm up over my face and leaned to my right. When it was all over with, when I raised up, my left arm was just a mass of blood and whatnot, and I couldn't move it, couldn't do anything with it. I took this hand and tried to force to see if I could get the door open. After I raised up and tried to get the door open, then the gentleman from the state truck

got out and ran across over and yanked on the door, pulling it, and I pushed and hit with this hand (indicating). We got the door open. I got out of the vehicle and started to go towards the road and the trooper, state trooper, met me and asked me please to go back and sit down on the seat of the vehicle, that the rescue squad was en route and would be there in a few minutes.

He came over and applied some gauze and whatnot on my shoulder and asked me to please just sit there, which I did. I sat there until the rescue squad got there.

Q. The rescue squad arrived you and transported you to the hospital?

A. Transported me to the Fauquier Hospital.

Q. When you went in the hospital, do you recall how you felt?

A. When I went in the hospital, I was in quite a bit of pain, actually. The doctor came in and started to get some of the glass out that was in my shoulder. In a few minutes, I went into shock, and I really don't know too much more what happened until about somewhere approximately around 6:30 or 7. They were rolling

was the one that treated me. When I first went in, Dr. Eglevsky, I think, was the one that was at the hospital when I was in the emergency room.

Q. Dr. Eglevsky left and went to Fredericksburg, didn't he?

A. I don't know, sir, where he went.

Q. When was the last time you saw Dr. Snyder?

A. I believe it was November of '79.

Q. You haven't really seen him very much actually since '78, have you?

A. Not a whole lot, no, sir.

Q. This therapy you're speaking of, that's some exercises that were recommended to you to try to increase the range of motion in your arm?

A. Yes, sir.

Q. It wasn't going to the hospital to get physical therapy or anything of that nature?

A. No, sir.

Q. You had gone to Marshall on one occasion and returned before the time of this accident, is that right?

A. That's right.

Q. On the same day?

A. That's right.

Q. You had gone up there that morning?

A. Yes, sir.

Q. This was your second trip to Marshall at the time the accident occurred?

A. Right.

Q. Had you noticed any highway work going on on your way up to Marshall that morning?

A. No, sir.

Q. It was not until you were going in the afternoon that you first became aware of the highway vehicles doing work?

A. Right.

Q. You noticed the sign up there at the town limits?

A. Yes, sir.

Q. Would that have been just beyond the shopping center there, around the Highland School limits?

A. Yes.

Q. How far did you go before you came up on these highway department trucks doing the work, or the truck and the grader?

A. Approximately, I would say, around five miles.

Q. Do you recall what time that would have been as you were going up there?

A. I don't know the exact time, no, sir, but it would have been past 12. I never left the main office until after 12:30. It was usually between 12:30 and 1 before I left.

Q. From Warrenton up to Marshall, it takes about 20 minutes, right?

A. Something like that, yes, sir.

Q. This accident happened about eight miles out of town?

A. I would say it was about eight. I'm just guessing at it. I never checked the mileage there.

Q. But you weren't even halfway to Marshall at that time, were you?

A. When?

Q. Where the accident occurred, it would have been about the midpoint, wouldn't it, or a little bit less?

A. No, sir, not where the accident occurred.

Q. How far is it from Warrenton to Marshall?

A. I think it's 11 miles.

Q. It's your testimony that in going up there you had to slow down behind the truck for a while.

A. That's right.

Q. How long did you say you sat behind the truck before you passed it?

A. I didn't stop on the highway, sir. The truck was moving, the grader was moving, when I was on my way up.

Q. I understand that, but you sort of got stuck behind it, didn't you?

A. I had to slow down, yes, sir, but I never stopped.

Q. How long did you say it was that you were behind the truck, where you're right up against it waiting to go around it?

A. It would just be a matter of guess of time. I never thought about it or watching time or anything. I more or less was interested in the oncoming vehicles to where I could get around him. But I would say five minutes or ten minutes; I don't know what.

Q. Can you estimate for me at all how fast the truck was moving as you were going along behind him for that period of time?

A. Just a guess, I would say from three to five miles an hour.

Q. You heard Trooper Frank testify, or Sergeant Frank, that he came right up on the scene of the accident. He testified the accident happened, I think, about 2 o'clock. Would you disagree with that, about the

time?

A. I wouldn't disagree with the time because actually the time would be a guess as far as to be exact.

Q. When you came up on the trucks, you were on the straightaway, is that right, as you were going up towards Marshall?

A. When I was on my way up to Marshall?

Q. Up to Marshall.

A. Yes, sir.

Q. Then coming back you saw them in a part of the S-curve there; is that right?

A. That's right.

Q. Were you able to see them before you got into the curve?

A. No, sir.

Q. There was no part of those vehicles or any of those vehicles in your lane of travel, were there?

A. No, sir.

Q. Do you recall if the road was wet the day of the accident?

A. Yes, sir.

Q. It was?

A. Yes, sir.

MR. PALMER: I think that's all I have. Thank you.

THE COURT: Mr. Dyer, any questions?

MR. DYER: Yes, sir.

EXAMINATION
BY MR. DYER:

Q. Mr. Nickens, at the time when you saw the state highway truck just prior to the accident, you slowed down, is that correct, to about 30 miles an hour?

A. When I saw the road grader and the highway truck, yes, sir, I slowed down.

Q. Did it have that revolving light on the cab going, the yellow light up on the top of that cab, at that time?

A. I imagine it was still going, sir. I really didn't pay too much attention to the light or anything when I was coming back. When I was coming south, they were heading north. When I went up, I saw the lights on the truck, but I imagine that I guess they were still on there, but I never paid too much attention.

Q. You didn't have any difficulty seeing the highway truck?

A. The grader was in front of the truck. In other words, I saw the grader first. But being the color that they are and they both were right close together, you could not help but see the yellow...

Q. I don't think anybody's asked the color. What color were the truck and the grader?

A. They were orange, or yellow; the state color.

Q. Prior to the accident occurring, did the pickup truck ever sound its horn?

A. No, sir, I didn't hear it.

Q. You testified that the roadway was wet at the time of the accident, I believe.

A. Yes, sir, it had been a mist rain.

Q. Prior to the collision, did you hear any squealing of brakes or anything that would indicate the pickup was applying its brakes and skidding on the road?

A. No, sir.

Q. You are right-handed; is that correct?

A. I'm not altogether right-handed. I guess you could call it even-handed. When I played ball, I threw with my left hand. There's a lot of things I do with my left hand, and there's some things I do with my right hand.

[Transcript Pg. 126]

MICHAEL LEE MCCOY, having been duly sworn by the Clerk,
was examined and testified as follows:

EXAMINATION
BY MR. PALMER:

Q. Mr. McCoy, would you state your name and address,
please?

A. Michael Lee McCoy, R.D. 1, Box 80, Gardners, Pennsyl-
vania.

Q. What age are you, sir?

A. 24.

Q. Are you married?

A. Yes, sir.

Q. Where do you work?

A. Herb Jones Yearbooks in Gettysburg, Pennsylvania.

Q. Back in 1978, in May, as a matter of fact, where did you live or where were you living at that time?

A. I was stationed at Vint Hill Farms. I was in the Army, living on the base.

Q. Back at that time, what was your position in the Army? What did you do?

A. I was an electronics technician.

Q. How long were you stationed at Vint Hill Farms?

A. It was close to two years.

Q. When was your station due to be up there?

A. June of '78.

Q. You went from there back to Pennsylvania?

A. Not immediately; about two months later.

Q. Directing your attention to May of 1978, you were involved in this accident with Mr. Nickens?

A. Yes, sir.

Q. Do you recall that day?

A. Yes.

Q. Do you recall about what time the accident occurred?

A. Approximately about 2 p.m.

Q. Where had you been prior to 2 p.m. on that day?

A. I had been in Warrenton. I had lunch with my girlfriend, and I was also doing some part-time work for some lawyers that work in Warrenton.

Q. You said you had lunch with your girlfriend?

A. Yes.

Q. Who was your girlfriend?

A. She's my wife now. It's Dorothy Edmonds McCoy.

Q. Where did she live?

A. The Plains, just outside Marshall.

Q. Was that where you were going at the time the accident occurred?

A. I was heading to Marshall.

Q. After lunch where had you gone?

A. I ate lunch there at...I think it's the Cardinal Restaurant. I came back into the Town of Marshall, just several blocks from here, to do some work.

Q. The Town of Marshall or the Town of Warrenton?

A. The Town of Warrenton, excuse me, just a few blocks from here.

Q. Did you then leave where you were and go on towards

Marshall?

A. Yes, sir.

Q. Do you recall about what time it was that you left town?

A. Shortly after 1:30.

Q. What kind of vehicle were you driving?

A. A 1970 Ford pickup truck.

Q. What color was it?

A. Yellow.

Q. What condition was that pickup truck in?

A. Excellent condition.

Q. As you left town, did you become aware of any signs?

A. Just right there at the shopping center, right before the Highland School there, there was a sign.

Q. What did that sign say?

A. Road Work Ahead.

Q. What, if anything, did that sign mean to you as you passed it that day?

A. It meant they were doing some type of work, and it did not specify.

Q. You then continued down the road?

A. Yes.

Q. Can you describe the area where the accident happened?

A. It's called a blind curve. It wasn't a real sharp curve, but visibility was really limited.

Q. What obstructed your visibility as you went around the curve?

A. A small bank on the right side of the road, maybe three foot high. It had a fence on the top of it, and pine-tree-like shrubbery.

Q. As you approached this area, do you recall what speed you were traveling?

A. About 55.

Q. Do you recall if there were any vehicles behind you at that time?

A. Not real close, no.

Q. As you approached the accident there at the scene, tell us just what occurred.

A. I rounded the turn and saw the state truck. It took me a few seconds to realize that it was stopped. At that time, I did not see the grader; it was still obstructed from my view. I attempted to stop. I started to apply my brakes. The right side of the truck went off of the road, and the rear wheel was off in the shoulder, like in a ditch there. I was thrown across the road, across the lines, and struck Mr. Nickens'

vehicle.

Q. As you went around this curve, were you still traveling 55?

A. Yes.

Q. When you saw the vehicle, you said it took you some time to realize it was stopped.

A. I immediately left off the gas, and then it took a few seconds to realize that it wasn't moving.

Q. When you realized it wasn't moving, what did you do?

A. I attempted to stop.

Q. How did you attempt to stop?

A. I started to hit the brakes easy at first, but there was a little dirt and gravel which was wet from off of the shoulder that they had pushed out. The two tires on the passenger side of the truck skidded on that; they did not grab the surface of the road.

Q. What, if anything, did you do when you started to skid?

A. I attempted to steer to the right, steer into the skid, to straighten the vehicle out.

Q. Why would you do that?

A. From the time I got my license and everything, that was always the thing to do, to attempt to steer into the skid to straighten the vehicle out.

Q. Then you eventually...you said you went off of the roadway and lost it; would that be a fair statement?

A. Yes.

Q. Where did you come in contact with Mr. Nickens' vehicle, do you recall?

A. I'm not good at distances. It was probably about 75 to 100 feet behind the state, or on the southbound side of the state truck, the Warrenton side.

Q. How far into Mr. Nickens' lane of travel is it your recollection you got?

A. No more than three feet.

Q. Where was the damage to your vehicle?

A. The left front fender and bumper.

Q. When you saw this truck what, if any, lights did you notice on the truck?

A. There were some red lights on the back. I did not notice the beacon light that they're referring to. I believe it was obscured because of the angle that I approached from the rear. I wasn't directly behind the truck, and that wire mesh they're referring to was...well, the hood up over the cab would have obscured your view from an angle.

Q. Did there come a time later on when you looked at the

truck from the rear and saw the beacon up there?

A. Yes.

Q. That would have been after the accident occurred?

A. Yes.

Q. After the accident, I assume you got out of the truck.

A. Yes.

Q. What did you do then?

A. I immediately went over to Mr. Nickens' vehicle and I told him to take it easy; he was trying to get up. I just wanted him to stay still until the rescue squad got there.

Q. Did you have occasion to talk to Mr. Pullen?

A. No.

Q. Did you notice any flags on the truck?

A. I don't recall any flags. There may have been; I don't recall.

Q. You mentioned that there was some dirt and gravel on the roadway. Where was that dirt and gravel located?

A. On the right side of the road, approximately two to three feet, covering the road two to three feet from the white line.

Q. That would have been along the right-hand side of the road in the direction you were traveling?

A. Yes.

Q. You would have been traveling north; is that right?

A. Right.

Q. Were you familiar with this road?

A. Yes.

Q. How many times would you say you had driven that road prior to the time of the accident?

A. Roughly 40, 45 round trips on that road.

Q. Do you recall what the weather conditions were the day of the accident?

A. It had been raining earlier. It was misting at some spots.

Q. Do you have a recollection as to the condition of the roadway?

A. To the best of my memory, at this spot where the accident was, I thought the roadway was relatively dry. It wasn't slopping wet. However, the gravel and the dirt from off of the shoulder was wet when that was out on the road two to three feet.

Q. How long was it until the trooper arrived; do you have a recollection?

A. It couldn't be any more than two to three minutes. He just happened to be coming that way.

Q. Did he come in the opposite direction from you?

A. Yes, from Marshall.

MR. PALMER: I think that's all

I have, Your Honor.

THE COURT: Any cross?

MR. DYER: Yes, sir.

EXAMINATION
BY MR. DYER:

Q. Mr. McCoy, you just told the jury you were familiar with that road based on having traveled it about, what, 40 times before?

A. Yes.

Q. So if you went into the start of the curve there, you knew it was a blind curve; is that correct?

A. Yes.

Q. It's your testimony you were traveling at 55 miles an hour when you went into that curve?

A. Yes.

Q. You told us today that the roadway was sort of wet, or it wasn't...I believe your term was, relatively dry; is that correct?

A. Yes.

Q. Do you recall in your deposition saying that the

roadway was dry?

A. Dry to one person may not be dry to another. I felt that it was...it wasn't slopping wet, like water flying above the tires or anything in that condition.

Q. Do you recall this question in your deposition on May 1st, 1980, on page 20? Question, 'Was it wet or dry?' Answer, 'I would say dry. It had been misting, but it was pretty warm. After the accident, I was out in the air for quite a while and did not get wet.' Question, 'Observation of the condition of the roadway was that it was dry at the time you got out of your truck?' Answer, 'Yes.'

Do you recall making that statement under oath at the time of your deposition?

A. Yes, sir.

Q. At that time, you didn't mention anything about it not being, not slopping wet.

MR. PALMER: Wait a minute, Your Honor. He's asking the question if that's what he said at the time of the deposition. Now counsel is interposing another question and a comment.

MR. DYER: I'm sorry.

Q. My next question was, at the time of the deposition

you didn't mention the term, not slopping wet; is that correct?

A. Right.

Q. At the time of the accident, you were on leave from the Army?

A. Yes.

Q. You were going to Marshall to get tools from your girlfriend's car?

A. Right.

Q. When you saw the sign as you started leaving Warrenton, the sign said, Road Work Ahead; is that correct?

A. Correct.

Q. I think it's your testimony that you expected to find some road work, is that correct, after seeing the sign?

A. What I considered was a reasonable length of roadway, I expected to see some road work being performed, and I didn't see any.

Q. Didn't you see that dirt that you talked about? Didn't you see that dirt along the roadway from the time you left Warrenton until you got to the accident scene?

A. Yes, but I've also gone down the road and seen fresh blacktop; that doesn't mean they just did it. I did

not connect the two together.

Q. You made no connection between the sign and the dirt that you saw as you went northbound on 177

A. I also assumed that if they were going to stop on a turn like that, they would have more notice. I thought they would be more concerned about the safety of the people using the highway. For a sign to be eight and a half miles down the road...

MR. DYER: Your Honor, I'd ask that that answer be stricken.

MR. PALMER: Your Honor, he's asking the question, he's getting the response, and he doesn't like it.

MR. DYER: No, sir, it wasn't responsive to the question I asked.

THE COURT: What was the question again?

MR. DYER: Could the court reporter read the original question, please?

(WHEREUPON, the reporter read the question.)

MR. DYER: Your Honor, that's not...

MR. PALMER: That certainly is

MR. PALMER: Your Honor, that's not his theory of where the signs should be. He stated where the sign was that day, and when he got that far up the road, he didn't really believe it had anything to do with what was there. That's responsive to the question.

THE COURT: I'm going to overrule the objection as to the responsiveness of that question, but ask the witness to respond as closely as possible to counsel's questions.

CONTINUATION OF EXAMINATION
BY MR. DYER:

Q. Mr. McCoy, the sign that you saw was approximately three feet by three feet in a diamond shape?

A. Yes, sir.

Q. Isn't it true that your theory was that the construction people had stopped for lunch?

A. I thought they had probably finished the work on the road at that time, since they weren't within a very close distance of the sign. I thought they had stopped for the day, or if they were on down the road, there would be another warning.

Q. How about stopping for lunch? Did you think they

stopped for lunch?

A. Yes, they might have stopped for lunch.

Q. Wasn't that one of your original statements?

A. Yes, stopped for lunch or stopped for the day.

Q. It was 2 o'clock in the afternoon, wasn't it, at the time the accident occurred?

A. I eat lunch at 1 o'clock, so...

Q. When you rounded that curve, once you got to where the x is on the diagram that Sergeant Frank drew, there was nothing in the road that obscured your vision on the truck; is that correct?

A. No, not at that point.

Q. You saw the truck as soon as you rounded the curve; is that correct?

A. Correct.

Q. When you applied the brakes, you were at least 225 feet from the truck?

A. Approximately 225, 250 feet, somewhere around there.

Q. You were still unable to stop your truck in that 225 to 250 feet?

A. Correct.

Q. When you applied the brakes, did you have a sensation of the brakes grabbing?

- A. Only on one side of the vehicle, on the driver's side.
The two wheels on the passenger's side slid.
- Q. What direction did the cab of the truck take with the two wheels sliding?
- A. It went to the right; it started to the right.
- Q. Did the nose of the truck go to the right?
- A. The nose of the truck went to the left.
- Q. Did you slide 225, or over 200 feet to where the accident occurred?
- A. No.
- Q. The trooper spoke to you right after the accident; is that correct?
- A. Yes.
- Q. Isn't it a fact that you did not tell him that your wheels went into a ditch?
- A. I don't recall what I had said immediately after the accident. I was upset about a person being injured. I can't sit here and be 100 percent sure of what I said immediately after the accident.
- Q. You heard the trooper testify today; he read your statement. Do you recall giving that statement to the trooper?
- A. No, I don't.

Q. At the time of the impact, is it your testimony you still hadn't reached the dump truck?

A. Correct.

Q. How far were you, in your estimation, from reaching the dump truck when you collided with Mr. Nickens' car?

A. Approximately 75 feet.

Q. Is it your testimony that there was approximately five seconds between the time you first saw Mr. Nickens' automobile and the collision?

A. I don't know, it all happened so fast. It's hard to recollect.

Q. Do you recall in your deposition giving that estimate of the five seconds?

MR. PALMER: What page is that, counsel?

MR. DYER: Page 24.

A. That'd probably be pretty close, yes.

MR. DYER: I'm sorry, it's 25.

Q. You never talked to anyone other than the trooper there at the scene?

A. Correct.

Q. When you rounded the curve and saw the lights, at

least the red lights on the truck...

A. Yes.

Q. Were you about approximately 175 feet from the dump truck when your rear wheels went into the ditch?

A. Yes, I'd say that's pretty close.

Q. Mr. Palmer asked you if you saw flags on the truck. Do you recall seeing flags on the back of the truck?

A. I'm not 100 percent sure. There may have been flags on the truck. I'm not sure at this point.

Q. At the time of your deposition on May 1st, 1980, do you recall this question?

MR. PALMER: What line is that, and page?

MR. DYER: Page 35, line 4.

Q. Question, 'Do you remember seeing any flags or signs on the rear of the vehicle?' Answer, 'I think they had some kind of flag on the back of the vehicle.'

Do you recall making that statement under oath?

A. That's what I'm saying now; I'm not 100 percent sure, but I believe there may have been.

Q. After you observed the road sign, did you see this dirt or dirt-like film at various locations on the highway, not just at one point, as you went from

Warrenton toward where the accident occurred?

A. Yes.

Q. Did you make any connection between the sign back up the road that there was road work going on and the loose gravel?

A. Yes, I saw that road work had been done there.

Q. Did you figure it was the same crew?

A. Would you rephrase the question? I don't understand what you're going for.

Q. When you saw the sign and you saw the loose gravel or dirt, did you figure it was the same crew?

A. Yes.

Q. In the 175 feet from where your wheels, as you've testified, went into the ditch, did you blow your horn at all?

A. No.

MR. DYER: I have no further questions.

THE COURT: Mr. Hall.

MR. HALL: Just briefly.

EXAMINATION
BY MR. HALL:

Q. You have seen the trooper's diagram.

A. Yes.

Q. Is that an essentially correct statement, the location of the vehicles and the curvature?

A. No.

Q. Where would you place anyone differently than Trooper Frank did?

A. My vehicle was stopped behind the state truck.

Q. Your vehicle was back up here (indicating)?

A. Right.

Q. Trooper Frank says that you're all the way past the northbound...he was mistaken?

A. To my recollection, yes.

Q. Do you agree with the sight distance from this point to the rear of the state truck?

A. I'd say that's pretty close.

Q. You're aware that that's 81 feet in excess of the length of a football field. We don't have any problem with that kind of math.

A. I'm not very good at estimating distances.

Q. Would you be comfortable that 300 feet is 100 yards?

A. Okay.

Q. If I understood your testimony correctly, you came around this bend notwithstanding the fact that you

had seen the sign and seen the dirt pulled out on the pavement, the asphalt top, and you came around here and first acquired sight of the state truck, it was a number of seconds, several seconds before you decided to apply the brakes?

A. I immediately left off the gas. Then it was about two seconds or so until I reacted to brake.

Q. You waited to apply the brakes until you ascertained that it was stopped, or moving slowly, or whatever it was you ascertained?

A. I immediately left off the gas. I guess it was two seconds until I hit the brakes.

Q. Your mental state was, if they're moving, I'm moving, so you weren't going to hit the brakes until you determined they had stopped or moving very slowly; is that correct?

A. No, that wasn't really my mental state. It was just reaction time.

Q. Whatever the mental state was, you didn't decide to brake immediately upon seeing the state truck.

A. I'd say that's correct.

Q. When you did apply your brakes, did you have any impression that you would be able to stop short of the

state truck without colliding with it?

A. I thought I should have plenty of distance to stop, but it was...I'd say it was the gravel and the loose dirt that was on the side which caused me to lose control.

Q. Your state of mind was, you thought you were going to be able to stop, but something happened that you were not able to.

A. Yes, sir.

Q. Your supposition or conclusion today is that it was something that you got on the shoulder here that kept your tires from grabbing?

A. Yes.

Q. There was equal amount of material on this shoulder all the way back along, wasn't there, roughly the same width of material?

A. It wasn't equal on all spots. It depended on how the road...the road is not perfectly flat. There were certain spots where the blade hit a little closer and they had it a little cleaner.

Q. How much distance, compared to this yellow pad, did that grader bring that dirt up on the street from the highway? Was it about 18 inches, 11 inches?

A. At that point, probably about 24 to 30 inches.

Q. So it was bringing up material two feet, two and a half feet?

A. Not at all points. It depended on how they were grading, the amount of material off of the shoulder, and the road surface, on how clean he was scraping it.

Q. When Trooper Frank came to the scene, you said you hit a bump or something and felt a jolt in your car, and that's when you went across into the oncoming lane.

A. Yes.

Q. Did you take Trooper Frank out and show him where you had gone off the paved portion or whatever it was you hit?

A. No, I wasn't thinking very clearly at the time. I had hit the top of my head, and I was very upset about seeing Mr. Nickens go to the hospital.

Q. What they had off the paved portion here on the shoulder was newly brought up dirt and loose gravel, was it not?

A. Yes.

Q. That had not been compacted by any machine or by the following dump truck, is that correct?

A. Correct.

Q. Had you gone off onto the shoulder, you would likely have left tire prints in that new soft shoulder, would you not?

A. Yes.

Q. Did you go back and look for that, either that day or later?

A. No, I didn't think to.

Q. Are you saying that when your car started to skid that it actually went on the shoulder?

A. Yes.

Q. At some point it hit something and came back across.

A. Right.

Q. Did you have your brakes on at all times from the point you applied your brakes until the point of impact?

A. I was trying the pumping action, which you normally do in skid, to try and straighten the vehicle out.

Q. You did have your foot on the brakes all the time?

A. Not solid, no; I was pumping the brakes.

Q. Do you have any explanation why, after applying the brakes, thinking you could stop coming on down here (indicating), that you were able to hit the Nickens' car and put the damage that you did on it and the

damage you did on your car and still believe you could have reasonably stopped by that truck?

A. Could you rephrase that?

Q. What was the damage to your car in numbers? Was your truck totaled?

A. \$896.

Q. The left front?

A. Yes.

Q. You've seen the pictures today, have you, of the Nickens car?

A. Yes; not today, but I've seen them before.

Q. That speaks of a pretty energy-absorbing impact between two vehicles, does it not?

MR. PALMER: Your Honor, I think that that's putting some physics or something in here that I don't know if counsel's qualified to do, and also this witness.

THE COURT: The Court allows reasonable latitude on cross-examination, but that, perhaps, gets out into something that maybe is beyond this witness and beyond counsel. Objection sustained.

MR. HALL: Let me put it this way, then, Your Honor.

Q. Mr. McCoy, what was your speed at the time of impact?

A. Probably 30.

Q. So you were able to reduce the speed from someplace out here (indicating) to 30 miles per hour over... what was the distance you quoted Mr. Dyer, 200-and-some feet? Is that correct?

A. From the time I first stated braking until the time of impact was probably about 200 feet, roughly.

Q. You heard Mr. Nickens testify that the very first time he saw you was that you looked like you were coming at him head-on, then you swerved back to the right. Is that the way you remember it?

A. Yes.

Q. Essentially you weren't going to try to pass those trucks because they were moving...

A. No, I wasn't attempting to pass.

MR. HALL: That's all I have,

Your Honor.

THE COURT: Redirect?

MR. PALMER: If I can.

EXAMINATION
BY MR. PALMER:

Q. Mr. McCoy, did you sustain any injuries in this

accident?

A. Nothing major, I had headaches for a while. I hit the top of my head on the roof of the truck.

Q. How did you feel after the accident happened, there at the scene?

A. I was shaken; I couldn't think straight; I was very upset about seeing a person injured.

Q. Did you go out and make any kind of investigation, make any measurements or anything like that that day?

A. No, I don't feel that that's my job. I thought that that was the police's job.

Q. Mr. Dyer asked you if you made an estimate of five seconds in your deposition, and he used page 25. Let me read, if I can, and see if you recall...page 25, starting at line 5. The question was asked, 'How much time elapsed between your first observation of his car and the impact?' Your answer was, 'I couldn't say.' Question, 'A fraction of a second, or a second, or five seconds?' Answer, 'A couple of seconds, five seconds, maybe. I am not sure. It just seemed to happen so fast I don't know.' Wasn't that your testimony at the deposition?

A. Yes.

Q. You didn't testify it was five seconds, did you?

A. No.

MR. PALMER: That's all I have,

Your Honor.

THE COURT: Recross?

MR. DYER: I just have a couple.

EXAMINATION

BY MR. DYER:

Q. Mr. McCoy, you didn't report any injury to the trooper, did you, Trooper Frank who was here this morning?

A. I said that I hit my head, and he said, do you want to go to the emergency room? I said, no, I don't think that's necessary.

Q. You didn't go to the emergency room, did you?

A. No, I was shaken up, but I didn't think it was necessary.

Q. Could you just demonstrate, using your hand, the front of your fingers as being the angle of your car ...tell us what the angle of your car was at the time you collided with Mr. Nickens?

MR. PALMER: Your Honor, I believe this is beyond the scope of my redirect examination. I didn't ask him any of those questions.

MR. DYER: Mr. Hall asked him about the position of his car at impact.

MR. PALMER: You had the opportunity before I went on redirect.

THE COURT: I think it's in evidence already. It probably was covered by Mr. Hall's line of inquiry. I'll allow it.

MR. DYER: Thank you, Your Honor.

CONTINUATION OF EXAMINATION
BY MR. DYER:

Q. Would you show us in relation, using Mr. Nickens' car and your hand as your truck, show us what the angle was of your truck at the time you struck Mr. Nickens?

A. This would have been the Nickens vehicle and mine. This would be going south, and mine was about this angle, about like that (indicating).

Q. Your vehicle as it skidded, as you've testified, never skidded down the road so that it was going at a 90-degree angle to him, did it?

A. Not that far, I straightened it out.

Q. There was no gravel or dirt underneath your two left wheels, were there?

A. No.

Q. When you applied the brakes, presumably those wheels were grabbing.

A. Yes.

WILLIS PAYNE RISDON, having been duly sworn by the Clerk,
was examined and testified as follows:

EXAMINATION

BY MR. PALMER:

Q. Sir, would you state your name, please?

A. Willis Payne Risdon.

Q. Where do you live?

A. Warrenton.

Q. What do you do? What is your occupation?

A. Building inspector.

Q. For whom?

A. Fauquier County.

Q. Mr. Risdon, I want to direct your attention back to
May of 1978 and ask if you recall observing an auto-
mobile accident that involved a Mr. Nickens, a Mr.
McCoy and a highway department truck that was stopped
in the roadway.

A. Yes, I recall it. I don't know the names, but I re-
member the accident.

Q. Where were you at the time this accident happened?

A. I was proceeding towards Warrenton, southbound on 17.

Q. Approximately how far from Warrenton was it would you
say that the accident occurred?

A. Approximately six, six and a half miles.

Q. Can you recall what the weather conditions were on that day?

A. Yes, there was a fine misty rain.

Q. As you were heading south on Route 17, did you become aware of any highway department vehicles?

A. Yes.

Q. Where were those vehicles located, and what were they doing when you saw them?

A. There was a road grader headed towards Marshall, apparently scraping the side of the road or the ditches. There was a dump truck following along behind him, staying behind him, pausing and stopping and just following slowly.

Q. Did there come a time when you observed a collision?

A. Yes.

Q. Where did you actually observe the collision; that is, how did you actually see it?

A. In the mirror of my vehicle.

Q. Would that have been the rearview mirror or the side-view mirror?

A. The sideview, toward the rear.

Q. Why was it that you happened to be looking in your sideview mirror or whatever when that occurred?

- A. I noticed the pickup swerving and starting to skid, so I just watched him in the mirror to see what happened.
- Q. When was it that you actually noticed the pickup and it started to skid?
- A. As I passed him, I noticed he was having some trouble controlling it then.
- Q. At that time when you saw him, what, if anything, unusual did you notice with regard to speed?
- A. I didn't notice any undue difference in anybody's speed.
- Q. Were there any other vehicles behind him?
- A. Yes.
- Q. As you observed this pickup in your sideview mirror, tell us what you saw.
- A. I saw him start to skid, trying to stop to avoid the dump truck, which was sitting in the road. Then he just swung out into the incoming path, and he hit the automobile behind him.
- Q. Is there any way you would use, or manner you would use to describe the manner he was skidding?
- A. A loud bang.
- Q. Where did the collision actually occur between the

two vehicles, if you know?

A. It was in the lane of the automobile that was struck, actually.

Q. Where was the vehicle, that is, the vehicle that was struck, where was it located in its lane or with relation to its lane at the time of the actual collision?

A. He was following me in his lane and just got run into; that's all.

Q. Did that vehicle appear to be off the road at the time it was struck?

A. No.

Q. Would you be able to estimate for us how far the pick-up truck got into your lane of travel?

A. It would be a guess, but it got far enough to hit the other car in the front quarter.

Q. What was the highway department vehicle doing at that time?

A. To the best of my recollection, he was sitting still behind the grader.

Q. Did you notice at that time where there was any person located or anything of that nature, of the highway department?

A. Any what?

Q. Did you see anybody outside of any of the vehicles?

A. No.

Q. Where did the pickup truck stop, or end up?

A. He ended up around in the roadway, struck the car and behind the truck. He stopped short of the truck.

Q. He was stopped short of the truck?

A. Yes.

Q. Assuming this is north going towards Marshall (indicating), he would have been behind the truck, then; is that right?

A. Yes, then he swung into the other lane.

Q. Can you estimate for us or are you able to tell us where the actual collision took place with regard to the location of the truck?

A. No, not with any assurance.

Q. Mr. Risdon, when was the first time I ever talked to you?

A. Today.

MR. PALMER: I think that's all

I have, Your Honor.

THE COURT: Mr. Dyer?

EXAMINATION
BY MR. DYER:

Q. Mr. Risdon, when had you passed the state highway truck and grader?

A. I was just ahead of the truck, so it was a very short distance, just past him, just a few seconds.

Q. How fast were you traveling?

A. About 40, 45.

Q. How much distance was there between your vehicle and the car that was struck going southbound?

A. Very small, I could see it in the mirror.

Q. To some people, small would be 20 feet; other people would be...

A. I'm not going to make a wild guess.

Q. What is your recollection at that time?

A. Somewhere between 100 yards and 50.

Q. Between 100 yards and 50 yards?

A. Somewhere in that distance.

Q. Was it somewhere between 150 feet and 300 feet?

A. Somewhere in there.

Q. Were you leaving the other car that was hit? In other words, were you pulling away from it?

A. Only momentarily. As soon as I saw he'd been hit, I

stopped and pulled off the side of the road and used my radio and called the ambulance.

Q. How far did you stop from where the two vehicles collided?

A. Oh, maybe a couple hundred yards.

Q. When was the first time you saw the northbound pickup truck?

A. As I passed him.

Q. What was he doing when you first saw him?

A. He was coming towards me, and then as he passed me, he started to try to stop and started losing control of the truck.

Q. He was...

A. He was attempting to stop.

Q. When you first saw him, you were just two cars passing?

A. He was just traffic coming down the road to me, yes.

Q. He did not appear to be trying to stop before he got abreast of you?

A. No.

Q. When you passed these state highway trucks, did it have a dome light up there revolving?

A. A small dome light on the cab, yes.

Q. Was it on, rotating?

A. (Witness responded in the affirmative.)

Q. Are you indicating yes?

A. Yes.

Q. The court reporter has to take it verbally.

Did it have blinking lights on it, orange and red blinking lights, too?

A. The only thing I noted was the yellow flasher on the cab as I passed him, which you couldn't see afterwards anyway; you couldn't see it from behind.

Q. When you got abreast of the truck, what directed your attention to it?

A. The pickup, you mean?

Q. Yes.

A. I could see he was starting to make a panic stop.

Q. Wasn't there about 275 to 300 feet between him and the truck?

A. I couldn't be sure.

Q. Does that sound about right?

A. It would be a guess, yes.

Q. Did you ever see him go off the road to the right at all, as opposed to just keep going straight and then out into the other side?

A. No, he seemed to fishtail a little and off to the side.

Q. Did he ever appear to get off the traveled surface?

A. Possibly one wheel or so.

Q. What direction was his vehicle going when you saw the collision? In other words, how was it planted or canted?

A. He just came up behind the dump truck and then canted right around to it when he got stopped, but he was in the other lane.

Q. But he didn't skid at a 90-degree angle or anything like that?

A. No.

Q. Was the position of the pickup truck the same as it would be if someone had gone out around to pass the dump truck?

A. It would be extreme.

Q. Was it basically the same position? In other words, he's not...

MR. PALMER: Your Honor, he did not say, basically the same position. He said it would be extreme.

Q. I'm sorry, I didn't catch that. It would be extreme?

A. Say again.

Q. What was his position? Was he headed in the same

direction at the time he collided with the car in the southbound lane as he would have been if he were just simply going out to pass the dump truck?

A. No, he was more of an angle.

Q. What part of the pickup truck did you...did you actually see the collision?

A. Yes, in the mirror.

Q. What part of the pickup truck struck the...

A. I would guess it was the front of it.

Q. Was it sort of a head-on type collision?

A. No, it was more on the side quarter of the front quarter.

Q. Did the oncoming car hit the pickup truck with its front?

A. To the best of my knowledge, it wasn't a dead-on, front-end collision, no.

Q. Did any part of the front end, the bumper or grille area, of the car in the southbound lane hit the pickup?

A. I couldn't tell by looking in the mirror.

Q. Did you, after you stopped, get out and go back to the scene?

A. Yes, after I had made a radio call.

Q. Did you walk along back down the road?

A. Yes.

Q. Did you see any evidence of skid marks or anything like that on the highway, Mr. Risdon?

A. No; I wasn't particularly looking for them.

Q. You did walk that whole distance there from the diagram on the board where there's about...from the curve down to where the car stopped?

A. Yes.

Q. Did the police officer take a statement from you?

A. The state trooper did, yes.

Q. Do you know how many seconds elapsed between the time you first saw the pickup and the time that it collided with the oncoming car?

A. No.

Q. There's no question in your mind that the pickup was at least partially into the oncoming lane when it struck the car?

A. No, no question.

MR. DYER: I have no further questions.

THE COURT: Mr. Hall?

MR. HALL: No questions.

THE COURT: Mr. Palmer?

EXAMINATION
BY MR. PALMER:

Q. Sir, you mentioned this dome light; you indicated you couldn't see it from behind.

A. No.

Q. Why was that?

A. There was a gravel shield over the cab, you didn't notice it. It was a very small light. It wasn't that noticeable.

WOODROW WILSON PULLEN, having been duly sworn by the Clerk,
was examined and testified as follows:

EXAMINATION

BY MR. PULLEN:

Q. Mr. Pullen, would you tell His Honor and the members
of the jury your full name, please?

A. Woodrow Wilson Pullen.

Q. Where do you live, Mr. Pullen?

A. Marshall, Virginia.

Q. How long have you lived in this area?

A. All my life.

Q. How much schooling have you had?

A. Three years.

Q. Are you married?

A. Yes.

Q. What is your wife's name?

A. Mabel Lee Pullen.

Q. Do you have any children?

A. I've got three kids.

Q. How long have you been working for the state highway department?

A. Five years.

Q. Back on May 24th, 1978, what work were you doing at that time? What was your job description?

A. Read that again.

Q. What was your job with the state highway back in May of '78?

A. Drive a truck, graders and all that stuff.

Q. Who were you working with that day?

A. Ronnie Putnam.

Q. What was his job?

A. He's running the grader.

Q. Would you run a grader sometimes as well as drive the dump truck?

A. Yes, sir.

Q. Could you just briefly tell us what you were doing, what pulling the shoulders means?

A. It means that sometimes the shoulder gets low on the side of the road, and we pull them loose rocks against

the shoulder, and we take a truck and knock it off.

Q. What kind of truck were you driving that day?

A. 1976 Dodge.

Q. What time did you start pulling shoulders on Route 17?

A. It was after lunch.

Q. Do you know what time of day that was?

A. It was 12:30.

Q. Where did you start that run on Route 17 that day?

A. The town limits.

Q. The Town of Warrenton?

A. Yes.

Q. Where was the sign placed, the road work sign?

A. We put one at the town limits and one at Old Tavern.

Q. Who is your superintendent or supervisor?

A. John Lucas.

Q. How long has he been the supervisor?

A. Since I worked for the highway department.

Q. Is he sort of like your foreman or your boss?

A. Yes, he's over top of us.

Q. Who would tell you where to place the signs?

A. The superintendent or the foreman.

Q. Had you ever read any regulations, or...we had Mr.

Coates testify today about some regulations. Have

you ever read those?

A. No, I haven't.

Q. Do you read?

A. Not much.

Q. Had you pulled shoulders before the day that the accident occurred?

A. Yes, I had.

Q. How would you handle the signs on those other occasions?

A. At the same place we put before.

Q. When you're pulling the shoulder, how much out onto the traveled portion of the road does the dirt come?

A. It's got a white line along the side of it. We pull to the edge of it.

Q. I'm sorry, you pull...

A. It's like a white line; we pull to the edge of it. We take the plow and knock it off.

Q. This white line, is this the line that we see on the edge of the road to let people know where the shoulder is?

A. Yes.

Q. How much over onto the traveled portion did the dirt come in inches or feet?

A. I'd say about an inch; no more than an inch, inch and a half.

Q. Did you ever see Mr. McCoy's pickup truck before the collision happened?

A. No, I didn't.

Q. What were you doing at the time, in your truck, when the accident occurred?

A. I was getting ready to get the flag.

Q. Why were you going to get the flag?

A. Hung the flag out to flag traffic around me.

Q. Where was the grader working when you were going to go get the flag and get out and flag traffic?

A. Going around that curve.

Q. How long had you been stopped before you started to get out with the flag?

A. As soon as I stopped, I was getting ready to get the flag and get out.

Q. What happened after that?

A. I heard a bang.

Q. Could you describe for the members of the jury what kind of lights were on that truck that day?

A. Yellow and red.

Q. How many different lights?

A. Four yellow and two red.

Q. Where are the lights located?

A. On the back of the truck.

Q. How about on top of the truck? Do you have a...

A. A following light, that's all.

Q. What do you call it?

A. A following light.

Q. A following light?

A. Yes.

Q. You've heard people talk about that light today. What covers up that following light to prevent the gravel or dirt from getting on it?

A. It's a shield.

Q. Can you see through that gravel shield?

A. Yes, it's got a small little hole, it's got a screen on it. You can see the light.

Q. Is the truck equipped with a four-way flasher?

A. Yes.

Q. What happens when you push that?

A. All four-way flashers work with a battery.

Q. At the time you stopped and before you got out with the flag to handle traffic, were the flashers on?

A. Yes.

- Q. How about that rotating beacon up on top, was that on?
- A. Yes, sir.
- Q. After the accident, did you go back over the road where the pickup truck had been coming from?
- A. No, I haven't.
- Q. I mean that day, did you go out there and look to see if there were any tires marks or ditch marks?
- A. No, I didn't.
- Q. Did you ever go back later that day and walk down the road to look at the ditch?
- A. Yes, I had.
- Q. Did you see any marks in that ditch that would indicate the pickup had gone...

MR. PALMER: Your Honor, I'm going to object. That's a leading question.

MR. DYER: Simply because it can be answered yes or no, Your Honor, I don't think it's leading. I asked if he had walked back to the ditch, and I asked him if he saw any marks.

THE COURT: Why don't you ask him, what did you see?

- Q. What did you see, Mr. Pullen, when you walked back to that ditch in the direction that Mr. McCoy had come?

Did you see anything unusual?

A. No, I didn't.

Q. Did your truck have any flags on it?

A. Yes.

Q. Could you tell the members of the jury what kind of flags you had on the truck, Mr. Pullen?

A. Red flags.

Q. You heard Trooper Frank, Sergeant Frank, testify that he had a line of sight of about 381 feet. Is that about correct?

A. Yes.

Q. Did you hear any sounds before the pickup truck hit the automobile, like the squealing of brakes or anything like that?

A. No, I didn't.

Q. Did you hear any horn sound by the pickup truck?

A. No, I didn't.

Q. Was the way that you had the signs put out that day the way that the supervisor wanted you to?

MR. PALMER: I'm going to object to that as being a leading question, Your Honor.

MR. HALL: I join in that, Your Honor.

THE COURT: Objection sustained.

Q. Mr. Pullen, when you put the sign out that day, did you follow the highway department policy?

A. Yes.

MR. DYER: I have no further questions.

THE COURT: Mr. Palmer?

EXAMINATION
BY MR. PALMER:

Q. Mr. Pullen, I might have misunderstood you, but was it your testimony that when you're pulling a shoulder, that the dirt only gets up on the white line and it comes over about an inch and a half?

A. Yes; see, it falls over, depending how much you got on your motor grader blade. It's depending how much you're pulling.

Q. The blade has a truck in front of it, right?

A. Yes.

Q. That blade is there, and it's down and it's going to push this stuff back on the shoulder; isn't that right?

A. Yes.

Q. Some of that material rides up on the blade, doesn't

it?

A. I can't read you on that.

Q. You don't read me on that?

A. No, come back again on it.

Q. I'll tell you what. Let's go to page 47 of your deposition, starting at line 10. You were asked a question. 'All right, I guess my question was when I observed, and I'm not saying that I'm a witness in this case, but what I have observed following your kind of an operation, but the dirt isn't just in the first six inches of the paved portion. There's a little film that is left or whatever, but it is more like a foot or a foot and a half.' You answered, 'Yes.' Question, 'As the earth moves up the blade?' Answer, 'Yeah, uh-huh. Is that what was going on in this occasion?' Answer, 'Yeah, uh-huh.' Do you remember stating that?

A. Yes.

Q. That's what happens, isn't it? That dirt sort of piles up in front of the blade and moves along the blade a little bit?

A. Yes.

Q. As the blade goes over the roadway, the road is not

perfectly flat, is it?

A. No.

Q. There are areas where the blade doesn't touch all the way down upon the roadway?

A. No.

Q. Some of that dirt is left behind, isn't it?

A. Yes.

Q. That's what occurred on this day. As you were going along the roadway, you were leaving some dirt as you went along, a foot and a half or so out from the edge of the road; isn't that right?

A. Yes.

Q. It happens all the time you do that, doesn't it?

A. Yes.

Q. So far as putting out the...you said you were stopping at the time to get a flag to go on out?

A. Yes.

Q. That was because you knew you were sitting in a dangerous curve there and knew the people coming around that curve really couldn't see you very well, wasn't it?

A. Yes.

Q. You stopped right in the middle of that curve, and

you were going to get the flag, and that's when this accident happened?

A. Yes.

Q. You were aware of the danger?

A. Not right off, I didn't.

Q. You knew it was a dangerous curve?

A. We stopped there before.

Q. You'd stopped there before?

A. Yes.

Q. You had just been lucky before, though, hadn't you?

MR. DYER: Objection, Your Honor.

Now he's quarreling with the witness.

THE COURT: Objection sustained.

MR. PALMER: Excuse me. I'll

withdraw it, Your Honor.

Q. It was your decision where to stop and where to get out and put a flag out, wasn't it?

A. Yes.

Q. You're the one who made that decision?

A. Yes.

Q. You didn't have to ask your supervisor, can I stop this truck and get out and put a flag out or be a flagman, did you?

A. We don't got no flagman, just the truck driver himself.

Q. Was the grader still moving at the time this accident happened?

A. Yes.

Q. How close were you to the grader?

A. I couldn't guess on that, I don't know.

Q. Was he real close by at the time the accident happened?

A. No, he'd gone around the curve.

Q. Is there any reason why you couldn't carry more than one sign in your truck?

A. That's all they'll let us have.

Q. That's all they'd let you have?

A. No, I say, that's all they'd let you have with the truck.

Q. They only let you have two signs?

A. Yes, that's right.

Q. So you knew you only had two signs?

A. That's right.

Q. You didn't think to go back and get the other one and move it up closer to where you were working?

A. We always put them up there. That's always done.

Q. You started pulling shoulders after lunch?

A. Yes.

Q. About 12:30?

A. Yes.

Q. How fast do you go when you're doing this job?

A. About five miles.

Q. Five miles an hour?

A. Yes.

Q. You go that fast?

A. Depending on how much you pull, too. You could be spotting, and you could be pulling solid. See, you can do that, too.

Q. When you're talking about pulling, you're pulling actually out of the ditch, aren't you?

A. No.

Q. That's just right off the shoulder?

A. Just shoulder and road.

Q. Is that what actually causes the shoulder to slope down all the time because you're pulling it up?

A. Yes.

Q. This pickup truck that was involved, did you say it was white?

A. I didn't see no pickup truck.

Q. Wasn't there a pickup truck involved in the accident?

A. Yes.

Q. Was it white?

A. I didn't see what color it was.

Q. Do you remember saying in your deposition it was white?

A. I could have, I don't know.

Q. Do you remember what color it was?

A. Yes.

Q. What color was it?

A. White.

Q. The first time you ever saw that vehicle was when the collision occurred?

A. Yes.

Q. You heard a bang?

A. Yes.

Q. You looked up and saw the vehicle?

A. Yes.

Q. Did you look in the rearview mirror as you were looking for this flag to see if there was anything coming?

A. No, I didn't.

Q. Would you dispute the sergeant's testimony about the line of sight distance of this curve?

A. No.

Q. On the right as you're coming towards Marshall, there are trees and bushes and whatnot that obstruct your vision of the curve, aren't there?

A. You can see around them, though you can't see that close.

Q. This revolving light that you had on the top of the cab, there's a cover, actually, that goes from the top of the dump over that cab, isn't there?

A. Not all the way over it, it ain't.

Q. No, but partly, though, isn't it?

A. Yes.

Q. Then there's a grille; there's a piece cut out in the grille where that dome light is?

A. Yes.

Q. It's tough to see that dome light from the back, though, isn't it?

A. Oh, yes.

MR. PALMER: I think that's all

I have, Your Honor. Thank you.

THE COURT: Mr. Hall.

EXAMINATION
BY MR. HALL:

Q. Mr. Pullen, this road that Sergeant Frank depicted

arches down this way. As you keep on going north-bound, it cuts back, doesn't it?

A. Yes, sir.

Q. In fact, at the time of the collision...I think Mr. Palmer asked you this question...at the time of the collision, the grader had already gone outside around the corner; is that right?

A. Yes.

Q. Around the S?

A. Yes.

Q. Had it been your policy to drive your truck behind the grader until you caught up to the grader?

A. Yes, sir.

Q. In fact, you had just arrived up behind the grader and stopped and decided to get out and flag traffic with your flag when the collision occurred.

A. Yes.

Q. But between the time you stopped and the time the collision occurred, this grader was already out of sight around the corner?

A. Yes.

Q. You were the one who made the decision to stop the truck where you did?

A. Yes, sir.

Q. You were going to take this flag that was in the truck and you were going to do what with this flag?

A. Flag traffic around.

Q. Around who?

A. Around the cars that were coming both ways. You hold one up and let the others go through until it's clear.

Q. Now, the grader is out of sight; you're not flagging them around the grader.

A. I was going to get back in the truck and move the truck on around.

Q. You stopped it, you got out with the flag and you were going to flag people around...

A. The truck until it was clear, that lane coming down was clear.

Q. You were going to flag them around your truck.

A. Yes.

Q. But then they were going to catch up with the grader, which was already out of sight.

A. Yes, that's true.

Q. Who was going to flag them around the grader?

A. I don't know.

Q. Isn't it a fact, sir, that you were going to get out of that truck and take this flag and go back up here to warn?

A. Yes.

Q. You were planning to walk up to where people coming around this bend could see you with the flag?

A. Yes.

Q. But you hadn't had occasion to do that because the collision occurred just (snap) like that.

A. Yes.

Q. So you were aware at the time of the collision that there was a risk that people might come around there and might not see you in time?

A. Yes.

Q. You didn't have any cones on board the truck?

A. No, sir.

Q. Is it they wouldn't give you any cones?

A. We never have used them on a job like this.

Q. If you'd asked for them, they would have given them to you, wouldn't they?

A. Probably would.

Q. You also could have waited, could you not, until the grader had moved on up around the corner instead of

coming down here and stopping? You could have kept the truck up here (indicating) until the grader had time to move on around the corner?

A. Yes.

Q. So then, the next time you stopped behind the grader, there'd be plenty of sight distance up to your truck.

A. Yes.

Q. But you decided to stop it here, on the curve?

A. Yes.

MR. HALL: That's all I have.

THE COURT: Redirect?

MR. DYER: Just one question.

EXAMINATION
BY MR. DYER:

Q. Mr. Pullen, when you stopped, how close to the grader were you, do you recall, when you first brought your vehicle to a stop?

A. I was a couple feet behind him.

MR. DYER: No further questions.

THE COURT: May this witness stand down?

MR. DYER: Yes, sir.

THE COURT: Mr. Pullen, you may

MR. DYER: What are you calling this one?

MR. HALL: 10.

THE COURT: This is 9.

MR. HALL: 9 was refused, Your Honor. This is the 9 that was refused; that's for Your Honor now. This new one would be 10.

THE COURT: This is 10. Do you gentlemen have any preferences as to the manner in which they are put together?

MR. DYER: No, Your Honor. Could I be heard on 10, though? This is something he just came up with.

THE COURT: Certainly; I apologize.

MR. DYER: I don't think this states the law. I think it's going to just allow the jury to...it's like saying an accident shouldn't have happened. There's a duty as a reasonable and prudent person in conducting himself on a public highway. What is that, conducting himself? I really don't think that's an accurate statement of the law nor a statement of the burden in this particular case.

I think you have a duty that arises from the law somewhere, and it just isn't an ephemeral standard that you're just supposed to conduct yourself as a reasonable and prudent person on the highway. It shows a standard of duty of care owed to the plaintiff in this case.

MR. PALMER: Your Honor, if I might, Mr. Dyer has been arguing all day here that, unless you have a code section for which there's a violation, you can't have any negligence. There's nothing in the code that says that a person should not fall asleep while he's driving an automobile. There's not a thing in the Code of Virginia that says, it shall be whatever, if you fall asleep while driving an automobile. There are cases in the Supreme Court that hold that a person is negligent if he falls asleep while he's driving an automobile. That comes because of the standard of reasonable and ordinary care. The reasoning behind that specific case is the fact that a person knows when he's tired. It's not something that befalls him suddenly. It's something that comes on over a period of time.

The Court has held in exercising ordinary and

reasonable care that, under those circumstances, it's a jury issue on whether the person was negligent or not. I think it's the same thing here.

MR. DYER: My response is, we all know what falling asleep is, but what is conducting yourself on a public highway?

MR. HALL: I've heard it both ways, but that one is specific. That means by the cones and signs and flags and warnings, because that might bring the guidelines into it, and they might misconstrue the portent of those, and you don't want it too general. Maybe I'm missing something, but when I went through tort class, automobile law was always the duties of users of the public highways were correlative duties between all users to act as reasonable and prudent people when on the public highways. Within those are those categories, rules of the road, that we have by statute. Here maybe that should say he had the duty to warn or alert that he was going to park it down there, but this certainly covers it.

THE COURT: The legislature, in its wisdom, has lifted out of the common law certain duties which it now prescribes by statute, I think

generally called rules of the road. They have added to the common law list, and they have given us additional duties that perhaps were not there. But it seems to me that the overall duty of care to other users of the road is there, and always has been there, and is not in anyway denigrated by the statutory enactments.

Whether this statement is overly broad for this case is a question the Court has to resolve. I believe this statement is proper for this case, and I'm going to allow it. I refuse to allow any specific litany of violations not appropriate. I think the general common law rule, as stated by Professor Prosser or whoever, is fine, and I will allow it.

MR. DYER: May I point out one additional thing? I don't think you should single out Pullen for that. The same duty applies to McCoy.

MR. PALMER: That's already in there, Your Honor. I've already got three instructions on my duty.

MR. DYER: No, but the same standard.

MR. HALL: The duty to see and

look out and control.

MR. PALMER: I've already got that.

MR. DYER: I don't think it's proper to say that Pullen had a duty to act as a reasonable and prudent person in conducting himself on a public highway, and to exercise due care for other users of the roadway, and not apply it to McCoy.

MR. PALMER: I've already got finding instructions in here against me.

MR. DYER: Not finding instructions. He set out that this is a standard of law in Virginia, and you're only applying it to one defendant.

MR. PALMER: In this case, he's using specific statutory language, to me.

THE COURT: I would think, Mr. Dyer, that I'm pinning Mr. Palmer's client to the closer situation. Whether or not the broader rule ought to prevail as to his client...

I think we've covered Mr. McCoy. I'm going to grant this and note your objection. I hope it's sufficient and balanced.

EXCEPTION NOTED

[Transcript Pg. 254]

MR. HALL: Thank you, Your Honor.

Ladies and gentlemen, as I indicated to you at the outset, this case is divided into two parts. The first is determination of liability, which is complicated only by who is liable, not is there anyone liable, because if you'll refer to the admission in which

Mr. Dyer...taking it from the evidence, clearly Mr. Nickens was free from fault in bringing about this accident, and your undertaking is whether to assess all of the damages against one defendant or the other, or against them both jointly. His Honor, in his finding instruction, sets out the manner in which you can do that.

As for the liability of the parties, I leave it in your judgment and your wisdom and suggest to you two areas of liability of each party, and I'll talk for a second about proximate cause.

It's obvious from the evidence that under the circumstances then and there existing on Route 17, a few tenths of a mile short of Route 245, Mr. McCoy exceeded a reasonable speed under the circumstances. In an instruction of the Court, Instruction number 4, you'll see that the duties on Mr. McCoy were threefold: to keep a proper lookout for things on the highway that would affect his driving; to maintain a reasonable speed without regard to the speed limit; and to keep his vehicle under proper control.

Measuring that mandate of law against his conduct, you'll see as follows; that is, with regard to lookout,

he saw and observed the sign, Road Work Ahead, but made a judgment that it did not apply to him because of the lapse of mileage from the sign. He had occasion to have that knowledge of what that sign meant refreshed by the fact that earth and gravel materials were brought onto the paved portion of the road for all of the mileage from the point where the work commenced at the town limits up until the point of the collision.

He failed, in his lookout, to observe and to take into his system of computing what that meant to him with respect to that sign, although he had driven that road 40 times, was familiar with it, was familiar with that kind of work that he saw the road crews doing.

His failure to keep a proper lookout in terms of when he made this turn at 381 feet and first observed the state vehicles in front of him to do what that lookout required, that is, to exercise ordinary care, to do what you ladies and gentlemen of the jury would do, to apply the brakes upon seeing an object sitting in the road, particularly when you couple that with the sign that said they would be there, and the dirt

and materials that suggested that they were still out and active.

With respect to the speed and the circumstances, the pavement was wet. Mr. McCoy didn't really recall that in his deposition as well as he recalls today. The trooper said so; the independent witness who saw it in the rearview mirror said so; Mr. Nickens said so. Mr. Pullen, I believe, said the roadway was wet. At that time on a slight downgrade, turning the corner, coupled...again, these are not isolated...but coupled with all the knowledge that he should have had about the possibility at a minimum of this equipment being on the highway, his speed was such that when he observed and elected to brake, he was unable to keep his vehicle under proper control, and it slid into the Nickens vehicle, as you've heard.

Excessive speed under the circumstances measured in part by this, 200-plus feet, or two-thirds of a football field of braking activity, which yielded only a reduction in speed to 30 miles per hour at impact. Those are Mr. McCoy's own assessments of how fast he was going at impact after braking for 200-and-some feet.

Losing control, as Instruction 4 indicates, was a product of the excessive speed, the failure to keep a proper lookout...they all work together, they inter-mesh, they all result in an irretrievable conclusion that Mr. McCoy was negligent. He violated the duties owed other people on the highway by his conduct. It's not exaggerated conduct; it's conduct both you and I are capable of when we're just a little inattentive and a little careless, but that's the standard that the law imposes.

Mr. Pullen. Mr. Pullen, whose initial position was that the planting of the sign was what was required of him and that he could work as far as he chose up the road without any liability for further warning, a position that somehow has a refinement...during his testimony, during my cross-examination...a refinement that said, yes, I recognized when I pulled my truck up and stopped it in position number 3 that there was some hazard there, and that's why I was reaching for a flag. Well, was I was going to flag traffic around the grader when the grader was out of sight? What I was going to do was go back up the road, southbound on 17 with my flag and flag traffic around me.

Those may not be his exact words. Anything that I say is my recollection of the evidence. When you get to the jury room it's your recollection of the evidence. If I'm mistaken, sometime it comes from the heat of advocacy. But my recollection was, at least the inference was what he was going to do with the flag was to direct traffic around him because the grader was gone. At the time of impact, the grader was out of sight around the other corner. Going back with the flag because there was a hazard.

A general common law duty; it was Instruction 10, a common law duty on Mr. Pullen that when he's on the public highways...it's a duty we all owe, a duty correlative to the duties owed us by others on the highway, to be reasonable and prudent people under the circumstances. In this case, I suggest to you that that points again irretrievably that his duty to post some kind of warning that is more proximate to this scene than seven or eight miles.

I feel some sympathy for Mr. McCoy's position,
but I suggest to you that Instruction Number 1 says,
where the negligence of two parties concurs and where
that current negligence causes, proximately causes

the accident, then each is liable for the whole, the whole of the damage that you award in the jury room.

What happens after that to that damage award is really none of your concern. It's for the courts and ourselves to determine, if any, how that award will be apportioned. But for you, if you find them both liable for their concurrent negligence, then you ought to enter an award for Mr. Nickens and leave the rest to the operation of the Court and to contract.

Proximate cause is a legal concept that boils down simply to this. But for the negligence of either one of these gentlemen, would the injury to Mr. Nickens have occurred? I say to you that proximate cause is fulfilled, is provided by the evidence when you ask this question. But for the concurrent neglect of these two parties, would Mr. Nickens have sustained his injury? By that I mean this.

Had Mr. McCoy been going a reasonable speed under the circumstances, or had braked when he first saw the truck, or to have been more cautious when he saw the sign and not have concluded that so many miles had passed that they must be out to lunch or off the roadway or done or whatever, had been prudent in seeing

what this dirt still on the roadside meant, would this accident have happened if he had obeyed those duties? Mr. McCoy would say, oh yes, well, it wouldn't have happened unless Mr. Pullen was there.

So we now turn to the proximate causation, the contribution to this accident of Pullen. Obviously, if Mr. Pullen wasn't there, Mr. McCoy wouldn't have had to apply the brakes and he would have gone right on through. But foreseeability says that Mr. Pullen is there, and Mr. McCoy owed greater duties with the knowledge he should have had of Mr. Pullen's presence.

Proximate cause; the but-for test of Mr. Pullen. Would this accident have happened as far as Mr. Pullen was concerned if he had posted more warning signs or done as he said he could have done; move the truck; not stop it in this hazardous location; wait until the grader had passed and gone around the corner; keep this truck up here at the top where there is no line of sight distance. Then when the grader was gone, by time or under judgment that he made where it was, to go on and stop up behind the grader at some location where there is clear line of sight.

But for the failure to take more precautions in

warning or in locating his vehicle, would this accident have occurred? The answer again is no; it was the concurrent negligence of these two parties which proximately caused the damage to Mr. Nickens. I won't belabor the injuries with you; you've heard them.

The instruction of the Court that governs your award is Instruction Number 2. I only call your attention to the components of your award. I start with the latter subparts, 6 and 7: any doctors, hospital, nursing and medical expenses incurred in the past. There's no debate about that, really. There's a bill from Dr. Manwaring for \$148; a bill from Fauquier Hospital, \$3,900.06; a bill from Dr. Snyder and his professional corporation of \$245. Total medical expenses are \$4,293.06.

There's an exhibit that you probably don't know about because it likewise came in by agreement, and there was no evidence or testimony taken one way or another on it. Plaintiff's #5, a wage loss statement from the bank, indicating that Mr. Nickens loss seven and a half weeks from work at a weekly rate of \$106. My mathematics is that that's \$795, but you can work the math out in the jury room, if you choose.

Those are what we call special damages. Those are liquidated or itemized damages that you can put your finger down on and say, there's the precise amount Mr. Nickens has coming for elements 6 and 7. The more difficult ones are the ones which are intangible in nature; that is, how do you make an award, for example, for pain and suffering? It's what you, the jury, in your collective judgment feels is fair, just and proper, based upon the evidence before you.

The evidence has been twofold: number one, the testimony of the witnesses, and number two, some of the documents that you have here. Let me suggest to you... for example, let's take Item number 2 of Instruction number 2. To make such an award for Mr. Nickens' injuries, that injury upon his health, according to its degree, then there were two kinds of injuries: the physical trauma, the broken ribs, the broken scapula, the broken acromioclavicular joint...I can't tell you how many years it took me to learn how to say that without mispronouncing it...and the injury to his lung.

Now, the injury to the lung, the trauma, the blow to the lung with the contusion, caused the injury to health. He developed pneumonia. He received a

bronchoscopy in the lung washing because of that injury to health.

Number one, bodily injury are the broken ribs, scapula, AC joint and the like. What, in your collective judgment, would it be worth to a reasonable and prudent person to avoid that kind of injury? You recall in the testimony that as a product of the lung contusion and the neurogenic shock, that is, the drop, significant drop, in blood pressure, Mr. Nickens' condition was considered life-threatening for a period of time; he was placed in the intensive care unit and was later, a week later, given an operation, the bronchoscopy under general anesthesia, to cure that condition.

He came out of IC; he recovered his health to a very significant degree. We're not suggesting to you that a large portion of any award you make to him should be cognizant of any significant degree of any permanent disability. But it is my job to try to take you back, to the degree that I can, to show you what he sustained at that time, and for you to make your award based on what to us now is ancient history.

I say to you, the effect upon his health was one that he was in a life-threatening condition, which,

thank God, he recovered from, but your award should take into account the risk and hazard that he was exposed to.

Part two, the broken ribs, the comminuted fracture; all of those you should give him an award for under the instructions of the Court. They are not major, significant injuries in a permanent sense, but they're painful. They were painful, particularly the fractured scapula and the ribs, painful when he attempted to breathe, and he needed to breathe to address this condition of the lungs.

All of these are cumulative. You may award... you're not required to, but you may award a separate monetary sum for each of these elements of damage that you find the evidence justifies, and then total those up in entering your finding award.

An element for pain and suffering; difficult to assess; difficult to acquaint dollars to pain and suffering. But yet what would it be worth to you as representatives of your community for Mr. Nickens to have avoided the pain that he sustained?

If you had to say, I will give you so much money not to put him through this, not to have the Demerol

and the morphine sulfate, which the doctor describes as the highest level of narcotic for the severest degree of pain. What is it worth for someone to avoid that kind of hazard?

Someone has said, under the Constitution of our country, again, it's permissible to sentence people to death, but it's never been permissible to sentence them to pain, and pain is an important or critical concept. In making your award, I would ask you to include that element which represents the pain that he sustained.

Disfigurement. To the degree...and we have the pictures here. Remember, these pictures are of August of 1978. They are of the tiger claw that Dr. Snyder has described. There are two pictures, one a front view of the left shoulder, and one a back view of the left shoulder showing the scars. Mr. Nickens doesn't have occasion to show those publicly much, and so his form of humiliation or embarrassment must be that which is private to him when he sees himself in the mirror, but it is an element for you to consider.

Again, in translating it to dollars, what would it be worth to you, the jury, collectively, to have

avoided if you could have said, Mr. Nickens, we'd like to spare you this. We are willing to pay into a public trust from the...

MR. PALMER: Your Honor, I've got to object to this line of argument. The method and the determination of damages...it's to recompense this man for the injuries he sustained. It's not what you would pay him not to go through it, and I object to this kind of argument.

THE COURT: Do you wish to be heard?

MR. HALL: As to...it's an equation, Your Honor, that's been contested and allowed every time I've argued it. It's what would it be worth to the jury to have avoided what he's gone through. That's the recompense because you pay him what he has been through.

MR. PALMER: Your Honor, I don't know where he argues his cases, but I certainly have never heard that argument in all the cases I've tried.

THE COURT: It's the Court's understanding that we're talking about compensation for his losses, if you'll confine it to that.

MR. HALL: The final constraint on an award of damages is it shall not exceed the amount sued for in the motion for judgment, and it is lawyers, not Mr. Nickens, that picked the figure, and the figure sued for was \$50,000, and your verdict should not exceed that. I'm not suggesting that your verdict should equal that or have any relationship to it, but there's one instruction of the Court that says you shall not come back with an award in excess of the amount sued for, and that sum is the sum quoted and your verdict should not...and I cannot expect it to...whatever it exceeded. So enough said.

I'll have a brief opportunity to speak to you in rebuttal of the final arguments of the defendants. I'm not certain I'll employ that. You have the right, at this time, to have the exhibits with you. I would suggest that you reserve looking at them until you're in the jury room out of fairness to Mr. Dyer and Mr. Palmer, so that you'll have ample, full opportunity to hear them. In the event they don't address issues that I feel warrant further rebuttal, you won't hear from me again, and maybe you'd like that. But in the event they raise new material, I'd like just a couple

more minutes of your time. Thank you.

MR. DYER: Your Honor, may we approach the Bench?

THE COURT: Yes, sir.

BENCH CONFERENCE

MR. DYER: Your Honor, near the beginning of the plaintiff's counsel's argument, he suggested, to remind the jury of concurrent liability, some things...I wrote some of them down...that concern themselves with the apportionment of the damages. He suggested that he leave the apportioning of the damages to the Court and to contract.

What counsel is doing there is a veiled hint to the jury that maybe Your Honor or some contract... which I find to be reprehensible because it can only suggest the insurance contract; there's no other contract before this jury...would apportion the damages, gave the jury the impression of a concurrent negligence standard, which we don't have. There's no reason to say that you leave the proportion of the damages to the Court in the contract because there's no contract before the Court. I think what it is designed to do is give the impression that if they find the Defendant

Pullen negligent to 10 percent, that somehow, after the jury comes back with their finding, that Your Honor will handle the matter and rectify the situation.

I would ask for a mistrial based on it because ...or else ask Your Honor to somehow instruct the jury that if they're both found jointly liable, then both be jointly liable for it, which means...

MR. HALL: That's what the instruction says. They're not to go outside the instruction limits. My concern is about what now remains for...

THE COURT: First of all, on the mistrial, the Court will deny your motion for a mistrial and note your exception.

MR. PALMER: I join in that motion, Your Honor, and note my exception, also.

THE COURT: All right, sir.

EXCEPTION NOTED

THE COURT: With reference to whether or not this argument may have misled the jury in some way, the Court will advise the jury again that argument of counsel is not the evidence in the case and that they should not be essentially directed

by it.

THE COURT: Ladies and gentlemen of the jury, the Court would tell you again, as I have previously indicated, I think on two occasions, that the argument of counsel is not evidence in this case. You must decide the case on the evidence that is before you and not on the basis of argument of counsel. Counsel is simply attempting to illuminate for you the evidence that it feels from an adversary standpoint should be considered by you. But that is not evidence.

* * * * *

THE COURT: Anything further, Mr. Hall?

MR. HALL: Just this, Your Honor. Ladies and gentlemen, it's evident now, after the arguments of counsel, that Mr. Dyer and I are in concurrence that Mr. McCoy is liable, and Mr. Palmer and I are in concurrence that Mr. Pullen is liable. The sole function that I see that you have now is to take the verdict form and as to the four options and enter a verdict in favor of Mr. Nickens for such sum that is fair and reasonable within the limits of the amount

The Court instructs the jury that the Defendant Pullen had a duty to act as a reasonable and prudent man in conducting himself on a public highway and to exercise due care for other users of the roadway. If you believe from a preponderance of the evidence that the Defendant Pullen breached that duty, then you shall find the Defendant Pullen was negligent. If his negligence was a proximate contributing cause of plaintiff's injuries, then you shall award damages to the plaintiff in accordance with the other instructions of the Court.