

Record No. 5482

In the
Supreme Court of Appeals of Virginia
at Richmond

THOMAS D. LEECH,
AN INFANT, ETC.

v.

DUANE BEASLEY, ET AL

FROM THE CORPORATION COURT OF THE CITY OF LYNCHBURG

RULE 5:12—BRIEFS.

§5. NUMBER OF COPIES. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. SIZE AND TYPE. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5482

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 6th day of March, 1962.

THOMAS D. LEECH, AN INFANT, Plaintiff in Error,
ETC.,

against

DUANE BEASLEY, ET AL., Defendants in Error.

From the Corporation Court of the City of Lynchburg

Upon the petition of Thomas D. Leech, who sues by his father and next friend, Raymond M. Leech, a writ of error is awarded him to a judgment rendered by the Corporation Court of the City of Lynchburg on the 28th day of September, 1961, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Duane Beasley and another were defendants; no bond being required.

RECORD

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MOTION.

Plaintiff, by his attorneys, pursuant to Rule 3:8 of the Rules of Court, comes and moves the Corporation Court for the City of Lynchburg, Virginia to order that his trial be tried separately from the causes of action asserted in the counter-claims in this action for the reason that a trial of all of the cases together would prejudice the plaintiff.

Plaintiff assigns as grounds for this Motion the following:

1. That the causes of action asserted in the motion for judgment and counter-claims involve different issues.

2. That attorneys defending the plaintiff against the counter-claims asserted against him, might, in the best interest of the plaintiff, tend to simply have the evidence brought into balance and the plaintiff must prove his case by a preponderance of the evidence.

3. That the action asserted in the motion for judgment by the plaintiff and the action asserted in the counter-claims will involve different burdens of proof and different degrees thereof which will result in confusion of the jury.

page 30 } WHEREFORE, plaintiff, by his attorneys,
moves the Court to order that his action be tried
separately from the actions asserted in the counter-claim in
this case.

J. MURRELL DANIEL, p. q.

Attorney at Law

516 Peoples National Bank Building
Lynchburg, Virginia.

Filed May 3, 1961.

H. H. M., Clk.

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In the Corporation Court for the City of Lynchburg, Jun. 30, 1961.

This day came the parties by counsel and the plaintiff, Thomas D. Leech, an infant, etc., having heretofore filed his motion for a separate trial of his cause of action against the defendants, Duane Beasley and Corrinne M. Johnson, Administratrix, etc., who have heretofore filed counter-claims in this action against the plaintiff, and the Court having heard arguments of counsel and considering it proper so to do the Court doth order that all of the issues made on the action of the plaintiff against the defendants and on the counter-claims of the defendants against the plaintiff be tried before the same jury on the same day in this Court and the plaintiff, by his attorneys duly objected and accepted to the action of the Court for the reasons stated in his motion for separate trials of the aforesaid issues.

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At Lynchburg Corporation Court, Sept. 28, 1961.

This day came the parties by their attorneys, and the jury sworn on a former day of the present term for the trial of this case, appeared in court according to their adjournment, and at the conclusion of the evidence, the said plaintiff by his attorney, having moved the court to strike the evidence of the defendants, Duane Beasley, and Corinne M. Johnson, Administratrix, the court overruled said motion, and the said plaintiff by his attorney excepted, and said jury having heard the evidence and argument of counsel, and having received the instructions of the court, were sent to their room to consult and consider of their verdict, and after some time,

returned into court and presented their verdicts, written on a blank sheet of paper, in the words and figures following, to-wit, "We the jury, on the issue joined, on the claim of the plaintiff, Thomas D. Leech, against the defendant, Duane Beasley, we find for the defendant, Duane Beasley; and on the counter-claim of the defendant, Duane Beasley, against the plaintiff, Thomas D. Leech, we find for the defendant, Duane Beasley, and assess his damages against the plaintiff, Thomas D. Leech, at \$8,000.00. Henry Ross, Foreman." "We the jury, on the issue joined, on the counter-claim of the defendant, Corinne M. Johnson, Admx. against the plaintiff, Thomas D. Leech, we find for the defendant, Corinne M. Johnson, Admx., and assess her damages against the plaintiff, Thomas D. Leech, at \$15,000.00,—and direct that it be paid to Corinne M. Johnson, Admx.—to be paid in full to Corinne M. Johnson. Henry Ross, Foreman."

Thereupon the said plaintiff by his attorney moved the court to set aside said verdict of the jury in favor of Duane Beasley, and the verdict of the jury in favor of Corinne M. Johnson, Administratrix, against Thomas D. Leech for damages and enter judgment for the plaintiff, Thomas D. Leech, *non obstante veredicto*, or in the alternative to grant the plaintiff a new trial on the grounds that the verdicts are contrary to the law and the evidence and without evidence to support them; for the action of the court in refusing to grant separate trials of the three claims of personal injuries, as the plaintiff,

page 76 } Thomas D. Leech, could not obtain a fair trial because of the many issues and conflicting interests and the inability to defend counter-claims of the defendants on the question of speed and other circumstances bearing on the question of gross negligence and because other counsel for the plaintiff admitted gross negligence; because the plaintiff had to take inconsistent positions that the principal witness was telling the truth about speed but not as to the identity of the driver, and because of argument of other plaintiff's counsel that "someone is entitled to a verdict;" for the action of the court in refusing to strike the evidence of the defendants, Duane Beasley and Corinne M. Johnson, Administratrix, at the conclusion of the evidence; for the action of the court in granting instructions A and B for the defendant Beasley; for the action of the court in granting Instructions A-1 and B-1 for the defendant, Corinne M. Johnson, Administratrix; and for the action of the court in refusing the plaintiff's instructions C-4, C-5, C-6 and C-11, which motion the court overruled, and the said plaintiff, Thomas D. Leech, by his attorney, excepted.

It is therefore considered by the court that the said Duane Beasley, upon his counter-claim, recover against the said plaintiff, Thomas D. Leech, the sum of \$8,000.00, the amount of the damages by the jury in their verdict aforesaid ascertained and assessed, with legal interest thereon from this day until paid, and his costs by him about his counter-claim in this behalf expended.

It is further considered by the court that the said Corinne M. Johnson, Administratrix, upon her counter-claim, recover against the said plaintiff, Thomas D. Leech, the sum of \$15,000.00, the amount of the damages by the jury in their verdict aforesaid ascertained and assessed, with legal interest thereon from this day until paid, and her costs by her about her counter-claim in this behalf expended;—the said \$15,000.00, when collected by said Corinne M. Johnson, Administratrix, to be paid in full to Corinne M. Johnson, according to the verdict of the jury aforesaid.

It is further considered by the court that the said plaintiff, Thomas D. Leech, an infant, who sues by Raymond M. Leech, his father and next friend, take nothing by his motion for judgment against Duane Beasley and Corinne M. Johnson, Administratrix of Carroll McWane Johnson, deceased, but for his false clamor, be in mercy, &c, and that the said Duane Beasley and Corinne M. Johnson, Administratrix of Carroll McWane Johnson, deceased, go thereof without day, and recover against the said Thomas D. Leech, an infant, who sues by Raymond M. Leech, his father and next friend, their costs by them about their defense in this behalf expended.

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To Honorable H. H. Martin, Clerk of the Corporation Court for the City of Lynchburg, Virginia.

TAKE NOTICE, That pursuant to Rule 5:1, §4 of the Rules of the Supreme Court of Appeals of Virginia, the plaintiff, Thomas D. Leech, by counsel, files his notice of appeal from the final judgments rendered against him in favor of the defendants, Duane Beasley, and Corinne M. Johnson, Administratrix of the Estate of Carroll McWane Johnson, De-

ceased, by the Corporation Court for the City of Lynchburg, Virginia, on the 28th day of September, 1961, and within sixty days from the date of the final judgments, and assigns errors as follows:

(1) The action of the Court in refusing to grant the plaintiff a trial of his cause of action against the defendants, separate from the causes of action asserted by the defendants in their counterclaims against him;

(2) The action of the Court in refusing to strike the evidence of the defendants at the conclusion of all of page 78 } the evidence;

(3) The action of the Court in refusing to grant Instructions C-4, C-5, C-6 and C-11;

(4) The action of the Court in granting Instructions A and B for the defendant, Duane Beasley;

(5) The action of the Court in granting Instructions A-1 and B-1 for the defendant, Corinne M. Johnson, Administratrix of the Estate of Carroll McWane Johnson, Deceased; and

(6) The action of the Court in refusing to set aside the verdicts in favor of the defendants and to enter judgment for the plaintiff, Thomas D. Leech, *non obstante veredicto*, or, in the alternative, to grant the plaintiff a new trial on the ground that the verdicts were contrary to the law and the evidence and without evidence to support them.

WM. ROSENBERGER, JR.
Attorney for Plaintiff
407 Krise Building,
Lynchburg, Virginia.

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September 26, 1961,

Morning Session.

PRELIMINARIES.

Preliminary motions and other matters taken up in Chambers before the jury was impanelled.

The Court: Do I understand there is a motion you want to make in this matter concerning the guardian *ad litem*?
Mr. Whitehead: We want to move that a guardian *ad*

litem be appointed for the plaintiff in this case, Thomas Leech, who is a defendant on the counter-claim. We move that William Rosenbeger, Jr. be named guardian *ad litem*.

The Court: Hasn't a guardian *ad litem* been appointed for Leech?

Mr. Whitehead: No, sir. A guardian *ad litem* has been named for Beasley but not for Leech. I cannot find it in the papers. I thought it had been done.

The Court: On motion of the defendant, by counsel, William Rosenberger, Jr. is appointed guardian *ad litem* page 4 } to represent Thomas D. Leech. We will have to have an order. I will have an order prepared and tell the Clerk to put it in the record.

Before we get started in the case I would like to clear up several matters. I have had a chance to look over the instructions offered and there seems to be from reading the instructions that I have got some marked C-1 through C-9. Are they going to be offered by the defendant or by the plaintiff or whose instructions are they? Is there any conflict among counsel in the instructions that each side are going to offer? I mean are counsel unified on what each one of you intend to present as the law?

Mr. Daniel: You mean as between the counsel lined up on one side?

The Court: That is right.

Mr. Daniel: There will be some objections to some of the instructions, I believe, Judge.

The Court: I don't think you can offer instructions and object to them. You are going to have to get together.

There will have to be uniformity of instructions on page 5 } both sides.

Mr. Frost: If your Honor please, may I say something? You remember after our case yesterday Mr. Rosenberger and I were in here and we suggested instead of getting instructions which would cover the defense of the claim from two sides that we could possibly instead of Mr. Rosenberger offering a set and me offering a set get together and let it cover just the principles of law that would cover in the matter and then we would have one set of instructions.

Mr. Rosenberger: One set that would cover the defense part of the case.

Mr. Frost: That is right. I went around to Mr. Rosenberger's office yesterday and we worked the best part of the morning on them. Now, there might be some in here that might overlap, I don't know. I think probably some do overlap.

The Court: From the instructions that have been submitted by Mr. Whitehead and Mr. Daniel there is an overlapping and, of course, there is the defendant's view of the law of the case and the plaintiff's view and I don't
page 6 } think both should be offered to offer both views of the case. The plaintiff won't be able to offer two views of what constitutes gross negligence. Mr. Daniel will have one view and Mr. Whitehead will have his view. Then Mr. Rosenberger who is associated with Mr. Daniel will come in with another instruction covering gross negligence which has probably been sustained by the cases yet from the defendant's point of view and not from the plaintiff's. I wonder if he is going to object to Mr. Rosenberger offering such an instruction.

Mr. Rosenberger: I think that can be taken care of this way, your Honor: I think that the plaintiff's theory of gross negligence should be presented in proper instructions and pursuant to your suggestion Mr. Frost and I have combined the defensive view rather than follow the usual method of approaching from an individual defense standpoint as we would have a right to do in that I would be defending on the counter-claim.

The Court: I notice they have been drawn with-
page 7 } out names so they will apply to either side.

Mr. Rosenberger: They will apply to anybody claiming damages and contemplating that situation would come up rather than have those instructions numbered either for the plaintiff or the defendant I thought we should rather have them from the standpoint as the Court's instructions and just call them C-1 through C-9. Now, when the Court gives all of the instructions applicable to the law of the case then those instructions become the law of the case and not any particular person's theory and I think that from a defensive standpoint and certainly I, defending Leech, and Mr. Frost defending Beasley and Johnson, as your Honor knows, and as we have stated before, we would like to state for the record Mr. Frost and I actually represent the same insurance carrier. Now, we feel that we should make a defense on behalf of these people and these instructions are when given the Court's instructions and the jury should be bound by them.

The Court: Suppose as a matter of policy there is a conflict between what you think should be presented
page 8 } and what Mr. Daniel and Mr. Watkins think should be presented, who is going to prevail?

Mr. Rosenberger: I think if they wish me to stay in to defend under the policy of liability insurance that my client

has issued that they will have to cooperate with me in the way I think it is best to defend the claim and any time they say they don't wish me to defend and they don't care to cooperate further then I can get out.

The Court: Don't you owe them a duty of protecting their interests and their claim? They have some rights in this matter too.

Mr. Rosenberger: I think they do too and if they want to insist on their rights where I think it is in violation of our contract and our duty to defend this man on the counterclaim then they can go so far as they see fit and at their risk, not at mine.

Mr. Daniel: For the record I would like for this to go in. Mr. Rosenberger, Mr. Watkins and I discussed this yesterday. Mr. Rosenberger's interest is the insurance company and Mr. Frost's interest is the insurance company page 9 } and consequently Mr. Rosenberger told us that he feels that he will have to argue that there was no gross negligence, one of the lines of his argument, on anybody's part and probably nobody should recover.

Mr. Rosenberger: That could be in the event the evidence comes out like this: As far as I know now there is a very definite possibility that the most the evidence will show is that there was a loss of control of this vehicle and nothing to show what caused the loss of control. If that be so as a matter of law then we will make a motion at the end of the evidence. I will certainly make a motion.

Mr. Daniel: Mr. Frost, will you state that will be your position in defending the insurance company?

Mr. Frost: I feel this way: If Leech does not prove gross negligence in his case—now, he has the opening—I feel it is my duty to move to strike the evidence. If, in my opinion, he has not made out a case of gross negligence then I should move to strike the evidence.

page 10 } Mr. Daniel: I understand that but wouldn't it be your duty representing the insurance company that Mr. Whitehead's clients weren't entitled to recover because no gross negligence was shown?

Mr. Frost: I don't think it would go that far. As the Judge says, we owe a certain duty to our client. Mr. Whitehead and I haven't worked out actually how we are going to argue the case but I don't think we will have any trouble about it.

Mr. Rosenberger: I will argue that Leech wasn't guilty of gross negligence.

Mr. Daniel: I am talking about this: It seems to me both

of you are representing the same interest in effect and, as Mr. Rosenberger stated, it would be to your client's advantage and also your duty to try to see that no judgment was rendered.

Mr. Frost: I won't go that far.

Mr. Rosenberger: We can't do that. I can't do any more than say my man Leech was not guilty of gross negligence. I can't argue that Beasley was not guilty of gross negligence and I will not.

Mr. Daniel: Now, in view of what has been page 11 } said here which is not exactly the way I understood it yesterday I still think it is obvious as can be that there is going to be some conflict of interests among the counsel on the same side in this case and that the only way to eliminate it is to give the parties in this suit separate trials which the Court has the discretion to do and I once again move the Court for separate trials in this case so that there will be no conflict of interests. There has almost got to be conflict in this case when it is viewed in the light of how the parties are lined up and how counsel are lined up.

Mr. Frost: If your Honor please, I oppose that. I don't know about Mr. Whitehead but I think he opposes it too, and here is the reason: The granting of separate trials does not help us out a bit. For instance, according to Mr. Daniel, the reason for the separate trial is the conflicting issues. We are still going to have the conflicting issues.

The Court: But you won't have two lawyers arguing conflicting arguments to the same jury.

Mr. Watkins: That is right. These should be page 12 } tried as separate cases.

Mr. Frost: We would be estopped to raise the question in the next case.

The Court: Take for instance, Mr. Rosenberger would get up and argue that Leech was not guilty of gross negligence.

Mr. Frost: He means Beasley.

Mr. Rosenberger: I would be arguing Leech was not guilty of gross negligence and my side agrees with me on that so we are not in any conflict about that.

The Court: Then would you say Duane Beasley is not?

Mr. Rosenberger: I can't say that. I can't argue that because that is in conflict with the side I represent.

Mr. Frost: Separate trials won't help us.

Mr. Rosenberger: I am arguing my man Leech was not guilty of gross negligence, was not even driving the automobile.

Mr. Daniel: It is your duty to prove that nobody has proved gross negligence and then have an instruction on mechanical failure; that it might as well be due to mechanical failure as to gross negligence.

The Court: That applies to you as well as to everybody.

Mr. Rosenberger: At the end of the evidence I said if no proof of gross negligence has been shown I was going to make a motion to strike and that if it appears from the evidence that it is just as likely that this thing was caused by some other thing than gross negligence then they haven't carried the burden of proof as to gross negligence and would ask the Court to instruct on that and I have given you an instruction on that so as to find that nobody was liable for damages and that was in accordance with the Court's suggestion that rather than name, say Leech was not guilty, and then Frost come along and say give me a separate one and say Beasley is not guilty, we have combined it. I am still willing to go along and give it just on Leech, but, of course, that emphasizes the lack of gross negligence.

Mr. Frost: It is a question of proof.

page 14 } Mr. Rosenberger: It is a question of proof but

I have never told you I will stand up and argue the other side is not guilty of any negligence and I am not. I am going to say my man was not guilty of any gross negligence and wasn't even driving the automobile, which is perfectly consistent and you agree with me one hundred per cent.

Mr. Daniel: Except it is your duty also to argue, if you feel like it, no gross negligence has been shown in the case period.

Mr. Rosenberger: I am going to say there is absolutely no evidence of gross negligence. I am going to move to strike and take that up as a matter of law with the Court and then also ask the Court for that instruction.

The Court: Suppose there is enough evidence to go to the jury on gross negligence?

Mr. Rosenberger: Then I am limited to arguing that Leech was not guilty of gross negligence.

The Court: You wouldn't get up and argue that Beasley was not guilty of gross negligence?

Mr. Rosenberger: Of course, I can't.

page 15 } The Court: I misunderstood you just now. I understood you would argue neither party was guilty of gross negligence if it went to the jury on that.

Mr. Rosenberger: No, sir. I can't stand up and argue any more than Thomas Leech is not guilty of gross negligence and that Thomas Leech was not driving the automobile and

that Beasley is telling the thing wrong and that Burley is telling the thing wrong.

Mr. Watkins: Are you going to make a motion at the end of Leech's evidence?

Mr. Frost: Not Mr. Rosenberger but I am.

Mr. Rosenberger: At the conclusion of all of the evidence if I believe that there is insufficient evidence to go to the jury I am going to make a motion to strike the evidence of Beasley and Johnson.

Mr. Daniel: In view of what has been said so far in disposing of the motion I have made the best you can say is that it might not keep the plaintiff from having a separate trial by having counsel lined up as they are and I say to you that as another factor in support of my motion there is such a strong possibility that the trial may be charged page 16 } with prejudice as to our man because you have to have the conflicting interests if they represent one side. I know what Mr. Rosenberger told Mr. Watkins in our office.

Mr. Rosenberger: I represent Nationwide Insurance Company and I want to see that Nationwide Insurance Company does not have to pay out any money for Thomas D. Leech.

Mr. Daniel: Or for anybody else.

Mr. Frost: Oh no.

Mr. Daniel: He told us—

Mr. Frost: I don't know what he told you but he would be disloyal. He can't do that. I think you are all looking for some nigger in the woodpile. We are trying to tell you as fair as we can.

Mr. Daniel: I am saying in the nature of the case you can't be completely fair to everybody and do your duty.

Mr. Frost: Yes, you can. Leech is suing for \$50,000.00 against Beasley and Johnson. Now, he does not want any judgment against him, you know he doesn't. The page 17 } same thing applies to Beasley and Johnson. I am trying to keep Leech from getting a judgment against Beasley and Johnson. Paul, on the other hand, is trying to recover over against Leech and there is nothing undercover in this thing at all.

Mr. Daniel: I am not saying it is undercover, what I am saying is that from the nature of the thing we have got to have different interests. While Mr. Rosenberger doesn't want to see a judgment against him we want to see a judgment for him.

Mr. Frost: Certainly. We had the same thing with Judge

Burks in the Cunningham and Farley case. In that case he gave an instruction if both of them were guilty of negligence neither could recover.

The Court: I had a case recently of a claim and counter-claim, Gentry and Davies on one side and Preston Sawyer and Hampton Kizer on the other but they got together on their instructions before they started the case, both of them got together and offered that instruction.

Mr. Rosenberger: You had instructions on both sides in that case and it will be the same way here. You page 18 } have to have them on both sides. In that case neither side argued anything contrary to his own plaintiff. Each went to the limit of saying his man was not guilty of negligence.

Mr. Rosenberger: Mr. Daniel, to set you straight, at the conclusion of the evidence if I think there is not enough evidence to make a case against Leech I am going to move to strike the evidence as to Leech. Then if I get an adverse verdict against Leech I am going to move to set it aside on the same ground. I certainly am not going to stand up and say that Beasley was not guilty of gross negligence because then I would be taking an adverse position.

The Court: As long as counsel assure me they are not going to take an adverse position I think we can go ahead.

Mr. Rosenberger: In this sense we are offering the instructions that will say nobody is entitled to a judgment.

The Court: That has to be but I didn't want any conflict before the jury in the argument of counsel. I can certainly rely on you and Mr. Frost, I am not concerned page 19 } about that, but I wanted to make sure neither plaintiff would be prejudiced by an argument of counsel on their own side which would prejudice him in some way before the jury.

Mr. Daniel: Do I understand my motion is overruled?

The Court: I overrule your motion.

Mr. Daniel: Counsel for the plaintiff excepts to the ruling of the Court.

Note: This concludes the preliminary matters taken up in Chambers with the exception of some off-the-record discussion between Court and counsel as to which of counsel would be permitted to argue the case to the jury.

(In the Court room—Jury Present).

Mr. Daniel: If your Honor please, the plaintiff would like to move that the witnesses be sworn and separated throughout the taking of the evidence.

The Court: You mean after they have testified they will still remain out of the courtroom?

page 20 } Mr. Daniel: Yes, sir.

Note: After quite a bit of discussion the foregoing motion was modified to permit the doctors summonsed as witnesses to remain in the courtroom but all other witnesses were sworn and excluded.

PLAINTIFF'S OPENING STATEMENT

Mr. Daniel: If your Honor please, before I start, I believe we have stipulated that certain pictures would be introduced.

May it please the Court, and you ladies and gentlemen of the jury, this is a civil suit that was originally brought by Thomas D. Leech as the plaintiff against Duane Beasley and the administratrix of the estate of Carroll McWane Johnson, Jr. Mr. Watkins and I represent Thomas Leech, this boy right here, for injuries he sustained in the wreck which I will tell you about later. Then after we instituted suit on his behalf for the injuries he had then Mr. Whitehead instituted a counter-claim against Thomas Leech for injuries to Duane

Beasley and Carroll M. Johnson, so the parties
page 21 } here, the original plaintiff, is represented by Mr.

Watkins and myself, and Mr. Whitehead represents the two defendants on the counter-claim. Mr. Rosenberger represents the defendant, represents Thomas Leech on the counter-claim against him, and Mr. Frost represents the other two, the estate of Carroll Johnson and Duane Beasley on the original claims against them. It is a little confusing but that is the way it stands right now.

Now, here is what the suit is about: On the 18th day of October, which was a Tuesday night, I believe about 11:30 to 12:00 o'clock, somewhere in that neighborhood as near as we can figure, there was an automobile wreck on Route 460 just east of Montvale. In the automobile was Thomas Leech, Duane Beasley, Carroll M. Johnson who was killed, and a boy named Thomas Burlev. Before the wreck they had gotten together. They all at that time, I believe, were working together at Barker—Jennings Corporation here in Lynchburg and had gotten together that afternoon to go to Roanoke

for the exact purpose we are not certain but some
page 22 } of the evidence will be that it was to ride around
and drink some beers.

I believe the evidence will develop that about 7:00 or 8:00
o'clock on the evening of Tuesday, October 18th, the three
boys, Beasley, Johnson and Burley picked up Tommy Leech
at The Florence. Tommy lives out near Forest, Virginia. They
picked him up at The Florence Restaurant about two miles
east of Forest. They already had a plan to go somewhere that
night so they picked him up there and they went on up the
road I believe to Reynolds' place and Carroll M. Johnson
bought a six-pack of beer. Beasley was driving the car. He
didn't drink any of the beer. I believe the evidence will be
that Carroll M. Johnson, and remember he is the boy that
is dead, drank possibly two to three of the beers; that Tommy
Leech had one or two beers and the Burley may have had a
beer or something like that. These are minor details but I
will bring you up to the accident. They went toward Roanoke,
they rode around up there, they circled around a couple of
places, one called the Auto-Dine just outside of Bedford and

circled around a place called Whitey's Truck Stop,
page 23 } a Phillips 66 gasoline station. This filling station
is on the left side of the road on the way to Roa-

noke. I believe after you get to a place called Blue Ridge,
which I think is nine or ten miles east of Roanoke on 460, it is
on the left side as you go up. They apparently circled into
that Phillips 66 station—anyway, they were seen there. They
then went on to Roanoke, were in Roanoke and went to a
restaurant there and talked to somebody that they did not
know. This is just sketchy but they had some conversation
and killed enough time so that about 11:00 o'clock or a little
after they were on their way back from Roanoke and I believe
all the evidence will be that Duane Beasley was driving this
car, a 1960 Chevrolet Impala owned by Mrs. Johnson but
only because her son I believe was under age when he bought
it. It was his car but in her name. He had given Beasley
permission and actually directed him in the driving of this
Chevrolet automobile. The other two boys, Burley and Leech,
were riding in the car. When they came back from Roa-

noke they stopped at some other places which the
page 24 } evidence will reveal. They also stopped again at
this Whitey's Truck Stop, the Phillips 66 station,

and that is approximately seven miles from where the acci-
dent happened, seven miles west. There was a man on duty,
a Mr. John Wood, who worked there at night from 11:00 to
7:00 who saw these boys. I don't know whether he saw them

when they went up but he saw them when they came back and actually stopped. Some of the boys will tell you they went in the rest room and possibly Carroll Johnson bought a dish of ice cream. Mr. Wood who worked at the station will tell you he remembered this car particularly and the boys in it because there was some conversation with him there and also it had a Model-T type horn on the 1960 Chevrolet, he remembered that well.

The evidence will be that these boys left that filling station, and I might say this—that filling station is one building that is connected to a restaurant and here is a picture, a small photograph of the Phillips 66 station which shows the station and you can pass it around. When they left
page 25 } that station Mr. Wood will tell you he had seen those boys all the time that they were there and he knows that Duane Beasley, this man sitting here, was still driving the car when they left the filling station. He saw it go out into the road and down the road. He heard it scratch off, as they call it, heard the tires and saw the car go down there and he made some remark about they would be lucky to make it to Bedford.

Now, they came on down Route 460, which is a divided two-lane highway at the point of this wreck. You probably will recall coming away from Roanoke there is Montvale where they used to land airplanes, they came past that field approximately two miles to a place called Goose Creek. Goose Creek is shown in this picture—this is looking west. They were actually going east. This is Goose Creek bridge and this is the lane of traffic they were in. You can see the westbound lane over here. As you cross Goose Creek you come into a series of curves. As you see, one turns to the right and after
page 26 } you get into that curve and around the curve it turns to the left and in the center of that second curve after they negotiated the first turn to the right there is a state highway which is I believe Route 726 that goes to Stewartsville. The evidence will be that this car came into that curve at approximately seventy-five to eighty miles an hour; that it was being driven by Duane Beasley and after making this first turn here for some reason or another apparently the car went out of control, traveled off of the hard surface of the road onto the shoulder a distance of—I will let the Trooper tell you exactly what he measured, but I believe traveled a total of three hundred and sixty feet off the hard surface. If you look at this picture you will see this is the route to Stewartsville. The car was going this way and the Trooper could find the tracks of the car where it went off

the shoulder of the road back here to the point where it stopped. I think this is right but you listen carefully to the State Trooper on this and I think he will say it was a distance of three hundred and sixty feet. He will also tell you that those tracks were only two tracks, made page 27 } by two wheels on the right-hand side of the car as if the car were on two wheels at that time in the curve before it went over into the gulley. Now, this gulley is probably thirty to forty feet deep, I don't know exactly how deep. There were trees all in this gulley and this picture here shows where the car had gone down through the trees into the gulley and this is just a picture of some of the trees. There were trees that had scuff marks some thirteen or fourteen feet up in the air which the Trooper will tell you indicates to him the car must have flipped over end over end to get the bark off of those trees that high up.

Now, as a result of that wreck Carroll Johnson was killed. I believe the evidence will show he was riding in the back seat probably on the right-hand side, maybe on the left-hand side, and apparently, so far as we know, all of the boys were completely thrown out of the car but two of them had gotten up on the highway before the Trooper got there so we don't know about that but the Trooper and the Deputy Sheriff can testify they assisted bringing up the body of Car- page 28 } roll Johnson from the wreck and he was found, I believe, to the front of the car which was headed back the way it had been going, and Tommy Leech was found twenty-five feet out of the car and to the rear of the car.

Now, apparently a Merita bread truck came along and was flagged by Thomas Burley, the boy who was so far as I know the least seriously hurt of any in the wreck, and I believe when the Trooper got there shortly after the bread truck driver got there both Beasley and Burley were on the highway. The Trooper and the Deputy Sheriff and others went down and got the other two boys back up on the road.

As a result of the accident Beasley and Thomas Leech both had pretty severe head injuries. They were both taken to the Bedford County Memorial Hospital and Thomas Leech was unconscious for probably a period of two weeks. He does not know and he can't tell you anything that transpired in the hospital and can't tell you anything except he knows they went to Roanoke, knows they came back to Whitey's Truck

Stop and he remembers that they left Whitey's page 29 } Truck Stop and that is about all he can tell you.

I believe that Mr. Beasley whom Mr. Whitehead represents is going to have to tell you substantially the same

thing. They both will tell you Beasley was driving the car up to Roanoke, up to Whitey's Truck Stop and neither can tell you what happened after arriving at Whitey's Truck Stop, according to what their testimony will be. I think the doctors will call that retrograde amnesia, which is an indication of a brain injury to both parties.

Mr. John Wood will tell you who was driving the car when it left the Phillips 66 place. Thomas Burley, the man who probably knows more about it than anybody else, I believe is going to tell you that Thomas Leech was driving the car, but we also believe that the evidence will show that he has made a series of conflicting statements to State Troopers. At times he said he didn't know who was driving, sometimes he has given different estimates of speed, one time he said he was asleep from the time they left until they got to the place and he didn't know, but John Wood will tell you exactly who he saw driving. Nobody, so far as we know, will claim
 page 30 } that the driver was anyone other than the one who
 drove away from Whitey's Truck Stop. So far as we know nobody will say that they pulled down the road and somewhere and changed drivers, in fact, I don't believe any of them intend to say that.

Now, I will ask you to listen carefully to the Troopers and to all the evidence because this case is going to be some what complicated. We have people who don't know who was driving or who don't remember and then we have some who have changed their stories but as a result of Thomas Leech's injuries he was in the hospital just about a month, may have been a few days less. The doctor would not let him go to work for at least three months from the time that he got the brain injury. When he was taken to the hospital he knew nothing—vomited—had no control over his feces or urine or anything of the kind—was in shock. He had every symptom of a pretty serious brain injury. The doctors will tell you that the damage to his brain will probably be permanent; that he has made a better recovery than they ever hoped he
 page 31 } could have made at the time that they first saw him. He is out-of-pocket right now for doctors' bills, medicines, hospital bills and wages I believe a total of \$1800.00 or more. You will hear evidence as to that phase as the case progresses.

We believe the Court is going to instruct you about this at the proper time and tell you that Tommy Leech and some of the other boys in the car were what we call guest passengers. In law there is a different degree of care owed to a paying passenger from what is owed to a guest passenger

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so the plaintiff in this case will have to prove that Duane Beasley was driving this car and that he drove it in a grossly negligent manner and that was the cause of the wreck and we will show you the condition of the road. We will show you, as you can see from these pictures, that about a block before he went into the first curve there was a big sign saying "Maximum Safe Speed 50 miles an hour," and vertical stripes reflecting markers indicating curve, an arrow pointing to the curve to show the curve was there and there were adequate warnings all over the place and except for the
page 32 } speed or lack of care the accident would not have happened in the manner it did. Pictures of the car itself we think will be indicative of some speed and while I have missed some of the points probably that will be brought out that is what I think substantially we can prove for the plaintiff, Thomas Leech, in this case. I thank you.

page 33 } Evidence for the plaintiff.

Mr. Daniel: If your Honor please, for the convenience of the doctors from Bedford I would like to take up their testimony out of order so they may testify and be permitted to leave. They are also witnesses in Mr. Whitehead's cases and he wants to know if they may be permitted to testify about the injuries his clients received at the same time. We will agree to that if it is all right with the Court.

The Court: That is all right. Let them testify at this time.

DR. WALTER G. HARDY,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Daniel:

Q. Dr. Hardy, you are engaged in the practice of medicine?

A. Yes, sir.

Q. Where?

page 34 } A. Bedford, Virginia.

Q. How long have you been engaged in the practice of medicine, Dr. Hardy?

A. Twenty-three years.

Q. Where did you go to medical school?

A. Medical College of Virginia, Richmond, Virginia.

Dr. Walter G. Hardy.

Q. Now, on the 18th day of October of 1960, which I believe was a Tuesday, did you, in your professional capacity, have occasion to treat or examine Thomas D. Leech?

A. I did.

Q. Would you just refer to your notes if you need to and tell the Court and jury under what circumstances you saw Thomas Leech, where, and your findings?

A. Thomas Leech was brought into the emergency room of the Bedford County Memorial Hospital. When I saw him it was on the 19th, past midnight but I don't have the exact hour. He had extensive lacerations of the scalp, face, right wrist and he was in deep shock and showed signs of brain injury.

Q. How was it he happened to be there? What did you find was the cause of his injuries?

A. He has been in an automobile accident.

Q. At that time was he conscious or unconscious?

A. He was unconscious.

page 35 } Q. Could you tell us how long he remained unconscious?

A. He remained unconscious for approximately ten days or thereabouts.

Q. You said the indications to you was he had a brain injury. Could you tell us some of the findings indicating to you he had a brain injury?

A. Well, his unconscious state which he remained in.

Q. Did you make examination with your hands of his head in any way?

A. Oh yes.

Q. What did you find there?

A. Well, there were lacerations of his scalp and I felt that I could feel a fracture line of the skull by examining the depth of the wound.

Q. Was that done with just your fingers?

A. That was done by finger.

Q. Were there any other signs which would indicate to you he had a brain injury physically? Was he vomiting?

A. Oh yes, he vomited and he was in profound shock.

Q. Did he have any control of his bowel movements or anything?

page 36 } A. No, he did not.

Q. Are those things indications of injury to the brain?

A. Yes, they are.

Dr. Walter G. Hardy.

Q. How long was he under your care?

A. He was under my care the whole time he was in the hospital and then I saw him in the office. I saw him the whole time he was in the hospital and then he was discharged at the office on the 18th of March, 1961.

Q. Did you recommend any period of time he remain inactive as far as work?

A. Yes.

Q. How long a period of time?

A. Well, that whole time. I had consultation with Dr. Weaver in Roanoke regarding his condition and he recommended too that he remain inactive.

Q. Did he have a neurological examination?

A. Yes, by Dr. Weaver.

Q. Do you know the findings of Dr. Weaver?

Mr. Frost: If your Honor please, I object to this as hearsay. As I understood, he sent him to Dr. Weaver for consultation and what Dr. Weaver reported would be hearsay.

The Court: I sustain the objection.

page 37 } By Mr. Daniel:

Q. The findings so far you have stated were your own findings?

A. Yes, sir.

Q. Did you make any neurological examination of any kind?

A. Yes, sir.

Q. What were your findings?

A. As I say, he was in shock—was unconscious.

Q. Did you ever check his reflexes?

A. Yes, sir, it is natural I would.

Q. What did they reveal?

A. Well, of course, his reflexes at the time of the initial examination and his reflexes later on as his condition improved varied but prior to his discharge his reflexes in the right arm and right leg were slightly increased as compared to those on the left.

Q. Did you check his eyes? Is that one of the tests you made?

A. Yes, and there was no difference particularly in his eyes.

page 38 } Q. Can you tell us now, Dr. Hardy, when you last saw Thomas Leech?

Dr. Walter G. Hardy.

A. On the 18th of March when I discharged him at the office.

Q. At that time did you have an opinion as to whether or not he still had an injury to his brain?

A. Yes, I definitely was of the opinion he still had some injury there.

Q. Do you have an opinion as to whether or not that damage to his brain will be permanent?

A. It is a good probability that it will.

Q. What is the significance of unconsciousness to you, Dr. Hardy?

A. Of course, it depends on what causes it. I would consider it a brain injury in this case.

Q. Would the length of unconsciousness be important?

A. I would think so.

Q. Based on a short period or long period what does it signify to you?

A. As a rule, a short period of unconsciousness would be somewhat in the category of a concussion and the longer period would be a contusion or laceration.

page 39 } Q. A contusion or a laceration of the brain itself?

A. Yes.

Q. Would you call unconsciousness ten days a long time or a short time of unconsciousness?

A. I would certainly call it a long time.

Q. Dr. Hardy, I believe also as a result of that one wreck you treated Duane Beasley and possibly Thomas Burley too.

A. I did.

Q. Do you remember anything about Thomas Burley's condition?

A. His condition was relatively mild. He wasn't rendered unconscious at the time and I think perhaps he had some slight lacerations. I don't have his chart with me.

Q. Is there any further treatment you can recommend for Thomas Leech that will do any more than you have already done for him?

A. I think he should be followed by a neurologist and there are things that can be done.

Q. What are the symptoms you normally expect from an

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injury of this type, symptoms which normally follow this type injury he had?

page 40 } A. Well, that could be variable but it could be some weakness of the limbs, perhaps headaches, and some personality changes.

Q. You did not know Thomas Leech before the wreck?

A. No, sir.

Q. You can't say whether there is any difference in his personality or not?

A. No, sir.

Q. Would, in your opinion, the loss of memory be a problem?

A. It certainly would be for the time being.

Mr. Daniel: You may examine.

CROSS EXAMINATION.

By Mr. Frost:

Q. Dr. Hardy, I understand you saw Tommy Leech on the morning of October 19th. Is that correct?

A. I believe it was the 19th.

Q. And you had x-rays made of his skull?

A. Yes.

Q. That x-ray was normal?

A. It was negative for fracture.

page 41 } Q. And did you have an x-ray of the spine?

A. That is right.

Q. Was that normal?

A. It was negative.

Q. Then I believe later on you had an x-ray of the chest.

A. That is right.

Q. And that was normal?

A. Yes, that is right.

Q. As far as x-ray findings were concerned they were normal. Is that right?

A. That is right.

Q. Now, when did you let Mr. Tommy Leech get up for the first time? Do you have a record of that?

A. He was allowed to get up in a chair for the first time on November 9th.

Dr. Walter G. Hardy.

Q. Then he gradually convalesced. Do you know when he was discharged from the hospital?

A. Yes, sir, discharged from the hospital on November 13th.

Q. November 13th?

A. Yes, sir.

page 42 } Q. Then you let him go on home. He had no particular attention between the time you let him go home and the time he started to work, did he?

A. Well, he was checked at regular intervals.

Q. He came back to your office?

A. Back to my office.

Q. And he seemed to be progressing very satisfactorily?

A. I thought so. I did have a consultation though with a neurologist.

Q. And, as a result of the consultation, and your own findings, you thought it would be all right for him to go back to work?

A. That is right.

Q. And that was when, March?

A. I think he returned to work on March 15th.

Q. And you permitted him to drive a car?

A. Yes, sir.

Q. And do anything else he wanted to do in his work?

A. That is right.

Q. What was the last date that you saw him professionally?

A. March 18th, three days after he had gone to work.

Q. And he has not returned to you since then
page 43 } for any further treatment?

A. No.

Q. Or any question about his condition?

A. No.

Q. And you take that as a good sign, do you, that he is progressing all right?

A. I don't know whether he has consulted anyone else or not.

Q. As far as you are concerned?

A. That is right.

Q. As far as any permanent effects doesn't it take a year or so to say whether there will be any permanent effects?

A. Quite often.

Q. In this case you wouldn't say it would have any one way or the other, would you?

A. He certainly showed signs of it when I last saw him.

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Now, of course, like you say, it could take a year or two to be sure about it.

Q. Isn't it a fact that you stated that he would have to be followed for twelve months?

A. Yes, I said that.

page 44 } Q. In other words, at the present time you can't tell whether there are any permanent effects from it or not?

A. You can't tell for certain, no.

Mr. Frost: I think that is all.

RE-DIRECT EXAMINATION.

By Mr. Daniel:

Q. Absolutely certain, is that what you mean?

A. That is right.

Q. I believe you stated it was your best opinion with reasonable medical certainly he will have permanent injury.

A. He probably will, yes, sir.

By Mr. Frost:

Q. Do you have a copy of your letter to Mr. Watkins dated February 11, 1961?

A. Yes, sir, I think so.

Q. Will you read the last paragraph of that letter starting with "there"?

A. "There has been no specific treatment in this case since leaving the hospital except he has been seen at regular intervals at my office. It was the recommendation of Dr. Weaver that he refrain from all work for three months and then return for reevaluation. I am unable to tell whether he will have any permanent sequela at this time and he will have to be followed carefully for the next twelve months for any new developments".

Mr. Frost: That is all.

The Court: Mr. Whitehead, do you want to use Dr. Hardy at this time as your witness?

Mr. Whitehead: Yes, sir.

DR. W. G. HARDY,

examined as a witness on behalf of the defendant, testifies as follows:

Dr. J. G. Jantz.

DIRECT EXAMINATION.

By Mr. Whitehead:

Q. Dr. Hardy, if you will, please refer to your notes on Duane Beasley. Was he mainly a patient of Dr. Jantz and were you in consultation with him?

A. That is right.

Mr. Whitehead: In view of that situation may I at this time call Dr. Jantz and then recall Dr. Hardy?
page 46 } The Court: Yes, and then you may recall Dr. Hardy.

Note: The witness, Dr. W. G. Hardy, stands aside temporarily.

DR. J. G. JANTZ,
called as a witness on behalf of the defendants, having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Whitehead:

Q. You are Dr. J. G. Jantz?

A. Yes, sir.

Q. And you practice your profession in Bedford, Virginia, and at the hospital in the town there?

A. Yes, sir.

page 47 } Q. And what was your educational background qualifying you to practice medicine, Doctor?

A. I graduated from Medical College of Virginia in 1931 and then stayed in the hospital on surgical service until 1936.

Q. And how long have you been practicing your profession in the Town of Bedford?

A. Twenty-five years.

Q. Now, on the early morning of October 19th, 1960 were you called to see a young man by the name of Duane Beasley who had been in an accident?

A. I was.

Q. Will you please tell us, Doctor, about this young man, what you found, his injuries, if any, he had sustained in this accident and his condition and so forth?

A. He had a laceration of his scalp quite deep through all of the layers of the scalp and also lacerations on the left side

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of his head and also lacerations of his eyelid on the right side and he had injuries to his left shoulder.

Q. When you say laceration you mean cuts?

A. Cuts, yes, sir.

Q. What did you do for the lacerations on his head and the other lacerations?

page 48 } A. I cleaned them and debrised them and by
that I mean that we took the ragged edges off the
incisions and cleaned with various solutions and then sutured
them.

Q. Now, at the time that you saw him there was it your opinion or not he had sustained any brain concussion or not?

A. He had. He was not unconscious but he was somewhat incoherent and he was not rational.

Q. Was not rational?

A. No.

Q. You, of course, made a thorough examination of him at that time?

A. Yes, sir.

Q. Did you have him x-rayed anywhere, Doctor?

A. Yes, we had x-rays of his skull and x-rays of his chest and his shoulder.

Q. Did the x-rays show anything? Were all of the x-rays negative?

A. No, he had a fracture of his scapula, the joint here, the articulation for the arm was fractured.

Q. That is up in the shoulder?

A. The neck of the scapula was fractured on into the joint
page 49 } but the bones and fragments were in good posi-
tion. Fixing his arm to his body to hold it still
was all that had to be done.

Q. Do your records show approximately how long he was a patient in the hospital?

A. Yes, he was in the hospital from October 19th until I think he left on the 5th of November. This envelope doesn't read the same as the chart does. My last note on him on the chart was made on the 5th of November.

Q. Made when?

A. On the 5th of November.

Q. Then after he was released from the hospital then have you seen him any since that time?

A. I saw him in my office for five visits. He made five visits to my office after he left the hospital.

Dr. J. G. Jantz.

Q. Now, the laceration to his scalp, how deep did you say that was?

A. Through all the layers down to the bone. That means the entire scalp.

Q. And approximately do you recall how long that laceration was, what was the length of it?

A. Between five and six inches long.

Q. Now, you watched him and observed him
page 50 } there and I believe you let him leave the hospital
and he came back to his home about November
4th?

A. He was discharged from the hospital on November 5th.

Q. Then you gave him the usual treatment which you have stated about his shoulder?

A. That is right.

Q. Then when was the last time you actually saw him?

A. I saw him on the 17th of December when I discharged him. He lived quite a distance from Bedford and I discharged him and asked him to go to some physician to follow him at home.

Q. Have you been advised later he was under the care of Dr. G. B. Arnold of this city?

A. I received a letter from you, I believe, to that effect.

By Mr. Rosenberger:

Q. A letter from who?

A. From Mr. Whitehead.

By Mr. Whitehead:

Q. While he was there in your hospital would you please refer to your notes? At that time was any electro-encephalogram run on him there at the hospital?

page 51 } A. No, sir.

Q. What is the total amount of your bill, not including coming here today?

A. I don't have the bill with me. I don't know.

Q. Now, as far as the lacerations or cuts he received you have done all you can do for those and nature will have to do the rest that will be done?

A. That is right.

Mr. Whitehead: All right, Mr. Rosenberger.

Dr. J. G. Jantz.

CROSS EXAMINATION.

By Mr. Rosenberger:

Q. Dr. Jantz, you said Mr. Beasley was not unconscious when you saw him on the morning of October 19th in the Bedford Hospital. Is that correct?

A. That is correct.

Q. You say that he was not rational and somewhat incoherent?

A. That is right.

Q. I take it that is compatible with having been in a severe accident and he was excited and nervous and in shock?

A. That would be from the head injury, a brain page 52 } injury, not from excitement.

Q. He was not unconscious from any brain injury when you saw him in the hospital.

A. No.

Q. So he could not have had a long period of unconsciousness, could he?

A. As far as my connection with him he wasn't unconscious at all but he was irrational for about three or four days.

Q. If you will look at your hospital notes there on October 19th, 12:45 P.M., doesn't it show he was fully conscious?

A. He was conscious all the time, never was unconscious at all, but there is a difference between unconsciousness and being rational.

Q. You examined his chest in the hospital when you got him in. Will you look at your notes on your chest examination? What did you find? What was the complaint about his chest?

A. He complained of pain in his left chest and his shoulder and for that reason the x-ray was taken.

Q. Could you give us some idea when you say the left chest what area it would be in?

A. The upper part of his chest.
page 53 } Q. The upper part of his chest. Will you point to your chest so the jury can see what you mean when you refer to the left chest?

A. The whole left chest means the whole left side.

Q. And whatever caused that pain in his chest resulted from the fracture of the scapula or collar bone?

A. Not collar bone. The collar bone wasn't broken. It was the flat bone in the back that your arm attaches to.

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Q. Could that have been the sort of blow one could have gotten from the steering wheel that would push them back and cause a fracture of the scapula in the back?

Mr. Whitehead: I object to that. That would be hypothetical and would be imaginative and could happen from anything.

Mr. Rosenberger: This is the doctor who examined him.

Mr. Whitehead: Certainly it would be a possibility.

The Court: The doctor has a right to tell what, in his opinion, it seemed to come from, whether from a sharp or a blunt instrument or from a steering wheel or any other object if he feels qualified to answer the question.

page 54 } The Witness: It could come from anything but most of the shoulder injuries like that come from a fall, being thrown against something.

By Mr. Rosenberger:

Q. From being thrown against something.

A. Well, I don't know if he was thrown out of the car or not but if he was that certainly could have caused it. Any force that would strike that area, no matter how applied, could cause that type of an injury.

Q. Any force to the front of the person?

A. No, not to the front. It would have to hit it on the side. This part would have to strike that part and what more than likely happened is that the head of the humerus was driven into the socket in which it worked.

Q. What I was getting at, the complaint you got was to the left upper chest and that is where the pain came from?

A. From the shoulder. You see the muscles are in the chest.

Q. He didn't have any pain in the back?

A. Yes.

Q. Did you mark it down there?

page 55 } A. Well, it is the shoulder girdle, we call it, but the pain is mostly caused by muscle spasm and the muscles in the back and front are attached that hold the shoulder joint in place and any of those muscles would give you pain.

Q. Doctor, did you check him to see if he had bruises in front on his chest or over the end of his shoulders or back?

A. I will have to read my notes.

Q. Your records don't show it.

A. We usually write down the findings.

Dr. J. G. Jantz.

Q. Your records don't show you found any bruises to the chest or to the shoulders either, do they?

A. Not necessarily.

Q. But it was because of the pain in the upper chest or the scapula that you took the x-ray?

A. That is right.

Q. And you discharged him from the hospital on October 5th?

A. Yes.

Q. Then you had him come back to your office despite the distance between the places for five visits.

A. That is right.

page 56 } Q. And you discharged him on December 17th so over what period of time did he come to your office? Tell me what dates.

A. On the 12th of November, the 19th, the 26th, the 3rd of December and the 17th of December.

Q. Doctor, can you tell us what you did for him at those times on any of those visits?

A. Mostly just examined him and instructed him what to do. Of course, the shoulder at that time hadn't healed and he didn't have complete recovery from his left arm.

Q. You were mostly interested in the injury to his shoulder?

A. Yes.

Q. And did you know that he went back to work on December 5th?

A. I don't have that record.

The Court: I wish you would speak up a little louder.

By Mr. Rosenberger:

Q. I believe my question was you were mostly interested in the injury to this boy's shoulder on those visits back to your office from November to December 17th. Is that correct?

A. That is correct.

page 57 } Q. Don't you have down on your card when you told him he could go back to work?

A. The only thing I have on the card here is that he was discharged from my services on the 17th of December.

Q. You don't have any record there of any treatment for any head injury or anything of that kind, do you?

A. Not any more than his scalp injury he had but that healed up while he was in the hospital.

Q. That healed in the hospital?

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A. Yes.

Q. You told him, I take it, when you discharged him you thought you had done everything for him he needed to have done?

A. I figured he needed to be followed by some physician because of his shoulder injury and also he had a weakness in his left arm which I attributed to the shoulder injury.

Q. And you told him to pick out whatever doctor he wanted?

A. That is right.

Q. And if he had any trouble to go to see him?

A. That is right.

Mr. Rosenberger: Thank you, Doctor.

page 58 } RE-DIRECT EXAMINATION.

By Mr. Whitehead:

Q. Mr. Rosenberger asked you about the unconsciousness—

Mr. Rosenberger: I asked him if he wasn't conscious on October 19th at 12:45.

By Mr. Whitehead:

Q. He asked you to refer to your file about unconsciousness. Will you refer to the front page?

A. He never was unconscious. I repeated that several times, not at any time.

Q. Will you please refer to your chart and see what you said on the first page down at the bottom of it?

A. That is the history.

Q. The medical history?

A. That is the history and that is what we get from the patient and he did not know.

Q. Will you read that?

A. "He sustained severe head injury, apparently unconscious, and is still irrational". You see he didn't remember anything so I just took that. Unconsciousness, as described by most neuro-surgeons, is when you are completely out for as much as ten minutes. We call that unconsciousness, but

page 59 } if a person stays in that state over that length of time, say for days or weeks, then we call that a contusion of the brain because they have some brain damage with swelling which makes them unconscious but a patient is not unconscious if he grunts and mumbles to him-

Dr. J. G. Jantz.

self, even if he doesn't know what he is talking about, he is still conscious. That is the difference in our medical judgment from the standpoint of treatment. We consider a person when he is semi-conscious as not being in as serious a condition as if he was completely out.

Q. In other words, your definition of unconsciousness means just completely out, can't say anything?

A. That is right. That is what we mean by unconsciousness.

Q. Then, as I understand it, you have got down there that he had severe head injury and apparently unconscious.

Mr. Rosenberger: I object to this.

The Court: What is the objection?

Mr. Rosenberger: He is leading the witness.

The Court: That is your own witness.

Mr. Rosenberger: In addition to that he has gone over the same thing and this is not re-direct.

page 60 } By Mr. Whitehead:

Q. Doctor, Mr. Rosenberger asked you about the condition you found about his chest. Then I understood you to say when you were testifying on cross examination you also found something about one of his arms. What was that you found?

A. He had a broken scapula.

Q. But you said something about a weakness in his arm.

A. Well, that could have been. That could have come, you see, when you strap an arm for six weeks or even two or three weeks, you naturally have paralyzed muscles. It would be difficult to ascertain whether that came from head injury or just from fixation of his arm in that length of time.

Mr. Whitehead: All right, thank you.

RE-CROSS EXAMINATION.

By Mr. Rosenberger:

Q. I didn't understand. You actually talked to this patient at the hospital. Was he walking or sitting down?

A. He came in walking.

Q. Came in walking?

Dr. Walter G. Hardy.

A. Wait a minute. I saw this patient sitting in a wheel chair.

page 61 } Q. And he talked to you. Did you know at that time he had been able to get up a forty to sixty foot bank with or without assistance and was up on the road flagging a truck?

A. I don't have anything like that in my record.

Mr. Rosenberger: All right, thank you, sir.

The witness stands aside.

DR. WALTER G. HARDY,
recalled as a witness by the defendants, testifies as follows:

DIRECT EXAMINATION.

By Mr. Whitehead:

Q. Your name is Dr. W. G. Hardy and you testified this morning so I won't go into your qualifications again. Dr. Hardy, did you also see Duane Beasley and observe him from time to time while he was there in the hospital?

A. Yes, sir, I did.

page 62 } Q. Was he mainly Dr. Jantz's patient?

A. That is right.

Q. And you were seeing him with Dr. Jantz?

A. That is right.

Q. Now, you have sat here and heard Dr. Jantz testify. Now, is there anything additional you found out the matter with him or anything that you didn't think was the matter with him that Dr. Jantz has testified about?

A. I don't have anything to add to it.

Mr. Whitehead: All right, sir.

CROSS EXAMINATION.

By Mr. Daniel:

Q. Dr. Hardy, do you have your bill with you?

A. I have Mr. Leech's bill.

Q. May I have it?

A. Yes, sir.

Q. Your total bill was \$124.50?

A. Yes, sir.

Charles E. Wilkes.

By Mr. Whitehead:

Q. Let me ask you to get this through with, what was your bill for services to Duane Beasley?
page 63 } A. I couldn't tell you that. I didn't bring it along.

By Mr. Rosenberger:

Q. Dr. Hardy, you were called in to see Mr. Beasley by Dr. Jantz?

A. That is right.

Q. And he was really Dr. Jantz's patient, wasn't he?

A. That is right.

Q. And you saw him then, of course, after Dr. Jantz had seen him?

A. Yes, sir, we saw him together.

Mr. Rosenberger: That is all.

The witness stands aside.

Mr. Daniel: Before we call the next witness, counsel have agreed to stipulate that all of these exhibits marked "Defendants' Exhibits 1-A through 1-E", and all defendants' exhibits marked "2, 3, 4, 5, 6, 7 and 8" are accurate and will be admissible without objection.

The Court: Let me have those to initial if they all are agreed on.

Mr. Whitehead: All on those boards are agreed page 64 } to and all these others.

Mr. Daniel: Defendants' Exhibit No. 27, an aerial photograph, is not objected to by anybody and there is no objection to Plaintiff's Exhibits 2 and 3 which are the small photographs.

CHARLES E. WILKES (State Trooper),
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Daniel:

Q. Please state your name.

A. Charles E. Wilkes.

Q. Mr. Wilkes, I believe you are presently employed by the Virginia State Department as a State Trooper.

Charles E. Wilkes.

A. Yes, sir.

Q. How long have you been so employed?

A. Since July two years ago.

page 65 } Q. What territory are you assigned?

A. Bedford County.

Q. Were you serving as a State Trooper on October 18, 1960 in Bedford County?

A. Yes, sir.

Q. As part of your duties were you called on to investigate a collision which happened there in Bedford County in which Thomas Leech, Duane Beasley and several other boys were involved?

A. Yes, sir.

Q. Will you tell the Court and jury the time you got the report and what you did after you got the report?

A. The accident happened the 18th, which was a Tuesday, approximately 11:35 P.M. The time could vary, I imagine anywhere from fifteen to twenty minutes. This accident happened on Route 460 one mile west of Irving, approximately eight miles or nine miles west of Bedford. The type of road is a grade and curve. It happened close to what is called Double Bridge on an S-curve. It was open country, traffic lanes marked, safety signs put out. The weather was clear—black top road—open country. A 1960 Chevrolet Sedan, hard top, was involved.

page 66 } I was notified about 12:21 and I arrived at the scene at 12:45.

Q. What did you find when you got there?

A. When I arrived at the scene with Mr. Rush I found Burley and Beasley on the side of the road. I put Beasley in the front seat of my police car and put Burley in the back seat. Trooper Rush and Deputy Sheriff Wells went down to where the car was.

Q. Where was the car?

A. The car was located approximately sixty feet down into a grade, approximately this much angle, and about fifty foot grade down. The car was in honeysuckle and all facing back toward Route 460, facing up toward 460.

Q. That would be facing back roughly north or northwest?

A. Northwest.

Q. At that time I don't suppose you were able to take measurements?

A. Measurements were taken the next morning.

Q. I believe you put Beasley in the front seat and ad-

Charles E. Wilkes.

ministered First Aid to Beasley while waiting for the ambulance to arrive. Did you help assist them into the ambulance and see that they got a way to the hospital?

page 67 } A. I did.

Q. Did you see Leech that night?

A. Yes, I helped to bring Leech back up the bank.

Q. Was he conscious or unconscious?

O. He was unconscious.

Q. And I believe the other boy was dead. Is that right?

A. He was.

Q. Mr. Wilkes, was Beasley unconscious at that time?

A. He was conscious.

Q. Have you prepared at my request a diagram you drew yourself of the terrain, the road and how the thing happened?

A. I have.

Q. Let me ask you this: Is this the diagram marked "Plaintiff's Exhibit No. 1"?

A. Yes, sir.

Q. Did you prepare that?

A. Yes, sir.

Q. One thing I want to ask you here: The sign here would indicate forty-five. What does that mean?

A. Approximate safe speed recommended by the state.

Q. Is there a sign up there warning what the safe speed is?

page 68 } A. It is.

Q. What does that sign say?

A. I believe it says "Maximum Safe Speed

Q. What?

A. 45.

Q. Is it 45 or 50?

A. I could be wrong. It could be 50.

Q. You would be willing to go by what the photographs show, wouldn't you?

A. Yes, I would.

Mr. Daniel: Do you want it changed?

Mr. Frost: Yes, we want it right.

Mr. Daniel: Will you change the diagram to show 50?

Note: The witness does as requested.

By Mr. Dainel:

Q. Come down here Mr. Wilkes and look at the photo-

Charles E. Wilkes.

graphs which show "Maximum Safe Speed 50". Otherwise is that diagram accurate?

A. To the best of my ability, yes.

Mr. Daniel: I would like to introduce the Trooper's diagram as Plaintiff's Exhibit No. 1.
page 69 } The Court: All right.

By Mr. Daniel:

Q. Do you recognize these pictures as being pictures of the place where the wreck occurred and close to it?

A. Yes, sir.

Q. Exhibit No. 2, do you recognize where the car is as being State Route 726?

A. Yes, sir.

Q. Now, this diagram which you have drawn as Plaintiff's Exhibit No. 1, I believe this road begins at the bottom of Plaintiff's Exhibit No. 1 is Route 460, the eastbound lane, is it not, near the point of collision?

A. Yes, sir.

Q. Now, what were you able to find in your investigation there about the path that the car traveled? Will you tell the jury about that, please? Is this where it says "Maximum Safe Speed"?

A. Yes, sir. This is Double Bridge on 460, approximately five hundred feet from the bridge to the first sign, and from the sign until this sign right here is approximately four hundred and fifty feet.

Q. This little sign is similar to this horizontal
page 70 } sign here?

A. Yes, sir.

Q. They are on the left-hand side of the road?

A. Yes, sir.

Q. You say that is four hundred and fifty feet to that sign?

A. Yes, sir.

Q. Are those signs built so they will reflect lights at night?

A. Yes, sir.

Q. Then you are beginning to go into the first curve to the right, are you not?

A. The first curve to the right.

Q. Go ahead and follow the diagram.

A. The worst part of the curve is perfectly flat and there

Charles E. Wilkes.

are no brake marks to indicate that it slid into the curve whatever the first time the car lost control.

Q. Let me ask you this: Is this sign indicating another curve, is this a sign indicating this curve right here? Do you think, Mr. Wilkes, that this is this sign right here that points to an arrow in Plaintiff's Exhibit No. 2?

A. Right in the curve. No, sir, it is another page 71 } sign back this way.

Q. So it would be a sign indicating this curve in addition to this arrow?

A. Yes, sir.

Q. I believe you said you found no pressure marks into the curve?

A. No brake marks, that is true.

Q. Go ahead, Mr. Wilkes.

A. These signs are marked here, also arrow signs indicating this curve here and, of course, this sign here indicating the next curve. The first time we determined where the car lost complete control is about four to five or six feet this side of Route 726, which is the Stewartsville road. It left the road and went over the shoulder across this road.

Q. Is that a sliding mark or a tire mark? I mean was it a brake mark or a scour mark?

A. These were loose rocks and it is probably where the tires slid into it rather than being actual brake marks.

Q. You could follow those marks to where the car went off the road?

A. Yes, sir.

Q. Were those marks off of the hard surface of page 72 } 460, the traveled portion of 460?

A. These marks, yes, sir.

Q. They were about how far in 726?

A. I have a photograph showing that.

Q. Where were the marks that you saw, the scour marks? This is 726 right here.

A. It is on Defendants' Exhibit No. 8. If you can imagine three feet eight inches from this shoulder right here from 460, the car slid in these loose rocks almost to the edge of the hard surface of 460.

Q. You say that the right wheel of the car was three feet eight inches over?

A. The left wheel was three feet eight inches.

Q. The left wheel. The car was completely off of 460?

A. It was.

Charles E. Wilkes.

Q. How many skid marks were you able to find there?

A. No skid marks, just these marks where he went across 726.

Q. Can you look at this exhibit right here and tell me about how long a distance those marks went? You can use your notes if you want to.

Mr. Rosenberger: Will you designate the page 73 } ture he referred to?

Mr. Daniel: It was Plaintiff's Exhibit No. 8.

The Witness: I don't have that measurement.

By Mr. Daniel:

Q. Just show us.

A. Where it left 460 it hit the dirt and then across 726.

Q. Tell us what measurements you put on there.

A. The measurements I have where he left 460 and first hit the dirt on the shoulder before getting to 726, across 726 and struck a sign, knocked a sign down, and then apparently all marks had left the road, left the dirt. There is a place ten to fifteen feet where only two wheels were on the shoulder.

Q. Were they deep wheel marks?

A. They were deep impressions.

Q. Were they deeper than the others when you could follow all four wheels?

A. They were deep impressions.

Q. Were these two wheel tracks made by one side of the car only?

A. One side of the car only.

Q. Could you say which side it was at that time?
page 74 } A. On the ground it was the left side.

Q. Would that be left or right?

A. It would be on the driver's side.

Q. On the driver's side.

A. He was over here on the shoulder across 726. The car was right here, the left rear wheel and front wheel were three feet eight inches from 460 and all of a sudden there appeared to be two marks and over on the right side there isn't anything. From that point where the two wheels appeared to be on the ground from where he left the road where the two wheels showed and not on the right side was two hundred and fifty feet. Then from that point the car apparently either went head over or just bounced, just completely bounced

Charles E. Wilkes.

and made a path completely through the field covered with honeysuckle.

Q. That is a big drop-off down there, isn't it?

A. It is a good drop. The car apparently rolled over and twisted around and the reason I say that it probably flipped over it struck a tree, one section of the car struck a tree approximately fourteen feet up in the air and then came to rest on its wheels facing back toward Roanoke in a northwest direction, a total distance from where it first left
page 75 } the road to where it stopped is three hundred and
 } sixty feet, and again the car was sixty feet from
Route 460 down to where it stopped.

Q. Sixty feet away from 460 over to the right?

A. Yes.

Q. Mr. Wilkes, the car was headed back toward the other way?

A. Yes, sir.

Q. And the curve at the time was a curve to the left?

A. It was.

Q. So he would have been going roughly this way, is that right?

A. Yes.

Q. I want to ask you once again to make sure there is no confusion about this, the wheel tracks where you only saw two, Mr. Frost asked me to ask you if they were made by the left side of the car or the right side of the car?

A. The left side.

Q. How can you tell that?

A. Well, I could follow the tracks from where it went across the intersection of 726, follow the impression through the dirt and then there is the drop-off.

page 76 } Q. How can you account for the right wheels not
 } being on the ground?

Mr. Frost: I object to that question. That is a conclusion.

Mr. Daniel: You wanted to know whether it was left or right.

The Court: Address your remarks to the Court.

Mr. Daniel: He asked me to ask the question which wheels made it and he said the left and I wanted to know how he concluded it was the left wheels.

The Court: When Mr. Frost examines him he can ask the question. You have gone beyond Mr. Frost's question

Charles E. Wilkes.

when you ask him how he arrived at his conclusion. I will sustain the objection.

By Mr. Daniel:

Q. Mr. Wilkes, had this car gone two hundred and fifty feet off of the road before it made just the two wheel marks?

A. At that point that is where it made the first flip. In other words, after the impression of the two wheels there was another ten or fifteen feet of nothing, in other words, where the car hadn't dragged, had either jumped or flipped.
page 77 } over completely.

Q. What I mean is, up to that point you could follow four wheels for awhile?

A. Yes.

Q. How far could you follow the four wheels before you hit the spot where the two wheels began? Could you approximate that?

A. Four wheels followed all the way across the intersection.

The Court: I don't think the members of the jury are able to see what you are indicating.

By Mr. Daniel:

Q. The four wheels could be followed to the point where he left the road?

A. Left the road, went across 726 to where he knocked the sign down and at that point is where the four wheels stopped.

Q. About how far was that from the point it left the road to where the four wheels stopped?

A. It was at least two hundred feet.

Mr. Daniel: That is all I want to ask him.

The Court: It is getting near lunch time. We
page 78 } will adjourn for an hour and come back at 2:00
o'clock. Members of the jury, do not discuss this case with anyone nor allow anyone outside to discuss it with you and, of course, do not discuss it amongst yourselves until you return.

Sergeant, we will recess until 2:00 o'clock.

(Recess).

September 26, 1961
Afternoon Session.

Charles E. Wilkes.

CROSS EXAMINATION.

By Mr. Whitehead:

Q. Mr. Wilkes, let me ask you this: As I understand it, you got the call so you say something after 12:00 o'clock.

A. Yes, sir.

Q. But, according to your information, you figured the accident happened about 11:35 P.M.?

A. As close as we could figure it.

Q. And that would have been on Tuesday night, October 18th?

A. Yes, sir.

page 79 } Q. Do you recall where you were when you got the call?

A. Yes, sir.

Q. Where were you?

A. At the stop light in Bedford, the one in front of Coleman's Restaurant. We were headed west.

Q. Now, approximately what is the distance from the Town of Bedford to the point of accident?

A. Eight to ten miles.

Q. And it is about eight miles from Phillips 66 Truck Stop to the accident, is it not?

A. Approximately, yes, sir.

Q. Now, much reference has been made here to Goose Creek. Do you know approximately what is the distance from Goose Creek proceeding east to the point of accident?

A. No, sir, I didn't measure that.

Q. Do you know approximately the distance, a half a mile or what is it?

A. Approximately half a mile.

Q. Now, when you cross Goose Creek right there at that point is the road fairly straight both east and west?

A. Yes, sir.

page 80 } Q. Then, as you testified this morning, after you leave Goose Creek proceeding on east then you gradually come into a curve?

A. Yes, sir.

Q. Now, would you please look at your notes and I want to be sure that I get this correct, from the point that you first noticed any wheels of the automobile leaving the hard surface of the road what distance was it from there to the point where you found the automobile at rest down over the bank?

A. Three hundred sixty feet.

Charles E. Wilkes.

Q. Now, did you measure that or did you step it off?

A. It was measured with a tape.

Q. Now, did any officer or anyone else go to the scene with you when you reported for this accident?

A. Trooper Rush.

Q. He was with you?

A. He was with me.

Q. Then I believe a gentleman by the name of Mr. Gregory took pictures of this accident. He is the one that took the pictures showing things as they were there the next morning after the accident?

A. Yes, sir.

page 81 } Q. Then would you please tell us what was the distance when the marks first left the hard surface of the roadway, what that distance is from that point to where it went over the bank?

A. The car left the road approximately, at most, I would say, five feet the Roanoke side of 726 and slid right on across.

Q. What distance was that before you go over the bank, could you tell us?

A. Two hundred and fifty feet to where the car made the first turn over beginning down the grade.

Q. Then would it be from that point down to where it came to rest, would that be one hundred and ten feet?

A. Yes, sir.

Q. Now, where this car came to rest, as you have explained it, down over in this ravine did you measure or could you tell us approximately how steep that bank is from that ravine—in other words, if you are standing down on the ground and looking up to the top of the road could you tell us approximately how far it is?

A. Fifty to sixty feet. The car was sixty-two feet from the road and it was just a short ways away from
page 82 } the bottom of the ravine.

Q. Then, as I understand it, from where the top of the road goes down to the bottom that is around fifty feet?

A. On either side.

Q. Because from the car going back to the bank and up to the road is sixty-two feet?

A. Yes, sir.

Q. You have seen, I believe, all of these pictures which have been introduced in evidence and would you mind coming down here just a minute? I take Defendants' Exhibit No. 9

Charles E. Wilkes.

and No. 10. Now, these pictures were taken the next morning when you were making your investigation, were they not?

A. Yes, sir.

Q. Now, as shown in both 9 and 10, there is a broken off piece sticking up there. What is that?

A. That is part of the sign we have right here.

Q. Like that sign right there?

A. Yes, sir.

Q. Now then, do you recall when you got there seeing that sign?

A. I don't remember it.

Q. But that is the type of sign that that represents?

A. Yes, sir.

page 83 } Q. Then after proceeding east and going on by where this sign is could you tell us and could you make a mark there if you could approximate where the wheels of the car left the bank there?

A. This will be only an approximation where it was.

Q. You are marking Defendants' Exhibit No. 9.

A. That is right. It was at this point approximately right here.

Q. Right there is where it disappeared?

A. Yes, sir.

Q. Would you make an x mark right at that point? I understand it is an approximation and not exact.

Note: The witness does as requested.

Mr. Frost: Let him mark it with a red pencil.

By Mr. Whitehead:

Q. So then from that point down to where the car was found would be one hundred ten feet?

A. Yes, sir.

Q. Now, let me ask you this: Where that wrecker is standing there is that where the car was then pulled back
page 84 } up the bank?

A. It is.

Q. And that is in Defendants' Exhibit No. 10?

A. Yes, sir.

Q. While we are down here let me ask you about these pictures. Described in common parlance, this type of curve being approached, what do you call that type of curve?

A. It is an S-type curve.

Charles E. Wilkes.

Q. Then, as you have shown on your diagram here, when this car left the road and then went over into this 726 actually the road for the driver would be bearing to the left, would it not?

A. Yes, sir.

Q. You have seen the pictures here showing the condition of the automobile after the accident. Was that the true condition of the automobile after the accident?

A. It was.

Q. As shown by the pictures, on this type of road there are two lanes for each direction. Is that correct?

A. Yes, sir.

Q. And I believe that the west lane at the actual point of this accident is a good distance from the east lane, page 85 } is it not?

A. Yes, sir.

Q. If you are in the east lane and then say looking up the hill toward the west lane is the west lane out of sight or can you see it at that point?

A. It is out of sight at that point.

Q. One thing I overlooked asking you. Can you tell us if you took that measurement what would be the length of the measurement where it got to a point where it did not show that the wheels were making a track except as you say from the left side? What was that point until you went over the bank, do you recall?

A. That is where we concluded was the first flip of the car, the right track completely left the ground and, as I mentioned, a space in between and again a long space where it finally came to a stop. As I recall, I believe on my chart there I listed approximately two hundred fifty feet.

The Court: Refer to your chart when testifying so there will be no question.

The Witness: Two hundred and fifty feet.

Mr. Rosenberger: I don't believe the Trooper understood the question.

page 86 } By Mr. Whitehead:

Q. Let me rephrase the question. Let me see if I can make myself clear. I don't mean the distance first leaving the hard surface. What I am talking about is when it got

A. W. Rush.

to the point that the tires only made one track which you said showed the tracks were made on the left side what was the length of that?

A. The impression it made in the ground?

Q. From the time you just saw one track made until it went over the bank what was the distance of that?

A. Ten or fifteen feet.

Q. Now, was that afterwards or before the skip mark, I believe you said you noticed? What do you mean by the skip mark?

A. Well, that was after the impression I referred to. When it made the impression I referred to with only two wheels on the ground then there was a blank spot that was referred to as the skip spot and then there is the path where the car finally came to a stop.

Q. I will ask you this: What was the condition of the weather? Was it a warm night, a cold night or what was it?

A. All I remember is that it was clear.

page 87 } Q. What was the road surface? Was that dry?

A. Yes, sir, dry.

Q. Now then, if you proceed on east of where the accident happened then you gradually start going upgrade?

A. Slightly upgrade, yes, sir.

Q. After you got to the accident then I believe you said you put Mr. Burley and Mr. Beasley in your vehicle and then did you walk down to the wrecked vehicle then?

A. No, sir. I administered first aid until the ambulance driver took Mr. Beasley. I didn't go down the bank then.

Q. Had they moved Carroll Johnson before you went down?

A. No, sir.

Q. He was still there when you went down?

A. He was still there.

Q. And also was Mr. Leech still there then?

A. He was. First aid was given to Mr. Leech down at the scene.

Mr. Whitehead: All right, that is all.

The witness stands aside.

page 88 } A. W. RUSH (State Trooper),
having been first duly sworn, testifies as follows:

A. W. Rush.

DIRECT EXAMINATION.

By Mr. Daniel:

Q. Mr. Rush, you are employed by the Virginia State Police Department, are you not?

A. Yes, sir.

Q. Were you employed and working as a State Trooper on the 18th of October, the date of this wreck?

A. That is right.

Q. Did you help Mr. Wilkes in his investigation?

A. I was with him that night.

Q. What did you do there at the scene of the wreck? Do you know about what time you all got there or about what time the accident happened?

A. It was sometime around midnight.

Q. And were you with him in the same car or did you all go in separate cars?

A. We were together in the same car.

Q. What did you find when you all got there?

A. When we arrived there the accident was in page 89 } the east bound lane of 460 near the intersection of the Stewartsville road which I believe is 726 and the car was down in the bottom there on the right-hand side of the road. The car had been demolished and at that time there was a truck driver at the scene who told me two people were down there near the car. Wilkes and I were together and I believe there were two other boys there standing on the edge of the road. I asked the truck driver if anybody was down there.

Q. Without telling what somebody else told you you found the truck driver and some other people there?

A. That is right.

Q. Were any of the people who were in the wreck up on the highway?

A. I believe the two boys.

Q. Now, do you know who they were?

A. No.

Q. I believe you went with some other people down into this ravine or hollow, whatever it was, to do what you could for the boys that were left down there.

A. That is right.

Q. When you got down there how many people did you find?

A. W. Rush.

page 90 } A. I found one boy, the Leech boy.
Q. Where was he?

A. He was below the automobile there I guess around twenty-five to forty feet from the Chevrolet car and he was lying on his back and he was bleeding from head injuries.

Q. Was he unconscious at that time?

A. Yes, he was.

Q. You said he was down about twenty-five feet from the car. Was that to the front, rear or what part of the vehicle? Defendants' Exhibit No. 14 shows the Chevrolet automobile down over the bank, could you say approximately the position you found Leech?

A. This is looking down the bank?

Q. Yes, sir.

A. He was found to the rear of the car.

Q. Where was the body of Carroll Johnson, the boy that was killed?

Mr. Frost: Get the directions, east or west. He said to the rear of the car.

By Mr. Daniel:

Q. Do you know which direction the rear of the car was pointing? In other words, after it went over the bank was it still heading the direction it originally was going, east?

A. The car was headed back generally west.

page 91 } Q. So the position of Leech would have been roughly east or southeast of the car twenty-five feet away from the car?

A. That is right.

Q. Then, did you find Carroll Johnson's body?

A. Yes, sir, we found that. That would have been west of the vehicle there and it was in the brush there and honey-suckle and so forth.

Q. Did he appear to be dead at the time?

A. He appeared to be dead. I examined him.

Q. So the body of one boy was there and Tommy Leech was there and two were on the highway?

A. That is right.

Q. Were you present when Trooper Wilkes put Beasley and Burley in his car?

A. No.

Thomas D. Leech.

Q. Did you hear any interrogation or questioning that Trooper Wilkes made to those two men?

A. No, sir.

Q. Did you hear any questions he asked about the accident?

A. No, sir.

page 92 } Q. I believe the place this thing happened was
right near the intersection of the Stewartville
road, State Route 726. Is that correct?

A. Yes, sir.

Q. Did you assist Trooper Wilkes in the measurements he made?

A. No, I did not.

Q. How far was Johnson from the car, do you know?

A. I would estimate around thirty to forty feet. It was not measured by me.

Mr. Daniel: That is all, you may examine.

By The Court:

Q. Johnson was twenty-five to forty feet in one direction and the other boy was twenty-five to forty feet in the other direction. Is that right?

A. That is right.

Mr. Whitehead: I have no questions.

The witness stands aside.

page 93 } THOMAS D. LEECH,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Daniel:

Q. You are Thomas D. Leech?

A. Yes, sir.

Q. How old are you?

A. Twenty.

Q. Tommy, prior to October 18, 1960 were you employed?

A. Yes, sir.

Q. Where were you employed?

A. Barker-Jennings Corporation.

Q. Now, had you finished high school at that time?

A. Yes, sir.

Thomas D. Leech.

Q. And how long had you been employed at Barker-Jennings?

A. I started there in June.

Q. Are you back working there now?

A. Yes.

Q. You are now married too, aren't you?

A. Yes, sir.

Q. Now, on October 18th how long had you
page 94 } known Thomas Burley, Duane Beasley and Carroll Johnson?

A. Just the time I had worked at Barker-Jennings.

Q. And that would have been approximately how long would you say?

A. From June until October.

Q. Did you all on that day make any plans to go anywhere the night of October 18th?

A. We talked about going to Roanoke.

Q. Do you know how the conversation got started?

A. No, I don't remember how it got started.

Q. Did all of you talk together or not?

A. Yes, sir.

Q. Where did you talk, at work?

A. Yes, sir.

Q. Then on October 18th did you get together in the car with the parties I have named, Beasley, Johnson and Burley?

A. Yes, sir.

Q. Where did you get together with them?

A. They picked me up at The Florence.

Q. Were the three of them in the car when they came to The Florence?

A. Yes, sir.

page 95 } Q. How did you happen to be at The Florence?

A. That is where they were going to pick me up at.

Q. Did you work at The Florence?

A. I did part of the time helping her out some.

Q. Do you know about what time they picked you up?

A. I think it was around 7:30, might have been after 7:30.

Q. In the evening?

A. Yes, sir.

Q. And were you in the place when they came there?

A. Yes, sir.

Q. Who came in, do you know?

A. I don't remember who came in, I am not sure.

Thomas D. Leech.

Q. Do you remember whose car you all were going in?

A. It was Carroll's car.

Q. Carroll Johnson's car?

A. Yes, sir.

Q. What kind of car did he have?

A. A 1960 Chevrolet.

Q. Do you remember anybody came in The Florence to get you?

A. I think one or two wanted to go to the rest room.

Q. Do you know that all three of the boys I
page 96 } named were present at that time?

A. I think so.

Q. You remember leaving The Florence all right, don't
you?

A. Yes, I remember leaving.

Q. Who was driving the car?

A. Duane Beasley.

Q. Where did you go from there?

A. We went to Reynolds' place.

Q. Where is that?

A. That is a little outside of Forest.

Q. Is that on the right-hand side outside of Forest?

A. Yes, sir.

Q. Is that a white building?

A. A kind of white building with gas tanks in front.

Q. Has a big driveway there?

A. Yes, sir.

Q. Is that before you get to the Perrowville road?

A. Yes, sir.

Q. That was between Forest and the Perrowville road?

A. Yes, sir.

page 97 } Q. What did you all do there?

A. Went in and Carroll bought a six-pack of
beer.

Q. Carroll bought a six-pack of beer?

A. Yes, sir.

Q. Did you buy anything?

A. I think I bought some cakes. I am not sure what I
bought.

Q. You remember anybody else buying anything?

A. I think Duane bought a Pepsi-Cola or something like
that.

Q. Did you all take the beer with you?

A. Yes, sir.

Thomas D. Leech.

Q. Who drank the beer?

A. Carroll and Thomas and myself.

Q. Tommy Burley?

A. Yes, sir.

Q. You remember how much beer you drank?

A. I drank one or two beers or more.

Q. Did Beasley drink any of the beer?

A. No, sir.

Q. He wasn't drinking at all that night?

A. No, sir, he wasn't drinking.

page 98 } Q. Was Carroll Johnson drinking most of the beer?

A. I don't know whether he drank the most but he was drinking.

Q. Was Duane Beasley doing all the driving for Carroll Johnson that night?

A. Yes, sir.

Q. Had anything been said about who was going to drive?

A. Not that I heard.

Q. When they picked you up Duane Beasley was driving and the arrangements had been made before they picked you up.

A. Yes, sir.

Q. From there can you tell where you went after they bought the beer and potato chips and things?

A. Went to Bedford and got to the other side of Bedford and ran around the Auto-Dine.

Q. What is the Auto-Dine, an eating place?

A. Yes, sir, a drive-in place.

Q. You didn't stop?

A. No, sir, I don't believe we stopped.

Q. Do you know from there where you went?

A. We went on and then stopped at Whitey's Truck Stop on the way to Roanoke.

page 99 } Q. Do you know about how far Whitey's Truck Stop is from Bedford?

A. No, I don't.

Q. Do you know which side of the road it is on as you go to Roanoke?

A. On the left side.

Q. Is that on the dual divided highway there?

A. It is a three-lane highway there.

Q. As you go on toward Roanoke from Bedford you have some divided highway and some that is three lanes?

Thomas D. Leech.

A. Yes, sir.

Q. At Whitey's Truck Stop you stopped and is that the Phillips 66 station we have mentioned here?

A. Yes, sir.

Q. This was on the way up. Do you remember approximately what time you went in there?

A. No, sir, I don't.

Q. Did you stop at Whitey's Truck Stop?

A. Yes, sir, I am pretty sure we stopped.

Q. Do you know for how long or for what purpose?

A. No, I don't know how long we stopped or why we stopped.

Q. Was Duane Beasley still driving then?

page 100 } A. Yes, sir.

Q. Did you leave there and go to Roanoke?

A. Yes, sir.

Q. Did Duane drive the car then?

A. Yes, sir.

Q. Who was telling him where to go?

A. We just were all together riding around, wasn't any particular place to go.

Q. Did Carroll Johnson tell him any place go to?

A. If he did I don't remember it.

Q. You don't remember that part?

A. No, sir.

Q. You do remember going to Roanoke.

A. I remember that and I remember some of the things such as stopping at Whitey's.

Q. Do you remember going into Roanoke City itself?

A. No, sir.

Q. Do you remember leaving Roanoke?

A. I remember leaving a place where we stopped and was talking to some boys.

Q. Was that in Roanoke?

page 101 } A. Yes, sir.

Q. What type of place was that?

A. It was just a drive-in restaurant.

Q. In the city you think?

A. Yes, sir.

Q. Do you know when you left Roanoke?

A. No, sir, I don't know what time we left.

Q. Do you know why you were going to Roanoke?

A. Just going up to have a good time.

Q. Were you married at that time?

Thomas D. Leech.

A. No, sir.

Q. Were you engaged?

A. No, not engaged.

Q. You say you don't know of any purpose why you went to Roanoke?

A. No, sir.

Q. Do you know when you left Roanoke or about what time?

A. No, sir, I don't remember what time it was.

Q. Go ahead and tell the jury what you did on the way back.

A. I remember stopping at Whitey's Truck Stop.

Q. That would have been the second time you page 102 } stopped at Whitey's Truck Stop.

A. Yes, sir.

Q. Who drove into Whitey's Truck Stop?

A. Duane.

Q. What did you all do?

A. I think some of us went to the rest room. That is all I remember doing at Whitey's Truck Stop.

Q. You do remember going there to Whitey's Truck Stop?

A. Yes, sir.

Q. Do you remember if you bought anything?

A. I don't remember buying anything.

Q. Do you know at the time you went in there Duane Beasley was driving?

A. Yes, sir.

Q. Had you asked to be permitted to drive the car at any time?

A. I don't remember asking to drive the car.

Q. Had you ever had any trouble with your memory before this wreck?

A. No, sir.

Q. Apparently you were in the car when it wrecked, were you not? page 103 }

A. Yes, sir.

Q. Do you know of anybody driving the car except Duane Beasley that night?

A. No, sir, don't remember anybody driving it but him.

Q. Do you remember leaving Whitey's Truck Stop?

A. No, sir.

Q. What was the next thing you knew after going to Whitey's Truck Stop on October 18th that night?

A. You mean what was the next thing I remember after leaving Whitey's Truck Stop?

Q. Yes, sir.

Thomas D. Leech.

A. I remember being in the hospital.

Q. Do you know what hospital?

A. Bedford Memorial.

Q. Do you happen to know the date you next remembered something, what day it was?

A. No, sir, I don't.

Q. Do you remember who was in the room when you came to in the hospital?

A. I don't know what his name was but his father had something to do with the 4-H Club.

Q. Was Duane Beasley in the room with you
page 104 } when you came to?

A. No, sir.

Q. He had already left before you came to?

A. Yes, sir.

The Court: You mean they were occupying the same room?

Mr. Daniel: That is what I understand.

Q. Can you tell us about how long you were in the hospital?

A. I don't know when I got out.

Q. Have you, at our request, made a list of your expenses?

A. Yes, sir, I have them in my pocket.

Q. Will you read them off and check them to see if they are accurate?

A. The hospital bill was \$423.00. Dr. Hardy was \$124.50. Westover Pharmacy was \$38.54. Dr. Weaver in Roanoke was \$35.00. X-rays taken in Roanoke was \$25.00. Dr. Novak was \$50.00.

Q. He is in Lynchburg?

A. Yes, sir. Lynchburg General Hospital \$30.00. Ambulance \$5.00.

page 105 } Q. I believe Dr. Hardy testified you were discharged from the hospital on the 13th of November. After that how long was it from the time you got out of the hospital until you returned to work?

A. March 15th.

Q. And you did go back to work on March 15th?

A. Yes, sir.

Q. You lost the wages you would have earned from October 18th to March 15th?

A. Yes, sir.

Thomas D. Leech.

Q. Now, after you were discharged from the hospital did you have to make any visits to Dr. Hardy?

A. Yes, sir. When I started off it was every week.

Q. Did you also have to go to Roanoke to see Dr. Weaver?

A. Yes, sir, went up there twice—I believe it was three trips.

Q. Do you know about how much each trip cost you?

A. Around \$30.00.

Q. For the three trips, you mean?

A. Yes, sir.

Q. Do you know about how many trips you made to Bedford?

A. About twelve trips.

page 106 } Q. Do you know what they cost you?

A. \$30.00.

Q. Is that the total?

A. Yes, sir.

Q. How about loss of time from work? How much would you have been earning while you were out?

A. Well, I was earning \$1.10 an hour.

Q. You know how much that comes to a week?

A. \$1,054.00.

Q. You mean that is for the whole time. How much were you earning a week?

A. I don't remember exactly how much it was a week.

Q. But you have figured for the time you were out the exact amount you lost while you were out of work?

A. Yes, sir.

Q. You are now back at work and have been working since March 15th?

A. Yes, sir.

Q. Do you have any symptoms or complaints from your injuries received?

A. Well, I am nervous. When I get nervous I get a headache.

page 107 } Q. Does this occur frequently or infrequently?

A. Whenever I get nervous my head starts hurting.

Q. Did you have that trouble before the accident?

A. No, sir, I never had.

Q. Anything else bother you?

A. My memory is not as good.

Q. How has your memory gotten?

A. Well, they tell me to go down to the third floor or some

Thomas D. Leech.

floor at Barker-Jennings to get something and by the time I get down there I have forgotten exactly the thing to get and I have to call back up and ask them something about it.

Q. What do you have to do at Barker-Jennings?

A. Order clerk.

Q. And what do you do?

A. Well, you have orders that come in by the salesmen and you have to work them up and ship them out.

Q. Do you have any trouble with you ability to sleep?

A. I have a right hard time getting to sleep.

Q. Did you have any of that trouble before the wreck?

A. No, sir.

Q. Had you ever been in this Chevrolet before this trip?

A. I had been in it before.

page 108 } Q. Had you ever driven it?

A. Yes, sir.

Q. What kind of condition was the car in?

A. It was in good condition to my knowledge—now, I didn't know much about the car.

Q. Was it a normally constructed car or had it been modified?

A. It hadn't been modified. It was like it was made at the factory.

Q. Without any changes?

A. Without any changes.

Q. Do you know anything about the type rear end it had in it?

A. No, I don't know what kind of rear end it had in it.

Q. Do you know what kind of engine it had?

A. I think it had the biggest engine you could get in that model.

Q. Do you know if it was a car made for using in drag races?

A. Well, most of them were made for that.

Q. It was?

A. Yes, sir.

page 109 } Q. Do you know whether it was used for that purpose?

A. Well, I never heard of him using it but just trying it.

Q. Was Carroll Johnson in the car the whole time you all were in there that night? Was he in the car with you all the whole time?

A. Yes, sir.

Thomas D. Leech.

Q. When you went back to Phillips 66 station do you remember whether he got out of the car?

A. I don't remember who got out of the car. I don't remember if I even got out of the car or not.

Mr. Daniel: That is all.

CROSS EXAMINATION.

By Mr. Frost:

Q. Tommy, as I understand, the first time you met these boys that night was at The Florence where they picked you up.

A. Yes, sir.

Q. Did all of them get out then?

A. I don't remember whether all of them got out or not. I think they did get out but I am not sure.

Q. Do you remember how you were riding when page 110 } you left The Florence, who was seated where?

A. I think I was seated on the right-hand side in the back, but I am not positive about that.

Q. Duane was driving?

A. Yes, sir.

Q. Who was sitting in front of you, do you remember?

A. Tommy Burley.

Q. And Carroll Johnson was sitting in the back with you?

A. Yes, sir.

Q. You then made the stop at Reynolds. Is that right?

A. Yes, sir.

Q. Is that a little bit beyond Forest?

A. Yes, sir.

Q. That is where you purchased the beer?

A. Yes, sir.

Q. Did all of you get out there?

A. Yes, sir.

Q. Then got back in the car and take the same seats when you got back in?

A. As far as I remember we did.

Q. Then you did not stop again, as I understand, until you got to the Auto-Dine and you drove around page 111 } that, didn't stop at the Auto-Dine.

A. I don't think we did.

Q. And that is west of Bedford, is it not?

A. I think so.

Thomas D. Leech.

Q. You know exactly where the Auto-Dine is.

A. It is on 460 outside of Bedford.

Q. West of Bedford?

A. Yes, sir.

Q. Then the next stop was Phillips 66, wasn't it?

A. Yes, sir.

Q. What did you make the stop there for?

A. I don't know why we made the stop.

Q. How long did you stay there?

A. I don't know how long we stayed there.

Q. All of you got out at the Phillips 66, did you?

A. I think so.

Q. Then you went on to Roanoke. Is that right?

A. Yes, sir.

Q. Your group bought some beer at Reynolds?

A. Yes, sir.

Q. Did you buy any beer at Phillips 66?

A. I don't remember buying any other beer be-
page 112 } side that first beer.

Q. You mean on the whole trip?

A. Yes, sir.

Q. You mean you don't know whether any other beer was
bought or not?

A. I don't remember any other beer being bought.

Q. Where did you go in Roanoke?

A. I don't know what the name of the restaurant was but
that is where we went, just riding around.

Q. Did you buy any beer there or did they serve any beer
at that place?

A. I don't know whether they did or not.

Q. Do you know whether any of your crowd drank any beer
at that time?

A. I don't remember anybody drinking any beer there.

Q. Then you came on back toward Lynchburg after you left
Roanoke. Is that right?

A. Yes, sir.

Q. And your first stop was at Phillips 66, the same place
you stopped when you went up there?

A. Yes, sir.

Q. That is the same as Whitey's Truck Stop?
page 113 } A. Yes, sir.

Q. All of you got out there, did you?

A. I guess all of us got out, I don't know. I don't remem-
ber.

Thomas D. Leech.

Q. Do you remember getting to Whitey's Truck Stop?

A. I just remember pulling in there. That is all I remember about it.

Q. Do you remember anybody there in the filling station or seeing anybody there?

A. I don't remember seeing anybody there.

Q. You don't remember seeing anybody and don't know whether everybody got out or not.

A. No, sir, I don't remember.

Q. You don't remember seeing any of the employees of that place, anybody that operated the place, out there?

A. No, sir.

Q. In other words, you just remember being at Phillips or Whitey's Truck Stop and pulling up there and you don't remember anything else after that.

A. That is true. That is right.

Q. You don't remember anything that happened leaving the place or anything else?
page 114 } A. That is right.

Q. Not until after the accident when your memory came back?

A. Yes, sir.

Q. You still don't remember anything that happened up at Phillips 66?

A. That is right.

Q. You don't know who drove away from the place?

A. No, sir, I don't.

Q. Do you know anything about the accident at all?

A. No, sir.

Q. Except from hearsay?

A. From hearsay, that is all.

Q. You heard Dr. Hardy testify this morning about your condition and so forth.

A. Yes, sir.

Q. He was correct in what he said, was he not?

A. Yes, sir.

Q. About the unconsciousness?

A. Yes, sir.

Q. And the extent of it?

A. Yes, sir, as far as I know he was.
page 115 } Q. I think he testified that you were discharged
November 13, 1960 and you returned to work on
March 15th, 1961. Is that correct?

A. Yes, sir.

Thomas D. Leech.

Q. And the last time he saw you was March 18th, 1961. That is the last time he saw you professionally?

A. Yes, sir.

Q. In other words, you never did go back to visit him again.

A. No, sir.

Q. Then did you see any other doctors between then and now?

A. I have seen Dr. Novak and Dr. Weaver.

A. Yes, sir.

Q. When did you see Dr. Weaver?

A. Saturday.

Q. This last Saturday?

A. Yes, sir.

Q. Is this the only time you have seen Dr. Weaver between March and now, last Saturday?

A. Yes, sir.

page 116 } Q. Did you go to Roanoke to see him?

A. Yes, sir.

Q. Did he examine you?

A. Yes, sir.

Q. Was he just checking you over? Is he testifying in this case?

A. No, he is not testifying in the case.

Q. But you did go up there for the checkup?

A. Yes, sir. He told me to come back in March.

Q. You went back on his recommendation. Is that right?

A. Yes, sir.

Q. Now, who sent you to Dr. Novak?

A. Mr. Watkins.

Q. Dr. Weaver did not advise you to go to Dr. Novak, did he?

A. No, sir.

Q. Nor did Dr. Hardy?

A. No, sir.

Q. And Dr. Novak has treated you or just examined you?

A. He examined me.

Q. Examined you how many times?

A. Once.

page 117 } Q. What date was that?

A. I don't remember what date it was.

Q. Do you remember how long ago it was? Was it in August or September?

A. It was this month.

Q. September?

Thomas D. Leech.

A. Yes, sir.

Q. Mr. Watkins, your attorney, sent you to Dr. Novak and he made an examination. Did he put you in Lynchburg Hospital?

A. He put me over there for a brain wave test.

Q. And that is the Lynchburg General Hospital bill for the test Dr. Novak made on you. Is that right?

A. Yes, sir, that is right.

Q. How much was that bill?

A. \$30.00.

Q. I believe since March you have been working at Barker-Jennings.

A. Yes, sir.

Q. Now, at the time you were making what, \$1.10 an hour?

A. Yes, sir.

Q. Now you are making \$1.25 an hour?

page 118 } A. Yes, sir.

Q. Your reporting for work has been regular. You have been going every day, have you not?

A. Yes, sir.

Q. Have you missed any days since March 15th?

A. Only when I had a couple of teeth pulled but that didn't have anything to do with the accident.

Q. In other words, except for the time lost pulling teeth you have been down there every day you were supposed to go down there?

A. Yes, sir.

Q. What time do you get to work?

A. 8:00 o'clock.

Q. How much time for lunch?

A. An hour.

Q. And get off at what time?

A. 5:00 o'clock.

Q. Do you work Saturday?

A. Half a day.

Q. That has been going on each week ever since March 15th?

A. Yes, sir.

page 119 } Q. And I believe you got married in April, is that right?

A. Yes, sir.

Q. You remember the date?

A. April 28th.

Q. In regard to driving this car which was a Chevrolet, as

Thomas D. Leech.

I understand, a 1960 Chevrolet, you have driven this car, haven't you?

A. Yes, sir.

Q. And did you drive it on this drag strip out here at Timberlake Road?

A. Yes, sir.

Q. How high could you get it up?

A. I don't remember how high I got it up.

Q. Do you think you got it up as much as ninety?

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

Q. You remember asking Carroll Johnson to let you drive?

A. No, sir, I don't remember asking him.

Q. Did you tell the Trooper that you were driving at the time of the accident?

A. No, sir, I did not.

Q. Or that you thought you were driving?

page 120 } A. No, sir.

Q. Do you remember going to Barker-Jennings in December or maybe in January, before you went back to work—you did go down to visit these boys before you went back to work, did you not?

A. Yes, sir.

Q. Don't you remember going down there and making a statement you thought you were driving at the time of the accident?

A. I went down there but I don't think I made a statement that I was driving the car or that I could have been driving the car.

Q. You deny that you made a statement that you could have been driving the car at the time of the accident?

A. I don't remember saying that.

Q. Did you make any statement about your driving the car to either one of these boys?

A. No, sir, I don't remember making a statement like that.

Q. With the exception of going to Dr. Weaver last Saturday and the examination at the instance of Mr. Watkins by Dr. Novak, you have not seen any doctor at all professionally because of the accident since March 18th when Dr. Hardy saw you. Is that correct?

page 121 }

A. Yes, sir.

Q. You are not taking any medicine at this time, are you?

A. I am taking some now for this cold.

Q. For what?

A. I am taking some medicine now for my cold but after

Thomas D. Leech.

I got out of the hospital I was taking iron pills and vitamin pills and nerve pills.

Q. The medicine you are taking now for a cold is for the cough you have now?

A. The congestion I have got.

Mr. Frost: That is all.

RE-DIRECT EXAMINATION.

By Mr. Daniel:

Q. I believe Dr. Hardy told you you should be followed by a neurologist. Did he tell you that or not?

A. Yes, sir.

Q. Did you know any neurologist then in Lynchburg?

A. No, I didn't.

page 122 } Q. You say you went back to Barker-Jennings since the wreck down there one time before you went back to work. Mr. Frost asked you if you told some of them you were driving the car. Do you deny you told them you were driving the car?

A. Yes, sir.

Q. This is the first time you have heard anybody say you said you had been driving the car?

A. Yes, sir.

Q. Let me ask you this: As a matter of fact, since this accident have you talked with Beasley much at all about this case?

A. He won't speak to me. He quit speaking to me.

Q. Was that after you instituted the suit?

A. Yes.

Q. So you haven't had any occasion to be talking to him about the accident, have you?

A. No, sir.

RE-CROSS EXAMINATION.

By Mr. Frost:

Q. I understood you to say you did see him before you went back to Barker-Jennings. You did go down and
page 123 } talk to the boys down there.

A. That is right.

Q. That was Beasley and Burley too, wasn't it?

A. Yes, sir.

John J. Wood.

Q. Beasley doesn't work at Barker-Jennings now, does he?

A. No, sir.

Q. Or Burley either?

A. No, sir.

Mr. Frost: That is all.

RE-RE-DIRECT EXAMINATION.

By Mr. Daniel:

Q. Did you have injuries other than what the doctors testified to? You have some scars, don't you?

A. Yes, sir, scars on my face.

Q. Does your back give you any trouble?

A. I have a little trouble lifting things. I am not big enough to lift too much.

Mr. Daniel: That is all.

The witness stands aside.

page 124 } JOHN J. WOOD,
 having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Daniel:

Q. Will you state your name?

A. John J. Wood.

Q. And you live in Roanoke, do you, Mr. Wood?

A. Yes, sir.

Q. Where do you work, Mr. Wood?

A. Whitey's Truck Stop, Phillips 66 at Bluebridge.

Q. How far is that from Roanoke?

A. Eleven miles.

Q. How long have you been employed there, Mr. Wood?

A. Since March of 1955.

Q. And what hours do you work?

A. From 11:00 to 7:00 and on Tuesday nights from 7:00 to 7:00.

Q. On Tuesday from 7:00 to 7:00?

A. Yes, sir.

Q. And I suppose you were working there on Tuesday,

John J. Wood.

October 18th, the night of this wreck, were you
page 125 } not?

A. Yes, sir.

Q. Before that night did you know any of the boys, Thomas
Burley, Duane Beasley, Carroll Johnson or Tommy Leech?

A. No, sir.

Q. As far as you know you hadn't seen them before that
time?

A. No, sir.

Q. What time did you go to work that night?

A. 7:00 o'clock.

Q. While you were on duty at the filling station did you see
the 1960 Chevrolet in which these boys were riding before
11:00 o'clock?

A. Yes, sir, they were over at the restaurant. The restau-
rant is on the east end of the building.

Q. About how long is that building all together, Mr. Wood?

A. Oh, it is, I expect, almost eighty feet.

Q. Is that a correct picture of the building in which you
work?

A. Yes, sir.

Q. You say they came to the restaurant part?

A. Yes, sir.

page 126 } Q. How far is your auto part from the restau-
rant?

A. About thirty feet from the entrance.

Q. Do you recall about what time they came there in this
car the first time?

A. No, not offhand, no, sir.

Q. Was it earlier in the evening?

A. It was early, the first part of the night.

Q. Was there anything that called your attention to them
that caused you to remember them?

A. Only that it was a nice white Chevrolet, a nice looking
car.

Q. Did they come in the service station at that time?

A. No, sir.

Q. Did you have any conversation with any of them at that
time?

A. No, sir.

Q. Do you remember the Chevrolet stopped there at the
restaurant?

A. Oh yes, it stopped at the restaurant.

Q. Did you notice any of them get out?

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A. They were out and around the car but whether they went in the restaurant I wouldn't say.

page 127 } Q. What did they do? Did they leave?

A. Just standing there talking like a bunch of boys will do.

Q. About how long did they stay there?

A. Oh, on up until around 10:00 o'clock.

Q. Would you estimate about how long they stayed there all together that night?

A. Well, offhand, not paying too much attention to them, around an hour and a half or a couple of hours, in and out.

Q. Did you notice anything unusual about the car?

A. The horn, it had an old Model-A horn or a Model-T horn.

Q. Is that one that goes "oogah"?

A. Yes, sir.

Q. When they left did you see which direction they went the first time?

A. They went toward Roanoke.

Q. Did you see who was driving the first time?

A. No, sir.

Q. Did they later come back to your service station that night?

A. Yes, sir.

page 128 } Q. Do you remember about what time that was?

A. Around about 11:00 o'clock.

Q. And what did they do at that time?

A. They pulled up beside of the pump, that is the first row of pumps.

Q. The gasoline tank pumps?

A. The gas tank pumps in front of the station. I walked to the door and they said they didn't want any gas, were going to the rest room.

Q. Didn't you mark with an X the gas tank pumps they pulled up to that second time around 11:00 o'clock?

A. This first one right here, the pump on this end, on the east end.

Q. Will you look at Plaintiff's Exhibit No. 3 and see if the red cross mark is the approximate point of the pump where they stopped?

A. Yes, sir.

Q. Is that where you would make the mark, Mr. Wood?

A. Yes, sir, that is on the east end of the pumps, the first row.

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- Q. That is where the car stopped. What did they say about gas? Did you ask them?
- page 129 } A. Yes, sir. They said they didn't want any gas, wanted to go to the rest room.
- Q. Do you know if they went to the rest room?
- A. One of them did.
- Q. You know which one that was?
- A. A black-haired boy.
- Q. Could you describe his height, whether tall or short?
- A. Well, he was pretty tall and thin.

Mr. Daniel: I would like for Mr. Beasley to stand up.

Note: Duane Beasley arises.

By Mr. Daniel:

- Q. Would you say whether or not it was this boy?
- A. Yes.
- Q. About how long did they stay there?
- A. I would say maybe ten minutes.
- Q. You know who was driving when they came in there?
- A. No, sir.
- Q. Do you know who was driving when they left?
- A. Mr. Beasley was driving when they left the station.
- Q. When they left the station did you see where
- page 130 } they went to?
- A. They headed east.
- Q. Did you see them go on out into the highway?
- A. Yes, sir.
- Q. Did you see them go down the road?
- A. Just a very short distance.
- Q. Were they completely out on the highway and away from the restaurant when you last saw them?
- A. Yes, sir.
- Q. And you are positive Mr. Beasley was the driver?
- A. When they left from in front of the pumps, yes, sir.
- Q. I mean when they left and went out into the road was Beasley driving?
- A. Yes, sir.
- Q. Did you so identify him as being the driver to Trooper Wilkes?
- A. Yes, sir.
- Q. And I believe you testified—

John J. Wood.

Mr. Frost: I object to leading questions.

By Mr. Daniel:

Q. How did you happen to identify him -for page 131 } Trooper Wilkes?

A. By the picture.

Q. How many pictures did he bring?

A. Four, I think.

Q. Did you have any trouble picking out the driver from the pictures?

A. No, sir.

Q. Did you make any remark or have any thought when you saw them leave the station?

The Court: Mr. Daniel, Mr. Frost objects to leading questions.

Mr. Daniel: I am sorry.

Mr. Frost: And I object to the particular question about any remarks he made.

By Mr. Daniel:

Q. In what manner did the car leave and go out into the road with Mr. Beasley driving?

A. Well, I wouldn't say it was too reckless a manner. There was loose gravel between the drive-in or station and the hard surface on 460.

Q. And what happened to the gravel?

A. Well, the tires were crying a little and skidding.

Q. You remember seeing this man there that page 132 } night, this man Leech?

A. No, sir. Two of the boys I didn't see, I couldn't see.

Q. Are you positive that this boy, Leech, was not driving the car away from there?

A. Not when they left the station.

Mr. Frost: I object to the leading questions.

The Court: Mr. Daniel, all your questions are leading. Please refrain from asking leading questions.

By Mr. Daniel:

Q. When this car was leaving there where were you standing Mr. Wood?

A. In the door.

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Q. In the doorway?

A. Yes, sir.

Q. Did you see the boys when they got in the car?

A. Two of them.

Q. What about the other two?

A. They were in the car.

Q. Who did you see get in the car?

A. The black-headed boy and the Johnson boy.

page 133 } Q. The black-headed boy?

A. The Leech boy—I mean the tall slender boy

I identified awhile ago.

Q. The one you identified as Duane Beasley?

A. Yes, sir.

Q. Which part of the car did Duane Beasley get in?

A. Beasley got in on the left side.

Q. Front or back?

A. Front.

Q. Were you in a position so as to see clearly?

A. Yes, sir, I could see clear across the drive.

Q. Any question in your mind about who was driving?

A. Not when they left the station, no, sir.

Q. Do you know if that automobile was ever moved from in front of your gas pumps?

A. It was not.

Q. Are you positive about that?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Whitehead:

Q. You had been working at this place how long before the accident?

A. Since '55.

Q. Now, I show you two pictures—

Mr. Daniel: If your Honor please, we have an objection to those two pictures.

The Court: What is the objection?

Mr. Whitehead: May I ask him first if they are a fair portrayal of the place?

The Court: Yes.

By Mr. Whitehead:

Q. I ask you to look at this picture first over on the right

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and I ask you if that is a fair portrayal of the situation as far as the pumps and the location of them in front of the filling station.

A. Yes, sir.

Q. That is?

A. Yes, sir.

Q. Now, I will ask you also, please sir, to look at these pictures, the one over on the left, and excluding this black automobile, I ask you if that is a true portrayal of the conditions in front of the restaurant.

A. Yes, sir.

page 135 } Mr. Rosenberger: If your Honor please, those pictures do not constitute one picture. They are two separate pictures and when put together they are not accurate.

The Court: Disconnect them.

Mr. Whitehead: I have them disconnected.

Mr. Rosenberger: If they are disconnected and separated from the board we have no objection. We have no objection to either one of them separately but do object to both of them put together.

The Court: He can put one on the board and leave the other off.

Mr. Whitehead: I will take them both off.

Mr. Daniel: May I make my objection?

The Court: What is your objection?

Mr. Daniel: I make objection to the pictures, two separate pictures, which do not accurately portray the scene and what they both show could just as well have been shown in one photograph.

The Court: I overrule your objection.

Mr. Daniel: We except.

Mr. Whitehead: Judge, suppose we call one
page 136 } 28 and the other one 28-A.

Q. Now, Mr. Wood, what time of night was this that they came back there the second time?

A. Around about 11:00 o'clock. It might have been a few minutes before 11:00.

Q. When they drove up that time which pumps did they stop in front of?

A. This pump here on this side. Here is the entrance to

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the station here and they pulled over on this side of the pump, headed east.

Q. Were these pumps there at that time?

A. Yes, sir.

Q. This is Defendants' Exhibit No. 28. Now, you say they pulled up in front of these pumps and headed east. Will you put the pencil where they stopped?

A. In front of these pumps.

Mr. Frost: You want to mark that?

Mr. Whitehead: I don't care anything about it being marked.

Q. In other words, it was along in here. Now then, Mr. Wood, at that time what were you doing?

A. At that time we weren't busy.

page 137 } Q. What were you doing?

A. I was standing at the entrance to the door. There is a little walk here, a sidewalk. There is the door that goes into the station.

Q. As you pointed out to the jury that is the little sidewalk and that is the door that leads into the station.

A. That is right.

Q. And you were standing in that doorway?

A. Yes, sir.

Q. Now then, which would be west of the station is the men's room sign or rest room sign, is it not?

A. Yes, sir.

Q. And the rest room then to get to those you would have to go on the side of the building and have to go either behind or down to this end. In other words, if you get out here you go right beside that building and that is where the rest rooms are.

A. Yes, sir.

Q. This sign is shown as "Whitey's Restaurant and Truck Stop". That is correct, isn't it?

A. Yes, sir.

Q. Now, I believe this is a soft drink box, is it not?

A. Yes, sir.

page 138 } Q. Now then, while we are down here we will take Defendants' Exhibit 28-A. Now, the soft drink box shown in 28-A that is right there, is it not?

A. Yes, sir.

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Q. In other words, the filling station, office and tanks would be west of the restaurant, would they not?

A. That is right.

Q. And the restaurant as it is shown in this picture, forget about the car parked here, but is that the door which I am pointing to that enters the restaurant?

A. Yes, sir.

Q. Then also as shown in the other pictures there is a large area out here to park and then you have to come around here to get back up into 460, do you not?

A. Yes, sir, come right out through here and that way to get back on 460.

The Court: Mr. Whitehead, there is some overlapping in those two pictures?

Mr. Whitehead: Yes, sir.

The Court: The jury will understand that is not half and half but that there is an overlapping in the photograph 139 } graphs.

Mr. Whitehead: The drink box, as I pointed out, overlaps in each one of them.

Q. Mr. Wood, of course, you are still working at that place, are you?

A. Yes, sir.

Q. And, of course, I believe you are still on duty on what we call the night shift?

A. Yes, sir.

Q. Now, I will ask you if you will, please, sir—this is not to scale—it is just a rough drawing—I ask you if that fairly portrays the filling station and the pumps and the restaurant and the layout around the place?

Mr. Daniel: May I take up a matter out of the jury's presence?

The Court: Yes, sir. The jury will retire to the jury room.

(Jury out.)

Mr. Daniel: If your Honor please, the plaintiff, by counsel, objects, to counsel for the defendant, Mr. Whitehead, using the diagram which he has there to interrogate page 140 } this witness on the grounds that it is not an accurate portrayal, not nearly as accurate as the

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pictures and it is drawn by Mr. Whitehead himself and if it is to be used as a diagram for the jury to see we object to it on the ground it is not an accurate portrayal and not drawn to scale and shows the buildings sitting back further than they were.

The Court: Was the Trooper's diagram drawn to scale?

Mr. Daniel: No, sir. The Trooper himself drew it and he was a witness.

The Court: As long as it accurately portrays what it intends to portray I see no objection.

Q. Have you examined that diagram carefully, Mr. Wood?

A. No, sir.

Q. Look at it carefully and then I will ask you some questions. That is not drawn to scale. After you finish looking at it let me know and I will ask you some questions.

A. There are two garages on this end, one is the grease rack and one is the wash rack.

Q. Does that accurately portray that filling page 141 } station and the restaurant?

A. Yes, sir.

Q. You say it does accurately portray the layout?

A. The layout, yes, sir.

Q. You said there was something else. What else was it?

A. This is the grease rack here and the wash rack here and the garage here.

Q. He has just got them all combined but this is the restaurant and the parking place and the pumps and the driveway and all that. Does it accurately portray the layout at the filling station which is known as the Phillips 66 station?

A. Yes, sir.

The Court: Mr. Daniel, your objection was that it was not an accurate portrayal. Do you have any evidence to substantiate that?

Mr. Daniel: I refer to Plaintiff's Exhibits 2 and 3 and Defendants' Exhibits 28 and 28-A as the best evidence of the conditions that are there and by an examination of those exhibits you can plainly see that that chart doesn't accurately show it.

The Court: Point out where it does not.

page 142 } Mr. Daniel: All right, the chart here which Mr. Whitehead is using is simply a series of lines without reference to the actual size of the pumps and they are

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all displaced or not shown as they are in the pictures which have been admitted.

The Court: It is apparent from the picture there is only one entrance to the restaurant and there are large pictures windows which are not shown in this, the two windows on the side are not shown, the door to the rear of the restaurant is not shown, so I am going to sustain the objection.

Mr. Whitehead: We want to note an exception on the ground, if your Honor please, that the witness says it does portray a true condition of the layout of that place.

The Court: In observing the pictures which you introduced you can see that although the witness testified it does portray accurately the things portrayed in the photograph it does not and I sustain the objection. Suppose we take a five or ten minutes recess before we call the jury in.

Note: The following transpired in Chambers page 143 } during this recess:

Mr. Daniel: During recess I noticed the defendant Beasley went out into the hall and was talking with the witness Burley who was in the witness room and was present in Court when the witnesses were instructed not to discuss the case with anyone. During the recess they were out in the hall and I called it to the attention of Mr. Whitehead and I think Mr. Whitehead went out and broke it up.

Mr. Whitehead: When I got out there they were not talking. Duane was out on the step talking to somebody, some boy not in the case, but I did ask him then "Did you hear the Judge tell you all you were not to discuss this case with anyone or talk it over with each other?" He said "I thought he meant I wasn't to talk to the jury". I said "No, you can't talk to any witness. Did you say anything to Burley?" He said "Yes, he and I stood there and talked." I didn't get to the point of asking him what was said.

Mr. Daniel: Was he telling Burley what was said?

Mr. Whitehead: I don't know a thing he told page 144 } him.

The Court: Do you have any evidence there was any discussion about the case?

Mr. Daniel: No, sir, none whatsoever except I know they were talking together in the hall. I didn't hear what they were saying.

Mr. Whitehead: I ran out there. When I got out there

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Burley was standing there but Duane was out on the steps talking to somebody else who was not a witness in the case. Then I called him and asked him had he talked about it.

Mr. Daniel: I think the witnesses should be instructed not to discuss the case with anyone when we have another recess, which we probably will.

The Court: I can call them in and tell them not to discuss it with anyone. They will surely understand that. I am sure that they have all discussed the case many times since it happened and you have had discovery depositions and they have probably read each others depositions.

page 145 } (In the courtroom—jury present.)

By Mr. Whitehead:

Q. Mr. Wood, then as I understand it, you were working there. Was anybody else working with you at that time?

A. Not at that time, no, sir.

Q. You were working by yourself?

A. Yes, sir.

Q. Now, when these boys drove in there the first time you said they stayed there until after 10:00 o'clock?

A. In and out until approximately that time. Of course, they were over at the restaurant, weren't over at the station.

Q. Before they left the station it was after 10:00 o'clock before they left the station?

A. Somewhere around 10:00 o'clock. I couldn't be positive exactly of the time.

Q. Then they left there and then came back when?

A. Around 11:00.

Q. Let me ask you this: I know it is an approximation but you are sure they didn't leave there until around 10:00?

A. They could have been in and out.

Q. I mean drive the car away from the station going toward Roanoke.

page 146 } A. No, sir.

Q. You are positive of that?

A. Yes, sir.

Q. How far is it from the station to Roanoke?

A. They call it eleven miles.

Q. Later, you say around 11:00 o'clock, then this white Chevrolet car came back and then was headed east?

A. Yes, sir.

Q. And it came up to the filling station and stopped, as

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you say, in front of the pumps, those which would be nearest to the filling station?

A. That is right.

Q. In other words, where they stopped would be between the pumps, would it not?

A. Yes, sir, be on the far side of the first row of pumps.

Q. And, of course, if you extend it on over that would lead to the next pump, wouldn't it?

A. Yes, sir.

Q. Now then, as the pictures show, what is there between the filling station and the restaurant?

A. The garage.

page 147 } Q. In other words, the whole building is joined up together?

A. That is right.

Q. But over on the extreme east end would be the restaurant?

A. Yes, sir.

Q. Then over on the west end would be the filling station and the building?

A. Yes, all in one building.

Q. So the west end of the building would be the filling station?

A. Yes, sir.

Q. Now, also the rest rooms or toilets are on the west side of the building, are they not?

A. The extreme west end.

Q. In other words, to get to the toilets you have to walk down the west side of the building, do you not?

A. Yes, sir.

Q. And taking Defendants' Exhibit No. 28 as shown right there you see that little thing right there, see that little sign right out from this building on the west side?

A. Yes.

page 148 } Q. Now that is "Rest Rooms," isn't it?

A. Yes, sir.

Q. To get to those rest rooms then you go down beside this building in that manner. Is that correct?

A. That is right.

Q. In other words, as you have shown and as shown by Plaintiff's Exhibit No. 2, that is the west end of the building there, is it not?

A. Yes, sir, that is the west end of the building.

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Q. And those two places there, that place and that place, are the two rest rooms, are they not?

A. Yes, sir.

Q. Now, when this car pulled up there or came back the second time and at that time was headed east you don't know who was driving, do you?

A. Not when it pulled up, no, sir.

Q. Where were you then?

A. I was in the doorway.

Q. Well, if you were standing in the doorway you were bound to have seen the car, weren't you?

A. Yes, sir, they pulled up and you can see them when they are pulling in at all times.

page 149 } Q. But you don't know who was driving then?

A. No, sir.

Q. Now then, didn't all four of the boys get out of the car?

A. I only saw two of them.

Q. The other two could have gotten out and you didn't see them?

A. They could have, yes, sir.

Q. Now, didn't but one boy come in the filling station part?

A. That is right.

Q. And was that a short-haired boy with light hair?

A. Yes, sir, as well as I recall.

Q. And I believe he got out and got some ice cream.

A. Got a Dixie cup, yes, sir.

Q. Then did you ask them if they wanted some gas or did they tell you they didn't want any gas?

A. I asked them.

Q. You asked them did they want some gas and they told you no, or words to that effect. Is that correct?

A. Yes, sir.

Q. Then I ask you this, Mr. Wood: When you
page 150 } asked them did they want some gas and they told
you no do you recall some of them going to the
rest room then?

A. No, sir, I don't recall whether any of them had to go to the rest room. Only one boy that I recall that went to the rest room, the black-haired boy.

Q. Then after you told them about the gas and they said they didn't want any gas wasn't that car moved from in front of your pumps down in front of the restaurant?

A. No, sir.

Q. Are you positive of that?

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A. Yes, sir.

Q. Why are you so positive about it?

A. Well, when the boy got his Dixie cup and they got in they drove off.

Q. Where did the boy get in the car with the Dixie cup?

A. When it was sitting in front of the pump.

Q. Did he get on the front seat or where?

A. Got in on the right side.

Q. What seat did he get in?

A. Whether he got in the front or back seat I don't know. It was a two-door car. He got in on the right side but I wouldn't say whether he got in the front seat or back seat.

Q. Then, if you were standing there looking
page 151 } at them and you don't know who drove the car
up there then actually you are not positive who
drive it away from the tanks, are you?

A. Yes, sir.

Q. You were looking both times, weren't you?

A. When the car pulled in was the only time I was positive it was the same car that had been there before.

Q. I say when the car pulled in you were looking at the car and at the people, weren't you?

A. No, sir, not necessarily looking at the people because cars are coming and going all the time. Of course, when one pulls in front of the pumps naturally we are supposed to go out.

Q. Then you did go out but you don't know who was driving.

A. At the time, no, sir, not when he pulled up.

Q. You said you identified Beasley by a picture. How many times did the Trooper come by to see you?

A. Only once.

Q. He never came to see you but once?

A. No, at the time he brought the pictures up there.

Q. That is the only time he came to see you.
page 152 } As I understand it, then you do not recall seeing
the car moved from the tanks over in front of the
restaurant.

A. No, sir.

Q. You did not know any of these young men yourself, did you?

A. No, sir.

Q. Who did the boy who bought the Dixie cup pay for the Dixie cup?

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A. Paid me for it.

Q. He got that from the inside?

A. Yes, sir.

Q. And you were the only attendant at the place at that time?

A. Yes, sir.

Q. As I understand it, when they came back there the second time you just remember seeing two boys, don't remember seeing the other two.

A. No, sir.

Q. Now, the place is well lit up, isn't it?

A. Yes, sir.

Q. And, of course, even though it was around page 153 } 11:00 o'clock at night the lights were bright enough so you could see all right?

A. That is right.

Q. I believe it has been testified here it is approximately eight miles from this filling station to the point of accident. Do you know anything about that or not?

A. No, sir.

Q. You just don't know about that?

A. No, sir, I don't know about that.

Q. You say that Beasley when the car left the tanks was driving. Where were the others sitting in the car?

A. I just couldn't tell you where the other two were sitting or how they were arranged in the car.

Mr. Whitehead: Thank you, Mr. Wood.

RE-DIRECT EXAMINATION.

By Mr. Daniel:

Q. Mr. Wood, you said as far as you knew you didn't know who was driving. You were referring to the time the car came into the filling station, were you not?

A. Yes, sir.

Q. And it is your testimony that that car did page 154 } not pull from the pumps down in front of the restaurant on the second trip out there.

A. No, sir, it did not.

Q. After Beasley got into the car and drove out on the highway did they stop and change drivers any time there?

A. No, sir.

Dr. John G. Novak.

Mr. Daniel: All right, that is all.

The witness stands aside.

DR. JOHN G. NOVAK,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Daniel:

Q. What is your full name?

A. John G. Novak.

Q. Are you engaged in the practice of medicine
page 155 } in the City of Lynchburg?

A. Yes.

Q. Do you have a specialty?

A. Specialty of neurology and psychiatry for almost twenty-five years.

Q. How long have you been practicing your specialty in Lynchburg?

A. For about twelve or thirteen months. My license in Virginia was granted in 1956 and my Pennsylvania license was granted in 1937. I have been in active practice here about a year.

Q. Were you in active practice in your specialty before coming here?

A. Prior to coming here I was in Newark, New Jersey for almost sixteen years, the previous five years in the United States Army in neurology and psychiatry and I practiced in Pittsburgh before the war.

Q. What training have you had?

A. Since my graduation from medical school and following internship I took the prescribed residences in training leading to certification by examination. I was certified as a specialist by examination in 1944 as a neuro-psychiatrist.

Q. What is neurology concerned with?
page 156 } A. The specialty neurology has to do with organic diseases of the nervous system involving infections, injuries, changes of blood vessels or tumors of the brain, spinal cord, nerves in the arms and legs.

Q. Dr. Novak, I believe you have recently examined Thomas D. Leech, have you not?

A. That is right.

Q. Did you give him a complete neurological examination?

Dr. John G. Novak.

A. Yes, I did.

Q. Did part of that examination consist of making an electro-encephalogram?

A. Yes, that was part of my examination.

Q. Some of us may not be familiar with an EEG. Will you explain what we call an EEG?

A. An electro-encephalogram or EEG, as it is commonly referred to, is the brain wave test. It is a standard laboratory procedure by which the electrical activity that is present in the brain of all living things, animals and people, is measured and graphed out on a moving tape of paper and it gives a special information concerning various things going on in the brain having to do with conditions that change the activity in the brain, whether they be chemical
page 157 } or whether they be due to changes in the blood vessels, the blood flow or changes caused by injury or changes caused by tumor.

Q. Do you have what is referred to as normal and abnormal readings of an EEG?

A. Will you repeat that question?

Q. Do those readings come out so you can classify them broadly as normal or abnormal?

A. We know from experience, from hundreds of thousands of tracings that have been done in various places in the world, some of the things constitute what we consider to be average or normal and we also know changes caused in these tracings are indicative of certain conditions in the brain when considered with the history and the examination of the individual. This is a laboratory procedure which has to be taken into consideration in conjunction with all we know about the person being examined.

Q. Dr. Novak, as part of your examination did you take a history from Thomas D. Leech?

A. Yes, sir.

Q. Tell the jury what you found and what the history was, and so forth.

page 158 } A. A history was taken at the time of the examination in my office on September 14, 1961. Mr. Leech came to the office alone. He stated he was involved in an auto accident between 11:00 and 12:00 o'clock on the night of October 18th, 1960. He said "As far as I know I was riding". He said "I don't remember ever driving the car so I don't think I was driving". He related in response to questions that he was in a car with three other boys, Duane Beas-

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ley, Tommy Burley and Carroll Johnson. The last thing he recalled is being at a service station several miles away. He said "Some of us, I think I did, got out and went to a rest room". He relates he has no idea of what happened until "I woke up at Bedford Memorial Hospital". He said "I wondered why I was there. My mother told me I was in an accident. I think I was there three weeks and four or five days." Questioning revealed that he believed that he was attended by Dr. W. G. Hardy and he related he was told Carroll Johnson was killed outright; that Tommy Burley was injured less severely than he or Duane Beasley. Questioning him considering his experiences in the hospital he indicated "I don't know what kind of injuries I had. I remember my right side was weak and hurting around the shoulder but I don't remember any bruises. I had scars on my
page 159 } right wrist, right leg and my face." He does not recall the length of time he was unconscious but has been told "various things, that it was two or three weeks".

Questioning concerning how he has felt since the accident revealed "Every now and then I get a headache and my memory isn't as good as it was." His headache was said to be located over the forehead and to occur as sharp pains that come and go. They are occasional—do not last very long. Occasionally he uses Anacin for them.

As far as any memory difficulty is concerned he states "My wife tells me to get things for her and I forget them and things of that type". Questioning concerning his difficulty in remembering things at work he indicated he does not usually have any difficulty under the circumstances. I questioned him concerning specific complaints having to do with various parts of the body and the nervous system. He told me that on occasions his back hurt. The day that I examined him, which was September 14th, was one of those days. He said he had been lifting some things at work and also that his back bothered him some. Spontaneously he told me every time something is brought up about the accident he gets nervous as the devil. Questioning him about this he wasn't
able to throw much light on it.

page 160 } Since the accident he had had difficulty in falling asleep, takes a greater period of time to fall asleep. He was asked if either his parents or his wife had spontaneously commented on anything they noticed about him since the accident and he said if they had noticed anything

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they certainly had not said anything to him about it. This was the extent of the information of Tommy's history.

Q. Did you give him the EEG test at your office?

A. No, I did the neurological examination after I obtained the history and referred him and made arrangements for the test to be done at the Lynchburg General Hospital and I was at the hospital during part of the recording of the particular EEG. As part of my responsibility as director of the laboratory at the hospital I interpret the tracings.

Q. What did the tracing reveal, Dr. Novak?

A. In describing tracings we usually describe certain things having to do with the patient's condition at the time of the recording and we usually define certain technical aspects that are present in the tracing. In addition, there are certain tests that we do that are routine tests in order to try to provoke any changes or additional changes, abnormal
page 161 } changes, if you wish, that may be in the record.
These are standard procedures.

Now, the report reads as follows: This is on Tracing Number 252 recorded September 14, 1961 at Lynchburg General Hospital.

Patient is alert and cooperative during the recording of eight capped seventeen electrodes. This merely indicates the recording from eight pencils or pens simultaneously and from seventeen electrodes. These are little silver discs about the size of the top of a pencil put in different symmetrical areas on the head and these areas are measured, the idea being that these little electrodes are spaced to cover the anatomical areas of the brain that lie underneath the scalp and skull and each of these little electrodes has a wire, a very fine wire which passes through the machine and the machine records simultaneously from eight different pens and each pen records electrical activity or summation, the electrical activity from two different areas.

This tracing showed what was a well defined alpha rhythm and decreased amplitudes. Hyperventilation, or over breathing, was well performed and did not bring out any changes, any abnormal changes, in addition to those that
page 162 } are already present. Throughout this record there were decreases in the amplitude over the left temple lobe, located in this part of the brain, and the left parietal area, located right about here, and also on the right side about here, on the right posterior temporal and occipital area. This tracing showed a decrease or a change in ampli-

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tude, much lower on the life side by comparison to the opposite side on the right, and lower here on the right by comparison to the same side on the left. My interpretation of these changes in amplitude were to the effect that these were related undoubtedly related to trauma and from what we call the contrecoup effect. The contrecopy effect, I am sure all of you have experienced taking either a full glass of jelly or a glass of jello and hit it and the jelly shimmies inside. This is about what happens to the brain inside the bony skull when the head is bumped. You can bump the head very slightly, just like this, and the brain will vibrate to some extent inside the bony skull. Now if that blow or trauma is severe the brain hits on one side, then flips back and hits on the other, and this is what we call the contrecoup effect, opposite to where the injury lies.

My interpretation of this tracing was that ap-
page 163 } parently the brain hit, vibrated on this side, and
this side, so from the side on the left to the back
on the right and that produced these changes for decrease
in amplitude.

Q. Amplitude, what does that refer to?

A. The height of the brain wave is measured and compared, right to left. In the average subject the height for all intents and purposes is practically the same.

Q. In your opinion, would that decrease in amplitude be present except for the injury?

A. Again I have to say this; that this is a laboratory procedure and interpretation of the findings of this test must be taken into consideration with your patient, your subject, what happened to that individual, what does that individual complain of, so with a history of the injury it is certainly indicative of or follows along as related to the injury.

Q. Dr. Novak, that is one of the tests you use to determine a medical diagnosis, is it not?

A. No, I would not say an EEG is used to make a diagnosis. I would say an EEG was a brain wave test, a laboratory procedure, which bears out or gives you additional information or supplement, if you wish, to the clinical examination which consists of history and examination.

page 164 } Q. Do you attribute unconsciousness as an im-
portant factor in regard to evaluating brain in-
jury? Is that an important factor or not?

A. It may be but not necessarily so.

Q. What is a contusion?

Dr. John G. Novak.

A. A contusion is a word that really means an injury of a certain type, for example, we may bump into a piece of furniture, some sharp piece of furniture and strike our thigh and get a little blue and black place that is sore and that we speak of as a bruise. If it is a little more severe it is called a contusion.

Q. If you injure the tissue of your brain will it regenerate?

A. No, the tissue of the brain or spinal cord will not regenerate.

Q. Dr. Novak, in view of all of your examination of this man which you know about do you have an opinion as to whether or not this EEG amplitude will continue permanently?

A. I have an opinion, based on my experience, about a change of this type which specifically is a decreased amplitude. In a tracing recorded almost a year after the accident, I believe the accident was October 18, 1960 and page 165 } this is September, 1961, if it is present in a year's time I would expect and anticipate it may continue.

Mr. Daniel: That is all.

CROSS EXAMINATION.

By Mr. Frost:

Q. Dr. Novak, as I understand, you only saw Tommy Leech one time, September 14, 1961?

A. Yes, sir.

Q. And it is perfectly possible for an EEG to have the same reading before the accident as it is after the accident?

A. It is possible.

Q. Now, when you got the history did you communicate with Dr. Weaver in Roanoke?

A. No, sir, I did not.

Q. Do you know Dr. Weaver or know of him?

A. I do have the pleasure of knowing him.

Q. What type doctor is he?

A. Dr. Weaver is a neuro-surgeon by specialty and a very outstanding practitioner of his specialty, a very outstanding man.

Q. Did you know this young man had seen Dr. Weaver on several occasions?

page 166 } A. I don't think that I did. The information I

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have recorded is that as far as Mr. Leech knew he was attended by Dr. Hardy in the hospital in Bedford. I don't recall that I had the information that he had been seen by Dr. Weaver.

Q. Did you communicate with Dr. Hardy at all?

A. No, sir, I did not.

Q. Did you have any x-rays taken?

A. No, sir.

Q. Did you inquire as to whether any x-rays had been taken?

A. I would like to refresh my memory on my original notes before I answer that. As I recall when I asked Mr. Leech about his course in the hospital with this hazy memory he was very, very vague and indefinite about any of these things. I can't absolutely say I asked him definitely whether they were or were not done but I would assume that I probably questioned him but because of his hazy memory he wasn't aware of what was done.

Q. Doctor, as I understand, when taking an EEG test you would prefer they do not eat beforehand, is that correct?

A. I make sure that they do eat beforehand.

page 167 } Q. That they do eat?

A. Yes, sir, and in this case I know that was done.

Q. You have several positions, one you call "rest position".

A. Actually we record simultaneously from what amounts to sixteen different parts of the brain because we are recording through eight pens and each pen represents the summation from two different areas of the brain so it is impossible to record all areas of the brain and we change the recording techniques so we change all areas crossways, back and forth, one side and then the other, so that all areas of the brain are covered. Now we record in what we state the patient is at rest, the patient seated comfortably to relax, eyes closed, breathing normal or average. Then we hyperventilate and this means we instruct the patient to overbreathe and overbreathing is done (the witness demonstrates), forcibly breathing in this way for a matter of three minutes or more. The purpose of this is to produce definite chemical changes in the blood which in turn affects the brain and the purpose is to provoke or bring out, if possible, changes that may be present. This is a standard procedure which was done in this case.

Dr. John G. Novak.

Q. In the overbreathing I understood you to page 168 } say it brought out no abnormal changes.

A. No pathological changes other than I have referred to and what that consists of is a decrease in amplitude.

Q. In the rest position, how about that?

A. Just decreased amplitude was present both in rest and in overbreathing.

Q. You say this just fits in with the general examination of a patient, the clinical examination.

A. Clinical examination and history of brain injury.

Q. You did perform a neurological examination?

A. Yes, I did.

Q. And that was normal, was it?

A. I indicated in my report that excepting for the loss of memory which was specifically spoken of as retrograde amnesia, this means a loss of memory going back before the time of the accident, excepting for that and excepting for the complaints which I have testified to, there was no demonstrable neurological deficit. In other words, I found no changes in the clinical neurological examination with the exception of these complaints.

Q. And that is what you got from the history?

A. Yes, sir.

page 169 } Q. Clinical or neurological deficit?

A. No, no neurological changes.

Q. Doctor, as I understand, he was just sent to you for examination, not to be treated.

A. I was requested to do an examination.

Q. In other words, your work is complete.

A. Yes, sir.

Q. No treatment has been indicated so far as you are concerned.

A. I made no recommendations.

Mr. Frost: That is all.

RE-DIRECT EXAMINATION.

By Mr. Daniel:

Q. Do I understand the decreased amplitude, in your opinion, came from the injury received in the accident?

Mrs. Horace R. Owen.

A. Yes, sir.

The witness stands aside.

page 170 } MRS. HORACE R. OWEN,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Daniel:

Q. You are Mrs. Horace R. Owen, are you not?

A. Yes.

Q. What relation are you to Tommy Leech, the plaintiff in this case?

A. He is my son-in-law.

Q. When did he marry your daughter?

A. April 28th, 1961.

Q. That was some little time after he got out of the hospital?

A. About a month after he returned to work.

Q. Had you known Tommy pretty well before he was in the wreck?

A. For about two years.

Q. Did you see him frequently before he was in the wreck?

A. Yes, sir.

Q. Have you seen him frequently since he was
page 171 } in the wreck?

Q. Yes, sir.

Q. Did you see him while he was in the hospital?

A. Yes, sir.

Q. Have you been able to detect any change in Thomas, any difference in him now from what it was before he was in the wreck?

A. Yes.

Q. What difference have you been able to detect? Tell the jury anything you have noticed.

A. Well, he doesn't remember well. He complains of his head hurting a lot and his back and shoulders.

Q. Do you notice anything else about him?

A. Well, I have noticed several things he does lately. I noticed one particular thing. I had company and we were sitting in the living room and he got up out of the living room chair and took a pillow and put it on the floor and sat on it. I noticed that.

Mrs. Horace R. Owen.

Q. Had you ever seen him engage in any such conduct before?

A. No.

Q. Before this wreck was Tommy a nervous type of person?

page 172 } A. No, he didn't seem to be.

Q. What was his disposition before the wreck?

A. He had a good disposition.

Q. Do you notice any difference in it now?

A. Yes.

Q. What difference do you notice?

A. Well, he gets real grouchy and can't stand a lot of noise. In fact, sometimes he is kind of hard to get along with.

Q. Anything else you can add, Mrs. Owen?

A. I don't think so. I think it has changed him a whole lot.

Mr. Daniel: All right, that is all. You may examine.

CROSS EXAMINATION.

By Mr. Frost:

Q. Mrs. Owen, you say you have known him about two years?

A. Yes.

Q. One of the things you noticed was he took a pillow out of a chair and sat on the floor?

page 173 } A. That was about two weeks ago or a month ago.

Q. Do you see him very often since the accident?

A. I see him every week-end.

Q. Before your daughter was married to him did you see him very often?

A. About every night and every week-end.

Q. He wasn't so nervous and grouchy you didn't want your daughter to marry him, was he?

A. He wasn't nervous and grouchy at all before the wreck.

Q. Not until he got married?

A. I wouldn't hold that against him if he was hurt.

Mr. Frost: That is all.

The witness stands aside.

MRS. DELLA LEECH,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Daniel:

page 174 } Q. You are Della Leech, are you not?
A. Yes.

Q. And you are the wife of Tommy Leech?
A. That is right.

Q. I believe you were married in April.

A. April the 28th.

Q. How long did you go with Tommy before he was in the wreck?

A. I have been going with him for three years before we were married.

Q. Were you with him pretty steadily while he was in the hospital after he was hurt?

A. He was hurt on a Wednesday, I believe, and they called me at 4:00 o'clock and I went to the hospital at 4:00 o'clock that morning.

Q. Which hospital?

A. Bedford. Well, I stayed with him the whole time, didn't leave him until I believe it was about 1:00 o'clock that following Sunday morning, or Monday morning.

Q. Was Tommy able to talk to you?

A. He was not, no.

Q. Was he in the hospital room in Bedford County Hospital?

page 175 } A. Yes, sir.

Q. Anybody else in the room with him?

A. It was Duane Beasley.

Q. Did you know Duane Beasley before the wreck?

A. Yes, sir.

Q. I believe you have been going to Phillips Business College, haven't you?

A. Yes, I have.

Q. Did you see Tommy and stay with him pretty regularly while he was in the hospital the whole time he was in the hospital?

A. I was there every evening. I mean I stayed there until at least 11:00 o'clock every night.

Q. Do you notice any difference in Tommy since the wreck and before?

A. Well, he is real nervous and his memory is not too good. I tell him things now and he just can't remember them.

Mrs. Della Leech.

Q. Was he nervous before?

A. He was never nervous. He was somewhat immature before but now he is kind of sullen.

Q. Does he complain of things?

A. His back aches. After he got out of the page 176 } hospital his back ached and it aches a little bit now.

Q. Mrs. Leech, you said you visited him in the hospital. Were you ever at the hospital in his room there when Duane Beasley was there and Duane Beasley's mother was there?

A. I was.

Q. Was Duane Beasley conscious at that time?

A. Yes, I believe so.

Q. Was Tommy conscious?

A. No, Tommy wasn't conscious.

Q. Do you know about how long that was after the wreck?

A. I really couldn't say.

Q. You do know Duane Beasley's mother was there?

A. Yes, she stayed right beside him most of the time. We did at one time have a private nurse.

Q. Did you hear any conversation between Duane Beasley and his mother regarding the driver of the vehicle?

A. Well, not a conversation between them exactly—I mean not a long drawn out conversation.

Q. What did you hear?

A. Well, I was in the hospital room one night and I don't know whether Duane Beasley had just heard Carroll had got killed or what happened but anyway I heard him page 177 } say he was driving the car.

Q. You did?

A. I did.

Q. Did you hear him say it more than once?

A. He said he was driving the car and he told his mother he was driving the car and his mother told him to be quiet.

Q. Did he tell you whether or not he was driving the car at the time of the wreck?

A. He didn't say that. He said "I was driving the car". He didn't say he was driving it then.

Q. Do I understand you to say at the time it was revealed to him that Carroll Johnson had been killed in the wreck he made that statement?

A. I am not sure about that. Something of that kind must have been said to make him say that or either he found out he was killed in the wreck or something.

Mrs. Della Leech.

Q. And Tommy was not conscious then?

A. No, he wasn't.

Mr. Daniel: That is all.

page 178 } CROSS EXAMINATION.

By Mr. Frost:

Q. Do you know when this statement was made when he said he was driving the car? Do you know when that was? This accident happened on October the 18th.

A. Well, Beasley left about two weeks before Tommy did and he said it before he left. I guess it was maybe a week before he left the hospital.

Q. You think this statement was made about a week before he left the hospital. He didn't say he was driving at the time of the wreck but said he was driving the car or had been driving the car. Do you recall his exact words?

A. He said "I was driving the car. I know I was driving the car", and his mother—I mean all of us were nervous and everything, and she told him to be quiet.

Q. Didn't he also tell you he didn't remember anything after they left this filling station?

A. Who told me that?

Q. Duane Beasley.

A. No.

Q. Did he say anything about not remembering?

A. No, sir.

page 179 } Q. Did he tell you any of the facts of the accident?

A. He didn't tell me anything about the wreck at all. The only thing I heard was I overheard that conversation.

Q. But you did not hear anything about how the accident happened or anything from Duane Beasley, did you?

A. No.

Q. Who was in the room at the time?

A. Mrs. Beasley, Duane, Tommy and I.

Q. And you say Tommy was not conscious at the time.

A. No.

Mr. Frost: I think that is all.

The witness stands aside.

RUSSELL WALDEN,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Daniel:

Q. You are Russell Walden?
page 180 } A. Yes, sir.

Q. Where do you work?
A. Barker-Jennings.

Q. How long have you been there?

A. Seventeen years.

Q. So you were there when Tommy Leech came to work there?

A. That is right.

Q. Mr. Walden, the main thing I want to ask you is this: Have you noticed any difference in Tommy since the accident, his ability to do his work and things of that kind?

A. Yes, sir. He is right forgetful since he has been back.

Q. What does he do?

A. He gets up orders.

Q. You say you notice some forgetfulness in him you didn't notice before?

A. That is right.

Q. Anything else?

A. He seems to be more nervous.

Q. You are not a medical man. That is your lay observations. Is that right?

page 181 } A. Yes, sir.

Q. He is working regularly there now, is he not?

A. Yes, sir.

Q. Is Duane Beasley still there?

A. No, sir, he is not.

Q. How about Thomas Burley, is he there?

A. No, sir, he is not there either.

Mr. Daniel: That is all.

CROSS EXAMINATION.

By Mr. Whitehead:

Q. So you won't have to come back tomorrow let me ask you this: What is your job at Barker-Jennings?

A. Well, I give out orders to be worked, assign the orders to the boys and check them after they work them.

Russell Walden.

Q. Now, before the time of this accident was Carroll Johnson working under you?

A. Yes, sir.

Q. I will ask you now if you will tell us, please, sir, what type of young man was he. Was he a well-behaved man or not?

A. Yes, sir, a quiet boy and you couldn't want
page 182 } a better boy to work with. He was always there
and did what you told him to do and he was always even tempered. I never have seen him mad or upset in any way. He was a nice person to work with.

Q. Was he a good worker?

A. A good worker.

Q. Did he work regularly?

A. Yes, sir.

Mr. Whitehead: All right.

The witness stands aside.

Mr. Daniel: If your Honor please, there is a matter I would like to take up with the Court out of the presence of the jury.

The Court: Members of the jury, you may be at ease. We will retire to Chambers.

(In chambers).

Mr. Daniel: Judge, here is what we want to take up. There is a witness in this case whose name is Thomas Burley who was one of the passengers in the car. He is represented by Mr. Whitehead and we have never been able to
page 183 } talk to him. We are satisfied that he has knowledge of the facts about this wreck that are important and necessary for the administration of justice in this case. We believe that what he says may or may not be a surprise. We don't know and we can't find out what he will say. We have seen an affidavit. We have a two-prong request, one that the Court call this person as a witness so we may examine him and not be bound by what he says. That is the first part of it, and the second part is if the Court doesn't see fit to do that that the plaintiff be granted leave to examine this witness as either an adverse or hostile witness or something in the nature of surprise and be permitted to examine

him to prove a certain fact and make him our witness only for that purpose so we will not be bound by any testimony on cross examination in respect to other matters on which we do not examine him in chief.

Mr. Rosenberger: Your Honor, I don't believe I am giving away any confidence if I say what the fact is, the fact

Mr. Daniel wants to prove.

page 184 } Mr. Daniel: No.

Mr. Rosenberger: I don't want counsel to call him as a witness because the purpose of calling this man is to show that the automobile was going eighty to ninety miles an hour as Mr. Whitehead stated in his opening statement. I am sure that we have evidence that contradicts this witness in other respects. We do not wish to be bound by him and we are in the position that this speed does prove gross negligence on whoever the driver was and I ask Mr. Daniel not to call him as a witness on the ground that Mr. Whitehead stated in his opening statement that Burley was going to say, or somebody was going to say the speed was eighty to ninety miles an hour.

The Court: You are assuming it is Burley.

Mr. Rosenberger: That is the only man summonsed here as a witness and we know one man is dead and the other two we have taken their deposition and they say they don't know what happened. Now, the defendant, Beasley, we have taken his deposition and he doesn't remember anything from Whitey's Service Station. Now, I can see it is important for Leech in his offensive claim to prove the speed
page 185 } but when he does that and counsel on the other side say "Who was driving?" and this man says "Leech", as Mr. Whitehead said in his opening statement Burley is going to say Leech was driving.

Mr. Whitehead: I don't think I used Burley's name.

The Court: You said "a witness".

Mr. Rosenberger: I can say that that is all the testimony it can be.

The Court: That is the only one that is left.

Mr. Rosenberger: That is the only one left and Beasley was up on the highway, nobody was under the steering wheel, so the only evidence we could have establishing the driver, other than John Wood who said that Beasley was driving, is this witness Burley.

The Court: Mr. Daniel wants the jury to believe half of what he says and not believe the other half.

Mr. Daniel: I only want to be bound by what I ask him on examination in chief.

The Court: You are not going to ask him who was driving.

Mr. Daniel: Ask him about the speed and drop
page 186 } it right there.

Mr. Rosenberger: Then they are going to
prove he made inconsistent statements about that.

The Court: You are going to try to impeach him on that?

Mr. Daniel: Not on speed, no, sir.

The Court: You will try to impeach him on who was the
driver. This is a good time for me to think this thing over
until tomorrow morning. Is this man an adverse witness?
Does he have a claim against Leech?

Mr. Frost: Yes.

Mr. Rosenberger: How would this litigation affect that?

The Court: Show what his interest in the matter is.

Mr. Rosenberger: I want to be in a position to impeach
this witness to show that his testimony should not be accepted,
certainly so far as the driver is concerned, and Mr. Daniel
and I are certainly together on that. Now, how many other
things he wants to go in to throw doubt on the
page 187 } man's credibility I don't know.

The Court: If Mr. Daniel can prove this man
has an adverse interest he is entitled to call him and ask him
one, two, three questions, whatever he wants to ask him, and
stop right there. If anybody else wants to ask him any ques-
tions aren't they making him their own witness for the ques-
tions they ask him if Mr. Daniel doesn't go into it?

Mr. Rosenberger: I don't know about that. I think I am
entitled to cross examine this witness because he is going
to establish the claim for Beasley and Johnson which I am
defending and I am the guardian *ad litem* and I should be
permitted to cross examine him.

The Court: I think you should too.

Mr. Rosenberger: I don't think I ought to be put in an
awkward position by anybody calling him as a witness and
I don't think Mr. Daniel ought to be permitted to call him.

The Court: If Mr. Daniel calls him as an adverse witness
you can't cross examine him at that time. You
page 188 } can cross examine him if Mr. Whitehead examines
him at a later time.

Mr. Rosenberger: What I am saying I feel like the in-
fant's position will be prejudiced if Mr. Daniel has to call
him as a witness. That is why I suggest to Mr. Daniel that
this man be called as a Court's witness because Mr. Daniel's
client is an infant and I am his guardian *ad litem*.

The Court: I want to hear what Mr. Whitehead has to say
in regard to this witness being called as the Court's witness.

Mr. Whitehead: We have got to give all the facts to the Court to know what the situation is. Both Mr. Rosenberger and Mr. Frost have in their possession statements taken from their client of Burley.

The Court: Who is their client?

Mr. Whitehead: Nationwide took statements from him while he was in the hospital. They have had ample opportunity to talk to this man and examine him. I never started to representing him until in December or the first page 189 } of January.

The Court: Haven't you advised him not to talk to anyone since you have been representing him?

Mr. Whitehead: Since that time, yes, sir, but that was after the suit. Before the suit, of course, they had access to him. In other words, Nationwide Insurance Company has got a statement which both Mr. Frost and Mr. Rosenberger have in which the boy makes the statement to the representative of the insurance company while there in the hospital that Leech was driving this automobile. Then, in addition to that, our evidence will show, and if they had investigated they would find it out, that Burley not only told them that in the hospital but has gone and made a full disclosure and statement shortly after this accident to the State Trooper Wilkes of exactly what took place and who was the driver. Now, under those circumstances, they have had all kind of opportunity to talk to this boy. Then because the witness is going to say what they don't want him to say they are coming in now and say they want to call him as an adverse witness or want the Court to call him as a witness.

page 190 } The Court: How could Mr. Rosenberger talk to the witness when he didn't get into the case until after the suit was brought?

Mr. Whitehead: His client knew. He has a statement from his client who talked to him.

Mr. Rosenberger: I have a statement which is contrary to the opening statement stating what he was going to say.

The Court: How could your client be prejudiced if the Court called him as a witness?

Mr. Frost: I don't know of any procedure you have. Here is one party who has an adverse witness they want to use. I know of no procedure at all where a Court would come along and bail them out because they happen to be in a position where one witness will testify contrary to what they want.

The Court: I am just asking a question, Mr. Frost.

Mr. Frost: If they want to use the man as an adverse witness they have a right to do it but they have to pay the penalty

if they want to take that chance and I think we
 page 191 } are just wasting time. It is the same story when
 a man has a case and can't make out a case with-
 out calling the defendant and he calls the defendant and the
 defendant doesn't talk right. They just haven't got the proof
 and that is the situation here. They have made the case, I
 suppose they claim they have, on Wood but Burley is not go-
 ing to testify what Wood testified to and they want the Court
 to come to their aid and I think we would be prejudiced by
 the Court calling as a witness the person or permitting them
 to cross examine the person they call as an adverse witness
 and he certainly is an adverse witness and pecuniarily an
 adverse witness, while he was injured less than the others
 he has a claim and he has a lawyer representing him, and I
 assume when we get through with this case his lawyer will
 sue.

The Court: Therein lies the difficulty that counsel them-
 selves are not together on what they want to do. Mr. Daniel
 wants to call him as an adverse witness.

Mr. Daniel: Only to prove one or two parti-
 page 192 } cular facts, not everything. We are willing to be
 bound by what he says in response to our ques-
 tions but not on new matter brought out on cross examination.

The Court: Under the law you are bound by matters you
 bring out but are not bound by matters you didn't bring out.

Mr. Rosenberger: If he brings him on the witness stand
 how am I going to have a chance to protect the infant?

Mr. Whitehead: He takes the position we are vouching for
 him as a witness. He is not a party to this suit.

The Court: But he has an adverse interest.

Mr. Whitehead: What difference does it make to Burley
 whether Beasley or Leech were driving, none whatsoever?

Th Court: He has a claim. Has he brought suit?

Mr. Whitehead: No, sir, he hasn't brought suit.

Mr. Daniel: What I am going to ask him is not going to
 preclude Mr. Whitehead from asking him what he wants to
 ask him.

The Court: If he can meet adverse witness re-
 page 193 } quirement you ask him two or three questions and
 stop. You are only bound by what he says then.
 If Mr. Whitehead puts him on later as his own witness, which
 I presume he will do to develop his case, then Mr. Rosenberger
 will have a chance to cross examine him then. What about
 that, Mr. Rosenberger?

Mr. Rosenberger: As soon as Mr. Daniel asks him a ques-
 tion about speed then they are going to say "Here is Mr.
 Daniel's witness. Mr. Daniel put him on the witness stand."

I will then say that the man is not entitled to be believed because he has made contradictory statements as to who the driver is.

Mr. Daniel: It is getting back to what I said before, we can't get away from the diversity of interests from all counsel.

Mr. Rosenberger: You don't want him to say it was your man driving.

Mr. Daniel: I do not.

The Court: He is not going that far.

Mr. Whitehead: Suppose you had no insurance in here what would be the difference?
page 194 } Mr. Daniel: Then we wouldn't have all these lawyers fighting.

The Court: Does any counsel claim he couldn't be called as an adverse witness?

Mr. Whitehead: I don't think he could be, he is not a party.

The Court: I don't think you have to be a party. I think the question is if your interest is adverse to the party.

Mr. Whitehead: He has no pecuniary interest here. He isn't an adverse witness.

The Court: It is now 5:00 o'clock. I will excuse the jury.

(In the courtroom—jury present).

The Court: Members of the jury, we are going to recess now until 9:30 o'clock tomorrow morning. I caution you again not to speak to anyone about this case or allow anyone to speak to you or have any conversation amongst yourselves concerning this case. You will be back at 9:30 o'clock in the morning.

page 195 } Sergeant, will you call the witnesses in? I want to tell them the same thing.

I will ask you ladies and gentlemen of the jury when you come tomorrow don't stand in the hall but come in and have a place in the jury box or in the jury room. I don't want you to mingle with the spectators or with people who may be witnesses.

Now, you witnesses are excused until 9:30 tomorrow morning. I want all of you back here at 9:30 and during the meantime I do not want you to discuss the case with anyone or amongst yourselves or allow anyone to talk to you about it, including lawyers or any person at all. No one can discuss the case with you and if they do attempt to discuss it with you just tell them the Court has instructed you not to allow any-

one to discuss it with you and this will apply until the case has been concluded.

(Recess).

page 196 }

September 27, 1961,
Morning Session.

(In chambers).

The Court: Gentlemen, I am ready to pass on the matters presented me late yesterday afternoon unless there is some other matter you want to present for or against what you have already said. I have found right many cases involving the subject we talked about.

Mr. Watkins: Your Honor knows all I know and more too.

The Court: It presents a novel question in that Mr. Daniel representing the plaintiff has asked the Court to put on an adverse witness, the witness Burley. Mr. Rosenberger, who represents the plaintiff also, objects to putting him on and asks to put him on as a Court's witness. Mr. Frost and Mr. Whitehead I believe both objects to using him as either a Court's witness or as an adverse witness.

Mr. Frost: I don't think I can stop him from being an adverse witness.

The Court: This does present a novel question
page 197 } of persons on the same side, one saying this and one saying that, so the Court is going to try to decide and do what it thinks is fair and just in the case.

First, dealing with the problem of the Court's witness, there is considerable Virginia cases on it. I think the first case was a case decided in 107 Virginia, 656, *Blackwood Coal Company v. James*. The question was there raised and the Court there stated that it has not been the practice in this state for the Court on its own to call witnesses in civil cases. They did not decide that in this case. *Pendleton v. Commonwealth*, 131 Virginia, 676, which is a criminal case as you can see from the title, there the Court called a witness to a crime at the request of the Commonwealth's Attorney over objection of the defense attorney because he had been unable to talk to the witness and the witness wouldn't talk to him and there the Court allowed the witness to be called as a witness on behalf of the Court and then allowed both the Commonwealth and the defense attorneys to cross examine.

page 198 } Mr. Daniel: Your Honor, I don't object to this witness being called as a Court's witness.

The Court: Then the Court there reiterates what was said in the Blackwood case and said "We are of the opinion that in a criminal case under circumstances above stated the Court has a right in the exercise of sound discretion to call witnesses as was done in this case" but that was a criminal case.

Then I notice in a case, 200 Virginia, 186, *Robinson v. Peterson*, this was a case in which there was a civil matter and a statutory proceeding under that section of the Code to establish a boundary line and in that case the Court directed a civil engineer to go out and make a survey and then he came back and the Court put the civil engineer on as a Court's witness and allowed both parties to cross examine him. The Court there said: "It is not the general practice in this Commonwealth for a Court on its own motion to call a witness in a civil case," there citing *Blackwood Coal Company v. James and Pendleton v. the Commonwealth* but said, "In page 199 } this particular proceeding there is a statute which allows the Court in this particular case to have a survey made," so there they did not have to directly pass on the question. They just cite the general principle of law and they get around it by letting him be called under this other section.

Then there is another case in 201 Virginia, 747, which is an equity proceeding concerning charge and surcharges of commissioner's accounts and reports and there was a witness neither side was able to interview. The Court put that witness on as a Court's witness and says "In an equity matter that where the Court felt or the Chancellor felt where equity would be done it would be necessary for the Court to call any witnesses that were necessary," and there again states it is not the general practice of this state for the Court of its own motion to call witnesses in a civil case and cites the three other cases I have previously cited. "It is a matter resting with the sound discretion of the Court and should be exercised with great care," and cites *Corpus Juris Secundum* page 200 } Section 350 page 70.

As far as I have been able to see there has not been any law action in any case in which the Court has called a witness other than this case.

Mr. Rosenberger: I was just appointed guardian *ad litem* yesterday morning so I couldn't have talked to anybody.

The Court: The Court is of the opinion that it is certainly, as the cases have reiterated time and time again, not the general practice of the Court to call a person as the Court's witness; therefore the Court will not call this witness as a Court's witness.

Now, on the other question as to whether or not he should be

called as an adverse witness, it appears to me that this witness is adverse. The fact he is represented by Mr. Whitehead in the same suit against—

Mr. Whitehead: Not the same suit.

The Court: The fact is you are representing the same interest.

Mr. Whitehead: Growing out of the same accident.

The Court: The Court is of the opinion that page 201 } the plaintiff has a right to call the witness as an adverse witness and subject to the rules of cross examination. I don't see how that can prejudice Mr. Rosenberger in his cross examination of him. You may call him as an adverse witness and then if the adverse side brings out anything that Mr. Rosenberger would like to cross examine him on he can do so; however, if the other side chooses not to examine at that time and places him on the stand at a later time to bring out anything else Mr. Rosenberger then has a right to cross examine him on any matters he chooses to cross examine him on.

Mr. Rosenberger: It is understood we will not be subject to violating a rule with two counsel examining the same witness?

The Court: You can examine him when he is placed on as an adverse witness.

Mr. Frost: We object to that.

Mr. Rosenberger: Mr. Daniel wanted the privilege of examining him.

The Court: I don't see why you can't ask the questions as well as Mr. Daniel. page 202 } Mr. Daniel: I am going to examine him only for a particular purpose.

The Court: If you examine him first then Mr. Rosenberger cannot come in on cross examination and examine him. Why not let Mr. Rosenberger ask the questions?

Mr. Daniel: I don't mind that except Mr. Rosenberger, I understand, wants to ask this man some questions we don't want brought out on our part of the evidence at this time.

Mr. Rosenberger: I would like to have it on the record you want to ask him the sole question of how fast the automobile was going.

Mr. Daniel: I want to ask him if he was a passenger in the car, if they changed drivers after they left Whitey's Truck Stop, and what was the speed at the time the accident occurred.

The Court: You are going to be bound by it if he says they changed drivers. If you ask that question he is your witness. If he answers "Yes" then you are bound by it.

Mr. Daniel: Except he is an adverse witness.
page 203 } The Court: You are bound by him under the
rules of cross examination.

Mr. Watkins: Here is our position: Mr. Daniel is very familiar with certain matters of this case that I think Mr. Rosenberger hasn't had an opportunity of becoming familiar with because Mr. Daniel has been in the case a long time.

The Court: Mr. Rosenberger can become familiar real easy. Mr. Rosenberger catches on right quick.

Mr. Rosenberger: I have a hard time keeping up with these boys.

Mr. Daniel: I understand you are not going to cross examine about the speed but about these other things.

Mr. Rosenberger: He doesn't want me to examine him about the speed and the contradictory statements he made on other occasions.

The Court: I understood the only thing you wanted to go into was the speed.

Mr. Daniel: That is right.

The Court: If you drop it there and they choose to go into other matters then Mr. Rosenberger would be able
page 204 } to cross examine on the matters that they brought
out on their examination of him.

Mr. Rosenberger: We might agree that we will sit down together and see what questions might be asked and I might leave it entirely to Mr. Daniel.

Mr. Daniel: Then I want to ask this witness if he was a passenger in the car and the speed of the car immediately before the accident.

The Court: All right.

Mr. Rosenberger: And it is on the basis he is an adverse witness?

Mr. Daniel: That is right.

The Court: That is my ruling. If you want to except go right ahead.

Mr. Rosenberger: We object for the reasons heretofore noted.

The Court: What is your objection?

Mr. Rosenberger: The plaintiff, by counsel, objects and excepts to the action of the Court in refusing to call the witness as a Court's witness for the reasons heretofore stated.

Mr. Daniel: Put that in as the plaintiff's de-
page 205 } fence counsel.

The Court: The exception is noted by Mr. Rosenberger, guardian *ad litem* for the infant plaintiff.

Mr. Whitehead: The defendant, by counsel, excepts to the ruling of the Court in permitting the witness, Thomas Burley

to be called as an adverse witness on the ground that the plaintiff has had at all times an opportunity to talk with and to go over this matter with Thomas Burley before I was employed as his counsel and furthermore on the ground—

The Court: State what date you were employed.

Mr. Whitehead: Employed the latter part of December, 1960, and this man, according to the evidence which will be presented, was out of the hospital and around less than ten days after the accident, and further on the ground that the representatives of the plaintiff or working on behalf of the plaintiff, have talked to Burley and have obtained statements from him shortly after the accident, those representatives being the liability insurance carrier on the Chevrolet page 206 } rolet car which was involved in the accident and it being the Nationwide Insurance Company, and these statements have been available to Mr. Rosenberger, representative of Nationwide Insurance Company, and of record as one of counsel for the plaintiff and guardian *ad litem* for the plaintiff in the counter-claim.

The Court: Although the record may have been available if the witness is adverse you still have a right to call him as an adverse witness regardless of anything else and the particular statement referred to I understand is an *ex parte* statement taken in the hospital and is plainly inadmissible under the Virginia Code.

Mr. Whitehead: And further on the ground that this witness, as far as this proceeding, is not a party in interest and has no financial interest in the outcome of this case and as far as the statements that were made although some may have been in writing there were oral statements made which were known by the representatives of Nationwide Insurance Company shortly after the accident.

The Court: I understood your associate counsel, page 207 } Mr. Frost, to make a statement that the witness was adverse.

Mr. Frost: I said there was no question about the fact you can call him as an adverse witness.

Mr. Whitehead: He may be adverse as far as not testifying as they want him to but he is not adverse as set out in the section by which he is being called as an adverse witness.

The Court: One case said he doesn't have to be adversely in interest if he is hostile, they even go that far.

Mr. Whitehead: There is no evidence as far as I know that the witness is hostile.

Mr. Watkins: As a matter of keeping the record straight Mr. Daniel and myself were not employed until long after Mr.

Thomas R. Burley.

Whitehead had been employed as counsel for Burley. We have never had a chance to talk to Burley.

Mr. Whitehead: May I get this in the record so it will show that this suit was instituted on behalf of the plaintiff in this case around January 24th, 1961 and the parties page 208 } had all the time from that time up to the trial to apply for a pre-trial deposition, certainly after April 1st, and did not until within one week of the trial.

Mr. Watkins: We didn't have that law at that time.

(In the courtroom—jury present).

The Court: All right, gentlemen, you may proceed.

Mr. Daniel: If your Honor please, I want to call Mr. Thomas R. Burley as an adverse witness.

The Court: All right.

Mr. Whitehead: It is my understanding that wasn't the understanding.

Mr. Daniel: It is in the record.

THOMAS R. BURLEY,
called as an adverse witness by the plaintiff, having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Daniel:

Q. You are Thomas R. Burley, are you not?
page 209 } A. That is right.

Q. Mr. Burley, were you a passenger in the 1960 Chevrolet automobile of Carroll M. Johnson's on October 18th around 11:30 o'clock P. M. when the same was wrecked in a curve just east of Goose Creek in Bedford County?

A. Yes, I was.

Q. Could you estimate the speed of that vehicle at the time it went into the curve and just immediately before it wrecked?

A. At the time it went into the curve I would say around seventy-five.

Q. Around seventy-five miles an hour?

A. Yes, and at the time of the wreck I would say around eighty, eighty-five or ninety.

Mr. Daniel: All right, that is all the questions I care to ask you.

Now, if your Honor please—

Thomas R. Burley.

Mr. Whitehead: If we go over this matter and if anything else is to be said it should be said in Chambers.

The Court: Do you want to examine him?

Mr. Whitehead: Yes, sir, we want to examine page 210 } him.

The Court: You may examine him.

CROSS EXAMINATION.

By Mr. Whitehead:

Q. Thomas, what is your age?

A. Nineteen.

Q. And what was your age at the time of this accident?

A. Eighteen.

Q. Now, at the time of this accident and the day before the accident where were you working?

A. At Barker-Jennings.

Q. Will you talk loud enough so everybody can hear you and look at the jury?

A. I was working at Barker-Jennings Wholesale Company.

Q. And were these other three gentlemen, Carroll Johnson, Duane Beasley and Tommy Leech, were thy working at Barker-Jennings with you at that time?

A. Yes, sir, they were.

Q. And you all knew each other there, did you not?

A. Yes, sir.

Q. And how long had you four been working page 211 } there approximately together, do you know?

A. We had been working together since some-time in June.

Q. All four of you had been working there since June of '60?

A. Beasley and Johnson were working there longer.

Q. But all four of you, after Leech got there, all four of you had been working together you think from sometime in June until the time of the accident?

A. Yes, sir.

Q. I believe you had an automobile that you were using as your car, did you not?

A. Yes, I did.

Q. And I believe Duane Beasley had one he was driving.

A. Yes, he did.

Q. And Tommy Leech had one he was driving.

A. Yes, he did.

Thomas R. Burley.

Q. Then also there was a Chevrolet that you all took the trip in.

A. Yes, sir.

Q. Now, when did you all leave Lynchburg together? Was it before you got off work or after you got off from work?

A. After we got off from work.

page 212 } Q. Now, where were you all going to, Tommy?

A. We had planned to go to Roanoke.

Q. Did you have any set plan or anything to do in Roanoke?

A. No, just going up there for the ride.

Q. Now, on that occasion after you all got off from work where did you meet up with Carroll Johnson and Duane Beasley?

A. I met them at Carroll Johnson's home over on Rivermont Avenue.

Q. When you got there what car did you three get into?

A. Into Carroll Johnson's Chevrolet.

Q. And who started to driving the Chevrolet from there?

A. Duane Beasley.

Q. And who was on the front seat?

A. Me and Carroll and Duane.

Q. Both of you got on the front seat with Duane?

A. Yes, sir.

Q. Where did you go from there?

A. We went out to Virginia Baptist Hospital.

Q. Did you all get out or any of you get out there?

A. Carroll got out and went in to see his grand-
page 213 } mother, I think.

Q. When he came back where did you go to?

A. We started to 460 toward Roanoke.

Q. What was the first stop you made?

A. At The Florence Restaurant.

Q. On what highway is The Florence Restaurant?

A. On 460.

Q. When you stopped at The Florence Restaurant did you all pick up anybody there? Did anyone get in the car with you there?

A. Yes, sir, Tommy Leech got in the car there.

Q. Then when you left The Florence Restaurant which way were you going then?

A. Going toward Roanoke.

Q. That would be west?

A. Yes, sir.

Thomas R. Burley.

Q. Now then, how were you all seated in the car at that time?

A. Duane Beasley was driving, Leech was on the right front, Carroll Johnson was on the left rear and I was on the right rear.

Q. What was your next stop?

page 214 } A. It was a little truck stop I guess about three or four miles west of the Florence.

Q. Did you all get out of the car there?

A. Yes.

Q. And were any purchases made there?

A. Yes. Carroll Johnson bought six cans of beer.

Q. Then was the beer drunk there or was the beer put in the car?

A. It was put in the car then. It wasn't drunk there.

Q. When you then started out did you proceed west or come back east?

A. Went on west.

Q. Were you going toward Lynchburg then or toward Roanoke?

A. Going toward Roanoke.

Q. Now, how many cans of beer was in this carton, do you know?

A. In the carton he bought?

Q. Yes.

A. Six cans.

Q. Who drank that beer?

page 215 } A. I drank about two cans of it, Carroll drank about two cans and I guess Tommy Leech drank about two cans.

Q. Just drinking it riding along?

A. Yes.

Q. Did Duane Beasley drink any of it?

A. No, he didn't.

Q. Now, what was the next place you stopped or got off the highway at all, do you recall?

A. It was about two miles below where we bought the beer we went off on some secondary road to the left and Carroll was going to show Tommy Leech or Beasley one where some girl lived and the road circled around and came back into 460.

Q. Did you all get out to see this young lady?

A. No, we didn't get out.

Q. Then you came on back into 460?

A. Yes.

Thomas R. Burley.

Q. Then where did you go?

A. Continued on toward Roanoke.

Q. Then, what was your next stop?

A. We stopped at a Phillips 66 service station.

Q. Do you know the name of that service station?

A. Whitey's.

Q. Then when you got there did any of you
page 216 } get out of the car?

A. Yes, all four of us got out.

Q. Then did you all leave there then?

A. No, me and Beasley went in the restaurant part and got a Pepsi-Cola and Carroll Johnson went across the street and I don't know whether anybody else went with him or not. He went to see if he could get some more beer but they didn't sell it over there.

Q. So he didn't get any more beer there?

A. No. We stayed at the restaurant about fifteen or twenty minutes.

Q. Do you know approximately what time you reached Whitey's Restaurant?

A. It was somewhere around 8:00 o'clock.

Q. And you think you stayed there about fifteen or twenty minutes?

A. That is right.

Q. Then where did you go to?

A. Went on to Roanoke.

Q. Now then, could you tell us if you recall approximately, or do you know approximately how far it is from where you
were at Whitey's Truck Stop or Phillips 66—it is
page 217 } the same thing, isn't it?

A. Yes, sir.

Q. How far is it from there to Roanoke?

A. Somewhere between five and ten miles, I don't know exactly.

Q. After you got to Roanoke what did you do?

A. We just rode around.

Q. Tell us if you can recall in detail the best you can what you did there and where you went.

A. I don't know much about the city. We just rode up and down the main part of town two or three times and met this bunch of boys, I think two or three boys in a '57 Chevrolet, and we got to talking to them about cars and we stopped at an Amoco service station and bought \$2.00 worth of gas and I think some oil, I don't know. Then the boys in the Chevrolet

Thomas R. Burley.

told us to follow them out to a place called Uncle Tom's. We went out there and talked to them.

Q. A place called what?

A. Uncle Tom's.

Q. And was Uncle Tom's a store, restaurant or what?

A. It is a small restaurant.

Q. So you went on out to Uncle Tom's. These
page 218 } boys you met in the other car, did they go out
there with you?

A. Yes, sir, they did.

Q. Did you all go into Uncle Tom's?

A. Yes, sir, we went in and talked to those boys about ten or fifteen minutes.

Q. Then what happened?

A. We then got back in our car and went back to the main part of town.

Q. Then what happened?

A. Then we went in a little sporting shop, I guess it was, a place they sold magazines and all of us got a Pepsi-Cola and got a couple of magazines and came back out and got in the car and stopped at some bar.

Q. Some what?

A. A place that sells beer and Carroll Johnson, all four of us got out, and Carroll Johnson bought two more cans of beer.

Q. Who drank those two cans of beer?

A. Carroll drank them.

Q. Except for the two cans he bought in Roanoke and except for the six cans you got going up here in Bedford County, was there any other beer in the car or did any of
page 219 } you all have any other beer?

A. No, we didn't.

Q. Did any of you have any kind of alcoholic drinks at all except for that beer?

A. No, sir.

Q. Did you have any whiskey or vodka or gin or rum or anything else?

A. No, sir.

Q. Now then, where did you then go?

A. It was about quarter to eleven then so we started on back toward Lynchburg.

Q. Could you tell us if you could approximately what time did you all get to Roanoke?

A. I couldn't say exactly, about 8:30.

Q. And when you left Roanoke it was about what time?

Thomas R. Burley.

A. Approximately quarter to eleven or ten minutes to eleven.

Q. Now then, when you left Roanoke where did you go to?

A. The next place we stopped was at the same Phillips 66 station that we stopped at before.

Q. Had Duane Beasley driven the car all the time from here to Roanoke?

page 220 } A. Yes, sir, he did.

Q. Now, from Roanoke coming back to Whitey's Truck Stop or Restaurant who drove the car from Roanoke back to Whitey's?

A. Duane Beasley.

Q. Then when you got back to Whitey's Truck Stop, you would be going east then, wouldn't you?

A. Yes, sir, we would.

Q. Where was the car stopped?

A. They have got two sets of gas tanks there and we pulled on the outside of the closest set to the road.

Q. And did anyone get out of the car there? Tell me now when the car pulled up there and stopped at that gas pump tell me what happened.

A. All four of us got out of the car and went to the rest room. Carroll Johnson came out of the rest room and he went in the filling station to get some ice cream.

Q. When you say rest room you mean the men's room?

A. The men's room. The guy in the filling station told us to move the car from the pumps if we didn't want any gas.

Q. Who told you that?

page 221 } A. The guy at the filling station, Mr. Wood.

Q. Do you know him?

A. I don't know him.

Q. Some man working at the filling station told you to do what?

A. To move the car out from in front of the gas pumps if we didn't want any gas.

Q. When did he tell you that? Was that before you went in the men's room?

A. Before we went in the men's room.

Q. Was the car moved at that time before you went in the men's room?

A. No, it wasn't.

Q. Now after you came out of the men's room, you four came out, what took place?

A. Well, Carroll went in the filling station to get some ice

Thomas R. Burley.

cream. Me and Beasley and Tommy Leech got back in the car.

Q. Who got under the driver's wheel?

A. Duane Beasley.

Q. Now then, was that car moved then?

A. Yes, it was.

Q. And where was it driven to then?

page 222 } A. Driven approximately fifty yards up in front of the restaurant.

Q. Now, could you explain to us where the restaurant is with reference to the filling station and the men's room?

A. Well, it is just one building, the restaurant in one end and the filling station in the other.

Q. Is it a small lot or a large lot? Can you explain what kind of place it is?

A. It has a big parking area.

Q. On what end of the building is the restaurant, the place you eat?

A. It is on the west end of the building.

Q. The restaurant?

A. I thought you said the rest room.

Q. I will put it this way: The place you eat, what end is that on?

A. That is on the east end of the building.

Q. Now, we won't use the words, rest room, because we will get it confused with the restaurant but what end is the men's room?

A. On the west end.

Q. Then when that car you say was driven from
page 223 } the tanks over in front of the place you eat, the restaurant, is that right?

A. Yes, sir.

Q. Now then, how were you all sitting in the car at the time it was driven from the tanks over to the place you eat?

A. Beasley was driving, I was on the right front, Tommy Leech was in the rear seat.

Q. After you got in front of the place you eat with the automobile then what took place?

A. Well, Carroll walked on over there to the car.

Q. Carroll Johnson?

A. Carroll Johnson. He walked over to the car from the filling station and Tommy Leech asked him could he drive and he said he didn't want him to drive the car; that he had been drinking beer that night, and he asked him again and he said "Okay, go ahead and drive it."

Thomas R. Burley.

Q. Let me ask you this: Before you all got back to Whitey's Truck Stop had Tommy Leech or not asked any time that night about whether or not he could drive?

A. He had asked Johnson once or twice in Roanoke to let him drive.

page 224 } Q. So then when Johnson told him "All right, go ahead and drive," then what happened?

A. Well, Beasley got out of the car and Leech got out after he did. Then Beasley got in the rear seat and then Tommy Leech got under the wheel and then Carroll Johnson got in the rear seat.

Q. Who was sitting on the front seat with Leech?

A. I was.

Q. Then at that time Leech was driving?

A. Yes, sir.

Q. You were on the right front and where was Carroll Johnson sitting?

A. Behind the driver on the left.

Q. And where was Beasley sitting?

A. On the right rear.

Q. Now then, what took place?

A. Then we started on back toward Lynchburg.

Q. And who was driving at that time?

A. Tommy Leech.

Q. Now, when you all left the filling station did you have any trouble with the car in the way he was driving it or anything about leaving the filling station?

page 225 } A. No, he just took out a little bit fast from the filling station.

Q. Then, as I understand it, you have just told us about going into the curve you were going you would estimate seventy-five and then just before the accident I believe you said eighty-five or ninety, is that correct?

A. That is correct.

Q. Do you know where Goose Creek is?

A. Yes, I do.

Q. Now, let me ask you this: At the time you say you left Whitey's place you say Tommy Leech was driving—that is, going east?

A. That is right.

Q. Now, would you please tell us who drove that car from that time until the time of the wreck or after the wreck?

A. Tommy Leech was driving.

Q. Did Duane Beasley drive the car at any time from Whitey's going east up until the time of the accident?

Thomas R. Burley.

A. No, he didn't.

Q. When was the last time that Duane Beasley drove the car?

A. When we pulled up from the pumps to the page 226 } restaurant.

Q. Do you recall just as the car went off the shoulder of the road down into the dip?

A. Yes, I do.

Q. Now, at that time how was it to your recollection? Was it running on all four wheels?

A. Well, I couldn't tell exactly but I remember when I looked up, I looked ahead and he was going across the secondary road and I remember when we hit that steel post and it felt like the car was turning around.

Q. Now then, after the wreck was over where did you go to?

A. I remember climbing the bank and I remember getting on the highway.

Q. Were you able to find anybody or did anybody come by?

A. I stopped some kind of truck.

Q. When was the next time then that you saw Beasley, Duane Beasley? Where did you see him after the accident?

A. I saw him up on the road after I stopped the truck.

Q. Do you know how long that had been?

A. No, I don't.

Q. Do you know how he got up there?
page 227 } A. No, I don't.

Q. Well, did you all stay there until the officer came?

A. Yes, I did.

Q. Then where did they take you?

A. They took me to the hospital, I guess.

Q. What hospital was that?

A. Bedford County Hospital.

Q. How long were you a patient there in the hospital?

A. About nine days.

Q. Now then, after you were released from the hospital then did you come on back to your home?

A. Yes, I did.

Q. I believe you live over near Sweet Briar in Amherst County.

A. That is right.

Q. And who do you live with?

A. I live with my uncle, Mr. E. T. Lawhorne.

Thomas R. Burley.

Q. Now, after you were in the hospital did the police officer come to the hospital to see you?

A. How is that?

Q. Did the State Trooper come to see you while you in the hospital?

page 228 } A. Yes, sir, a State Trooper came to see me while I was in the hospital.

Q. And do you know his name?

A. State Trooper Wilkes.

Q. Did he ask you at that time about who was driving and about the accident?

A. Yes, he did.

Q. Now, I want to ask you this: When he talked to you at that time did you or not at that time tell him who was driving when you left Whitey's place—that is, the restaurant?

A. I told him who was driving when we left.

Q. And who did you tell him was driving?

A. I told him Tommy Leech was driving.

Q. Did you tell him who was driving at the time of the accident?

A. No, I didn't.

Q. Well, Tommy, why didn't you tell the man when he talked to you there at the hospital, why didn't you tell him who was driving at the time of the accident?

A. Well, we were all four friends and I didn't want to get anybody in trouble.

page 229 } Q. Did you know at that time that Johnson was dead?

A. Yes, I did.

Q. Had you been informed about whether or not Leech was seriously hurt?

A. Yes, I had.

Q. Now, when you were released from the hospital you say you went to your uncle's home where you made your home over at Sweet Briar?

A. Yes, I did.

Q. Now, did you later talk to the officers and tell the officers who was driving at the time of the accident?

A. Yes, I did, about a week after I got out of the hospital.

Q. And did you or not go home and have a talk with your uncle about it?

A. Yes. I told him I hadn't told the State Trooper who was driving and he told me the best thing for me to do was to go ahead and tell the truth about it.

Q. Then after that did you meet the State Trooper?

Thomas R. Burley.

A. Yes.

Q. Where?

A. At the Virginia Department of Highways
page 230 } office on 501.

Q. Is that just outside of Lynchburg?

A. Yes, sir.

Q. Did you then tell the Trooper who was driving the car
at the time of the accident?

A. Yes, I did.

Q. And who did you tell him was driving?

A. Tommy Leech was driving.

Q. While you were in the hospital were you in the room
with either Mr. Beasley or with Mr. Leech?

A. No, I wasn't.

Q. Were you or not informed while you were there in the
hospital of the serious condition that Tommy Leech was in?

A. Yes, they told me.

Q. I believe it has been brought out in evidence but I will
ask you, on that night was the road dry and was it clear or was
it raining?

A. The road was dry and it was clear.

Mr. Whitehead: All right, gentlemen.

RE-CROSS EXAMINATION.

By Mr. Daniel:

Q. Mr. Burley, when you all made plans to take
page 231 } this trip to Roanoke where were you at that time,
at Barker-Jennings?

A. Yes, sir.

Q. And you and Johnson and Beasley got together before
you picked up Tommy Leech at Forest, I believe.

A. I couldn't hear you.

Q. Did you and Duane Beasley and Carroll Johnson get
together before you picked up Tommy Leech at Forest?

A. That is right.

Q. Did you all know at that time that Duane Beasley was
the only person who wasn't going to drink any beer?

A. That is right.

Q. Was that why you decided Beasley should drive the car?

A. That is right.

Q. I believe after you got to Forest you picked up Leech
and about what time was that?

A. Somewhere around 7:00 o'clock.

Thomas R. Burley.

Q. Do you know what time you left the hospital?

A. No, I don't.

Q. Did you check your watch at any time to see what time it was?

A. No.

page 232 } Q. The next place you went was where you got the beer. Is that right?

A. That is right.

Q. Is that just past Forest?

A. Yes, it is.

Q. Do you know if that is the place that at that time was called Reynolds' place or is called Reynolds' place now?

A. I don't remember seeing any name there.

Q. Then, as I understand, you went on to Bedford. Did you stop at any other place, the Auto-Dine or any other place?

A. No, sir.

Q. You didn't stop at a place called Auto-Dine?

A. No, we didn't.

Q. Did you circle around it?

A. I don't remember that.

Q. Who was telling Beasley where to drive that night?

A. No one.

Q. Did Carroll Johnson ever tell him how to drive and where to drive?

A. No, he didn't.

Q. Did he ask Beasley to drive the car for him?

A. Yes, he did.

page 233 } Q. And was that so he, Carroll Johnson, could drink beer?

A. That is right.

Q. How old was Carroll Johnson?

A. He was twenty-one, I think.

Q. The rest of you all were between eighteen and nineteen?

A. That is right.

Q. Carroll Johnson is the one who bought the beer. Is that right?

A. That is right.

Q. Was that because he was over twenty-one?

A. I guess so.

Q. You don't remember circling around the Auto-Dine, you say.

A. No, I don't.

Q. Do you know where the Auto-Dine is?

A. No, I don't.

Thomas R. Burley.

Q. Do you know what time you left Reynolds' place after you bought the beer?

A. I couldn't say exactly. We stayed there about five minutes.

page 234 } Q. Then you say you went on a side road to a girl's house to see where it was?

A. That is right.

Q. Do you know where that was?

A. I couldn't tell you but I know it when I see it.

Q. Was it before you got to Bedford or after?

A. Before you got to Bedford.

Q. Could you tell me approximately where it is?

A. It was approximately two or three miles below the place we bought the beer.

Q. Do you know where the Perrowville road is?

A. No, I don't.

Q. Now, did you go to any other places on the way to Roanoke before you got to Whitey's Truck Stop?

A. No, we didn't.

Q. Did you circle any places?

A. No, sir.

Q. Did you have any traffic in Bedford to amount to anything?

A. No, sir.

Q. How long do you think it took you to go to this girl's house?

page 235 } A. Approximately two or three minutes.

Q. Just drive down and back?

A. No, the road leaves 460 and circles around and comes back into 460, about a mile and a half or two miles below.

Q. Does the road have a number?

A. It has a number but I don't know what it is.

Q. Is it a part of old 460?

A. It could be, I don't know.

Q. All this time did Duane Beasley drive the car up to Whitey's Truck Stop?

A. Yes, sir, that is right.

Q. How was he driving?

A. He was driving along fifty-five or sixty.

Q. Any complaint about his driving?

A. Not a bit.

Q. Apparently everybody was satisfied with the way he was driving?

A. Yes, sir.

Q. And you say Tommy Leech you think drank two beers?

Thomas R. Burley.

A. That is right.

Q. Do you happen to know how long you
page 236 } stayed at Whitey's Truck Stop?

A. About fifteen or twenty minutes.

Q. And that is about five or ten miles from Roanoke, you
say?

A. That is right.

Q. And you got there about what time?

A. Got where?

Q. To Whitey's Truck Stop the first time.

A. I would say around 8:00 or 8:30.

Q. Around 8:00 to 8:30. What were you doing at that
place?

A. Me and Beasley got out and got a Pepsi-Cola at the
restaurant.

Q. You had had two beers before that?

A. That is right.

Q. You said Johnson went across the street, didn't you?

A. That is right, a little store across the street.

Q. Is it directly across the street?

A. Yes, it is.

Q. You mean across 460?

A. Yes.

Q. Is that a three-lane highway there?

page 237 } A. I don't remember.

Q. Now, do you know the reason why you went
to Roanoke?

A. No, just to have a good time, ride around.

Q. How long had you known Duane Beasley before you
went on this trip?

A. Ever since I had been working at Barker-Jennings,
about three months.

Q. And was he working there before Tommy Leech came
there?

A. Yes, he was.

Q. And were you working there before Tommy Leech came
there?

A. No, I think me and Tommy Leech came there about the
same time, maybe a week's difference.

Q. Had you been around with Duane Beasley double dating
with him or anything of the kind?

A. No, I hadn't.

Q. You say you came back to Whitey's Truck Stop after
you had been to these places in Roanoke? Is that right?

A. Yes, sir.

Thomas R. Burley.

Q. On previous occasions you have been questioned about this wreck, haven't you?

page 238 } A. You mean by who?

Q. By Trooper C. E. Wilkes.

A. Yes, sir.

Q. Were you ever able to tell him on those occasions where you went in Roanoke?

A. I don't remember.

Q. You don't remember. You mean you don't remember telling him. You remember to the point you could tell him like you are telling it now or you just don't remember whether you told it or not?

A. I talked to him right after the accident and he said I talked to him. He said I did but I don't remember talking to him at all.

Q. You don't remember talking to him?

A. After the wreck?

Q. You remember coming up on the highway, you said.

A. That is right.

Q. You remember flagging a truck, you say.

A. I remember that.

Q. And you remember Duane Beasley coming up?

A. Yes, sir.

Q. And you remember the State Trooper coming up?

A. I remember seeing him.

page 239 } Q. You remember getting in his car?

A. I think I do, I am not sure.

Q. Do you remember Duane Beasley being in the front seat and you in the back seat?

A. I think so. I am not sure.

Q. Why aren't you sure about that part? Did you have a head injury?

A. Yes, I did.

Q. What type head injury? Were you hurt?

A. I don't know, more or less a brain concussion, I think.

Q. Were you unconscious?

A. Not while I was in the hospital, I don't know whether I was during the wreck or not.

Q. I want to take you back right now to Whitey's Truck Stop when you came back the second time on the way to Lynchburg. You said Beasley drove into the pumps on the outside. Is that right?

A. Yes, sir.

Q. You didn't know John Wood before that?

Thomas R. Burley.

A. No, I didn't.
 page 240 } Q. You have nothing against him and he has
 nothing against you as far as you know?

A. No, sir.

Q. At that time how long did you stay there all together?

A. From the time we pulled in until the time we were leaving to go to Lynchburg.

Q. About fifteen minutes?

A. About fifteen minutes.

Q. I am talking about the second time.

A. Yes, sir.

Q. All you did was to go to the rest room and Carroll Johnson bought a cup of ice cream. Is that right?

A. Yes.

Q. Was it a Dixie cup or do you know?

A. I don't remember.

Q. The restaurant is located in the same building that the filling station is located in, isn't it?

A. That is right.

Q. And isn't the office of that filling station right next to the restaurant? Let me show you the pictures. Here is Plaintiff's Exhibit No. 3 and I ask you if that is Whitey's Truck Stop you are talking about.

page 241 } A. Yes, sir.

Q. This sign which has "Restaurant" is the restaurant you are talking about?

A. Yes, it is.

Q. Will you point out where the office of the filling station is?

A. Right through this door right here.

Q. Would you mark that with this pen with an X?

Note: The witness does as requested.

Q. Could you estimate the length of that building?

A. I would say between one hundred and twenty-five and one hundred and fifty feet.

Q. You think it would be that long? When you parked at the outside pumps you were near the center of the building at that time, were you not?

A. No, sir, about twenty feet from the west end.

Q. Aren't the pumps right in front of the center of the office of the filling station?

A. More or less.

Q. Now, you stated when you pulled away from there

Thomas R. Burley.

Duane Beasley drove the car fifty yards down page 242 } to in front of the restaurant. Is that right?

A. I said approximately fifty yards.

Q. Don't you realize that would be approximately one hundred and seventy-five feet from the pumps down to in front of that restaurant?

The Court: One hundred fifty feet.

By Mr. Daniel:

Q. Three times fifty is one hundred and fifty. Do you realize that would be approximately one hundred and fifty feet from the approximate center of the filling station to the restaurant?

A. That is just my estimation.

Q. Let me ask you this: You were in front of the restaurant and the restaurant was lighted, was it not? They had lights on the apron and the driveway, didn't they?

A. Yes, sir.

Q. And you had good visibility?

A. That is right.

Q. Did you say about how far away from the door of the restaurant you drove the car?

A. You mean the front door?

Q. Yes, sir.

page 243 } A. About twenty feet.

Q. Which side of the door, east or west?

A. Just about directly in front of it.

Q. Pointed long ways headed toward Lynchburg?

A. Yes.

Q. Now, up to that point had there been any complaint about the way Duane Beasley was driving?

A. No, there hadn't.

Q. You say Tommy Leech asked to drive a couple of times in Roanoke. What did Carroll Johnson say then?

A. He said "No, you have been drinking and we had planned for Beasley to drive and let Beasley drive".

Q. And he had still been drinking when you got to Whitey's Truck Stop, hadn't he?

A. Who?

Q. Leech. He had had something to drink, hadn't he?

A. He had had two beers.

Q. Was it planned for Duane Beasley to drive to Roanoke and back that night?

A. Yes, it had been.

Thomas R. Burley.

Q. Getting back to this point right after the accident where you said you remembered being up on the road, page 244 } remembered the State Trooper, and remembered other things and I will ask you this, do you remember being in the rear seat of the Trooper's car while Duane Beasley was in the front seat?

A. I don't know. I have a faint recollection of seeing the car with a red light on top.

Q. You said you remembered the State Police coming there.

A. I remember seeing the State Policeman and I remember seeing the car with a light on top of it.

Q. When did your memory become bad on you? You remember going up the bank and flagging the truck and the State Trooper coming up there, did your memory go bad at the point where you got into the Trooper's car?

A. It seems like I remember getting into the Trooper's car. It seems like I got in the front seat.

Q. Does it seem like you remember Beasley being in the car?

A. I don't remember.

Q. You don't remember Beasley being in the car at all?

A. No, I don't.

Q. Do you know how you got to the hospital?

A. No, I don't.

page 245 } Q. Do you remember whether an ambulance took you or the Trooper?

A. No, I don't.

Q. You don't remember any conversation with the Trooper?

A. No, I don't.

Q. Don't you remember the Trooper asking you who was driving the car at that time?

A. No, I don't.

Q. At that time did he ask you and didn't you tell him you did not know and turned to Duane Beasley and asked him who was driving?

A. Right at the accident?

Q. While in the Trooper's car.

A. No, I don't remember it.

Q. You don't deny it or don't remember it?

A. I don't deny it and don't remember it either.

Q. Let me ask you this: You say you were conscious in the hospital and knew the seriousness of Tommy Leech's injuries?

Thomas R. Burley.

A. That is right.

Q. And did you think Tommy was going to die at that time?

page 246 } A. I did not know.

Q. Had you heard he probably would?

A. I heard he was pretty bad off and the chances were he could die?

Q. When Trooper Wilkes came to you at the hospital who did you tell him was driving at that time?

A. I told him I did not know.

Q. You did tell him you did not know then?

A. That is right.

Q. That was at the hospital?

A. Yes, it was.

Q. Did you know then?

A. Yes, I did.

Q. And your reason for not telling him was you didn't want anybody to get in trouble?

A. That is right.

Q. Let me ask you this: Have you employed Mr. Whitehead as your attorney to represent you for personal injuries in this case?

A. Yes, sir, I have.

Q. And is it your understanding he will institute for you in the future a suit in your behalf?

page 247 } A. Yes, he will.

Q. Have you read the deposition that Tommy Beasley—I mean Duane Beasley gave before this actual trial began, some two or three weeks ago, a little brown book something like this?

A. No, sir, I haven't.

Q. Did you ever tell the Trooper when he was questioning you about this that you were asleep or dozing and didn't remember anything about who was driving?

A. I remember telling him I was asleep.

Q. You told him that one time?

A. Yes, I did.

Q. You told him one time you did not know who was driving. Is that right?

A. That is right.

Q. And then do you remember the date that you first told him that Tommy Leech was driving?

A. No, I don't. It was after I got out of the hospital.

Q. How long after you got out of the hospital?

A. I don't know exactly, I think about a week.

Thomas R. Burley.

Q. Is your uncle's name Elmo T. Lawhorne?

A. That is right.

page 248 } Q. Did you ever discuss this with him and say
you were going to decide to say Leech was driving?

A. Sir?

Q. You said you discussed it with your uncle. Did you make the statement you had decided Leech was driving?

A. No, I didn't. I talked to him and I finally told him I knew who was driving.

Q. At the end of that week after you got out of the hospital you knew then Tommy Leech was still unconscious, didn't you?

A. Yes.

Q. And you knew his prospects weren't good?

A. He wasn't unconscious when I got out, he was coming and going.

Q. When did you get out of the hospital?

A. On the 29th.

Q. The 29th of what?

A. October.

Q. If the doctor said he was unconscious for ten days you would have been out before he became conscious.

A. I went in to see him before I left and he was conscious.

page 249 } Q. Was he able to talk sense to you?
A. No, he wasn't.

Q. He didn't know what was going on then, did he?

A. No, he didn't.

Q. Didn't you decide that Tommy would be the man who couldn't be hurt by who you said would be driving after you got out?

A. Sir?

Q. Didn't you decide because of Tommy's condition after you got out of the hospital you might as well say he was driving figuring he would never get in the position where he could be hurt by it?

A. No, I didn't.

Q. Didn't you at one time in a statement to Trooper Wilkes say "As far as I can remember Leech was driving"?

A. I don't remember. I talked to him approximately three times in the hospital.

Q. Now, the last time that you talked to him you say was out here at the State Police barracks on 501. Is that right?

A. Yes, sir.

Thomas R. Burley.

Q. Do you remember where you were when you
page 250 } told the Trooper you were asleep and didn't know
 who was driving?

A. I was in the hospital.

Q. This statement you gave the State Police on 501 was
given on November 2nd, 1960, wasn't it?

A. I don't remember.

Q. You know that Tommy Leech never was charged with
any offense in this thing after this statement?

A. I don't know.

Q. Did you know that Trooper Wilkes went back to Mr.
John Wood with photographs of all of you? Did the State
Trooper get your photograph?

A. He told me that.

Q. Did the Trooper ever tell you what John Wood said?

Mr. Whitehead: I object.

The Court: I sustain the objection.

By Mr. Daniel:

Q. When you left the hospital did you go to see Duane
Beasley too?

A. Yes, sir, I did.

Q. He was conscious at that time, wasn't he?

A. Yes, sir.

Q. And you could talk with him at that time?
page 251 } A. Yes, to a certain extent.

Q. Mr. Burley, did you know as much about
that wreck at the time you were in the hospital as you did
within a week after you got out?

A. No, I didn't.

Q. Where did you learn the balance of it?

A. It just came back to me.

Q. Did you call the Trooper then about that or did he
call you and ask you to meet him?

A. He contacted me for another statement.

Q. And after all that came back to you you didn't report
to him to tell him the true facts of the accident. Is that right?

A. That is right.

RE-CROSS EXAMINATION.

By Mr. Whitehead:

Q. Mr. Burley, Mr. Daniel has shown you here a little
exhibit called Plaintiff's Exhibit 2 and another one called

Thomas R. Burley.

Plaintiff's Exhibit 3. Now, I ask you to look there. Where did you make a mark on that picture?

A. Right here.

page 252 } Q. Now, so as to get you straight, if you will
look at the big picture where you can see something where he got you to make a mark that is where the soft drink box is, isn't it?

A. Yes, sir.

Mr. Daniel: I told him to mark it where it was.

By Mr. Whitehead:

Q. If you made the mark there that is the soft drink box, isn't it?

Mr. Rosenberger: Let the witness say where he made the mark, not let counsel say where he made it.

By Mr. Whitehead:

Q. I will put it this way Will you please refer to the picture No. 3 and to the larger picture—

Mr. Rosenberger: I object. He is putting those two pictures together.

The Court: They overlap.

Mr. Whitehead: I will just take one.

Q. I will take Defendants' Exhibit 28 and ask you now, the light might not be the best, but I ask you to look there and tell us where you made that mark and looking
page 253 } at the picture what did you put the mark on?

A. I put it right there.

Mr. Daniel: Let him make that point too.

By Mr. Whitehead:

Q. What does that represent?

A. That is the door.

Mr. Rosenberger: Let him mark it.

By Mr. Whitehead:

Q. Will you put a mark right there on the white—

Mr. Daniel: Let him say where to put the mark.

Thomas R. Burley.

Note: The witness makes a mark on the photograph.

By Mr. Whitehead:

Q. If you want to put it on the black I will ask you to use a red pencil.

The Court: You mark there where you thought the car was parked originally.

The Witness: This is not what I am marking.

Mr. Daniel: You are marking where it pulled down to?

The Witness: No, you asked me to mark page 254 } where Carroll Johnson went into the filling station.

By The Court:

Q. What did you intend to mark in the first place?

A. I marked the door to the office to the filling station.

Q. Mark the door to the filling station on the large picture and do it yourself with that red pencil.

Note: The witness does as requested.

The Court: He has marked the door to the office on that large picture. What exhibit is that?

Mr. Whitehead: This is Defendant's Exhibit No. 28.

By Mr. Whitehead:

Q. Now, where is the door leading into the filling station?

A. Right there at the red mark.

Q. Now, where are the tanks or pumps that the car was stopped beside first when it came from Roanoke back to Whitey's?

A. It stopped on the outside of these double pumps.

Q. These pumps—what is this right here? That would be west of that door. What does that show?

A. It is the grease pit.

page 255 } Q. Like the pump here and the pump there,
I am referring to the pump right directly or the one nearest to the filling station and the one furthest from the filling station, if you look toward 460 are those pumps more or less in line or not?

A. You mean in line with the door of the filling station?

Q. Yes, sir.

A. Yes, sir, they are.

Q. Then what does this represent right here?

Thomas R. Burley.

A. The restaurant.

Q. You say all four of you went to the men's room?

A. Went right around the corner here.

Q. Now then, that is Defendant's Exhibit 28. Now, I will ask you about Defendants' Exhibit 28-A and ask you when Beasley drove the car from in front of the pump could you point out some place approximately on Exhibit 28-A where he drove the car to?

A. We were right here in front of the door.

Q. Forget about that car because that shouldn't be in the picture showing.

A. We were right along here.

page 256 } Q. Did I understand you to say as you walked out of the door of the restaurant you were about twenty feet from the car?

A. About twenty feet.

Q. And which way was the car when it pulled over there heading?

A. It wasn't directly parallel with 460, it was headed I don't know what angle it was.

The Court: You will have to speak a little louder.

By Mr. Whitehead:

Q. You say the car was headed in an angle?

A. Yes, about an angle like this (indicating).

Mr. Rosenberger: We don't want to keep anything out but Mr. Whitehead has been over this on direct examination and this is not re-direct. He took him from the pump to the restaurant, who was driving when they left, and he is just reiterating.

The Court: But Mr. Daniel had him mark these pictures on his re-examination of him and Mr. Whitehead is going over that in light of his testimony.

Mr. Rosenberger: I think he went over it page 257 } once before.

Mr. Whitehead: I never asked him about any pictures on direct examination, Mr. Daniel brought that up.

Q. Mr. Daniel asked you about putting this thing on somebody. I will ask you this, Mr. Burley: Up to the time of this accident what was the relation between you four fellows, were you friendly or not?

A. Yes, sir, we were pretty good friends.

Thomas R. Burley.

Q. Now, was it your desire to put it on any one driver although he may not have been the driver?

Mr. Rosenberger: That is a leading question.

The Court: I sustain the objection.

By Mr. Whitehead:

Q. Then, when the officer talked to you at the hospital as I understand you told Mr. Daniel then that you told him Leech left driving the car but you told him then you did not know who was driving at the time of the accident. Is that correct?

A. Yes, sir.

Q. Then you say you left the hospital about October 29th?

A. Yes, sir.

page 258 } Q. Then you went home?

A. That is right.

Q. Now, at that time did you ever tell your uncle or anybody that you were going to put this thing on somebody whether it ought to be on them or not?

A. No, I didn't.

Q. And you say when you talked to your uncle your uncle told you to go to the State Police and tell them the truth?

Mr. Daniel: I object to that line of questioning.

The Court: You have been over that on direct.

By Mr. Whitehead:

Q. Now, Mr. Daniel asked you if you had never contacted the State Police after that time but they contacted you. Now, I ask you wasn't it about that time that the State Police contacted you?

Mr. Rosenberger: Just a minute. That is leading, your Honor. Mr. Daniel asked the witness if he knew what the date was and the witness said he did not. I object to him leading the witness.

The Court: Rephrase the question.

page 259 } By Mr. Whitehead:

Q. I am asking you this: About the same time that your uncle told you to go and tell the truth did not the State Police contact you and tell you to come out on 501?

Mr. Rosenberger: We object to the leading question.

Thomas R. Burley.

The Court: That is a leading question.

By Mr. Whitehead:

Q. I will ask you this then: Was there any days difference, if so how many days difference, from the time your uncle told you to go and tell the truth that the State Trooper got in touch with you?

A. It was about one day.

Q. Then, in accordance with the request from the State Trooper, did you go and meet him out at the office on 501, Mr. Wilkes?

A. Yes, I did.

Q. I will ask you this: You were with Tommy Leech all the time from the time you all left here until the time of the accident practically, weren't you?

A. Yes, sir.

Q. Now, how much of anything of an alcoholic page 260 } nature did Tommy Leech have to drink during all that period?

A. Not over two beers.

By The Court:

Q. When were the two beers consumed that you drank?

A. Within a few minutes after we bought them.

Q. Would that be before you reached Roanoke?

A. Yes, sir.

Q. You say you reached Roanoke about 8:30?

A. That is right.

Q. Then after 8:30 o'clock that evening until the time of the accident Tommy Leech didn't have anything else to drink at all?

A. No, sir.

Q. Had he eaten anything or drank anything other than any alcoholic beverage from the time he had the beer up to the time of the accident?

A. Might have drank a couple of Pepsi-Colas.

By Mr. Whitehead:

Q. When the question came up about taking this little joy ride, you four young fellows, was it one person or was it all of them, did all four of you decide to go and did one or all of you decide to let Duane Beasley drive?

page 261 } A. Well, Carroll Johnson and Beasley and Tommy Leech had decided to go before I knew

Thomas R. Burley.

anything about it and they asked me Tuesday morning did I want to go with them.

Q. That was October 18th?

A. Yes.

Q. The same day of the accident?

A. Yes, sir, and I asked where they were going and they said to Roanoke, said going up for a ride. I said "Why can't we have as much fun in Lynchburg?" He said "No, we are going to drink a couple of beers and won't anybody around here know it". I said "All right", so I went with them.

Q. I overlooked asking you this: Who were you in the room with when in the hospital? Were you by yourself?

The Court: You asked him if he was in the same room with the others and he said no.

By Mr. Whitehead:

Q. Were you in the room with somebody else?

A. Yes, sir, I was in the room with a guy named Gene Dooley.

Q. You didn't know him, did you?

A. No, I didn't.

Mr. Whitehead: All right.

page 262 } Mr. Daniel: May I ask two questions?

The Court: No, he has been examined on direct, cross examination, re-direct and re-cross and this will have to stop some time.

Mr. Daniel: All right.

The witness stands aside.

Mr. Daniel: I wish to offer as Plaintiff's Exhibit No. 1 this paper. It was testified to yesterday without objection.

The Court: This is the same as writing a witness' testimony out and putting it in evidence. What is the purpose of that?

Mr. Daniel: Because I don't think the jury can possibly remember every item I read and I thought it would be a proper exhibit for them to take to the jury room.

Mr. Frost: The objection is the evidence is already in. He can mention it in his argument and the total amount has been testified to.

Mr. Daniel: I will withdraw it.

If your Honor please, the plaintiff rests.
page 263 } Mr. Frost: If your Honor please, we would
like to make a motion in the absence of the jury.

The Court: All right, members of the jury, retire to the jury room.

(Jury out).

Mr. Frost: The defendant, by his attorneys, moves to strike the evidence in the case of Thomas D. Leech against the said defendants on the following grounds:

1. That there is no evidence shown by the plaintiff to prove that Beasley or Johnson was driving the car at the time of the accident;

2. That there is no evidence of gross negligence; that there is evidence of speed; that there is no evidence showing the reason for the car getting out of control; and

3. That there has been no agency established—that is, the legal principle of agency established that would hold Carroll Johnson or his estate in any event.

Now, I would like to elaborate on the question
page 264 } as to who was driving at the time. The burden of proof is on the plaintiff to establish who was the driver of the vehicle. There is no burden on the defendant to disprove it but there is a burden on the plaintiff to prove who was driving the automobile at the time of the accident and there is no evidence in the record at all as to who was driving other than the testimony of Burley who testified that Leech was driving at the time of the accident.

The Court: There is evidence that Leech's wife overheard the boy in the hospital make an admission when talking to his mother and he told his mother that he was driving the car. Isn't that legal evidence he was driving the car? Leech's wife overheard a conversation between Beasley and his mother and at that time Beasley told his mother that he was driving the car.

Mr. Frost: I think that is exactly true.

The Court: Isn't that admission evidence that he was driving?

Mr. Frost: As I understood there was no definite time put in there when he was driving. Beasley has remarked
page 265 } "I was driving the car." Now, to my mind the question came up as to what time Beasley was talking about. There is no question about the fact Beasley was driving the car all the way up and all the way back to

Whitey's Truck Stop and a statement to come out, an isolated statement, "I was driving the car", no question about that. Of course, Beasley hasn't testified but he is going to testify that he doesn't remember anything, the same thing Leech testified to, so that statement I think would have to be read in the light of all evidence and irrespective of what Beasley testified to there is no question about the fact he was driving the car and at the time of the accident I tried to get from the girl, as I recall, what time they were talking about and she said that is all he said. I said "Will you give me the direct words?" and she said "Beasley said 'I was driving the car' ". That I don't think is sufficient to base a verdict on who the driver was or make an issue where they have not carried the burden to show who was driving at the time of the accident.

page 266 } Now, as far as the agency is concerned, this was a trip apparently planned by three boys or four boys and they picked out Beasley to drive because he didn't drink and used his car. Each of the boys had a car but there wasn't any question about which car it was and the primary purpose was a convenience, not an agency proposition, because they didn't want a man who had been drinking to drive the car and that applied to Leech, Burley and Johnson and they all went along there and it was merely a trip of convenience.

The Court: Do you gentlemen have anything to say?

Mr. Whitehead: May I say that as far as the motion about the driver, as far as the motion certainly against the Johnson estate, I, as attorney for the defendants, heartily join in that, but as attorney for the defendant I could not join in the motion, and the evidence shows unquestionably, that there was the grossest kind of negligence in this case and the sole question seems to be in this case a determination from the evidence who was the driver. We take

page 267 } the position, of course, that the evidence does not show that Duane Beasley was driving; that there is not sufficient legal evidence to go to the jury on the question that Duane Beasley was the driver at the time, and furthermore, the plaintiff put Thomas Burley on the stand, called him as an adverse witness, asked him with reference to whether or not he was a passenger in the car, and I take the position certainly by asking him that that he would then be bound by anything he may say with reference as to how the other people were seated in the automobile.

Mr. Daniel: I join in partly with Mr. Whitehead in that there was gross negligence. As has been pointed out, Leech's wife heard Beasley state he was driving the car and in addi-

tion the evidence of Mr. John Wood who positively stated Beasley drove the car away from the filling station and down the road and there is no evidence whatever that the drivers ever changed between that restaurant and the place of the wreck and, in view of all the circumstances in the case, I

think there is a strong presumption that if the
page 268 } jury believe John Wood that Beasley was the driver of the car, and as to the question of no reason for the car going out of control it has been shown there was an S-curve there with a bank over the side, an intersecting highway and warning signs for half a mile or more before going into the curve and evidence which the jury could believe that he was going into that curve at eighty to ninety miles an hour, so I say the jury could infer from all the circumstances the reason why the car went out of control was because of the excessive speed. In addition, the pictures of the damage to the car substantiate the speed.

As to the agency question it is admitted in the pleadings that this car was titled in the name of Corene Johnson, mother of the deceased Carroll Johnson, but that it was actually his car; that he had all control of it.

The Court: You mean the plaintiff is admitting that it was his automobile?

Mr. Daniel: It is admitted in the pleadings that the car is titled in her name but her son is now dead and
page 269 } whose estate we are now suing, that that boy had complete control over the car and exercised dominion over it. Burley has testified that this trip was made to Roanoke and a plan was made for Beasley to drive so that they could drink and Johnson, according to the evidence, did most of the drinking, and I believe, without stating positively, that the presumption is when an effective owner is in an automobile and another person is driving it is presumed, until the contrary is proven, that the person so driving was driving as the agent on business of the effective owner of the automobile.

Mr. Rosenberger: According to what transpired at the Phillips 66 station this witness Burley said in response to a question from Mr. Whitehead that at that station Leech asked permission of Johnson to drive the automobile and Johnson granted the permission and under those circumstances it shows control.

The Court: He had control of who drove the car, no question about that.

page 270 } Mr. Frost: It was his car.

Mr. Rosenberger: He was driving for him and he was drinking.

The Court: But the witness testified he didn't have directions, all he had was permission to drive. He let him drive. It was agreed he was going to drive because he wasn't drinking.

Mr. Watkins: The evidence shows in Roanoke twice this boy asked for permission from this man to operate the car and was refused.

Mr. Whitehead: That is right.

The Court: I don't see why the agency question bothers you. I don't think any agency has been established, a relationship of principal and agent. In addition, I don't think it makes much difference one way or the other so Mr. McCarthy you may take this down:

On Mr. Frost's motion to strike the evidence the Court with reference to the motion to strike the evidence against Duane Beasley on the ground that gross negligence has not been proven and that Duane Beasley was not the driver of the car is overruled for the reason that there is page 271 } evidence which, if believed by the jury, both circumstantial and direct evidence, would, I think, meet the test sufficiently to submit that issue to the jury on gross negligence.

There is direct evidence to show that shortly before the accident Beasley was driving the car and I think that raises a sufficient jury question to submit the matter to the jury as to who was driving the car, so on that issue I will overrule the motion.

Now, on the motion to strike the evidence as to the administrator of Carroll Johnson the Court sustains the motion on the ground that the evidence, in the Court's opinion, is insufficient to establish an agency relationship of principal and agent which is required in order to give Johnson the control that is required of a principal and agency relationship, so therefore the Court in striking the evidence against the administratrix of Carroll Johnson will discharge the jury from further considering the case against her and will enter judgment for the defendant, Carroll Johnson's administratrix, in the suit against her by the plaintiff Leech, but, page 272 } of course, it is not overruled as to Duane Beasley.

Mr. Whitehead: Would you mind putting in there "but, of course, retains the claim of the estate against Leech"? We have got three suits growing out of the same accident.

The Court: That is not in the motion but I will put that

Mildred D. Beasley.

in if you want me to. The only thing I am striking from the proceedings is the suit of Leech against Corinne M. Johnson, administratrix of Carroll Johnson, and the other matters will be submitted to the jury on all issues.

Mr. Rosenberger: So as not to prejudice anybody's rights I suggest you proceed under that rule and enter a summary judgment and not submit the issue of Leech against Johnson because the jury would be confused.

The Court: I am going to tell them that I have so held and am going to take that issue away from them and enter a judgment in favor of the defendant on that issue.

Mr. Rosenberger: I was suggesting you didn't page 273 } even have to bring that up, enter a summary judgment and submit the other issues because they will have enough issues, just get them confused, and I don't want them to get the impression the Court is taking any part in it.

The Court: My recollection is that that is about the language of the rule.

Mr. Frost: The defendant, by counsel, objects and excepts to the ruling of the Court in overruling the ground of the motion to strike in regard to number one and number two as set out above.

Mr. Daniel: The plaintiff, by counsel, excepts to the action of the Court in sustaining the motion to strike the evidence as to the defendant Corinne Johnson, administratrix of Carroll Johnson, on the ground stated in the argument in opposition to defendant's motion to strike originally made and upon the ground that the law is that the owner of an automobile who is in the automobile is presumed to be the principal or master of the person driving his car until evidence to the contrary appears from the defendant.

page 274 } Mr. Frost: In addition to my grounds of objections and exceptions previously stated I would like to add that I also object and except for the reasons stated in the argument. I would like to add that to my exceptions.

(Trial resumed—Jury present).

Evidence for the Defendants.

MRS. MILDRED D. BEASLEY.
having been first duly sworn, testifies as follows:

Mildred D. Beasley.

DIRECT EXAMINATION.

By Mr. Whitehead:

Q. You are Mrs. Mildred D. Beasley?

A. That is right.

Q. Will you talk loud enough so the ladies and gentlemen on the jury can hear you and so his Honor can hear you? Are you the mother of Duane Beasley, the young man sitting behind me?

A. Yes, I am.

Q. Now, Duane before the accident and since the accident has been living with you and your husband, has he not?

A. That is right.

page 275 } Q. Now, on the night of this accident when you received message about the accident did you go to the Bedford Hospital?

A. Yes, as quick as we could.

Q. Now, do you know approximately how long Duane stayed in the hospital?

A. I think it was eighteen days.

Q. Now, during that period of time were you with him most of the time?

A. Yes, I was.

Q. At the time when you got to the hospital after you got notice at that time was he conscious or unconscious or how was he? I don't know if you know what we mean by conscious but I mean could he carry on a conversation with you or was he out of his head or what?

A. Well, it seemed like he recognized me but he didn't know where he was and he didn't know what had happened and couldn't understand why he was where he was at.

Q. While you were there at the hospital how long was it then before he seemed to know where he was and was talking all right to you?

A. I don't know.

page 276 } Q. Do you know how many days it was?

Mr. Rosenberger: She said he didn't know.

By Mr. Whitehead:

Q. Do you know whether it was one day or more days or can you tell us or not?

A. No, I don't know.

Q. Before he left the hospital did he talk all right?

A. Yes.

Mildred D. Beasley.

Q. Let me ask you this: While he was there at the hospital I believe he was in the room with Mr. Leech, was he not?

A. Yes.

Q. At any time there while you were in the hospital, I believe about a week or ten days after the accident, did Duane make any remark about whether he was driving the car at any time that night?

A. Well, he did get to wondering what happened.

Q. What?

A. He wondered what happened. He knew he was driving the car when he left Lynchburg and he said he was driving because he remembered driving it to Roanoke. He remembered first when he got to the underpass or something before he got to Roanoke.

page 277 } Q. Did you hear him make any remark as to whether that night at any time he was driving the car or not?

A. Well, he did say that he was driving because he figured—

Mr. Rosenberger: I object to her conclusions of what he figured.

The Court: Confine the statement to the statement he made.

By Mr. Whitehead:

Q. Did he at any time in the hospital in your presence and also in the presence of the little lady that married Tommy, did he make any remark at that time about that he was driving the car?

A. He may have. I don't know just how he said it. He said "I must have been driving" or "I was driving". I don't remember just what he said.

Q. Then after Duane came home did he stay there at home for awhile?

A. Yes, sir.

Q. Then later I believe he went back to work at Barker-Jennings, did he not?

page 278 } A. Yes, sir.

Q. Now he has been living with you before and after the accident, you say?

A. Yes.

Q. You see him daily?

A. Yes.

Mildred D. Beasley.

Q. Now, what complaints did he have from the accident? How was he hurt?

A. Well, he had a concussion and he had a lot of cuts and bruises.

Mr. Rosenberger: I object to her diagnosis as to what this boy had. She is not a doctor. She can tell things she observed or saw but she couldn't observe a concussion. She is telling what somebody told her.

The Court: She can tell what she observed about his condition.

Mr. Rosenberger: We move that that answer be stricken out about the concussion.

The Court: You members of the jury will disregard what she said about concussion.

page 279 } By Mr. Whitehead:

Q. When you got up to the hospital and after you were with him say for the first day or so was he the same then as he is now?

Mr. Rosenberger: I object to the question, your Honor. He is relating a time and she said awhile ago she didn't know how long he wasn't himself. Now, in his question Mr. Whitehead is saying "For the first day or so", you see he is putting a definite time in his question and it is a very material thing, particularly in view of what the doctor's testimony was.

The Court: Let the court reporter read the question back.

Note: The question was read back by the court reporter.

The Court: I think that is a question she can answer. As I recall, her statement was concerning she didn't know when he recovered his consciousness but this is after he left the hospital.

Mr. Rosenberger: No, while he was in the hospital. She didn't know the number of days he didn't seem to be himself.

The Court: He asked her if there was any difference then as compared to a later time when he left the hospital. I overrule the objection.

Mr. Rosenberger: We object and except for the reason stated.

Mildred D. Beasley.

By Mr. Whitehead:

Q. Do you want me to repeat the question?

A. Yes, sir.

Q. For the first day or two after he was in the hospital right after the accident was he the same then as he is now with reference to his conversation and talking?

A. No.

By the Court:

Q. You will have to speak louder. The jury can't hear what you say. Will you repeat your answer?

A. Well, he didn't say much, just complained about where he hurt, his arm hurt him so much and his back hurt him so much and that is about all the conversation you could get out of him.

Q. That is not responsive to the question I asked you.

page 281 } Mr. Whitehead: She said "No".

Mr. Rosenberger: She is explaining why she said no.

By Mr. Whitehead:

Q. What was your answer to my question, was it "Yes" or "No"?

A. I am not very good at this.

Q. I will ask you this. For the first day or so after he was in the hospital was there any difference between him then and as he is now with reference to talking and walking around?

A. Well, he couldn't walk then. He had to be flat on his back for ten days. The only talking he did was complaining about how he felt.

Q. Then after he got home and from that time up to the present time how has he been getting along?

A. Well, he is quieter than he used to be. He is awfully nervous and he trembles a lot and he complains of his head and his scalp is sore and his neck hurt him a lot.

Mr. Whitehead: All right.

page 282 } CROSS EXAMINATION.

By Mr. Rosenberger:

Q. Mrs. Beasley, you understood Mr. Whitehead all right.

Clayton G. Beasley.

You said that Duane knew where he was hurting and he told you and he complained about that.

Mr. Whitehead: You Honor please, she didn't testify that he knew where he was hurt. She said he was complaining.

By Mr. Rosenberger:

Q. He complained of his back and being sore all over. Did I hear you right?

A. Well, his arm was hurting him so bad.

Q. And he complained of his back hurting him?

A. Yes, sir.

Q. And he complained of being sore?

A. No, I don't think he said anything about being sore. His arm hurt him so bad.

Q. His arm hurt him and his back hurt him and he complained of those so he knew where he hurt?

A. Yes.

Mr. Rosenberger: That is all.

The Witness stands aside.

page 283 } CLAYTON G. BEASLEY,
 having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Whitehead:

Q. You are Mr. Clayton G. Beasley?

A. That is right.

Q. And are you the father of young Duane Beasley sitting here behind me?

A. Yes, sir.

Q. And the lady who just testified is your wife?

A. Yes, sir.

Q. Now, I believe Duane lived in the home with you all before and also after the wreck when he came from the hospital and is still living with you all. Is that correct?

A. Yes, sir.

Q. Now I will ask you this: Have you noticed and if you have please state to us any difference between Duane after the accident than he was before the accident?

A. He talks less than he did before, he speaks a little

Duane Charles Beasley.

slower maybe than he did; he has complaints of headaches and his neck hurts and a bone was broken in the—

page 284 } Mr. Rosenberger: I move that that be stricken
on the ground he doesn't know.

The Court: Gentlemen of the jury, you will disregard any testimony about a bone being broken.

By Mr. Whitehead:

Q. He did return to work after this accident at Barker-Jennings for awhile and now he is working at Jefferson's, the optician, is that right?

A. That is right.

Mr. Whitehead: All right.

CROSS EXAMINATION.

By Mr. Rosenberger:

Q. Mr. Beasley, does he tell you that he has headaches now and then?

A. Yes, sir.

Q. I suppose he had them now and then before the accident too, didn't he?

A. No, sir.

Q. Never had one?

A. I never remember him complaining of one.

Mr. Rosenberger: That is all.

page 285 } The witness stands aside.

DUANE CHARLES BEASLEY,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Whitehead:

Q. Will you speak loud enough so the Court and jury can hear you? What is your name?

A. Duane Charles Beasley.

Q. And what is your age now, Duane?

A. Twenty.

Q. And when were you born?

A. August 31, 1941.

Duane Charles Beasley.

Q. Duane, at the time of this accident or before this accident in October, 1960 where you working?

A. Barker-Jennings.

Q. What was your job there?

A. Order clerk.

page 286 } Q. Talk louder.

A. Order clerk.

Q. And how much were you making per week?

A. One dollar an hour.

Q. One dollar per hour and how much did you average per week? Would you work thirty hours or forty hours or fifty hour a week?

A. Forty-four.

Q. Then did you get \$44.00 or what did you get?

A. Well, we got time and a half for Saturday. That was four hours we got time and a half for.

Q. How much would that approximately average a week before anything was taken out?

A. About \$51.00, I think.

Q. \$51.00 a week?

A. Yes, sir.

Q. Before the accident you knew Tommy Leech, Tommy Burley and Carroll Johnson, did you not?

A. Yes, sir.

Q. And all of you were working at Barker-Jennings just before this accident?

A. Yes, sir.

page 287 } Q. How long had you been working there?

A. I think I went there in January.

Q. January of '60?

A. Yes, sir.

Q. Now, Duane, do you drink alcohol?

A. No, sir.

Q. Now, on the night before this accident did you all leave here, you three boys, and then go and pick up Tommy Leech out in Bedford County?

A. Yes, sir.

Q. Now, who was driving the car then?

A. I was.

Q. How did you happen to be driving the Chevrolet automobile?

A. They had planned earlier that day I was to drive.

Q. You all had?

A. Yes, sir.

Duane Charles Beasley.

Q. Then after you picked up Tommy Leech tell us what happened to the best of your memory.

A. Well, we picked up Tommy Leech at The Florence Restaurant and I don't know if we all went in or not. I think we went on up the road to another little restaurant on the right-hand side of the road and all of us got out and Carroll bought some beer there. I got a drink or something and we all came out in the car.

Q. What do you mean when you say you got you a drink or something?

A. A Pepsi-Cola or something like that.

Q. A soft drink?

A. Yes, sir. Then Carroll bought the beer in the paper sack. We got in the car and I was still driving. We proceeded on toward Roanoke. When we got in Bedford we went around the Auto-Dine a couple of times or something like that.

Q. Did you stop at the Auto-Dine or just ride around it?

A. I think we just rode around.

Q. You were driving the car then?

A. Yes, sir.

Q. What were they doing with the beer? Was anybody drinking that?

A. Three of them were drinking that then.

Q. Who was sitting up beside you?

A. Tommy Leech.

Q. And who was on the back seat?

page 289 } A. Carroll Johnson was on the left rear and Tommy Burley was on the right rear.

Q. Had they finished drinking the beer when they got to this Phillips 66 truck stop or Whitey's Restaurant?

A. Yes, sir.

Q. They had finished drinking the beer before you got there?

A. Yes, sir.

Q. Now then. when you left this Auto-Dine and drove on then where did you go?

A. We went to Whitey's Truck Stop.

Q. Did you all stop there?

A. Yes, sir.

Q. Who was driving then?

A. I was.

Q. Do you know approximately how long you stayed there?

A. No, I don't. I remember we went in and got a drink

Duane Charles Beasley.

or something, not over fifteen or twenty minutes I don't think.

Q. Then where did you all go to then?

A. I was still driving and we headed on to Roanoke.

Q. What did you do in Roanoke?

A. We rode around through the main section of town.

Q. What else did you do? Go on and tell me
page 290 } everything that you know you did in Roanoke.

A. Well, I remember seeing these boys with that black Chevrolet and went out to Uncle Tom's and went inside and sat down in the corner booth and we were talking to them. Then I remember another restaurant we went in. I heard Carroll got some more beer but I don't know whether he did or not. I don't remember being in there. Then I remember leaving Roanoke then.

Q. Do you know approximately what time you left Roanoke? Did you look at a watch or a clock?

A. I think it was some time around 11:00.

Q. Then where did you go?

A. We headed back to Lynchburg.

Q. Did you stop anywhere?

A. We stopped again at Whitey's Truck Stop.

Q. When you were driving from Roanoke to Whitey's Truck Stop who was driving the car?

A. I was.

Q. Then when you got to Whitey's Truck Stop where did you stop?

A. I pulled into the pumps, the first pump next
page 291 } to the road on the outside.

Q. Then what did you all do?

A. All four of us got out and went into the men's room.

Q. Now then, after you came out the men's room what did you do?

A. I remember Carroll saying something about getting some ice cream. I don't know if he got it or not, and that is all I remember.

Q. Do you remember getting in the car after then?

A. No, sir.

Q. Or driving?

A. No, sir.

Q. Do you remember anything about who drove the car away from the place?

A. No, sir.

Q. Now, what was the next thing you remember?

A. Waking up in the hospital.

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Q. Do you remember anything about getting up a bank after the accident?

A. No, sir.

Q. Or anything about the accident?

A. No, sir.

page 292 } Q. Now then, after you were in the hospital tell us what, if anything, you can remember about being in the hospital.

A. Well, before I woke up or remembered clearly I remembered they were strapping my arm to my chest. I vaguely remember them picking me up and going around with the tape or whatever it was and I remember seeing a chrome pole sitting up, I don't know what that was.

Q. You remember something about them wrapping your arm and you remember a chrome pole?

A. Yes, sir.

Q. How long had you been in the hospital before you could remember things all right?

A. Seven days.

Q. How do you know it was seven days?

A. I woke up and asked my mother where Tommy was and she told me he was in Lynchburg and she told me it had been seven days since it happened.

Q. Did you know at that time that Carroll was dead?

A. No, sir.

Q. When did you find out that Carroll was dead?

A. When I left the hospital and went home.

page 293 } Q. Well, when you came to after seven days was any other patient in the room?

A. Tommy Leech was in the room with me.

Q. Now, you heard the lady, Mr. Leech's wife, you remember the little lady who testified yesterday?

A. Yes, sir.

Q. You heard her say that while you were there in the hospital some time after this accident that then you made some remark about you were driving the car. Do you have any recollection of making that remark or not?

A. No, sir.

Q. To your best memory did you tell anybody there who was driving or who was not driving?

A. No, sir, not that I remember.

Q. While you were there in the hospital did you know who was driving the car?

A. Nothing was said about it.

Q. I said did you know who was driving the car?

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A. At the time of the accident?

Q. While you were in the hospital did you know then who was driving the car at the time of the accident?

A. No, sir.

Q. When did you first find out who was driving page 294 } the car at the time of the accident?

A. I had gone back to work—I mean when I got out of the hospital I went down to Barker-Jennings to see everybody down there and Tommy Burley told me.

Q. You hadn't gone back to work then?

A. No, sir.

Q. You just went down to see your buddies at Barker-Jennings?

A. Yes, sir.

Q. Then up to the time or before the time that Tommy Burley talked to you down at Barker-Jennings after the accident then you didn't honestly know who was driving at the time of the accident, did you?

A. No, sir.

Q. When did you go back to work?

A. December 5th.

Q. That would be 1960, wouldn't it?

A. Yes, sir.

Q. Now, after you went back to work in December of 1960 did Tommy Leech come down to Barker-Jennings?

A. He came down one day after I went back to work just for a visit.

page 295 } Q. Did you and Tommy Leech have any conversation down there with reference to who was the driver?

A. Yes, sir.

Q. And what was that?

A. Well, Burley, Leech and I got over to the side, just the three of us, and Leech said for not any of us to get any lawyers because he didn't want anything to be done about it, or something like that, and he said he was driving when we left the restaurant up there but he didn't know if he was driving at the time of the accident or not.

Q. Now, let me ask you this: Had you ever driven the Chevrolet involved in this accident before the accident?

A. Yes, sir.

Q. And how many horsepower was in the Chevrolet?

A. Three hundred thirty-five horsepower.

Q. Now, had Tommy Leech ever driven it before the accident?

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A. Yes, sir.

Q. And where did he drive it?

Mr. Rosenberger: Where Tommy Leech drove it before the accident has nothing to do with this case. It is completely immaterial and irrelevant.

page 296 } The Court: Other than to show that in the past he had driven the car. I think Tommy testified he had driven it before.

Mr. Rosenberger: He admitted he had driven it on another occasion.

The Court: What is the relevancy of this question?

Mr. Whitehead: I am going to show by him what Tommy Leech told him the car would do.

Mr. Rosenberger: That has nothing to do with this case.

The Court: How is that relevant to this case?

Mr. Whitehead: I think it is relevant because the evidence shows in this case that the car certainly had been driven all right and no trouble.

Mr. Rosenberger: I think the jury should retire.

The Court: Let the jury retire to the jury room.

(Jury out).

The Court: Mr. Whitehead, what do you propose to show by this witness?

page 297 } Mr. Whitehead: The relevancy and I think the fair deduction the jury might draw—the evidence will show this car had been driven all right from Lynchburg to Roanoke and back to Whitey's Restaurant by Beasley and that thereafter at that time then it was driven not in an all right manner but at a very high rate and excessive rate of speed and in a reckless manner and I think the purpose is that the jury would know that this man Leech had driven this car before and that he knew how much speed he could get out of it.

The Court: Didn't Leech testify he got it to ninety miles an hour?

Mr. Daniel: He said it may have been that.

Mr. Rosenberger: That has no materiality here, proof of other crimes or other incidents are not pertinent.

The Court: I will sustain the objection.

Mr. Daniel: While the jury is out may I ask this man a question on the same point?

The Court: No. I will pass on that when the time comes.

Duane Charles Beasley.

Call the jury in. Mr. Beasley, don't answer that page 298 } question that he asked you.

(Jury in).

By Mr. Whitehead:

Q. As I understand, Duane, when you were off from work that was from October 18th to December 5th, 1960. Is that correct?

A. Yes, sir.

Q. And you estimated you were making at that time around \$51.00 gross per week?

A. Something like that.

Q. In addition to your loss of wages let me ask you this: Who was your doctor up at Bedford?

A. Dr. Jantz was my main doctor and then Dr. Hardy.

Q. Do you have a list of your medical expenses excluding Dr. Arnold and Dr. Novak?

A. Yes, sir.

Q. Will you please read those out?

A. Dr. Hardy's bill was \$57.00.

Q. Talk louder, we can't hear you. Don't you mumble.

A. Dr. Hardy's bill was \$57.00. Dr. Jantz' bill was \$140.00.

Dr. Waters and Dillard's bill was \$15.00. Bedford County Memorial Hospital was \$290.20.

Lynchburg General Hospital was \$60.00. The ambulance bill was \$5.00.

Q. Lynchburg General Hospital's bill was divided up one time \$30.00 and another time \$30.00, was it not?

A. Yes, sir.

Q. They were for the two EEGs run on you?

A. Yes, sir.

Q. What is the next one?

A. The ambulance was \$5.00.

Q. Now, in addition to that are you taking medicine? Have you had any bills for the medicine you are taking?

A. Yes, sir.

Q. You are taking medicine now at the order of a doctor?

A. Yes, sir.

Q. And how much does that medicine cost each time you fill it?

A. It is two dollars and something, I don't know exactly.

Q. Now, Duane, would you please tell us where it hurt you after you came to at the hospital or after the accident? Where were you hurting?

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A. My arm bothered me and my neck was hurt-
page 300 } ing.

Q. What else?

A. My foot bothered me some.

Q. Anything else?

A. Well, I had headaches every now and then.

Q. I am talking about in the hospital, not now.

A. Yes, sir.

Q. Anything happen to your head?

Mr. Rosenberger: I object to the leading questions. He has asked him about three times where he was hurt and apparently he didn't hurt.

The Witness: I didn't stay in the hospital eighteen days just for my health.

By Mr. Whitehead:

Q. What happened to your head?

A. Well, I had lacerations in my head.

Q. Bend your head over. Are those places shown on your head is that from the accident or not?

A. Yes, sir, they are.

Q. Come down here if you will and stand in front of the jury and show them where the places on your head are.

Note: The witness does as requested.

Q. How many days were you in the hospital at
page 301 } Bedford?

A. Seventeen.

Q. After you were dismissed from the hospital then did you go back to see Dr. Jantz or Dr. Hardy?

A. I had to go back to see Dr. Hardy.

Q. Dr. Hardy or Dr. Jantz?

A. I mean Dr. Jantz.

Q. I believe the doctor said he told you to get a doctor down here.

A. Yes, sir.

Q. Then what doctor did you get down here to look after you?

A. Dr. Arnold.

Q. Are you now under the care of Dr. Arnold?

A. Yes, sir, I am.

Q. Since you have gone back to work are you having any trouble that you did not have before the accident? If you

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are having any trouble now, tell us about it and if none please tell us about that.

A. Well, my head bothers me a lot and I am having headaches and my neck hurts.

Q. Where does your neck hurt you?

A. Right in the back. It is stiff all the time
page 302 } and most of the time it hurts a lot. It stays stiff
all the time. It's been stiff ever since the accident.

Q. You went on back to work at Barker-Jennings on December the 5th, I believe.

A. Yes, sir.

Q. Then did you continue to work there or did you transfer to another job?

A. I went to work with A. G. Jefferson on February 22nd.

Q. Now, at the job you are doing what job are you doing at A. G. Jefferson's?

A. I am an apprenticed optician there.

Q. An apprentice optician?

A. Yes, sir.

Q. What do you do in that work?

A. Well, grinding lenses now.

Q. Does that call for any heavy lifting?

A. No, sir.

Q. In other words in that job do you have as much lifting to do as you did at Barker-Jennings or less?

A. Less.

Q. At this place you are getting how much per
page 303 } week gross?

A. I am making \$69.00.

Q. \$69.00 per week?

A. Yes, sir.

Q. Now, would you please tell us—you say you are having some headaches from time to time—where on your head do you have those headaches?

A. Right in here over my eyebrows.

Q. That is the front part of your forehead?

A. Yes, sir.

Q. And how long do they stay on you, Duane?

A. Sometimes they don't last too long and other times they do.

Q. This medicine that the doctor is giving you since he has giving you that medicine do you feel better or worse or the same or what?

A. I feel about the same, I think.

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Q. Tommy Leech said yesterday all of you were friends but that since this thing has come up here and these trials and things that you won't speak to him, won't have anything to do with him. Do you all have anything to do with each other since he sued you?

A. No, sir.

page 304 } CROSS EXAMINATION.

By Mr. Rosenberger:

Q. Mr. Beasley, I believe you were working at Barker-Jennings and that is a wholesale hardware store, isn't it?

A. Yes, sir.

Q. As an order clerk you went around to get articles together to get orders filled?

A. Yes, sir.

Q. And you had to do right much heavy lifting?

A. Right much at times.

Q. A hard job.

A. It was not as hard as what I am doing now.

Q. It was not as hard work as what you are doing now?

A. No, sir.

Q. Lifting lenses is not as heavy as lifting a keg of nails.

A. If you look at it like that it is not.

Q. That is the way I am looking at it right now. You had this accident on October 18th, 1960 and you went back to work at the hardware store on December 17th?

A. Yes, sir.

Q. So you were off from work just about forty
page 305 } days, weren't you?

A. I don't know exactly.

Q. Then on this day that these boys asked you about going to Roanoke you heard Mr. Burley here this morning say the three of you came to him and asked him to go to Roanoke.

A. Yes, sir, I heard him.

Q. I understood you to say that those three boys instead came to you and wanted you to go.

A. That is right.

Q. So Burley is wrong in that particular?

A. Yes, sir.

Q. Now, why did they want you to go?

A. Wanted me to drive.

Q. And the plan was you were to drive up there and back because they were going to drink beer?

A. They were going to have a good time and were going

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to drink two or three cans of beer and wanted me to drive because I didn't drink.

Q. And Carroll Johnson was going to buy this beer because he was twenty-one and the other two boys were under age, isn't that so?

A. Yes, sir.

page 306 } Q. Now, you went to Carroll Johnson's house in your automobile and Burley arrived in his automobile about the same time?

A. Yes, sir.

Q. What time did you all get to Johnson's house?

A. I would say five minutes to seven.

Q. Then from Johnson's house on Rivermont Avenue where did you go?

A. To the Virginia Baptist Hospital.

Q. How long did you stay out there?

A. I don't know.

Q. Do you know what time it was when you left the Baptist Hospital?

A. No, I don't.

Q. This was October the 18th. Do you know whether it was daylight or dark when you left?

A. I don't know.

Q. You know whether you had your lights on?

A. No, I don't.

Q. You know whether you went out Memorial Avenue or out Link Road?

A. I don't know.

page 307 } Q. Do you know if you were driving or not?

A. I was driving.

Q. Had you driven that car before?

A. Yes, sir.

Q. Where?

A. I had driven it around town a couple of times and I drove it on the drag strip one time.

Q. You drove it on the drag strip?

A. I drove it on the strip.

Q. What do you do when you drive it on the drag strip?

A. See how fast you can accelerate in a quarter mile from a standing start.

Q. Now, as you were driving along to Roanoke you don't know which way you went leaving Lynchburg but you went west and got on 460 and stopped at The Florence. Do you know if you went in the The Florence or not?

A. No, sir.

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Q. You don't remember that?

A. No, sir.

Q. The next place you stopped do you know the name of that?

A. No, I don't. It is on the right-hand side of page 308 } the road but I don't know the name of it.

Q. Did you go in it?

A. Yes, sir.

Q. And who attended to buying the beer?

A. Carroll got the beer.

Q. Carroll went on over to the bar and bought the beer and he was over twenty-one and the others stayed away from where he was getting the beer. Is that right?

A. Yes, sir.

Q. When you left Reynolds' then you say you drove around the Auto-Dine which is west of Bedford, isn't it?

A. Yes, sir.

Q. Now, that Auto-Dine is on the other side of the road from the way you were going. You had to cross the four-lane road and go over to the other side to get to it?

A. Yes, sir.

Q. Are you sure you drove around the Auto-Dine?

A. Yes, sir.

Q. You heard Mr. Burley this morning say you didn't.

A. As far as I know we did.

Q. Then when you got to Whitey's Phillips 66 you told the jury this morning you stopped there when you page 309 } were going to Roanoke.

A. Yes, sir.

Q. That is what Burley said too, didn't he?

A. I don't know.

Q. Didn't you hear Burley say that this morning?

A. I heard him say a lot of things this morning.

Q. Didn't you tell me when your deposition was taken on the 30th day of August that you did not stop at Phillips 66 as far as you could remember?

A. I have remembered some since then.

Q. You have remembered this since then?

A. Yes, sir.

Q. Did you remember it after Mr. Burley told you in Court this morning?

A. No, sir.

Q. And you remember you even went in and got a Pepsi-Cola?

A. That is right.

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Q. And they charged you two cents deposit on it?

A. I went outside and drank it and went back in and got my two cents deposit and then we left.

Q. Who else bought something up there?

page 310 } A. I don't know.

Q. Do you remember Johnson going to try to buy some more beer?

A. I remember him going across the street.

Q. Did you know why he went over there?

A. No, sir.

Q. When you were driving around in Roanoke was he still trying to buy some beer?

A. Wasn't too much said about it.

Q. Now, Duane, didn't you say when this deposition was taken that Johnson said he wanted to get some more beer in Roanoke because it was getting close to closing time or 11:00 o'clock?

A. Yes, sir.

Q. Well, something was said about it, wasn't it?

A. I said something was said about it.

Q. Now, when you got back to this place—first you stopped and went in and talked to some boys about a fuel injecting kit there in Roanoke, didn't you?

A. Yes, sir.

Q. And that fuel injection pump is something you put on the carburetor?

page 311 } A. Yes.

Q. When you got back there to Whitey's 66 you remember getting back to the station?

A. Yes, sir.

Q. Had these boys drunk any beer between the time you left Reynolds' place after they got that six-pack, had they bought any more beer between that time and the time you got back to Whitey's?

A. Not as I remember.

Q. Did Johnson ride from Whitey's up to Roanoke with you?

A. From where?

Q. From Whitey's 66 up to Roanoke, did Johnson ride up there with you?

A. You are talking about going to Roanoke?

Q. Yes, sir.

A. Yes, sir, he did.

Q. Burley said he bought two beers there across the road.

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A. No, he said he bought them in Roanoke. I don't remember whether he did or not.

Q. You don't remember him drinking them?
page 312 } A. I don't remember him buying them.

Q. You don't remember him drinking any?

A. What you mean, of the six we first got?

Q. No, the other two.

A. I don't remember him even buying those.

Q. When you got down to Whitey's 66 you remember being there, don't you?

A. Coming back?

Q. Yes, sir.

A. Yes, sir.

Q. And you remember all four of you went into the rest room?

A. Yes, sir.

Q. And when you came out of the rest room you remember telling Johnson not to buy ice cream?

A. Yes, sir.

Q. Why did you tell him not to buy any ice cream?

A. I had heard ice cream and beer did not mix good together.

Q. And just two beers and ice cream didn't mix?

A. Well, as far as I knew any beer and ice
page 313 } cream didn't mix.

Q. Now, do you remember whether he bought the ice cream or not?

A. No, sir, I don't.

Q. Do you remember leaving the filling station?

A. No, I don't.

Q. But you do remember the pumps that you parked the automobile by, don't you?

A. Yes, sir.

Q. And you say you parked it on the outside of the pumps?

A. Yes, sir.

Q. You remember where this man, Mr. Wood, said the ice cream was, right there in the filling station? He was standing in the filling station door and Johnson paid him for ice cream and you don't remember any of that transaction?

A. No, sir, I don't.

Q. You remember the car leaving there and throwing gravel up?

A. No, sir, I don't.

Q. Now, up to the time that you got back to the service sta-

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tion had there been any complaint of the way you were driving?

page 314 } A. Nobody said anything.

Q. Nobody complained of the way you were driving. You hadn't had anything to drink in the way of beer or liquor or anything like that?

A. No, sir.

Q. The plan was when you left Lynchburg you were to drive to Roanoke and all the way back?

A. Yes, sir.

Q. Then there was no reason for anybody else to drive the car, was there?

A. As far as I knew, no.

Q. How much money did you have when you left Roanoke?

A. I had about \$12.00 when I started up there and I had \$11.00, I guess, when I left up there and when they found me I had one penny on me.

Q. You don't remember spending any money?

A. My billfold was lost at the accident and it came back to me about a month later postmarked Thaxton, Virginia with just my registration card, driver's license and that stuff but no money.

Q. But your billfold came back?

A. Yes, about a month later.

page 315 } Q. When Tommy Leech, Burley and you got together down at Barker-Jennings, to quote you—

Mr. Whitehead: At what time?

By Mr. Rosenberger:

Q. After this accident happened, after everybody was out of the hospital, you told Mr. Whitehead that Leech said he thought he was driving when he left the restaurant. Is that right?

A. He said he was driving and thought he wasn't driving at the time of the accident.

Q. He thought he was driving when he left the restaurant but thought he was not driving when?

A. He said he was driving when he left the restaurant and thought he wasn't driving at the time of the accident.

Q. I thought you told Mr. Whitehead he didn't know if he was driving at the time of the accident.

A. He told that here.

Q. He told you he was not driving.

A. He said he was driving when he left the restaurant but

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he thought he wasn't driving at the time of the accident—guess they changed drivers somewhere.

Q. So from what he said you would judge they page 316 } changed drivers?

A. What do you mean?

Q. If he thought he was driving when you all left Phillips 66 and thought he was not driving, or if he said he was driving at Phillips 66 and thought he was not driving at the scene of the accident then from what he was saying the drivers had been changed. Is that right?

A. Well, that is what he said.

Q. Now, isn't it so that the preceding conversation was that Leech told you he couldn't remember who was driving? Didn't he say that at that time and place?

A. He said he did not know who was driving at the time of the accident.

Q. Now, you talked with the State Trooper in the hospital, didn't you?

A. No, sir, not that I remember.

Q. Did you talk to him at home?

A. Yes, sir, he came down to the house twice.

Q. Did you tell State Trooper Wilkes at your house that you could have been driving the automobile?

A. I don't remember that I did.

Q. You don't remember?

page 317 } A. I might have. I don't remember.

Q. Now, this is after the accident. No reason for you to forget that, is it?

A. It has been a long time since he has been down there.

Q. It has been less than a year and it is a very important thing. You wouldn't forget that, would you?

A. I must have.

Q. So you must have told him you could have been driving.

A. Well, I don't say that.

Q. If he says you told him that you wouldn't deny it, would you?

A. If he said that I said that I don't guess I could.

Mr. Rosenberger: That is all, thank you.

RE-DIRECT EXAMINATION.

By Mr. Whitehead:

Q. Mr. Rosenberger asked you about had you driven this car before and you told him yes you had and you had driven it

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out on the strip. Now, to your knowledge, had also Mr. Tommy Leech driven this car also before the accident?

A. Yes, sir.

page 318 } Q. And had he driven it out on the strip?

A. Yes, sir.

Q. And he outran the speed you made?

A. Yes, sir.

Mr. Rosenberger: We object to the leading question.

The Court: I sustain the objection to the last question.

By Mr. Whitehead:

Q. Then, as I understand it, the question has been asked you about the State Police. The State Policeman did come down to your place several times, did he not?

A. Twice.

Q. And you at all times were cooperative with him, were you not?

A. I was. He wanted me to take a lie detector test and I told him I would go but he never came back.

Q. Let me ask you one more question so I can get this straight. You have been working continuously since December 5th, 1960, either at Barker-Jennings or up at Jefferson's have you not?

A. Yes, sir.

page 319 } Mr. Whitehead: All right.

RE-CROSS EXAMINATION.

By Mr. Rosenberger:

Q. I neglected to ask you this. When did you first go to Dr. Arnold, what date?

A. I don't know.

Q. Who sent you to Dr. Arnold?

A. Mr. Whitehead.

Q. So you got a lawyer before you got Dr. Arnold?

A. Yes, sir.

Mr. Rosenberger: That is all.

The witness stands aside.

Mr. Whitehead: I would like to call Dr. John Novak.

Duane Charles Beasley.

Mr. Rosenberger: I would like to be heard before he calls this witness.

The Court: The jury will retire.

(Jury out).

Mr. Rosenberger: If your Honor please, be-
page 320 } fore counsel starts to examine this witness I would
like it stated to the Court that counsel will be in a
position to prove that this man will probably have epilepsy
rather than a possibility of it because if it is brought in and
talked about it is my opinion, based on what I have heard this
doctor testify before, that he can't say that this witness Beas-
ley will probably have epilepsy, and since he can't then it is
not admissible but if he gets to talking about it before the
jury on the possibility of epilepsy the damage is done and I
will have to ask for a mistrial if that is done.

The Court: If he will testify that it is probable he can
testify to that but, of course, if it is just possible that is
an entirely different thing. I think we will have to find out
first what he is going to testify to.

Mr. Rosenberger: Counsel can say one way or the other.
Another thing counsel has mentioned is dilantin which has
been given this person and we know that one of the uses for
dilantin is for epilepsy but we don't know that
page 321 } this doctor is saying he has got epilepsy so I
don't want what it generally is used for to be put
before the jury.

Mr. Whitehead: Do you want to examine the doctor in
the absence of the jury?

Mr. Rosenberger: The Court has ruled that counsel cannot
refer to it unless he means to prove that the witness will prob-
ably have epilepsy.

Mr. Whitehead: That is what I expect to prove.

Mr. Frost: If the doctor prescribes a certain drug I don't
see how that will be inadmissible.

The Court: He can name the drug, the purpose for which
it was prescribed and if he prescribed it to ward off epilepsy
he can testify to that.

Mr. Rosenberger: That would get into possibilities.

The Court: He has got to testify to probabilities first and
then testify it is to keep down the probability or lessen the
probability he has given the drug. Are there any other ques-
tions before we call the jury back?

Dr. John G. Novak.

Mr. Rosenberger: That is all. I just wanted it understood.

page 322 } (Jury in).

DR. JOHN G. NOVAK,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Whitehead:

Q. You are Dr. John Novak?

A. Yes, sir.

Q. And you are the same gentleman who testified yesterday concerning Mr. Thomas Leech?

A. Yes, sir.

Q. In addition to the qualifications and experience you have had which you stated yesterday may I ask you in addition to your duties here are you now connected in any way with the Lynchburg Training School or doing any work there?

A. In the year that I have been here I have two titles at Lynchburg Training School, one is Chief of Psychiatry and the other is Director of the Department of Electro-encephalography. Actually I act in the capacity of consultant and read the tracings at the Training School.

Q. And is your work there mainly dealing with the brain and with the functions of the brain and so forth?
page 323 } A. My work is divided in keeping with the two positions I occupy, one, I read the tracings recorded at the Training School, and two, I do some teaching in psychiatry in the field of psychiatry.

Q. Now, Doctor, I believe EEGs are being given at Lynchburg Training School. What are you doing with reference to the EEGs run at Lynchburg General Hospital?

A. I have the title and responsibility of this department, the brain wave department at Lynchburg General Hospital, and I read the tracings that are recorded there.

Q. Will you please tell us whether or not you have had charge of the electro-encephalograms run on this young man, Duane Charles Beasley, one of the parties in this suit, and if so when and where?

Mr. Rosenberger: If he was there I have no objection if he ran it but I would object if he wasn't present when it was run.

Dr. John G. Novak.

By the Court:

Q. Do you know whether this was run on the person? Was it run in your presence?

A. Two were run. The second one was run in my presence.

The Court: He may testify to that one.

page 324 } By Mr. Whitehead:

Q. Do you know the first one was run on this particular person?

Mr. Rosenberger: I object. He says he wasn't there.

The Court: He hasn't answered the question whether he was or was not present. Are you able to connect it up by somebody running it and turning it over to him?

Mr. Whitehead: I can get the man and bring him here who ran it.

Mr. Rosenberger: If this man wasn't there he wouldn't know about the tracing.

The Court: You will have to connect it up.

By Mr. Whitehead:

Q. Is the first running a part of the hospital record of this man?

A. Yes, sir.

Mr. Rosenberger: We object to it.

Mr. Whitehead: If that be true, if it is part of the hospital record the hospital record has been turned over
page 325 } to the defendant—I mean to the plaintiff and certainly Mr. Rosenberger knows about the first run.

Mr. Rosenberger: I wasn't there. I don't know if this man was there. This doctor does not know if they got the right man there.

The Court: I think the objection is well taken if he can't prove it was run in his presence.

By Mr. Whitehead:

Q. Is this department under your supervision?

A. Yes, sir.

Q. And being under your supervision you have charge of those under you?

A. Yes, sir.

Q. And do you delegate to the others under you to run these tracings?

Dr. John G. Novak.

A. Yes, sir. There is a technician and it is his responsibility for running the tracings.

Q. And what is the name of that technician?

A. Mr. Don Adkins.

Q. Is he the one that has charge of running the tracings there at the hospital?

A. Yes, sir, he is an employee of the hospital
page 326 } with the specific duties of working under my directions in the EEG laboratory.

Q. Was he there present at the time this first EEG was run?

Mr. Rosenberger: He does not know. If he wasn't there he can't say who was there.

Mr. Whitehead: Can't we tell that by the hospital records?

The Court: If he wasn't present how does he know the man was there?

By Mr. Whitehead:

Q. Do you have the hospital records?

A. Yes, sir.

Mr. Rosenberger: He can't testify about the hospital records. The librarian would have to testify about that. He can't pick the record up and say that is so and this is so. We have to have somebody here to prove the record.

The Court: I will sustain the objection unless you can connect it up that he was there or bring the person here who was there to testify and say he turned them over to him.

page 327 } By Mr. Whitehead:

Q. Doctor, we will deal with the second EEG. Now, I will ask you this, if I may, and the Court will tell me whether I can ask it or not—according to the hospital records could you tell us from those records when the first EEG was run?

Mr. Rosenberger: I object, your Honor.

The Court: The objection is sustained for the same reasons.

By Mr. Whitehead:

Q. According to your own knowledge when was the second EEG run or was an EEG run when you were present?

A. On September 14th, 1961.

Dr. John G. Novak.

Q. Was that run on this gentleman sitting here, Duane Beasley?

A. Yes, sir.

Q. Will you please tell us about that and tell us your findings? You testified yesterday with reference to EEGs and the way its works so I won't go over that again.

A. I will read the official report that I wrote and then explain it. It reads as follows:

Interpretation: The patient is alert and co-page 328 } operative during the recording of an eight channel, seventeen electrode placement record. The tracing shows a low to moderate voltage with a fairly well developed alpha rhythm of normal frequency, and distribution. Throughout the resting record there is a considerable amount of diffuse low to moderate voltage 4.5-6 cycles per second. Hyperventilation provokes bursts and runs of high voltage three cycles per second activity, as well as some spiking activity.

Impression: By comparison to Record Number 181—

Mr. Rosenberger: I object.

Mr. Whitehead: You have to skip that part about the comparison. Tell us what this shows.

A. The present record is quite similar.

Q. You can't tell about the similarity to the first one. You have just got to confine it to this one right now.

A. The changes are a manifestation of a post-concussion syndrome.

Q. What do you mean by a post-concussion syndrome?

A. Post-concussional syndromes are a group of symptoms or complaints following a concussion of the brain, a head injury.

Q. Then, Doctor, according to this EEG which page 329 } you ran on September 14, 1961 now then as to that would you please tell us you say you noticed some spikes in there. What do you mean by that?

Mr. Rosenberger: If counsel wants to ask him if he arrived at the same diagnosis on this EEG as he did on the other EEG it is all right with me. I don't want to put him to the trouble of getting somebody else here if he is just going to arrive at the same diagnosis.

Mr. Whitehead: Unless he consents to let the first one be

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read we will have to struggle along and bring somebody else here because we want to get it in. It is very important.

Mr. Rosenberger: All right, go ahead.

By Mr. Whitehead:

Q. Now, Doctor, what do you mean? Explain to the Court and jury what you mean by spiking.

A. In order to explain this I think it is important to understand certain technical aspects about doing the tracing. The tape on which the record is made, and you will recall I have testified yesterday there are eight pens that move simultaneously that are recorded from different areas of the brain, the tape moves at a constant rate of speed of three centimeters, a little bit over an inch, and this gives you a means of measuring the activity that is spelled out. Now, certain activities have a certain speed and there is a certain amplitude or certain height is normal. There are certain other types of activities, depending upon the characteristics in terms of speed and height that are abnormal and, of course, this is all dependent upon the age of the patient and we are dealing with a young adult of twenty and there is a description in this record of certain types of activity that I described as overactivity, eight to ten cycles per second and this is usual and normal and also described what I read was superimposed low voltage fast activity. This is activity very low in amplitude and this is made in millimeters. There are ten millimeters to a centimeter and to make some comparison approximately three centimeters to an inch. The low voltage fast activity is twenty-two to twenty-four cycles of these waves in each second of time. I also read that overbreathing brought out bursts and runs of high voltage three cycles per second activity and bursts are described as a group of three waves and a run is more than three, four, five, six, seven or eight times per second.

Of course, three per second would mean obviously slower than six or eight per second.

I also read that there was some spiking activity. Now, spiking on an electro-encephalogram is a very sharp wave, contrasted to a slow wave, more or less this type of wave, a very sharp wave. When spikes occur they are invariably abnormal, an indication of some underlying change in the brain.

Q. Then from the readings of the EEG which was made in your presence on September 14, 1961 I ask you what was your

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conclusion from that reading? Is the EEG normal or abnormal?

A. It is abnormal.

Q. Now, Doctor, what does the EEG do? Why do you use the EEG? What is it used for?

A. The EEG is a laboratory procedure or laboratory test which gives additional information to the clinical examination which consists of taking history and doing an examination and it must be interpreted in the terms of the information you are given by the patient and the findings which you find at the time of the examination. It is a laboratory test which is helpful to the doctor in evaluating all of the aspects of the case. It represents an extremely sensitive means of diagnosing conditions of the brain.

Q. What doctor got you to run this EEG?

page 332 } A. It was done at my request.

Q. What doctor referred you to run the EEG?

A. This second test I referred and made the arrangements for the test to be made.

Q. Did you know when you were running it he was under the care of any other doctor?

A. Yes, sir.

Q. What doctor was that?

A. That was Dr. Arnold.

Q. Then let me ask you this: Then also in addition to running the EEG did you first examine Mr. Beasley as a result of this accident and if you did will you please tell us what your examination consisted of, when you did the examination, and your conclusions as to whether or not he has any injury as a result of the accident of October 18, 1960?

A. Your Honor, I find an error in my notes about something I just testified to. I must say it is an honest mistake and I understand why I made it now. I am in error. I did not make a request for this second EEG and the reason why I thought that I did was because my name is signed as a referring doctor. I think I can explain the reason but I did not make this request and I am awfully sorry.

page 333 } Mr. Rosenberger: That is all right, it is immaterial.

By Mr. Whitehead:

Q. Who made the request?

A. The second request was made by Dr. Arnold and the reason—

Dr. John G. Novak.

Mr. Rosenberger: We object to his reasons.

By Mr. Whitehead:

Q. You are telling us now that this tracing in September was at the request of Dr. G. B. Arnold?

A. That is correct.

Q. Now, after running that tracing at the request of Dr. G. B. Arnold did you also have an opportunity to see, observe and examine Duane Beasley?

A. Yes, sir.

Q. And when did you see him, Doctor?

A. I saw him on September 20th.

Q. That was what year?

A. 1961.

Q. Now, will you please tell us or give us the history of what you found out from him, who was with him at the time you made the examination and what your conclusion is with reference to whether or not he received any injury in the accident of October 18, 1960?

A. This twenty-year old white man alleges that he was involved in an auto accident at or about midnight on the night of October 18th, 1960. At this time he does not recall the actual accident nor does he recall where he was riding or sitting in the car at the time of the accident. He recalls being in a service station some several miles from where he was later told was the point of the accident. He recalls that he and his three companions, Carroll Johnson, Tommy Burley and Tommy Leech, stopped and went into the rest room in a service station. He recalls that he had been driving up until then and that the car belonged to Carroll Johnson. He recalls coming out of the rest room but does not recall getting back into the car.

“Questioning reveals that the next thing that he remembers is awakening in the hospital which he later learned was the Bedford Memorial Hospital. When he woke up his mother was sitting next to the bed. He was told that he had been unconscious for seven days. Questioning reveals that he was aware of pain in his right foot and leg as well as discomfort described as ‘cracking and popping and pain in my neck’. He was also in the hospital for an eighteen-day period and as far as he knows suffered a fracture of the left scapula and also a fracture of one of the vertebrae which was discovered after he left the hospi-

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tal. The discomfort in his right lower extremity was said to have been due to a 'broken blood vessel'."

"Since the accident, the patient has suffered with headaches which are described as being located across his forehead. They are said to be rather sharp and shooting in character and to come and go. He is unable to recall their frequency but remembers that he had one the day previous to the examination. He is unable to recall when he had a headache previous to that one. He has used aspirin but usually does not use anything as the headaches usually only last a half hour and usually 'wear off'. In addition, he states 'My neck bothers me'.

"Questioning reveals that he has a feeling of stiffness in the neck all the time and this stiffness has been present ever since the wreck. It is more marked in cool weather and in cold weather the stiffness is accompanied by a 'hurting'. He has also been aware of some 'nervousness' which he indicates is present whenever he has a headache.

"Questioning reveals that his appetite is good; page 336 } that he has no difficulty in sleeping. Questioning further reveals that following the accident he returned to his former work at Barker-Jennings but elected to change his position in February, 1961 to better himself. He currently works as an apprentice optician.

"Mr. Beasley, Sr., indicates that since the accident his son has been 'moody, quiet and irritable around home'. Questioning reveals that he has always been quite but has been more so since the accident. "At times he's in a bad humor"—at such times he seems to be irritable and this occurs in spells. The father believes that the moodiness and irritability are present when he has a headache and occasionally at other times—when he may not have a headache as he never says anything about it. The father is also aware that the boy has been more restless around the home since the accident.

Mr. Rosenberger: I object to somebody else's history.

The Court: Just leave out the reference to the father.

The Witness: During the taking of the history and the examination of the patient, the patient was co-
page 337 } operative, alert and answered questions readily but offered little if any information spontaneously. "The patient appears somewhat tense and pensive throughout the entire procedure of the examination. The weight recorded was a hundred and forty-five and a quarter

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pounds, blood pressure one hundred and twenty-four over eighty.”

If I may, I would like to read this and then go back and explain the meaning because this is technical.

The Court: Go right ahead and we will see about it.

By Mr. Whitehead:

Q. Go ahead.

A. “Neurological examination reveals the station and gait to be normal as are the associated movements. The Rhomberg is negative and the patient stands on either foot with his eyes open and closed without difficulty. He walks on his toes and heels without difficulty. There is no evidence of any muscle weakness or palsy and there is no evidence of any cerebellar signs. Patient performs the finger to finger and finger to nose tests well and without difficulty.”

page 338 } “Inspection reveals a scar over the left lateral aspect of the head extending from the central to the parietal area and measuring approximately four inches in length. It is freely movable and nontender. Just in front of this scar and inside the hairline is a cross shaped scar with the cross limb measuring approximately one inch and the vertical limb approximately three-quarters of an inch. This is freely movable and nontender. There is a crescent shaped scar just at the edge of the hairline over the right forehead measuring approximately one inch in length and this is freely movable and nontender. Over the inner third aspect of the left eyebrow is an almost vertical scar measuring approximately one-half inch and a horizontal scar with a bluish discoloration measuring approximately three-quarter inch is present over the right eyelid.

“Percussion of the skull provokes no complaints. The head is freely movable both actively and passively and there is no restriction of movement in any of the usual four directions. However, the patient complaints of ‘stiffness’ on moving his head in all directions.

“The pupils are round, equal and react to light and in accommodation. The extra-ocular movements are
page 339 } normal and there is no nystagmus. The fundi are clearly visualized and appear normal. The corneal reflexes are active bilaterally. The tympanic membranes are clearly visualized and appear normal. The tuning fork is lateralized to the occluded ear and air conduction is greater than bone conduction bilaterally. There are no abnormalities of the nose, mouth, or tongue. The gag reflex is absent bilater-

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ally. There is no evidence of any facial weakness and sensory examination is normal over the face.

“The deep reflexes in the upper and lower extremities are active and equal and no pathological reflexes are elicited. The cremasteric and abdominal reflexes are active and equal bilaterally.

“Sensory examination (testing for pain, light, touch and vibratory sense as well as position sense) is found to be essentially normal.

Q. Doctor, you cannot refer to any EEG that you may have made prior to the one you ran in September.

Mr. Whitehead: If your Honor please, it is five minutes after one. It is going to take right much more time.

The Court: We are supposed to adjourn at page 340 } 1:00 o'clock and it is past that time now. We will recess for one hour and come back at 2:00 o'clock.

Let me caution you members of the jury again not to discuss this case amongst yourselves nor permit anyone to discuss it with you or in your presence and when you come back after lunch come on in the jury box or in the jury room.

(Recess).

September 27, 1961,
Afternoon Session.

Mr. Whitehead: If your Honor please, the gentleman who made the EEG at the hospital prior to the one that Dr. Novak has testified to is here and I wonder if your Honor has no objection to putting him on now before Dr. Novak resumes the stand.

The Court: We will suspend the testimony of Dr. Novak until the other witness testifies. Bring him up and let him be sworn.

page 341 } DONALD D. ADKINS,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Whitehead:

Q. What is your name?

A. Donald D. Adkins.

Donald D. Adkins.

Q. What position do you have or what is your work at Lynchburg General Hospital?

A. EEG technician.

Q. Now, what does the EEG technician do?

A. He records brain waves.

Q. I believe also in addition to your duties at Lynchburg General Hospital you are also attending Lynchburg College, are you not?

A. Yes, sir.

Q. And that is where we contacted you shortly before lunch?

A. Yes, sir.

Q. Now, will you please tell us in your capacity your work at Lynchburg General Hospital if you run an EEG or an electro-encephalogram on this gentleman sitting page 342 } right here, Duane Beasley, in June of 1961.

A. Yes, sir.

Q. Do you recognize the young man?

A. Yes, sir.

Q. Now, what day in June did you do that?

A. This was on June 27th, 1961.

Q. Now, after you made a record of these tracings do you have those tracings there with you?

A. Yes, sir, I have them here and also the reports.

Q. Then are those tracings kept there at the hospital?

A. Yes, sir, I keep them in my files.

Q. At the hospital?

A. Yes, sir.

Q. Now, with reference to the report, who makes the report out after the tracings are made?

A. Dr. Novak.

Q. You have the tracings with you which you can turn over to Dr. Novak right now. Is that correct?

A. Yes, sir.

Mr. Whitehead: All right, that is all.

page 343 } CROSS EXAMINATION.

By Mr. Rosenberger:

Q. Mr. Adkins, how long have you been running the EEG machine?

Donald D. Adkins.

A. For approximately two years.

Q. Where have you run them?

A. Well, I worked at Lynchburg General and also worked at the University of Virginia.

Q. How old are you?

A. I am twenty-four years old.

Q. And you are a student at Lynchburg College but also work part-time at Lynchburg General Hospital?

A. I work full time at Lynchburg General Hospital.

Q. Full time?

A. Yes, sir.

Q. Do you know the amount of interference that you had on your machine at the particular time that you took the EEG of this young man, Duane Beasley?

A. Very little. There was nothing outside of what would normally be on an EEG, I would say.

Q. In other words, you do get some outside electric static interference?

page 344 } A. We did not in this case.

Q. You didn't?

A. No, sir.

Q. Do you know whether this young man had had anything to eat at the time you gave it to him?

A. I cannot recall.

Q. Do you know how long you took this reading before Dr. Novak read the results of your graph?

A. Yes, sir.

Q. How long was it?

A. I would hate to make a positive statement because I don't remember exactly but I think it was possibly three to four days maybe, along in that period.

Q. Dr. Novak was on vacation at the time, wasn't he?

A. Yes, sir.

Q. So he couldn't have seen this young man before he took the EEG to instruct him or know whether he had anything to eat, could he?

A. No, sir.

Q. Now, in taking these recordings and having them out at the hospital do you ever confuse any patient's records and get one record in another patient's file?

page 345 } A. No, sir. To prevent this immediately after I get through with my EEG before I take the

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patient's electrodes off of his head I put the log in the EEG, write the patient's name on the EEG, the date and whether the patient was alert, cooperative, and certain notes like that.

Q. Was this patient, Duane Beasley, alert and cooperative when he took this one?

A. He was alert and cooperative, yes, sir.

Q. He knew what was going on?

A. Yes, sir.

Q. He responded to your instructions?

A. Yes, sir.

Q. And you are the one that ran the entire thing, including the pens that made the graph on the paper that were recording the electrical waves?

A. Yes, sir. I completed the entire EEG from beginning to the end.

Mr. Rosenberger: Thank you very much.

RE-DIRECT EXAMINATION.

By Mr. Whitehead:

Q. Let me ask you this: Since he has asked page 346 } the question will you hold it up and show it, this particular EEG ran on June 27th, 1961, what did you write on the front of it?

A. It has the EEG number.

Q. What is the number?

A. The number is 181 and then the patient's name which was Duane Charles Beasley, age nineteen years and the date was 6,27,61, "Alert and cooperative. Hyperventilation very well performed."

Q. Are you the only recorder that they have out there now? Do you do all the work?

A. Yes, sir, I do all of the EEGs for Lynchburg with the exception of the Training School.

Q. You mean the Lynchburg Training School?

A. Yes, sir.

Q. Were you also the recorder or man that did the EEG on Duane Beasley in September of 1961?

A. Yes, sir.

Mr. Whitehead: All right, sir.

Dr. John G. Novak.

RE-CROSS EXAMINATION.

By Mr. Rosenberger:

Q. Did you record on the outside of that thing page 347 } the hyperventilation very well performed?

A. Yes, sir.

Q. I take that to mean there was nothing abnormal about the hyperventilation.

A. No, sir. It is how the patient performed his hyperventilation. What we do is to have the patient close his eyes and without moving the muscles in the cheeks we have them breathe for a period of time like this (demonstrating) and how well the patient performs this is indicated and I write it on the record for Dr. Novak to evaluate.

Mr. Rosenberger: Thank you very much.

By Mr. Whitehead:

Q. And that is what you mean by hyperventilation?

A. Yes, sir, overbreathing.

The witness stands aside.

DR. JOHN G. NOVAK,
recalled, testifies as follows:

DIRECT EXAMINATION.

By Mr. Whitehead:

Q. Now, Dr. Novak, just before lunch you were page 348 } going over your examination and report of this young man and at that time you were instructed not to refer to anything in the EEG run prior to September of 1961. Now, with the EEG having been proven by the person who made the record in June of 1961 I will ask you will you please tell us at this time what the reading showed?

Mr. Rosenberger: Just a minute. Before he shows that result I think it is important that the doctor say whether the patient had had anything to eat or not because he has testified that that is a very important thing and he always sees that they have something to eat. Now when this one was taken he was out of town and the man who testified about it said he does not know whether the patient had anything to eat or not.

Duane Beasley.

Mr. Whitehead: If there is any question about that may I put Mr. Beasley back on and see if he had had something to eat? I don't really know myself.

Note: Dr. Novak stands aside temporarily and Duane Beasley is recalled for further examination.

page 349 } DUANE BEASLEY,
recalled for further examination, testifies as follows:

DIRECT EXAMINATION.

By Mr. Whitehead:

Q. Duane, we are speaking of when you went to Lynchburg General Hospital in June of 1961 for an EEG. Do you recall what time of day that EEG was run?

A. I think it was right around 2:00 o'clock when I left to go there.

Q. You have to talk louder.

A. I think it was around 2:00 o'clock.

Q. I will ask you this: Had you or not had anything to eat before he ran this test on you?

A. My lunch hour is over before 2:00 o'clock.

Q. I know about your lunch hour but had you eaten anything?

A. Yes, sir. If it was 2:00 o'clock I had eaten.

Q. If it was 4:00 o'clock had you eaten your lunch?

A. Yes, sir.

By Mr. Rosenberger:

Q. What time do you normally eat your lunch?
page 350 } A. What day was that?

Q. It was in June 1961.

A. What day is it on? On certain days I eat at different times.

Q. June the 27th is the best I can do for you.

The Court: June 27th was a Tuesday.

The Witness: On that day I ate from 12:00 to 1:00.

By Mr. Rosenberger:

Q. You ate between 12:00 and 1:00 o'clock?

A. Yes, sir.

Q. Where did you usually eat on those Tuesdays?

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A. At the Virginia Restaurant.

Mr. Rosenberger: That is all.

The witness stands aside.

page 351 } DR. JOHN G. NOVAK,
resumes the stand for further examination.

By Mr. Rosenberger:

Q. Doctor, before you start will you look and see if the graph shows what time it was taken?

A. No, sir, it is not recorded other than the date.

By Mr. Whitehead:

Q. Doctor, let's stop for a moment and deal with what the findings of the EEG were that was run on Duane Beasley in Lynchburg Hospital on June 27th, 1961.

A. This report reads as follows:

"Interpretation: This nineteen year old patient is alert and cooperative during the recording of an eight channel, seventeen electrode placement record. The tracing shows a low to moderate voltage with a fairly well developed alpha rhythm of normal frequency, and distribution. Throughout the resting record there is a considerable amount of diffuse low to moderate voltage 4.5 to 6 cycles per second activity. Hyperventilation provokes bursts and runs of high voltage three cycles activity per second, some of which is associated with abortive spikes. While these high voltage, flat top waves are diffuse, they are particularly prominent over
page 352 } the frontal, anterior and mid-temporal regions. A few sharp wave discharges occur bilaterally over the anterior and midtemporal areas.

"Impression: This tracing is abnormal. The changes are a manifestation of a post-traumatic syndrome and the specific nature of this abnormal activity suggests a posttraumatic epileptic state."

Mr. Rosenberger: I move that the latter part be stricken out.

The Court: I will withhold ruling on that until I see if he connects it up, if not it will all be stricken out.

Dr. John G. Novak.

By Mr. Whitehead:

Q. Doctor, if you can go back to where you were testifying about your findings and so forth and if you will start in your report there about the second EEG report.

A. This is a direct quotation following my examination as I testified:

"In my capacity as Director of the EEG Laboratory at the Lynchburg General Hospital, I had occasion to read tracing Number 181 recorded 6-27-61 and tracing Number 251 recorded 9-14-61 on this patient. I was present page 353 } during the recording of the latter tracing. Reports of these two EEGs have been forwarded to the patient's attending physician, Dr. G. B. Arnold. Each of the tracings are similar and both are grossly abnormal showing very definite changes indicative of a post-traumatic syndrome. The type of the abnormality as described in the reports are suggestive of a post-traumatic epileptic state. During—"

Mr. Rosenberger: We move this be stricken out.

The Court: I will take it under consideration.

By Mr. Whitehead:

Q. Will you continue?

A. "During the course of the examination, it was learned by questioning that the patient had been taking dilantin sodium grains one and a half twice a day. This medication was prescribed by Dr. Arnold shortly after the recording of the first EEG in June, 1961.

"Opinion: On the basis of the information as noted above as a result of the alleged auto accident, patient had an undetermined period of unconsciousness and now has a retrograde amnesia as well as complaints indicative of a post-concussional state. Neurological examinations page 354 } revealed no gross neurological deficit but the two EEGs recorded are abnormal and the abnormality is of a type in keeping with a post-concussional syndrome. The nature of the EEG abnormality (high voltage, slow waves with some spiking) raises up the question of post-traumatic seizures as a later complication. It is the opinion of the undersigned that the nature of these two EEGs bring this question into the realm of probability."

Q. Let me ask you one thing. In your report, referring to

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the EEGs run, you said Tracing Number 251 recorded September 14, 1961.

A. Tracing Number 181 was recorded 6-27-61 and the other is dated 9-14-61.

Q. And the last one is Number 251?

A. Number 251.

Q. With the benefit of the EEG reports, and based on the history you received from him, and further assuming these facts to be true, that subsequent to this accident this boy has been more nervous and is not as talkative as he was prior to the accident; assuming those things to be true, plus the other history which you obtained yourself, I will ask you whether or not, in your opinion, from this accident Duane Beasley has received any permanent injury or not?

A. On the basis of the information that I have page 355 } testified to, my own history, neurological examination, my interpretations of the EEGs, as well as the additional information that is assumed that he had more nervous symptoms and has been more quiet since the accident, I am of the opinion that he has suffered permanent damage to the nervous system.

Q. Now then, based on all of that situation I will ask you whether or not, in your opinion, there is a probability of epilepsy developing.

A. On the basis of the information I have testified to and in consideration of these two EEGs which are abnormal and similar in their abnormalities, it is quite probable that a late complication of post-traumatic epilepsy may occur.

Q. Doctor, are you familiar with the medicine dilantin?

A. Yes, sir.

Q. I will ask you this: Based on the information you have and your opinion in this thing if this were your patient would you or not prescribe dilantin for him?

A. On the basis of this I certainly would.

Q. Doctor, tell us, please sir, about the EEGs, whether or not if it is abnormal what that indicates to you? Does that indicate things may or may not be out of order or what?

A. Well, again I have to point out that the page 356 } EEG is a laboratory procedure which must be in its interpretation taken into consideration with all of the picture on examination of the patient. Now, these two records recorded at intervals of approximately a little less than three months time show similar and very definite abnormalities. I indicated in the reading of these tracings that there are certain abnormal aspects but there are also

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certain normal aspects. The abnormal aspects are the high voltage, high waves that are slow and they measured out at three cycles per second. In addition to this there is another type of abnormality as I previously testified, what we call spiking or a sharp wave which is specifically an abnormal wave. In the first tracing recorded in June of 1961 there is still another type of wave that I do not make mention of in the second tracing and that is as I read here, a few sharp wave discharges occur bilaterally over the anterior and middle temporal area. The temporal areas are centers right here on the head and we divide the temple lobe of the brain up in three sections, the front part, anterior and the middle part called the middle part and the back part which we call the posterior and bilaterally means on both sides. These sharp waves are distinguishable by a spiking
page 357 } wave in that it is not quite as short a duration.

Mr. Whitehead: All right, gentlemen.

CROSS EXAMINATION.

By Mr. Rosenberger:

Q. Doctor, you had not seen this patient before the EEG had been taken, had you?

A. No, sir.

Q. Did I understand you correctly to tell Mr. Whitehead that the EEG was purely a laboratory test that you use to confirm what your findings are on examination and history?

A. Yes, sir.

Q. So then you don't depend on the EEG entirely.

A. I depend on the EEG entirely on the basis of the information it supplies to me in history form.

Q. Aren't you evading the question? You don't depend on the EEG without a history and without examination, do you?

A. I have to answer that in this way—

Q. Can you answer that question or not?

A. I have to answer the question yes and no. In terms of my own examination of a patient I take into consideration my own history and my own neurological examination and my interpretation of the tracing.
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Q. Now, before you leave that if you will be responsive to my question, you generally get a history and you do an examination and then this EEG is a laboratory test that may confirm or not your examination and your history.

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Is that true?

A. Well, it may add to or detract and in that sense may confirm or not.

Q. So another thing which is about the EEG is that you can't tell what this man's EEG may have been before he was in this automobile accident on October 18th, 1960, can you?

A. I have no way of knowing that.

Q. There are many people walking around today that have no signs of brain injury, no history of an accident, that have abnormal EEGs.

A. It is estimated about twelve to sixteen per cent at the most.

Q. Twelve to sixteen per cent of the population of the United States may have some abnormality in their EEGs without clinical manifestations?

A. Yes, sir.

Q. And the reason you pointed up about the page 359 } eating before you take this thing is because whether a man has a full stomach or not will show up in his EEG.

A. Technically the absence of a full stomach, as you put it, would indicate that the blood sugar may be at a low level. If the blood sugar is at a low level it will reflect itself by certain changes in the EEG. These changes are usually slow activity three to four to five per second.

Q. You have some low activity here 4.5, didn't you?

A. Part of our slow activity is read here as 4.5 to 6 cycles per second activity.

Q. That takes care of the EEG so you didn't know what he had before you took it and you also depend on your examination. Now, there are many neurological examinations to show whether or not a person has a brain injury, aren't there?

A. Yes, sir.

Q. How many neurological examinations are there that a neurologist uses on a person to determine whether or not he has any brain damage or involvement?

A. When I speak of the neurological examination it is an all inclusive type of examination which includes literally hundreds of different types of tests, individual tests we use.

Q. All kinds of tests?

page 360 } A. Yes, sir.

Q. And you have a number of them that neurologists generally use and a neurologist generally relies on those tests, doesn't he?

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A. Yes, sir.

Q. As a matter of fact, you are the only man in Lynchburg who can read an EEG, aren't you?

A. Dr. Nagler is well qualified in encephalography.

Q. Many neurologists do not even read EEGs.

A. There are some.

Q. To get to some of these neurological tests that have been time honored and stood the test of time in medicine you performed those on this man, didn't you?

A. Yes.

Q. You did the Babinski?

A. Yes.

Q. And that was perfectly all right?

A. Yes.

Q. You did the open limb test on him?

A. No, sir.

Q. You didn't do that?

A. No, that is a confirmatory test of the Babinski. There are several confirmatory tests of the Babinski and if it is normal there is no use going through all the rest.

Q. The Babinski was no good you didn't need the other?

A. It was normal.

Q. You checked his motor nerves and they all operated all right, didn't they?

A. Yes, sir.

Q. Now, when I speak of motor nerves I wish you would explain to the jury what the motor nerves are and how they operate the body.

A. Well, I am not sure to which you refer but I can speak of this just the same. We divide the nerves of the body into two great groups. The ones that have to do with the head or special senses we speak of as the cranial nerves. Some of these are supposed to be purely motor nerves when stimulated. For example, a nerve has to do with turning your head is a motor nerve and that has to do with the tongue is a motor nerve and some of these nerves are called sensory nerves or purely sensory nerves; for example, the nerve which has to do with viewing, we perceive something transmit it to the brain and it is interpreted. Some of these cranial nerves having to do with the head are mixed, have both sensory function—that is, function to appreciate sensations of pain, touch or vibration, and some of them have motor components and these are mixed nerves, carry both of these functions.

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Q. How about the nerves that operate the feet and move the hands?

A. I was about to say that in the remainder of the body there are nerves that belong to what we call the peripheral nervous system. They are away from the brain and these nerves extend in the leg and arm and body and they have functions again being motor, having to do just with the function of certain muscles, having functions of being sensory, that is, ability to perceive and transmit to the brain sensations of pain or temperature or light, touch, deep pressure or vibration and some of them are mixed again serving two functions.

Q. Now then, that was the reason you were telling the jury you were checking this man for gait, how he walked?

A. That is part of the complete neurological examination.

Q. How he turned his head and had no stiffness in his head, moved his arms all right and no defect in his touch or feel or sensory nerves, were there?

page 363 } A. No, sir.

Q. All of these nerves come out of the brain and radiate down the body?

A. Brain and spinal cord, yes, sir.

Q. So from your examination you could not determine that he had any brain damage, could you?

A. On the basis of one part of the neurological examination, the objective part of the examination, I could not determine any changes or any abnormality.

Q. And of the objective examinations, what you yourself saw, that is, to put the man on the table and examine him, there was nothing that you could find.

A. No, sir.

Q. The only other thing that you found was a group of symptoms which you call a post-concussional syndrome. Is that right?

A. Yes, sir.

Q. And the symptom is what the man told you, is that so?

A. Yes.

Q. And he told you he had headaches on occasions?

A. Yes.

page 364 } Q. That would be one symptom of a post-concussional syndrome?

A. One symptom.

Q. And the headache he had he only had it about a half an hour and didn't take any medicine for it and he didn't

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have that more than once every two weeks or so. Isn't that right?

A. Yes, sir.

Q. So that wasn't a very serious headache problem, was it?

A. I would assume not.

Q. Then the only other thing he told you was that his memory wasn't as good. Is that right, or did he tell you that?

A. I don't recall that this patient told me that.

Q. As a matter of fact I wrote down what he told you and the only thing I wrote down in that syndrome would be the headache, I believe. Did he have anything else that went in that syndrome?

A. The nervousness he told me about.

Q. He told you he was nervous but you couldn't find it, could you?

A. In my objective examination I recorded page 365 } "Patient appears somewhat tense and pensive throughout the entire procedure of the examination".

Q. Pensive means thinking about what you were doing to him?

A. It could be interpreted that way.

Q. And if someone was examining you neurologically you would be thinking about it and keeping quiet generally, wouldn't you?

A. Of course I would but I don't know how somebody else would do.

Q. So you didn't find any great symptom or sign there?

A. I feel on the basis of my knowledge and experience in this field that this man, I had to value it in the terms of my own experience, that he was twenty years old, considering the fact he was seeing me in my office for the first time that he was more or less nervous and more tense than I see in the average twenty-year old group.

Q. You don't know whether he is used to doctors or not, do you?

A. No, I have no way of knowing that other than, of course, the questions I asked him as to who attended him.

Q. Is unconsciousness an important phase in page 366 } determining whether or not somebody has a brain injury?

A. It may be—does not necessarily have to be.

Q. Is the fact that a person is unconscious for a long

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period of time indicative of more brain injury than one who is just unconscious for a short time?

A. As a rule of thumb, yes. The period of unconsciousness generally indicates the severity of the brain injury. This is a rule of thumb but there are exceptions to this.

Q. So if you had like Tommy Leech unconscious for eight days and Duane Beasley conscious when he came in the hospital would that be indicative of the fact that Tommy Leech had more brain damage than Duane Beasley?

A. On this one point only but I don't feel that I can give an honest answer on a limited point of history. Again I feel to give any kind of qualifying answer or to express any kind of opinion on the basis of my own knowledge and experience I have to take into consideration all of the factors available.

Q. That is one of the factors. This man came into the hospital from the accident and was conscious according to the doctor who saw him.

Mr. Whitehead: If your Honor please, some of them say he was conscious and some say he wasn't. He page 367 } says himself he wasn't.

Mr. Rosenberger: The doctor said he was.

The Court: The doctor explained what he understood unconsciousness to mean and it seems that unconsciousness means different things to different people. In the question he is assuming he is unconscious or not conscious when he got there. I think he can ask the question on that assumption.

By Mr. Rosenberger:

Q. Doctor, did you have the history that Dr. Jantz had who treated him and said he never was unconscious and that Dr. Jantz who treated him had him come to Dr. Jantz following this thing for trouble with his shoulder and his arm and that Dr. Jantz did not refer him to any neurologist for any brain injury?

A. I had not known that history, no, sir.

Q. Did you know Mr. Duane Beasley had been discharged by the doctor and that he had returned to hard work on December 5th, 1960 and that he was discharged by his doctor on December 17, 1960 and that he did not seek any medical assistance until his lawyer sent him to a doctor? Did you know that?

A. No, I did not know all of these things. I page 368 } indicated in my report, which is now a matter of record, I knew he had returned to his former

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work and that he had changed jobs and he was under the care of Dr. Arnold. These are things I knew. The rest I did not know.

Q. And, of course, the reason I am going into these things you are the doctor who can only give an opinion on what they tell you the history is.

A. My opinion is based on the information that I have testified here and contained in the report and my reading of the EEG.

Q. You read the EEG of Tommy Leech and found that abnormal too?

A. Yes, sir.

Q. And that young man was unconscious for eight days, according to the testimony here, or ten days. You didn't give an opinion that he probably would have epilepsy, did you?

A. The tracings are totally different. Both tracings show abnormalities but they are both very different.

Q. This tracing of Duane Beasley was similar on September 20th as against what it was June 27th, wasn't it?

A. Yes, sir.

Q. And Dr. Arnold had this boy on dilantin page 369 } from the time he had that first one on June 27th, didn't he?

A. Yes, sir.

Q. Wouldn't it normally be expected if dilantin was going to help his problem or retard epilepsy it would show some change in the EEG?

A. I think having this information indicates the severity of the injury and the tracing would be similar even though the patient had been on dilantin. I think this is an indication there has been little response to the medication.

Q. In other words, there has been no response to the medication, has it?

A. I would assume that very definitely.

Q. Doctor, in other cases where you have EEGs and you start them on dilantin and the EEG improves isn't it your conclusion that the dilantin was getting at the trouble and improving the trouble?

A. Yes. It depends upon the dosage.

Q. You don't know how much Dr. Arnold gave him?

A. I have the history from the patient that I testified about that he was receiving dilantin one and a half grains twice a day. He identified the capsule when I examined him.

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He gave me a description of the medicine and I
pag 370 } showed him various ones, various dilantin capsules, and he picked out the particular capsule.

Q. Wouldn't that be enough to change him over that period of time?

A. I have to assume it didn't on the basis of the two tracings.

Q. You know it didn't so wouldn't you conclude that dilantin wasn't the right medicine for whatever he was complaining about; that it didn't have any effect, and this was the same EEG he would have had if he had taken it before October 1960 before this wreck?

A. I could not conclude that, no, sir.

Q. That is a logical conclusion, isn't it?

A. Well, I think again it is a matter of dosage too.

Q. Don't you assume Dr. Arnold knows how much to give him if he is treating him?

A. I would certainly assume this but I can't assume that Dr. Arnold's experience is similar to mine or mine are similar to anyone else's and I must be guided by my own knowledge and my own experience in these things.

Q. You have only examined this man on September 20th, Is that right?

page 371 } A. That is correct.

Q. You have just seen him one time?

A. I have seen him twice. I saw him when he was in the hospital for the tracing on the 14th and I saw him in my office.

Q. You didn't examine him on the 20th.

A. No, sir, I talked with him but didn't examine him.

Q. So to boil it all down you have the history that he gave you, omitting some things that are in evidence that I have recited to you, and he has headaches every couple of weeks and he was a little bit tense, and based on that, plus the EEG, you think maybe that he might have epilepsy?

A. I don't recall testifying that he has epilepsy. I do recall testifying that because of the nature of the abnormality in these two EEGs that it is highly probable that post-traumatic epilepsy may occur as a late complication.

Q. Are you using "may" in the same sense as "might"?

A. No, using it in the same term as "probability".

Q. What percentage?

A. Again this gets into the discussion of a large number

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of cases and I have to quote from this. I can quote from my own knowledge and experience too.

page 372 } Q. Doctor, bring it right to the point.

Mr. Whitehead: Let the doctor finish.

Mr. Rosenberger: He is not responding to my questions.

Mr. Whitehead: He is getting ready to do it.

By Mr. Rosenberger:

Q. In a series of cases all over the United States where there were closed head injuries with no neurological changes what per cent of them have epilepsy?

A. I hesitate to tell you. Your question indicates closed head injuries and what percentage was known.

Q. Isn't it less than one per cent?

A. There are too many qualifying things to this question for me to be able to give an answer.

Q. On the closed head injury that you have here where there is no penetration of the skull don't less than one per cent of the people who have injuries to the head have epilepsy?

A. I can't answer that.

Q. Can you turn it around and tell me what per cent do have them?

A. No, because this question is qualified too narrowly, too rigidly for me to answer with any knowledge.

page 373 } Q. All right, right on the problem that this man had, you assumed he was unconscious and you know he has no neurological changes now and you know now he has a headache every two weeks and he is tense and pensive and dilantin hasn't helped him any and you never had an EEG on him before. Do you mean to say that the chances are better than fifty per cent that he is going to have epilepsy?

A. I will answer that question in this manner—

The Court: Let him answer the question in his own way.

Note: The question is read back.

The Witness: I can't answer that question without it being qualified.

The Court: Then don't answer it.

The Witness: To answer it on the basis of information I have before me I think it is more likely than not.

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By Mr. Rosenberger:

Q. The percentages around the country don't follow that percentage, does it?

A. Around the country on the basis of this page 374 } kind of abnormal tracings they do.

Q. You are putting everything on the two abnormal tracings?

A. No, I am adding this: I am adding the type of abnormality to what is included in the question. That is the reason I couldn't answer your question.

Q. Without including the EEG, and where you have studied on head injury of people in the armed forces and in all other type injuries, where there is no penetration of the skull, just forget everything else, less than one per cent of them have epilepsy. Isn't that so?

Mr. Whitehead: We object to that question on the ground it does not include everything that has been proved in this case. He is leaving out the EEG.

The Court: He is talking about a separate state of facts entirely foreign to this man. What has that to do with this case?

Mr. Rosenberger: I have the man on cross examination.

The Court: You can't go into all kinds of situations except situations similar to this situation. If it is similar to this boy's situation it is all right.

By Mr. Rosenberger:

Q. Doctor, you are familiar with the studies I referred to where studies have been made to determine epilepsy resulting from injuries?

A. There have been many studies and I am not sure that I am familiar with the specific ones you are referring to.

Q. I am referring to this one, Brock on head injuries. I believe you have his book, don't you?

A. Brock, yes.

Q. And they deal particularly with a group of cases where there has been no penetration of the skull, don't they?

A. They deal with both and if I am thinking of the particular chapter I think the chapter on post-traumatic injuries or, let's say more broadly, injuries to the head and the EEG findings, I am trying to think of the specific name of the text, it is "Trauma and Nervous System" and the particu-

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lar chapter is by Paul Lefferd and I believe that Brock was the editor. It was written by specialists in their respective fields and this is a text published last year, 1960, called "Traumas of the Nervous System". I am not sure of the name of the editor. I am referring to the chapter on EEGs written by Paul Lefferd in which he quotes, I think, all of the reasons of the recent series all over the world in terms of EEG changes, closed and open, penetrating wounds, his percentages in terms of abnormalities, EEG percentage of post-traumatic epilepsy, specific types of EEG, trauma and what their significance is.

Q. That is what I had in mind and the percentage of those having epilepsy in that type of case are how many?

A. What type case?

Q. The type cases you said, open and closed head injuries.

A. I will take these separately and talk about them.

The Court: Let's not go into things other than things similar to this boy's injuries. To go into all other type injuries we are going too far.

By Mr. Rosenberger:

Q. Closed head injury.

A. Closed head injury with certain type of EEG abnormality recorded more than six months after the time, two tracings similar, and these are things that qualify my opinion.

Q. Doctor, you don't think he has any organic page 377 } brain change, do you?

A. Yes, I do.

Q. How would you tell it? You didn't check his spinal fluid, did you?

A. That is not a necessary test to determine it.

Q. That is one of the important tests.

A. It is a test that can be used.

Q. It is an important one, isn't it?

A. I think it is quite important in certain types of conditions. I would not do a routine spinal puncture on every patient I see with neurological findings.

Q. You did not do it, did you?

A. No.

Mr. Rosenberger: That is all.

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RE-DIRECT EXAMINATION.

By Mr. Whitehead:

Q. Mr. Rosenberger referred to unconsciousness. As a medical man what do you mean when you say "conscious" and "unconscious"? Let me put it this way, if you are conscious do you mean you are like a bag of meal, you just breathe and nothing else or could you walk around and be unconscious?

page 378 } A. Well, in the strictest sense of the term I believe a layman understands it, and certainly as a medical expert would use it, unconscious means to me an individual who is not aware in any way at all of what is going on in his environment, is not alert in any way at all and is not in a position to do more than carry on the automatic functions of the body such as the heart beat, breathing, perspiring and that sort of thing.

Q. What is the term for a person who is able to walk around and has no memory and knows nothing about it?

A. This gets into a different realm. This is not what I would personally term unconsciousness. This can be described as a state of lack of awareness that is often described as a fugue. That is a state in which the individual functions as though nothing was wrong but has absolutely no awareness or memory of anything that is going on. This is the type of thing where every once in awhile we pick up a paper and see where John Doe woke up hundreds of miles from his home and suddenly realized he was someone else. They call that fugue. That is the term used for that.

Q. Can these people sometimes frequently walk around and even carry on a conversation and never know
page 379 } anything about it later on?

A. Well, fugue as I speak of it if it occurs in terms of head injury it is an immediate thing. I wouldn't say that it is a common thing.

Q. As I understand your definition of consciousness is awareness and unconsciousness is you just breathe and your heart beats but you don't do anything else.

A. Absolute minimal functions of the body are carried on without awareness of any type and without any alertness. The individual has to be flat on his back, so to speak.

Q. That would be absolute unconsciousness, I take it?

A. Yes, sir.

Q. Doctor, with your conclusions in this case will you please tell us whether or not in your opinion should additional

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from time to time electro-encephalograms be run on this man or not?

A. In my opinion they should be done at regular intervals and the interval of time should be based primarily upon what the clinical picture is—that is, what he complains of. If there are no changes of any kind they should be done at least at six months intervals.

Q. Mr. Rosenberger asked you whether or not page 380 } dilantin is given whether or not that was helping him any. As I understand, the EEG run in June is that worse or is that about the same as the one run in September or what?

A. They are similar.

Q. Now, dilantin could have kept the condition from getting worse from June until September and held it where it was?

A. It is possible.

Q. When you were making your examination of Mr. Beasley were you also advised that he received cuts on his head that went all the way down to the skull?

A. I was aware that he had numerous lacerations as a result of the accident and these were described in my report. I had no idea of the depth of these except on the basis of what I might estimate because of the size of them and that sort of thing.

Q. You have only seen this man I believe twice. You have seen him when the second EEG was run and then you saw him when you made an examination of him on I believe September 20th, 1961. Now, Doctor, you have had experience in this line of practice for how many years?

A. I have been in this specialty for almost page 381 } twenty-five years.

Q. I will ask you this, in your opinion, from your observations and from your examinations and from any movements of his body did you find any indication that this young man is malingering or, that is, putting on?

A. I have had nothing to indicate or suggest it to me.

Mr. Whitehead: All right.

RE-CROSS EXAMINATION.

By Mr. Rosenberger:

Q. Doctor, why would you take additional EEGs if they were just confirming your neurological examination?

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A. From my way of thinking in an intelligent man of this type this is your most sensitive guide and gauge of what is going on. You have in a sense established a base line for that abnormality and you have to take into consideration, as I have indicated, what the clinical course is, what the individual complains of, and what changes occur, and if nothing occurs in that regard I feel that six months interval is the minimal time to do repeated tracings. If there is any change in the complaints or examination then I think the tracings should be done at shorter intervals of time. This page 382 } again is based on my experience.

Q. Is Frederick Gibbs an authority?

A. Yes.

Q. Do you agree with this statement by him—

Mr. Whitehead: Your Honor, I don't mean to object but it seems to me he should have gone over this when he had him on cross examination. He has asked him about everybody's book in the country.

Mr. Rosenberger: Mr. Whitehead brought up additional EEGs.

The Court: Is this something about additional EEGs?

Mr. Rosenberger: This will show no additional EEGs will throw any light on it.

The Court: Ask the question.

By Mr. Rosenberger:

Q. Do you agree with this: "Other things being equal, generalized electro-encephalogram abnormality is found three to four months after a severe head injury without epilepsy the chances are one to three-quarters that this abnormality antedated the injury"?

A. This happened to be Dr. Gibbs' opinion but page 383 } there are other experts that don't agree with that.

Q. Do you agree with him?

A. I do not agree with him.

Q. You admit he is an authority?

A. He is an outstanding authority.

Mr. Rosenberger: That is all.

The witness stands aside.

DR. G. B. ARNOLD,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Whitehead:

Q. You are Dr. G. B. Arnold?

A. Yes, sir.

Q. Doctor, I believe you practice your profession here in Lynchburg?

page 384 } A. Yes, sir, I do.

Q. And what do you specialize in? What is your branch that you work in?

A. Well, I am doing general practice now but for fifteen years I was over across the river at the Colony. I was Superintendent over there but since '44 I have been doing general practice here in Lynchburg.

Q. In your practice do you specialize or do you have a lot of cases dealing with injuries to the brain?

A. I do, sir.

Q. And I believe you stated you were Superintendent over at Lynchburg State Colony?

A. For fifteen years.

Q. And that was for fifteen years prior to 1944?

A. Yes, sir.

Q. Doctor, coming right up to this thing right quick would you please tell us when you first saw and started treating Duane Beasley?

A. February 6th, 1961.

Q. February 6th, 1961. Will you please tell us what history you got from him, what you found about him and what, if anything, you had done for him to try to help him?

page 385 } A. The history I got was he was in an automobile accident on October 18, 1960; that he had been unconscious seven days, had been in the hospital eighteen days. He went back to work on December 5th, 1960. While he was in the hospital they found out he had a number of lacerations on his head, had a broken scapula and he had some lacerations and bruises on his extremities.

Q. At that time was any complaint made to you about his neck when you saw him or in that period of time?

A. The first time I saw him, which was on February 6th, the main thing he was complaining about was headaches. Then later I saw him on May 9th and at that time he told me his headaches were much better but he had this pain in

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his neck so I had him x-rayed and it showed that one of the cervical vertebrae had been cracked.

Q. Had that healed over?

A. That had healed but apparently was causing some pressure.

Q. Where is that vertebra?

A. It goes from the back of the skull down to the shoulder and one of those had been cracked and undoubtedly that was causing the pain in his neck.

page 386 } Q. What treatment, if any, have you rendered him? What have you done for him?

A. The first several times he came to see me I tried to relieve his headaches. Then later he did have an electroencephalogram done and after getting the report I put him on dilantin because dilantin is used for a number of things. It is not only used to control seizures, it is used to prevent epilepsy and is also used as a nerve medicine. Some people have an idea it is used only for one thing but that is not right. It is used for a number of things.

Q. What does the medicine dilantin do for the body?

A. Well, we are not too sure but we think it helps to bring oxygen to the brain. The exact mechanism of dilantin working in the body we are not sure of.

Q. Have you found from experience it does help in these cases?

A. Yes, sir, I have.

Q. Doctor, subsequent to the EEG being run in June then was also another one run in September?

A. Yes, sir, one was run in September and that was very much the same as the one done in June.

page 387 } Q. I believe you are kind of known as the father of EEG in Virginia, are you not?

A. I don't know if I am the father of it but I had something to do with buying the first one ever bought in Virginia. That was the one across the river, the first one ever sold in the State of Virginia, and I think I was the first one to ever do any encephalograms in Virginia.

Q. In your opinion will an encephalogram aid you and guide you in making your determinations of a patient?

A. Yes, sir.

Q. From the history he gave you and from his complaints and from your seeing him and examining him and before the EEG had been run in June of 1961 I will ask you whether or not at that time you had reached an opinion as to whether or

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not this man had suffered any injury to the nervous system or to the brain from the accident which he related to you.

A. I was of the opinion that he had received a brain injury. I was furthermore of the opinion that there was a possibility that this man was—

Mr. Rosenberger: I move to strike out the testimony about possibilities.

The Court: Dr. Arnold, we are dealing in probabilities, not possibilities.
page 388 } The Witness: Probably that he could develop epilepsy and when I put him on dilantin I was trying to do something to prevent this condition.

By Mr. Whitehead:

Q. You have heard the testimony here and you have also said that the EEGs were more or less similar to the one run in June and the one run in September. You had him on dilantin during that period.

A. Yes, sir, I did.

Q. And how much dilantin were you giving him?

A. Taking three grains a day.

Q. A grain and a half each time twice a day?

A. Yes, sir.

Q. Now, the fact the EEGs are about the same in this interval of time and the patient has been taking dilantin does that indicate anything to you whether dilantin is helping or not?

A. I think it indicates to me it is helping him in that he hasn't had any seizures which I was afraid he would have. Dilantin is not going to repair the damage done to the brain if any has been done there because you can't repair that
page 389 } you don't restore that type of tissue. If it is hurt it is hurt and it is going to stay hurt. If you break your arm that will grow back but if you destroy part of the brain it is gone but from the fact he is not any worse than he was I think it has helped him.

Q. Doctor, in your definition of consciousness and unconsciousness what do you understand when a person is unconscious? Does that mean he can just breathe?

A. No. It is a hard term to describe but to me knowing is consciousness. When you don't know you are unconscious. When you don't know your surroundings, don't know your environment, don't know who you are or anything I classify that as being unconscious and there are certainly different

Dr. G. B. Arnold.

phases of unconsciousness. I think when a man is down asleep he is unconscious. He may be able to move around and talk and so forth but doesn't know what he is doing or saying and he is unconscious.

Q. From the history given you here about Mr. Beasley and you heard him also testify today and you heard the evidence about the fact he got up a bank some way and do you think he could have been conscious at the time he got up the bank necessarily or not?

A. I think possibly he was unconscious.

page 390 } Q. You can't talk about possibilities.

A. I don't think he was conscious.

Q. Doctor, what do you call where your memory will not take you up to the time you got the blow on your head or something that happened before the accident? What do you call that thing?

A. Call that retrograde amnesia.

Q. Did you or not gather in your history of this young man that he did or did not have retrograde amnesia?

A. In my opinion he did.

Q. Does that indicate to you then that he was unconscious or not?

A. It indicates to me he was unconscious and indicates to me that there was a brain injury.

Q. Doctor, from the history you have received from him, from your examination and your treatment of him, and from the EEG readings you have received will you state whether or not in your opinion this man has received any permanent injury either to his brain or his nervous system as a result of this accident?

A. I think he has.

Q. Do you have what your bill is to date for
page 391 } treating him?

A. It is \$60.00.

Q. Doctor, is it or not your opinion that this man should be observed in the future and be under the care of a doctor or not?

A. In my opinion, this man should be observed and under the care of a doctor for at least three years. At the end of three years if he is doing all right you can feel pretty sure he is going to do all right but I don't think there is any way of telling under three years.

Mr. Whitehead: All right.

Dr. G. B. Arnold.

CROSS EXAMINATION.

By Mr. Rosenberger:

Q. Doctor, did you do all of the neurological examinations that Dr. Novak spoke of doing?

A. Yes, sir.

Q. You didn't find anything wrong with those, did you?

A. Nothing except this tenderness over the back of his neck.

Q. That was something that had to do with where he hurt his neck?

page 392 } A. Yes, sir.

Q. He can move all parts of his body, his eyes, head, feet and this brain injury you speak of hasn't shown up where it affects any part of his body yet, has it?

A. No, sir.

Q. You don't read an EEG, do you?

A. I can read them. I haven't read one for some years.

Q. How many years?

A. Well, not since 1944 but the readings haven't changed any I don't think too much.

Q. You referred him to Dr. Novak on that?

A. Yes.

Q. And you go on Dr. Novak's readings?

A. That is right.

Q. You are not saying this man will probably develop epilepsy and that is the reason you say there is no way of telling. You want to watch him for three years?

A. That is right.

Q. So when you used the word "possibly" that is what you actually meant. Is it possible he will so you want to watch him for about three years.

A. That is what I would like to do, yes.

page 393 } Q. And that is your reason for it, the possibility of it, and you want to watch him and catch it. Is that right?

A. Yes.

Q. Do you know that this man knew which way to go to the road and to get up that hill?

A. I have heard that in Court.

Q. So that took some awareness and consciousness. Did you hear he was waving and flagging for the truck?

A. No.

Mr. Frost: There is no evidence of that.

E. P. Lawhorne.

By Mr. Rosenberger:

Q. Did you hear Burley testify?

A. I didn't hear Burley testify.

Q. Did you know that his hospital record showed that on October 22nd, October 21st, he was conscious and rational?

A. No, sir, I did not.

Q. One other question. By comparison by Mr. Beasley and Mr. Leech, the fact Mr. Leech was unconscious and in the hospital and the people in the hospital thought he was unconscious for nine or ten days would that indicate that his brain was more severely injured than the one the doctor said was not unconscious?

page 394 } A. That would be one sign, yes.

Mr. Rosenberger: That is all.

The witness stands aside.

E. P. LAWHORNE,

having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Whitehead:

Q. You are Mr. E. P. Lawhorne?

A. Yes, sir.

Q. Where do you live?

A. Sweet Briar.

Q. Is that in Amherst Cousty?

A. Yes, sir.

Q. Are you an uncle of Thomas Burley?

A. Yes, sir.

page 395 } Q. And at the time of this accident and now does Thomas Burley live with you?

A. Yes, sir, been living with me ever since he was eight years old.

Q. Now, of course, you recall when this accident occurred on October 18, 1960, do you?

A. Yes, sir.

Q. After Tommy was released from the hospital I believe you say he was there eight or nine days and where did he go then?

A. He came home.

Q. After he came home you can't tell what he said but after

Allen Carson.

he came home did he tell you anything about knowing who was the driver of the automobile at the time of the accident?

A. No, sir.

Mr. Daniel: I object to that. He can't tell what he said.

Mr. Whitehead: I am asking if he talked to him about who was the driver and what advice he gave him.

Mr. Rosenberger: It is immaterial what advice he gave him.

page 396 } The Court: The boy testified to certain things that took place and if he wants to testify all right.

Mr. Rosenberger: It is a self-serving thing, your Honor.

The Court: It is not self-serving on what he said, it is self-serving on what the boy said.

Mr. Rosenberger: It is purely hearsay then.

The Court: I don't see how you are going to get around hearsay. What is the exception to the hearsay rule, Mr. Whitehead?

Mr. Whitehead: A question has been raised as to who was the driver and I think I am entitled to bring out that in explanation of what Burley testified to—

The Court: You want him to testify who he told was driving the car?

Mr. Whitehead: No, sir. I am going to ask him when the boy talked to him about the driver what advice did he give the boy, what did he tell the boy to do, if anything.

Mr. Rosenberger: It is still hearsay.

The Court: That is hearsay and I will have to page 397 } sustain the objection.

Mr. Whitehead: All right.

The witness stands aside.

ALLEN CARSON,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Whitehead:

Q. You are Mr. Allen Carson?

A. That is right.

Q. Where do you work, Mr. Carson?

A. I operate a service station at 1117 Church Street.

Q. You operate a filling station at 1117 Church Street?

A. Yes, sir.

Martha Harvey.

Q. Did you know Carroll Johnson?

A. Yes, sir.

page 398 } Q. How long had you known him before his death?

A. About three years.

Q. Did he deal at your service station?

A. Yes, he did.

Q. Do you know what his reputation was for being a diligent hard working young man or not?

A. As far as I knew his reputation was unusually good from all I could hear about him and all I knew about him.

Mr. Whitehead: All right, that is all.

Mr. Rosenberger: No questions.

The witness stands aside.

MRS. MARTHA HARVEY,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Whitehead:

page 399 } Q. You are Mrs. Martha Harvey?
A. That is right.

Q. Where do you live, Mrs. Harvey?

A. Route 4, Amherst, on Route 778.

Q. Is that up toward Temperance?

A. Yes, sir.

Q. Did you know Carroll Johnson?

A. Yes.

Q. How long have you known him?

A. All of his life.

Q. Did he live at your home or near your home?

A. Yes, he did.

Q. For how long?

A. Three years.

Q. And when did he leave where your home was?

A. It was in May of '59.

Q. Did you see him after that time from time to time?

A. Well, yes, occasionally.

Q. I will ask you if you would, please Ma'am, tell us what type of young man was Carrol, was he a good boy and worked hard or what type of man was he?

A. Carroll was a real good boy.

Claude Campbell.

Mr. Whitehead: All right.

page 400 } Mr. Rosenberger: No questions.

The witness stands aside.

Mr. Rosenberger: To save time, your Honor, we don't question this was a good boy. He has questioned two witnesses about that already.

CLAUDE CAMPBELL,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Whitehead:

Q. You are Mr. Claude Campbell?

A. Yes, sir.

Q. Where do you live, Mr. Campbell?

A. I live at 820 Rivermont Avenue.

Q. Now, at the time of this accident was Carroll Johnson making his home there in your house?

page 401 } A. Yes, sir.

Q. How long had you known Carroll?

A. I had been knowing him all his life.

Q. Would you please tell us what kind of young man was Carroll? Was he a good hard working young man and well behaved?

A. Yes, I would say he was. He was a very quiet boy and he worked and attended to his job and was always ready to go to his work.

Mr. Whitehead: All right.

Mr. Rosenberger: No questions from me.

The witness stands aside.

Mr. Whitehead: Now, if your Honor please, at this time I understand the gentlemen for the other side will stipulate this; that the mother of Carroll Johnson, Corinne M. Johnson, has qualified as administratrix of his estate and is still qualified before this Court here and the Circuit Court and also that as a result of injuries received in this accident Carroll Johnson was killed.

Corinne M. Johnson.

Mr. Rosenberger: We will stipulate that.
page 402 } Mr. Whitehead: Also he was born March 21,
1939 and that according to the mortuary tables
he would have lived forty-eight more years; and according to the mortuary tables Beasley was born August 31, 1941 and he would have lived forty-nine years according to the mortuary table, and that Leech was born August 27, 1941 and he would have lived or his life expectancy would have been forty-nine years.

The Court: That stipulation will be admissible in lieu of evidence. Is there any stipulation as to who his heirs are?

Mr. Whitehead: I don't know. I will put Mrs. Johnson on the stand right now.

Mr. Rosenberger: We admit they are as alleged in the Motion for Judgment.

Your Honor, may Mr. Whitehead and I approach the bench?

The Court: Yes, sir.

Note: Discussion between Court and counsel was not heard by this court reporter so therefore is not recorded.

page 403 } MRS. CORINNE M. JOHNSON,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Whitehead:

Q. Mrs. Johnson, I want to ask you a few questions, please. Of course, you are the mother of Carroll M. Johnson.

A. Yes, sir.

Q. Now, I will ask you this: Will you please tell us at the time before this accident what health Carroll was in? Was he in good health or not?

A. He was in good health.

Q. Would you please tell us whether or not he was diligent worker? Would he stick to his job or not?

A. Yes, sir, he did.

Q. Now, as I understand it, Carroll did not have any brothers and sisters, did he?

A. That is right, he didn't.

Q. And you and your husband are the sole heirs, are you not?

A. Yes, sir.

C. E. Wilkes. (State Trooper)

Q. Mrs. Johnson, I show you here a picture
page 404 } marked "Defendants' Exhibit No. 29." I will ask
you if you will please tell us is that a fair, true
portrayal of your son, Carroll, shortly before the accident?
A. Yes, it is.

Mr. Whitehead: Now we would like to offer this as Defendants' Exhibit No. 29. All right, thank you very much.

Mr. Rosenberger: Thank you, Ma'am.

By Mr. Daniel:

Q. Was your son light-haired or dark-haired?

A. He had kind of medium brown hair.

Q. About how tall was he?

A. Five feet, six inches, about my height.

Mr. Daniel: That is all.

The witness stands aside.

Mr. Whitehead: We rest, if your Honor please.

The Court: Is there any rebuttal?

Mr. Daniel: Yes, sir, we would like to recall Trooper C. E. Wilkes.

page 405 } C. E. WILKES, (State Trooper)
recalled in rebuttal, testifies as follows

DIRECT EXAMINATION.

By Mr. Daniel:

Q. Mr. Wilkes, on the night that you made this investigation I believe you previously testified that Mr. Burley and Mr. Beasley were up on the road when you got there.

A. That is true.

Q. You also stated that you put Mr. Beasley in the front seat of your car and tried to administer First Aid and that you put Mr. Burley in the back seat.

A. I did.

Q. And I believe you said Mr. Burley was fully conscious at that time.

A. Burley was, yes, sir.

Q. At that time did you ask either of those boys while they were in the car with you who was driving the car?

C. E. Wilkes. (State Trooper)

A. I did.

Q. What was the reply of Mr. Burley?

A. Mr. Burley turned and asked Duane, said "Who was driving the car?" Beasley said "I don't know."

page 406 } Q. Is that all that was said?

A. That is all the conversation.

CROSS EXAMINATION.

By Mr. Whitehead:

Q. Now, Mr. Wilkes, as I understand it, after the accident and the next day I believe you also went by the hospital on that occasion, did you not?

A. I did.

Q. And did you not receive information from Burley on that day at the hospital, or one day shortly thereafter, that at that time when they left Whitey's Restaurant going east or coming toward Lynchburg that Leech was then driving—

Mr. Rosenberger: Just a minute. That is pure hearsay, your Honor, and that is not any impeachment testimony at all. Mr. Whitehead knows that is completely inadmissible, what somebody else told the State Trooper who is not a party.

The Court: Who is he talking about told him?

Mr. Rosenberger: Burley.

The Court: That is hearsay as far as he was concerned.

A declaration that Mr. Burley made to the State
page 407 } Officer that is hearsay unless you can remove it to
some exception.

Mr. Daniel: He was recalled solely for the purpose of impeachment and the foundation was laid for it. I asked Mr. Burley about the conversation. I think that is the only way I can reach the witness for the purpose of impeachment.

Mr. Rosenberger: The examination is limited to that, your Honor.

Mr. Frost: Mr. Burley got on the stand and explained the situation. In view of the questions by Mr. Daniel we certainly have a right to bring out from Mr. Wilkes substantiation of what Burley has already testified to, first he did not know and later on said Leech was driving and it looks like to me that follows in with the whole line.

The Court: The jury will go out a minute.

(Jury out).

C. E. Wilkes. (State Trooper)

The Court: Mr. Frost, doesn't it stand uncontradicted what Burley said about what he told the Officer? It hasn't been contradicted by anybody.

page 408 } Mr. Frost: I move to strike out the testimony of Mr. Wilkes as to what he testified.

The Court: I am talking about what statements he made in the hospital. There has been no contradiction of those statements.

Mr. Rosenberger: None. In the Bedford Hospital Mr. Burley testified what he told the Trooper and then he testified he went over to the area office a week after he got out of the hospital and he has testified to that. He is not a party to this suit. We didn't impeach him on those statements.

The Court: Mr. Frost, he is trying to prove what he told him there at the scene and he's trying to impeach him on that but he is not trying to impeach him on the statement he made to the State Trooper at the hospital or at the highway office out here. Those statements stand unimpeached.

Mr. Rosenberger: That is right.

The Court: I think you are trying to add to what he has said but I don't believe it is admissible.

Mr. Frost: We want to ask this question out page 409 } of the presence of the jury.

The Court: All right.

By Mr. Frost:

Q. We want to ask you out of the presence of the jury did you not as a result of your investigation designate Leech as the driver of the automobile at the time of the accident?

The Court: He, himself, thought he was the driver? Is that what you are trying to bring out?

Mr. Frost: As a result of his investigation.

Mr. Rosenberger: That is for the jury to determine.

The Court: The jury has to find out who was driving the car. It is not what this witness thought.

Mr. Frost: Could we put it in the record?

The Court: Yes, go ahead and ask the question out of the presence of the jury.

By Mr. Whitehead:

Q. Mr. Wilkes, as a result of your investigation did you not determine and did you not put in writing to that effect that the driver of the motor vehicle at the time of the accident was Thomas D. Leech?

C. E. Wilkes. (State Trooper)

Mr. Rosenberger: We object to this question.
page 410 } Counsel is reading from a motor vehicle report
made by the officer and obviously it isn't admissible. He can't use it and he is going back to a time when the officer had not completed his investigation and it is an expression of opinion on the part of the Trooper and in addition to that it would be in violation of the Statute that prohibits the use of that in the trial.

Mr. Whitehead: I am not trying to use it.

The Court: He is not introducing that in the trial but I will sustain the objection on the ground it is his opinion as to who he thought was driving.

Mr. Frost: He could answer the question, couldn't he?

The Court: I will let him answer the question out of the presence of the jury.

The Witness: As I understand, you want to know if I proved he was driving?

By Mr. Whitehead:

Q. I didn't ask you that. I asked you did you determine from your investigation that Thomas D. Leech was driving the automobile at the time of the accident and
page 411 } didn't you so put it down in writing?

A. That was my opinion.

The Court: I will rule it out. It is not admissible before the jury. Let the record show that this has taken place in the absence of the jury and that counsel for the defendant excepts.

Mr. Frost: Objects and excepts.

The Court: Are there any questionable questions you want to ask while the jury is out?

Mr. Whitehead: I believe that is all we want to ask him.

The Court: Bring the jury in.

(Jury in).

The Court: Have either of you gentlemen any further questions of this witness.

Mr. Whitehead: No, sir.

Mr. Rosenberger: We have concluded our examination.

The witness stands aside.

page 412 }

THOMAS D. LEECH,
recalled in rebuttal, testifies as follows:

DIRECT EXAMINATION.

By Mr. Daniel:

Q. Tommy, were you in the courtroom this morning and did you hear Duane Beasley but not Burley testify you came down to Barker-Jennings and made a statement you thought you could have been driving when you pulled away from the station but not when the car wrecked? Is that right?

A. Yes, sir.

Q. Did you go down to Barker-Jennings at the approximate time he said or some time after you were injured?

A. No, sir.

Q. Have you had any conversation with Duane Beasley after you got out of the hospital in any way telling him you thought you were driving the car when it left the filling station?

A. No, sir.

CROSS EXAMINATION.

By Mr. Whitehead:

Q. Tommy, you tell us you never went down to
page 413 } Barker-Jennings after you got out of the hospital?

A. I never said I never went down to Barker-Jennings after I got out of the hospital.

Q. That is what you just told.

A. He asked me did I make the statement that I was driving the car.

Q. He asked you did you go down to Barker-Jennings and you said no. Is that right?

Mr. Daniel: That isn't the same question I asked him.

By Mr. Whitehead:

Q. You did go down to Barker-Jennings.

A. Yes, I did go down to Barker-Jennings.

Q. And didn't you tell us here when I laid the foundation for that yesterday morning that you didn't remember talking to him?

A. I don't understand what you are talking about now.

Q. In other words, when I asked you yesterday morning some questions whether or not after this accident didn't you go down to Barker-Jennings and didn't you talk to both

Thomas D. Leech.

Beasley and Burley and them about the accident, you remember that?

A. I remember you saying something about page 414 } that.

Q. And you said you didn't remember whether you did or not.

A. I said I didn't remember whether I talked to them about the accident or not.

By Mr. Daniel:

Q. I understand you deny you ever told—

Mr. Whitehead: Wait a minute.

Mr. Daniel: I want to get it straight.

Mr. Whitehead: This witness has testified that he don't remember whether he talked to them about the accident or not. Now they are attempting now to try to get him to say something about what happened down there.

The Court: He didn't finish his question.

By Mr. Daniel:

Q. My question solely is this: Have you since you have had your memory back ever told Duane Beasley or anybody else that you thought you were driving that car when it left the Phillips 66 service station?

A. No, sir, I have not.

By Mr. Whitehead:

Q. If you don't remember what you told them page 415 } down there then you don't know what you told them at Barker-Jennings.

A. That is right, I couldn't have said anything.

The witness stands aside.

Mr. Daniel: We rest, if your Honor please.

The Court: Is there any surrebuttal?

Mr. Whitehead: No, sir.

(End of all testimony).

Mr. Rosenberger: We have a motion to take up with the Court.

The Court: I am going to excuse the jury until tomorrow morning. All of the witnesses are excused.

Members of the jury, as you see this case hasn't been concluded yet so I will ask you all to report back here tomorrow morning at 9:30.

Sergeant, recess Court until 9:30 tomorrow morning.

(Court recessed).

The Court: I would like to see counsel in Chambers.

page 416 } (In chambers).

Mr. Rosenberger: The plaintiff, Thomas D. Leech, by counsel, and guardian *ad litem*, moves the Court to strike the evidence of Duane Beasley on his counterclaim against Thomas D. Leech and the evidence of Corinne M. Johnson, administratrix, on her counterclaim against Thomas D. Leech on the ground that the evidence fails to prove as a matter of law that there was any gross negligence, and on the further ground that the evidence fails to prove as a matter of law that Thomas D. Leech was driving the automobile at the time and place that the collision occurred and the injuries and damages resulting.

Mr. Daniel: If your Honor please, I, as counsel for Thomas D. Leech, and I think Mr. Watkins joins with me, not joining in that portion of the motion of failure to show gross negligence. We feel gross negligence was shown but we join in the portion of the motion as to striking out the evidence that did not show Thomas Leech to be the driver.

Mr. Rosenberger: And that the evidence of the page 417 } man, Burley, is incredible.

The Court: I am going to overrule the motion. I think it is a jury question. Burley testified this man was driving and it is up to them to pass on whether or not he was driving the car. I think the evidence amply sustains sufficient proof to submit it to the jury on the question of gross negligence and circumstantial evidence, the condition of the car, the highway marks, and three hundred and sixty feet of marks. The direct testimony of one witness Burley was that they were speeding at seventy-five miles an hour and got up to eighty or eighty-five miles an hour just prior to the accident and I think under the cases of the Supreme Court that it is sufficient to make it a jury issue so I overrule your motions.

Mr. Rosenberger: The plaintiff, by counsel, objects and excepts.

Mr. Frost: This is probably a little out of turn. I want to renew the motion I made at the conclusion of the plaintiff's

testimony with the exception, of course, of the
page 418 } agency which the Court sustained my motion.

The Court: I will overrule the motion.

Mr. Frost: And we object and except to the action of the Court in overruling the motion as there was no evidence of any gross negligence on the part of Duane Beasley.

Mr. Whitehead: Like I did this morning when Mr. Frost made his motion, I do not want to be any part in moving that the evidence is not sufficient to go to the jury on the question of gross negligence.

Mr. Frost: I want to amend that gross negligence, solely on the part of Duane Beasley. That is what I intended.

page 419 }

September 28, 1961,
Morning Session.

(In chambers).

Note: The Court met with counsel in Chambers at 9:00 o'clock A. M. and after informally discussing instructions offered by the various parties the following ensued:

Mr. Frost: The defendants, by counsel, on the claim of Leech against Duane Beasley objects and excepts to the action of the Court in giving any instructions for the plaintiff, Thomas D. Leech, in this case on the ground that there is no evidence to support a finding that Duane Beasley was the driver of the automobile at the time of the accident or that Duane Beasley was guilty of gross negligence at the time of the accident.

Mr. Whitehead: The defendants, Duane Beasley, and Corinne M. Johnson, by their counsel, Paul Whitehead, object to any instructions being given on behalf of the plaintiff Leech
page 420 } with reference to Beasley being the driver of the automobile on the ground that the evidence shows, as a matter of law, that Leech was the operator of the automobile, but said defendants on their claim assert that Thomas D. Leech, as a matter of law, was guilty of gross negligence or that it was certainly a question for the jury as to whether Thomas D. Leech was guilty of gross negligence.

The Court: We are now going to consider the instructions offered by the plaintiff, Mr. Daniel and Mr. Watkins, for Thomas D. Leech.

Instruction No. 1. Is there any objection to that?

Mr. Frost: If your Honor please, I might state, as attorney for the defendant, Duane Beasley, subject to the above

general objection, there are no further objections to Instruction No. 1.

The Court: The general objection has been stated and it will not be necessary to state it in regard to each individual instruction. I understand there is no objection to plaintiff's Instruction No. 1 and this instruction will be given as offered.

page 421 } Instruction No. 1 (Granted):

“The Court instructs the jury that the term gross negligence means, negligent conduct by a person which shows an utter disregard of prudence amounting to complete neglect for the safety of another. It is something more than ordinary negligence, which is the failure to exercise that degree of care which a reasonably prudent person would or should exercise under like circumstances. And it is something less than wilful, wanton and reckless conduct and it falls short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong. Ordinary and gross negligence differ in degree of inattention while both differ in kind from wilful and intentional conduct which is, or ought to be, known to have a tendency to injure.”

The Court: Is there any objection to Instruction No. 2?

Mr. Frost: We have no specific objection to Instruction No. 2.

The Court: Instruction No. 2 will be given as offered.

page 422 } Instruction No. 2 (Granted):

“The Court instructs the jury that by preponderance of evidence is meant that evidence which is most convincing and satisfactory to the minds of the jurors. In determining upon which side the preponderance of the evidence is, the jury may take into consideration the opportunities of the several witnesses of seeing and knowing things to which they testify, their interest, if any, or want of interest, if any, in the result of the case, the probability or improbability of the truth of their several statements, in view of all the other evidence, and the facts and circumstances upon the trial; and from all the circumstances determine the weight or preponderance of the evidence. The jury is the sole judge of the weight of the evidence and the credibility of the witnesses.”

The Court: Is there any objection to Instruction 3-A?

Mr. Frost: I have no specific objection to Instruction 3-A.

The Court: Instruction No. 3-A will be given as offered.

page 423 } Instruction No. 3-A (Granted):

“The Court instructs the jury that if you believe from a preponderance of the evidence that the plaintiff, Thomas D. Leech, was riding as a guest passenger in the 1960 Chevrolet automobile, described in the evidence; that the defendant, Duane Beasley, was the operator thereof at the time the same wrecked, that the said defendant, Beasley, drove the same at a speed or in a manner so as to cause or permit the said automobile to run off of the highway and wreck and that the conduct of the said defendant amounted to gross negligence, as defined in the instructions of the court, and such gross negligence, if any, was the proximate cause of the wreck and injuries to the plaintiff, you should find a verdict for the plaintiff, Thomas D. Leech.”

The Court: Is there any objection to Instruction No. 5?

Mr. Frost: I object to subsections 3, 4, 5 and 6 as to future suffering, future expense, future inconvenience
page 424 } and future financial loss on the ground that there is no evidence to support such findings and the jury will be permitted to speculate and guess.

Mr. Daniel: There is evidence that there will be future suffering and future expense and the jury could find that there will be and specifically as to subsection 6 there is evidence that this man will have a permanent brain injury and loss of memory which will be permanent and will continue to have headaches and probably have personality changes.

The Court: The Court will give Instruction No. 5 as offered.

Mr. Frost: The defendant, by counsel, excepts to the action of the Court in giving Instruction No. 5 for the reasons stated.

Instruction No. 5 (Granted):

“The Court instructs the jury that if they find for the plaintiff, Thomas D. Leech, on his claim against Duane Beasley, it is their function to determine the amount of damages that should be awarded him and in determining the same they must be guided solely by the evidence and
page 425 } should fix the amount at such sum as to them seems fair and just compensation for the injuries and damages proximately caused him by the alleged collision and in arriving at the amount of damages to be awarded the plaintiff, they may take into consideration any of the following items or elements of damage, shown by a preponderance of the

evidence to have been sustained by the plaintiff as the proximate result of the collision and injuries sued for:

“(1) Any bodily injury or disability, the extent and character thereof;

“(2) Any injury to the brain or nervous system and the extent and character thereof;

“(3) Any physical pain, suffering and mental anguish that he has already been caused to suffer and endure, or that he will likely and probably, with reasonable certainty, hereafter be caused to suffer;

“(4) Any expense for medicines and medical care and treatment that he has already incurred, or will likely and probably, with reasonable certainty, hereafter incur in a proper effort to be cured of his injuries or to alleviate the effects thereof;

“(5) Any inconvenience and discomfort that he page 426 } has already sustained, or will likely and probably, with reasonable certainty, hereafter sustain;

“(6) Any financial loss that he has already sustained by reason of his inability to earn his normal wages, or will likely and probably, with reasonable certainty, hereafter sustain.”

The Court: Mr. Daniel, are there any other instructions you have offered?

Mr. Daniel: They are all my instructions.

The Court: Now we will consider instructions offered by Mr. Whitehead representing the defendants Duane Beasley and the estate of Carroll M. Johnson. The first instruction is lettered A. Is there any objection to Instruction A?

Mr. Rosenberger: The plaintiff, Thomas D. Leech, by William Rosenberger, Jr., of counsel and as guardian *ad litem*, objects to the granting of any instruction on behalf of the defendant, Duane Beasley, and the defendant page 427 } Corinne M. Johnson, administratrix, on the ground that there is no credible evidence of gross negligence on the part of Thomas D. Leech and on the further ground that there is no credible evidence that Thomas D. Leech was operating the vehicle at the time and place the collision occurred, and the plaintiff has the additional objection that Carroll Johnson was a guest in the motor vehicle and the instruction which the defendant Johnson proposes to offer is based on simple negligence rather than gross negligence.

Mr. Daniel: The plaintiff by his attorneys, B. G. Watkins and J. Murrell Daniel, do not object to giving an instruction pertaining to gross negligence for the reason that it is their contention that the driver of the motor vehicle was guilty of

gross negligence. We do, however, join in the objection to the instruction to be given on behalf of the defendant on the ground that there is no credible evidence that Thomas D. Leech was the driver of the car at the time of the collision.

The Court: Mr. Whitehead, do you want to answer that for the record?
page 428 } Mr. Whitehead: I don't see any need to answer it.

The Court: We are now considering Instruction A. It will be understood that the objections made to all of these instructions by Mr. Rosenberger will stand without being repeated in regard to each instruction but if you have any specific objections to instructions we will consider them. We are now considering Instruction A. Do you have any specific objection to Instruction A?

Mr. Rosenberger: Counsel has no objection to Instruction A except in Paragraph (e) and the ground of the objection to that paragraph is that there is no evidence that the defendant, Duane Beasley, will likely and probably with reasonable certainty hereafter sustain any loss by his inability to earn wages or by any reduction of his earning power and it will be pure speculation if the jury made any award based on any such element of damage.

The Court: Mr. Whitehead, do you have any reply to make to the objection?

Mr. Whitehead: No, sir, we have no reply. We
page 429 } think it is a proper instruction.

The Court: The Court is of the opinion that there is ample evidence to sustain Sub-paragraph (e) by the fact that the testimony that probably he will have epilepsy and also that he will be continued under a doctor's care and the jury has a right to infer therefrom that there should be some inability to work or some loss of wages. Instruction A will be given.

Mr. Rosenberger: The plaintiff, by counsel, excepts to the action of the Court in granting Instruction A for the reasons heretofore stated.

Instruction A (Granted):

"The Court instructs the jury that if you find for the defendant, Duane Beasley, on his counter-claim against Thomas D. Leech, it is your function to determine the amount of damages that should be awarded him, and in determining same you must be guided solely by the evidence, and should fix the amount at such sum as to you seems a fair and just compensation for the injuries and damages proximately caused the

defendant by the alleged accident, but not in ex-
 page 430 } cess of the amount sued for; and in arriving at the
 amount of damages to be awarded, you may take
 into consideration any of the following items or elements of
 damage that a preponderance of the evidence may have
 shown to have been sustained by the defendant as a proximate
 result of the alleged accident, to-wit:

“(a) Any bodily injury, or disability, the character and
 duration thereof;

“(b) Any physical pain, suffering and mental anguish he
 has been caused to endure, or that he will likely and probably,
 with reasonable certainty, be hereafter caused to suffer;

“(c) Any expense for surgical, medical and hospital treat-
 ment he has heretofore incurred or with reasonable certainty
 will hereafter incur;

“(d) Any inconvenience and discomfort he has already
 sustained or will likely and probably, with reasonable cer-
 tainty, hereafter sustain;

“(e) Any loss he has already sustained, or will likely and
 probably, with reasonable certainty, hereafter sustain by rea-
 son of his inability to earn wages or by reason of a reduction
 or lessening of his earning power.”

page 431 } The Court: Is there any objection to Instruc-
 tion B?

Mr. Rosenberger: The plaintiff, by counsel, objects to In-
 struction B on the ground that this instruction indicates that
 the Court has singled out and emphasizes a particular fact
 from all of the evidence and it ignores other evidence and
 therefore the jury is misled. It contains a recital of part
 of the evidence and it impresses that on the jury to the ex-
 clusion of other evidence. The instruction is further object-
 ionable in that it refers to an award of damages in accord with
 Instruction A and therefore it reemphasizes the item of dam-
 ages and indicates the Court is of the opinion that Duane
 Beasley is entitled to damages under Instruction A.

Mr. Whitehead: The defendant, Beasley, by counsel, Paul
 Whitehead, states that the reason that phrase was inserted in
 the instruction, award damages in accordance with Instruc-
 tion A, was because in this case a suit has been instituted
 against Beasley by Leech and without that addition put into
 the instruction—that is, “and award damages in
 page 432 } accordance with Instruction A,” the jury might
 be led to believe that they could find for the de-
 fendant Beasley but should not award him any damages and
 this instruction is based on the claim of Beasley against Leech

and distinguishes it from the claim of Leech against Beasley.

Mr. Rosenberger: As far as counsel's reasoning in that regard then we would have to conclude that Instruction A was not a complete self-explanatory instruction and B was not a complete instruction and therefore it would be error to give either one of them. I assume that the Court is giving a complete instruction in Instruction A and giving a complete instruction in Instruction B. To have one refer to damages twice over-emphasizes that element. Under Instruction A they could find for the defendant Beasley on the claim of Thomas Leech and award Beasley damages because Thomas Leech hasn't proved his case. Instruction A is objectionable on that ground.

The Court: You didn't make that objection.

Mr. Rosenberger: I just noticed it. Your page 433 } Honor, while we are further considering this instruction it would not be a proper instruction of gross negligence because it makes it an absolute duty on the operator of the automobile.

Mr. Whitehead: I will change it. I will put in there it was his duty to exercise slight care to operate the said automobile along the highway. Does that meet your objection?

Mr. Rosenberger: My objection as originally made stands. I think it would be better to amend it by deleting everything from the first line to the last.

Note: Instruction B as originally offered was withdrawn as offered and after being amended and rewritten was again offered as Instruction B.

The Court: I will give Instruction B as it is now amended.

Mr. Rosenberger: The plaintiff, by counsel, excepts to the action of the Court in giving Instruction B on the page 434 } ground that even as amended it is objectionable for the reasons heretofore stated.

Mr. Whitehead: I think counsel should be required to state what his reasons are.

Mr. Rosenberger: We stated them once and then we stated them twice and then we stated them three times and you amended the instruction twice and I now will restate the first objection that the instruction indicates that the Court has singled out and emphasizes a particular part of the evidence and it ignores other evidence, therefore the jury will be misled by this instruction. It contains a recital of part of the evidence and impresses that on the jury to the exclusion of other evidence.

Instruction B (Granted, as Amended):

“The Court instructs the jury that if you believe from a preponderance of the evidence that the defendant, Duane Beasley, was riding as a guest passenger in the 1960 Chevrolet automobile, described in the evidence; that the plaintiff, Thomas D. Leech, was the operator thereof at the time the same wrecked, that the said plaintiff, Leech, failed to exercise slight care and drove the same at a speed or in a
page 435 } manner so as to cause or permit the said automobile to run off of the highway and wreck and that the conduct of the said defendant amounted to gross negligence, as defined in the instructions of the court, and such gross negligence, if any, was a proximate cause of the wreck and injuries to the defendant Beasley, you should find a verdict for the defendant, Duane Beasley.”

The Court: We will now consider Instruction A-1. Is there any specific objection to this instruction?

Mr. Rosenberger: The plaintiff has no specific objection to Instruction A-1 but has the same general objection to that instruction as heretofore stated.

The Court: Instruction A-1 will be given.

Instruction A-1 (Granted):

“The Court instructs the jury that if you find for the defendant, Corinne M. Johnson, Administratrix of the Estate of Carroll McWane Johnson, deceased, you may
page 436 } award such damages as to you may seem fair and just, but not in excess of the amount sued for, and in ascertaining the damages you may find the same with reference to the following:

“(a) The pecuniary loss, if any, sustained by the mother and father of Carroll McWane Johnson, deceased, fixing such sum with reference to the probable earnings of the deceased, Carroll McWane Johnson, taking into consideration his age, intelligence and health, during what would have been his probable lifetime, if he had not been killed;

“(b) In ascertaining the probability of life of the deceased, you have the right to determine the same with reference to recognized scientific tables relating to the expectation of human life;

“(c) Compensation for loss of his care, attention and society to his mother and father; and,

“(d) By such further sum as you may deem fair and just

by way of solace and comfort to his mother and father, for their sorrow, suffering and mental anguish occasioned to them by his death, and you may direct in what proportion any damages which you may assess shall be distributed to the mother and father of the deceased, Carroll McWane page 437 } Johnson.”

The Court: Is there any specific objection to Instruction B-2?

Mr. Rosenberger: The plaintiff, by counsel, objects to Instruction B-2 on the ground that the duty of Thomas D. Leech as stated in this instruction is in conflict with the duty of Thomas D. Leech as stated in Instruction B and the jury will not know what the duty of Thomas D. Leech was at the time and place of this collision in view of the absolute conflict in the instructions even if the jury believe that he was the driver of the automobile. The instruction also is amenable to the objection that it duplicates and emphasizes the duties in using the duty in the reckless driving statute used in (b) which is a duplication of the duties to keep the automobile under proper control in (a) and the question in this case, if I understand counsel, is that the speed of the automobile caused the operator, whoever he was, to lose control and nebulous as that may be we do not believe that we should duplicate it and emphasize this point to the jury. The instruction page 438 } is further objectionable in that it again refers to and emphasizes the question of damages at the end and this was the same objection which we made to Instruction B and which counsel changed—that is with reference to damages.

The Court: It seems to me that Instruction B-2 has got to have in there the evidence as to Carroll Johnson, got to distinguish the duty owed to Carroll Johnson and the duty owed to the other boy Beasley.

Mr. Whitehead: It is by degree.

Mr. Daniel: It is a little difference in degree.

Mr. Whitehead: As far as I know about that we have got to use ordinary and reasonable care. I will amend this instruction.

Note: Instruction B-2, as offered, was withdrawn and amended and after being amended and rewritten was offered as “Instruction B-2.”

The Court: Instruction B-2 will be given as amended.

Mr. Rosenberger: We object and except to the action of the Court in giving Instruction B-2.

page 439 } Instruction B-2 (Granted, as Amended):

“The Court instructs the jury that on the counter-claim of Corinne M. Johnson, Administratrix of the Estate of Carroll McWane Johnson, deceased, against Thomas D. Leech, if they believe from a preponderance of the evidence that the plaintiff, Thomas D. Leech, was operating said automobile at the time and place this accident occurred it was the duty of the plaintiff, Thomas D. Leech, to use ordinary and reasonable care to perform or comply with each and all of the following duties:

“(a) To drive the Chevrolet automobile under proper control;

“(b) To drive said automobile at a speed and in a manner so as not to endanger the life or limb of Carroll McWane Johnson, deceased, and under no condition in excess of sixty miles per hour;

“(c) To keep a proper lookout.

“That these were continuing duties to be exercised when they would be reasonably effective, and that if the plaintiff, Thomas D. Leech, failed to perform any one or more of said duties as above set forth and that such failure, if any, was a proximate cause of the accident, then you shall
page 440 } find for the defendant, Corinne M. Johnson, Administratrix of the Estate of Carroll McWane Johnson, deceased.”

The Court: Now we will take up this set of instructions which are numbered C-1 through C-10. Who is offering these instructions?

Mr. Frost: Let me make a statement on the record. In regard to Instructions C-1 to C-10, inclusive, of necessity there will be certain instructions given from the defense view of Duane Beasley and Thomas D. Leech. In order to simplify the matter the Court suggested that counsel prepare general instructions, if possible, in order that there would not be considerable duplication in the instructions. Acting on the suggestion of the Court these instructions were prepared, with the exceptions of C-8 and C-9 in which there would have to be a duplication reversing the names of the parties.

The Court: Is there any objection to Instruction C-1?

Mr. Daniel: I have no objection.

page 441 } Mr. Whitehead: I think it is all right.

The Court: Instruction C-1 will be given.

Instruction C-1 (Granted):

"The Court instructs the jury that the basis of the claim of Thomas D. Leech and the counterclaim of Duane Beasley is gross negligence which means that degree of negligence that shows an utter disregard of prudence amounting to complete neglect and is such heedless and reckless disregard of the rights of another as to shock reasonable men. The jury cannot infer gross negligence from the mere fact that an accident occurred, as the mere happening of an accident places no responsibility on anyone and does not raise any presumption of gross negligence. The jury should not return a verdict based on conjecture, surmise or speculation as to what you think may have happened and the law imposes on anyone claiming damages, the burden of proving their case by a preponderance of the evidence, and the jury should not find a verdict for damages against anyone, unless and until that one proves by a preponderance of the evidence that the driver of the automobile was guilty of gross negligence and that such gross negligence was a proximate cause of page 442 } the collision.

"The Court further instructs the jury that if after hearing all of the evidence, the jury believes that the evidence is equally balanced, or if the jury is uncertain as to whether the driver of the motor vehicle was guilty of gross negligence and it appears equally probable that he was not guilty of gross negligence as that he was, then the jury should not return a verdict for damages in favor of either Duane Beasley or Thomas D. Leech."

The Court: Is there any objection to Instruction C-2?

Mr. Daniel: The plaintiff, by counsel, objects to Instruction C-2 on the ground that the beginning of the instruction says "Thomas D. Leech and Duane Beasley" and I think it should be "Thomas D. Leech or Duane Beasley", and I object on the further ground that this instruction is covered by other instructions and thirdly upon the ground it is an attempt to distinguish the two degrees of negligence page 443 } and if we are going to make a distinction we should distinguish between the three degrees of negligence and those distinguishments are made in plaintiff's Instruction No. 1.

The Court: Plaintiff's instruction has nothing to do with ordinary care.

Mr. Daniel: In defining gross negligence it distinguishes between ordinary negligence and gross negligence.

Mr. Rosenberger: The word "and" should remain in there. Both of them have failed to prove it.

The Court: Mr. Whitehead, do you have any objection.

Mr. Whitehead: Yes, sir, I object. To save a lot of repetition may I say this, that I, as attorney for Corinne Johnson, administratrix, and Duane Beasley, object to any and all of the instructions given leaving a question for the jury to decide on gross negligence and as to who was the operator of the automobile on the ground that, as a matter of law, the evidence shows that the operator of this automobile was

Thomas D. Leech and, as a matter of law, the
page 444 } operator of the automobile was guilty of gross negligence.

The Court: Do you have any specific objection to Instruction C-2?

Mr. Daniel: I would like to state a general objection to the giving of gross negligence because the credible evidence is that the negligence, if any, was gross negligence. All the credible evidence is that Duane Beasley was the driver of the automobile at the time of the accident and that he was guilty of gross negligence.

Mr. Whitehead: I have no specific objection except those objections which I have just stated and will ask the Court rather than being continually repetitious if agreeable I want those objections to stand to all instructions offered and given pertaining to those two questions.

Mr. Watkins: Also on behalf of Thomas D. Leech the instruction is argumentative and repetitious and unduly emphasizes the gross negligence feature.

The Court: The Court will give Instruction C-2 as offered.

page 445 } Mr. Daniel: The plaintiff, by counsel, excepts to the action of the Court in giving Instruction C-2 for the reason stated.

Instruction C-2 (Granted):

"The Court instructs the jury that the least showing upon which Thomas D. Leech and Duane Beasley may recover damages is that the driver of the motor vehicle was guilty of gross negligence which proximately caused the collision. There is a distinction between ordinary negligence and gross negligence in that mere carelessness, inadvertence, lack of attention, failure to skillfully operate an automobile, to act intelligently, or to operate an automobile at a low rate of speed may constitute ordinary negligence. Gross negligence, however, is substantially and appreciably higher in magnitude

than ordinary negligence and means a complete absence or lack of care to avoid inflicting an injury to the person of another and is such a heedless disregard of the rights of another as should shock reasonable men. If you believe from the evidence that the driver of the automobile was guilty of some negligence, but that such negligence did not show an utter disregard of prudence amounting to complete neglect of the safety of another, or that such negligence did not indicate such heedless and reckless disregard of the rights of another as should shock reasonable men, then Duane Beasley and Thomas D. Leech have failed to prove gross negligence and the jury should not return a verdict for damages in favor of either Thomas D. Leech or Duane Beasley."

The Court: Is there any specific objection to Instruction C-3?

Mr. Whitehead: We object to it on the ground that he has in there the measure of care for a guest as he would have for a passenger for pay.

Mr. Rosenberger: We will amend this instruction by striking out the words "for pay" and inserting the words "not a guest". This would make it read "the same measure of care for a guest as he would have been for a passenger not a guest".

The Court: Mr. Whitehead, does that meet your objection?

Mr. Whitehead: Yes, sir.

page 447 } The Court: Instruction C-3 will be given.

Instruction C-3 (Granted):

"The Court instructs the jury that at the time and place that this collision occurred, the driver of the vehicle was not under an obligation to use the same measure of care for a guest as he would have been for a passenger not a guest. The driver of such an automobile makes no implied representation to a guest except:

"(1) That he will not operate his automobile with gross negligence or knowingly or wantonly add to those perils which ordinarily may be expected;

"(2) That he will not intentionally injure his guests; and

"(3) That there are not known defects in the automobile which would make its operation particularly dangerous.

"Beyond this, all risks are assumed by the guests."

The Court: Is there any specific objection to No. 4?

Mr. Daniel: I object to Instruction C-4 on page 448 } the ground that there is no evidence that the collision resulted from one of two causes and that the cause, according to the evidence, was the speed or the only cause was the cause for which the driver was responsible.

The Court: Mr. Whitehead, do you have any objection?

Mr. Whitehead: I object to C-4 on the ground that there is no evidence in this case that the accident happened except for one cause and that was failure to keep the automobile on the road and drive within the speed limit.

Mr. Rosenberger: This instruction is directed at the fact that in this case we have some evidence of a witness who said that as he looked up the car ran off the road and crossed a secondary road and he gave as an opinion that the car was going seventy-five miles an hour when it went into the curve and the evidence shows that there were two very sharp curves this automobile went in and completed those curves

and it traveled a substantial distance along a page 449 } straightaway and that when it left the road there was no evidence of any application of brakes; there were no skid marks, so in order for the jury to arrive at gross negligence in this case it would have to deduct this thing was caused by speed. Now, it may just as well infer that something happened to the driver that he did not put on his brakes; that the car continued in a straight line off the road after it made that turn and nobody said that the speed actually caused the automobile to run out of the road. That is the reason I want to emphasize to the Court that it is a question of inference as to what was the cause of loss of control and that is absolute lacking and if the jury may infer it was speed under your Court's ruling, which I beg to differ, then the jury might just as well infer that the driver passed out from illness, died of a heart attack, because the car continued along with no application of brakes, no turning of the wheels, nothing to avoid what the driver normally would have been bound to have done as a human being to avoid injury to himself.

page 450 } The Court: The Court is of the opinion that Instruction C-4, C-5 and C-6 all cover the same proposition Mr. Rosenberger has recently addressed himself to and is going to refuse all three of those instructions, C-4, C-5 and C-6. All of them are dealing with the same matter.

Mr. Rosenberger: The plaintiff, Thomas D. Leech, by counsel, excepts to the action of the Court in refusing these three instructions for the reasons stated.

Mr. Frost: The defendant, Duane Beasley, objects and

excepts to the action of the Court in refusing Instruction C-4, Instruction C-5 and Instruction C-6 for the same reason stated by Mr. Rosenberger.

Instruction C-4 (Refused):

“The Court instructs the jury that if you believe from the evidence that it is just as probable that the collision resulted from one of two causes, for one of which the driver would be responsible, and the other he would not, then you should not return a verdict for damages in favor of anyone.”

page 451 } Instruction C-5 (Refused):

“The Court instructs the jury that if it appears from the evidence that it is just as probable that the collision resulted from some faulty mechanism, as it did from gross negligence of the driver, then you should not return a verdict in favor of anyone for damages.”

Instruction C-6 (Refused):

“The Court instructs the jury that if you believe from the evidence that it is as probable that the collision resulted from the sudden illness of the driver, as it did from the gross negligence of the driver, then you should not return a verdict in favor of anyone for damages.”

The Court: Is there any specific objection to Instruction C-7?

Mr. Daniel: Instruction C-7 is objectionable on the grounds already covered. It simply says “unless page 452 } gross negligence is shown you can’t recover.”

The Court: Do you want to be heard on that, Mr. Rosenberger?

Mr. Rosenberger: C-7 has not been covered in that this instruction makes a difference between mere inadvertence and misjudgment and does not constitute gross negligence and we think that as a theory of law and theory of the defense against gross negligence it should be given.

Mr. Daniel: The plaintiff will withdraw his objection to Instruction C-7.

The Court: Do you have any objection, Mr. Whitehead?

Mr. Whitehead: I object just on the general ground.

The Court: Instruction C-7 will be given as offered.

Instruction C-7 (Granted):

“The Court instructs the jury that if you believe from the evidence that the collision was caused alone and only by certain acts of inadvertence and misjudgment on the page 453 } part of the driver of the motor vehicle and not from such negligence which shows an utter disregard of prudence amounting to complete neglect of the safety of another, or that the collision did not proximately result from such negligence as to indicate a heedless and reckless disregard of the rights of another as should shock reasonable men, then the driver was not guilty of gross negligence and you should not return a verdict for damages in favor of either Duane Beasley or Thomas D. Leech.”

The Court: Is there any objection to Instruction C-8? This one Mr. Rosenberger is offering and Mr. Frost is offering C-9.

Mr. Whitehead: I object to Instruction C-8 on the ground that as a matter of law the evidence shows Thomas D. Leech was driving the car at the time of the accident.

The Court: I will give Instruction C-8 as offered.

page 454 } Instruction C-8 (Granted):

“The Court instructs the jury that the burden is on the defendant, Duane Beasley, and the defendant, Corinne M. Johnson, Admr., to prove by a preponderance of the evidence that Thomas D. Leech was driving the vehicle at the time and place that the collision occurred, and if you believe from the evidence that it is just as probable that the defendant, Duane Beasley, was driving the vehicle as it is that the plaintiff, Thomas D. Leech, was driving the vehicle, then you should not return a verdict for damages in favor of either the defendant, Duane Beasley, or the defendant, Corinne M. Johnson, Admr., against the plaintiff, Thomas D. Leech.”

The Court: Is there any objection to Instruction C-9?

Mr. Daniel: My objection to C-9 is that it should not be “just as probable that the plaintiff, Thomas D. Leech, was driving the vehicle as it is that the defendant, Duane Beasley, was driving the vehicle”, on the grounds that the evidence would be that one or the other was driving.

page 455 } The Court: This is dealing with the burden of proof here. If the proof fails to establish by a preponderance of the evidence which was driving then it falls short of being sufficient to find a verdict. Do you still object to Instruction C-9?

Mr. Daniel: No, sir, I withdraw the objection.

The Court: Instruction C-9 will be given as offered.

Instruction C-9 (Granted):

“The Court instructs the jury that the burden is on the plaintiff, Thomas D. Leech, to prove by a preponderance of the evidence that the defendant, Duane Beasley, was driving the vehicle at the time and place that the collision occurred, and if you believe from the evidence that it is just as probable that the plaintiff, Thomas D. Leech, was driving the vehicle as it is that the defendant, Duane Beasley, was driving the vehicle, then you should not return a verdict for damages in favor of the plaintiff, Thomas D. Leech, against the defendant, Duane Beasley.”

page 456 } The Court: Instruction C-10 is the verdict instruction. Is there any objection to this instruction?

Mr. Whitehead: It seems to me, Judge, we have been through all this up in Bedford and any such instruction as this unless the Court might write it it is going to be just as confusing as the dickens. In other words, I don't see why there is anything complicated here. You have three claims and the jury can say who they are going to give money to and who they are not.

The Court: If somebody didn't write a verdict for these people in this case they never would write a verdict. In this case the jury needs a form of verdict to copy. In the third paragraph I think the word each should be changed to “all” to read “The jury cannot find for and award damages to all of the parties”.

Mr. Rosenberger: To use the word “all” is all right with me. I am not wedded to any particular language.

The Court: In the next to the last paragraph page 457 } on the first page I am inserting the words “Thomas D. Leech.”

Mr. Whitehead: Judge, in this last paragraph I believe something should be added to that.

The Court: I will tell them orally that they have a right to pay it to either the father or the mother or to both of them in such sums as they may feel fair and just. Will that be all right?

Mr. Whitehead: Yes, sir.

The Court: Instruction C-10 will be given as amended.

Instruction C-10 (Granted as Amended):

"The Court instructs the jury that in arriving at your verdict, you should consider the claim of the plaintiff, Thomas D. Leech, against the defendant, Duane Beasley; the counterclaim of the defendant, Duane Beasley, against the plaintiff, Thomas D. Leech; and the counterclaim of the defendant, Corinne M. Johnson, Administratrix of the Estate of Carroll McWane Johnson, Deceased, against the plaintiff, Thomas D. Leech.

"The jury shall determine by a preponderance of the evidence whether any party is entitled to recover damages against the other party and, if so, which one of the parties is entitled to so recover and the amount of damages to be awarded.

"The jury cannot find for and award damages to all of the parties, but the jury may find against each party and award no damages to any of them, or may find for and award damages in favor of any of the parties, as may be warranted by the evidence.

"Should the jury find that none of the parties are entitled to recover damages against the other party, a proper form for their verdict would be:

"We, the jury, on the issue joined, on the claim of the plaintiff, against the defendant, Duane Beasley, we find for the defendant; and on the counterclaim of the defendant, Duane Beasley, against the plaintiff, Thomas D. Leech, we find for the plaintiff; and on the counterclaim of the defendant, Corinne M. Johnson, Administratrix of the Estate of Carroll McWane Johnson, Deceased, against the plaintiff, Thomas D. Leech, we find for the plaintiff."

"Should the jury find that the plaintiff, Thomas D. Leech, is entitled to recover damages against the defendant, Duane Beasley, a proper form for their verdict would be:

"We, the jury, on the issue joined, on the claim of the plaintiff, against the defendant, Duane Beasley, we find for the plaintiff, Thomas D. Leech, and assess his damages against the defendant, Duane Beasley, at \$....., and on the counterclaim of the defendant, Duane Beasley, against the plaintiff, Thomas D. Leech, we find for the plaintiff; and on the counterclaim of the defendant, Corinne M. Johnson, Administratrix of the Estate of Carroll McWane Johnson, Deceased, against the plaintiff, Thomas D. Leech, we find for the plaintiff."

“Should the jury find that the defendant, Duane Beasley, is entitled to recover damages against the plaintiff, Thomas D. Leech, a proper form for their verdict would be:

“We, the jury, on the issue joined, on the claim of the plaintiff, Thomas D. Leech, against the defendant, Duane Beasley, we find for the defendant, Duane Beasley; and on the counterclaim of the defendant, Duane Beasley, against the plaintiff, Thomas D. Leech, we find for the defendant, Duane Beasley, and assess his damages against the Plaintiff, Thomas D. Leech, at \$.”

“Should the jury find that the defendant, Cor-
page 460 } inne M. Johnson, Administratrix of the Estate
of Carroll McWane Johnson, Deceased, is en-
titled to recover damages against the plaintiff, Thomas D.
Leech, a proper form for their verdict would be:

“We, the jury, on the issue joined, on the counterclaim of the defendant, Corinne M. Johnson, Admrx, against the plaintiff, Thomas D. Leech, we find for the defendant, Corinne M. Johnson, Admrx., and assess her damages against the plaintiff, Thomas D. Leech, at \$., and direct that it be paid to:”

Mr. Daniel: I want the record to show that the plaintiff, by counsel, excepts to the action of the Court in overruling the objections to each of the instructions as heretofore stated.

Mr. Rosenberger: The plaintiff, Thomas D. Leech, by counsel, objects and excepts to the action of the Court in granting Instruction A for the reasons heretofore stated and the plaintiff, Thomas D. Leech, objects and excepts to the Court granting Instruction B on the ground that there is no evidence on which to base that instruction and on the ground that this instruction indicates to the jury that the Court has
singled out and emphasizes a particular part of
page 461 } the evidence and it ignores other evidence and
therefore the jury is misled by it. It contains a
recital of part of the evidence to the exclusion of other parts
of the evidence and it impresses that on the jury to the
exclusion of all other evidence.

The Court: Is that all, Mr. Rosenberger?

Mr. Rosenberger: Yes, sir.

The Court: Now, I want everybody to check on what I am giving. Mr. Daniel, I am giving for you Instructions num-

bered 1, 2, 3-A and 5 and you did not offer any that were refused.

Mr. Daniel: That is right.

The Court: I am giving instructions offered by Mr. Whitehead lettered A, B, A-1 and B-2. Are there any instructions that you offered that I refused?

Mr. Whitehead: No, sir.

The Court: Now, Mr. Rosenberger and Mr. Frost, I am giving all of your instructions offered as offered or as amended except Instructions C-4, C-5 and C-6 which I have marked "Refused".

page 462 } Mr. Rosenberger: That is right. We have objected and excepted.

The Court: I thought I would make this brief statement to the jury if you have no objection to it. I will tell them these are the instructions of the Court; that we are trying three separate cases, three separate and distinct lawsuits in one, and they shall find verdicts in accordance with one of the instructions that sets out the form of verdict; that in two of the cases, and I will name which two, that it is necessary to prove gross negligence and the other case the Court rules it is only necessary to prove ordinary negligence, which is a different degree of negligence. I want to call that to the jury's attention so they can be fully aware of the difference in degree of negligence without trying to tell them anything else. Do any of you object to me stating that to the jury?

Mr. Rosenberger: If your Honor please, the plaintiff, Thomas D. Leech, objects to the Court orally instructing the jury as to the amount of proof and degree of care in the three different cases because that would over-

page 463 } emphasize in favor of the defendant Johnson.
I think the instructions speak for themselves and we have tried to cover them completely.

The Court: I don't want to add anything more than what has already been said in the instructions. I will say that there are three different distinct law cases to be tried in one case and they will render three verdicts and to make sure they look through the instructions in each case to see what is required as to each individual case.

Mr. Rosenberger: I think that is as far as you should go.

The Court: Is there any objection to that?

Mr. Daniel: No, sir.

Note: Discussion as to the amount of time to be allotted counsel in arguing the case and which of counsel would be permitted to argue the case is here omitted.

Mr. Rosenberger: One further thing, in his opening statement yesterday Mr. Daniel made a distinction in page 464 } front of the jury that he and Mr. Watkins originally were employed by Mr. Leech and that I was subsequently brought in on the counter-claims which sort of spells insurance to me, and maybe I am oversensitive on the matter.

Mr. Daniel: If he comes in and argues there wasn't any gross negligence I am going to say that Daniel's side does think there was gross negligence.

Mr. Rosenberger: I won't argue there is no gross negligence.

Mr. Watkins: Can we not state we represent him on the original claim and you represent him on the counter-claim?

Mr. Rosenberger: No, sir, that leaves the inference that Rosenberger is representing the insurance company. I do not mean to argue the instructions about the distinctions between gross negligence and ordinary negligence and will not deal with Burley specifically and call him what he is about the speed but I am going to take him apart on the evidence that he has given and his contradictions on the basis that he should not be believed. I will have to do that.
page 465 } The Court: You are not going to argue about his testimony of the speed the automobile was going?

Mr. Rosenberger: I haven't mentioned that. It is bad but there is nothing I can do about it. I never examined him and didn't ask him about his estimate of speed.

(In the courtroom—jury present).

The Court: Ladies and gentlemen of the jury: The Court will now instruct you as to the law applicable to these cases. The instructions which will presently be read to you are all the Court's instructions. You are aware we are trying three lawsuits at the same time. We are trying the suit of Thomas D. Leech versus Duane Beasley and Corinne M. Johnson, Administratrix of the estate of Carroll M. Johnson. Now, Corinne M. Johnson, Administratrix, was originally a defendant in this suit but the Court has stricken the evidence as to Corinne M. Johnson, Administratrix, for the reason that there was no principal and agency
page 466 } relationship shown so as the case now stands
Thomas D. Leech is suing Beasley and Corinne M. Johnson, the Administratrix, has been discharged. You are discharged from further considering that suit as far as she is concerned.

You are trying a second suit of Duane Beasley versus Thomas Leech.

You are trying a third suit of Corinne M. Johnson, Administratrix of Carroll M. Johnson, against Thomas D. Leech, and you will render separate verdicts for or against all of these in accordance with an instruction which you will have to take with you to your jury room with the form on it.

Note: At this point the Court reads the written instructions, after which the closing arguments of counsel are made first by Mr. Daniel, followed by Mr. Rosenberger, Mr. Frost and Mr. Whitehead and the final closing argument of Mr. Daniel is here transcribed:

At the conclusion of Mr. Daniel's closing argument Instruction C-11 was offered by Mr. Rosenberger
page 467 } and to ascertain what transpired in regard to
this instruction refer to page 475 of this transcript.

Instruction C-11 (Refused):

"The Court instructs the jury that if the identity of the driver of the vehicle is not proved by a preponderance of the evidence, then you should not return a verdict for damages for any one."

CLOSING ARGUMENT

Mr. Daniel: May it please the Court, and you lady and gentlemen of the jury, I have one good piece of news for you, I have forty minutes left and I don't intend to take all of it.

I have a couple of things I wish to reply to that Mr. Frost and Mr. Whitehead said. You know we are all honorable men, don't misquote anybody any time. It is your function to decide what was said and what was not said. I have heard misquotations but I don't think they were intentional. You are not going to remember everything exactly as
page 468 } it was said but by the time you all get together
and correct it I hope you will be able to remember exactly.

Now, Mr. Frost said you are not going to get to the question of damages because you are not going to be able to tell who was the driver but he doesn't really mean that. If he did he wouldn't go on and argue what is wrong with the boy who sits there in the middle of the floor. "My grandchildren do it, you have seen your children do it". That is one isolated

instance but remember now if this was just a grandchild we are talking about it would be something different so I say to you he is minimizing something at the same time he tells you you don't have to consider it, so I don't believe he means it.

I agree with Mr. Whitehead that the question is not one of gross negligence because we feel certainly there was gross negligence in this wreck and we think you have every reason to believe it.

Now, I did my best to patiently explain, because this is a matter of law, as to why we used Burley and why I said you can believe him or not about the speed. It makes no difference whether you believe him about the speed but we have no one to contradict him about the speed so we can use him for that purpose and I say you don't have to believe it. I don't completely believe it, and I am not jumping on his neck.

As Mr. Rosenberger told you very plainly we have a duty to our client and we have a duty to the Court to try to see that justice is done. We are officers of the Court and it is as much our duty to see that justice is done in the long run as it is to see one party lose and one party win.

I say this, I agree with Mr. Whitehead in this case here that somebody in this case is entitled to a verdict and it is the person not the driver of the car because if we are just going to rule against everybody, which Mr. Frost seems to want, nobody gets anything. Because it is a hard case or because it is a little hard to decide exactly who is telling the truth then we are taking away the actual purpose of a trial and the reason for a jury because you have got to decide in this case who was driving. Now, they say we asked you to believe Burley on the speed.

I would ask you not to believe that speed if I could prove otherwise but all the evidence points to the excessive speed so I don't care if you believe what Burley said or not. I knew what he was going to say when I put him on the stand. I didn't vouch for him, in fact I know it because, as I said, all the evidence points to speed.

Now, Mr. Whitehead in his questions said honorable and astute counsel would certainly have gotten Dr. Weaver down here to testify if he was going to say Tommy Leech wasn't hurt. Mr. Whitehead knows as well as anybody else here what it costs to get a busy doctor from Roanoke to come down.

Mr. Whitehead: I want to differ. I haven't mentioned Dr. Weaver.

Mr. Daniel: I am sorry, it was Mr. Frost. Mr. Frost was

the man and he knows what it costs to pull a neuro-surgeon away from his work for three days.

Mr. Frost: I object to that. He is talking about the cost of getting doctors down here.

page 471 } The Court: He is arguing you didn't call him as a witness. He can refer to that. You failed to call him and he can argue that.

Mr. Daniel: You want to talk about Dr. Weaver? What evidence is there for you to believe that Dr. Weaver would have said the man was injured when he treated him three times in Roanoke and Dr. Hardy had him referred to a neurologist and said he should be followed by a neurologist here or somewhere,

Now, one other thing I would like to get straight and that is about the case of the claim against the estate of Carroll M. Johnson. As the Court has told you, we haven't been able to prove he was the agent or servant—that is, that Beasley was the agent or servant of Carroll Johnson. Carroll Johnson can't testify so Carroll Johnson's estate is no way hurt in this matter. No matter how you rule on the counter-claim of Carroll Johnson they still can bring this suit again but neither Leech or Beasley can so I say you don't have to be too much concerned about that case.

Now, one other thing I would like to say and
page 472 } that is if you will remember about this filling station—Mr. Wood, I am not going into what the reasons are but Mr. Wood said, and there is no contradiction, that the building is eighty feet long. He said that the restaurant is approximately thirty feet, the front of the restaurant is approximately thirty feet from his office in that building; that this automobile pulled twelve feet from the tanks or from where he was where he could see so if this car had been pulled, and remember this statement was never given to Trooper Wilkes, if they had pulled fifty yards down there they could not have possibly have been in front of the restaurant or anywhere near it. If they had pulled thirty feet they would have been in front of the restaurant. They said Mr. Wood was busy running the filling station and has no reason to watch the people. He had no special reason to watch them but he had those people around his place earlier that night for I guess an hour or more and he had seen them all in front. He must have noticed the way they were driving around the place or when they left
page 473 } there and then he did see the boys were there in front of his filling station and he must have had some reason for watching them. I say to you Mr. Wood must know just what he said he knew. They have said he wouldn't

have any reason to notice every customer but he must have noticed and considered this thing pretty carefully to say with certainty he knows who got in that car and who drove away so it is a question of who you are going to believe in the case and I do have to say it is up to you to decide whether you are going to accept his testimony on behalf of Leech or accept the one witness on behalf of Beasley, the witness Burley.

Mr. Whitehead says the evidence is overwhelming. Where is the evidence that was so overwhelming? He said a man with retrograde amnesia can't remember anything and then he turns around and said Tommy Leech is supposed to have gone down to Barker-Jennings and said he thought he was driving the car and he had retrograde amnesia, according to what the doctor said, he can't remember what happened before the accident so why would Tommy Leech
page 474 } go down and make a case against his own self after this thing was over? This is not a case of somebody beating somebody else to Court. You remember the pleadings in there and you will see an affidavit signed by Duane Beasley that he was not the driver of the car at the time of the wreck and that Tommy Leech was. That is an affidavit signed by Duane Beasley right in the pleadings but now he says he does not know who was the driver, so there are a lot of inconsistencies.

The Court has told you you must believe by a preponderance of the evidence, which evidence sounds the most convincing and satisfactory to you all. Of course, I agree with Mr. Whitehead that it is tragic, not minimal injuries, not minor things. Have you ever thought if Tommy Leech lived his normal life expectancy how many Anacin he would take during that time, two thousand weeks? Suppose he has got to be followed for forty-nine years by a neurologist? You can figure with some reasonable certainty approximately what that would cost. What is a man's future chances for
promotion in a job when his memory is not as
page 475 } good and his brain has been damaged and won't be regenerated? Those things are essential things in this case and things you have got to consider, I think, in determining how much you are to award.

Now, you can, I think, disregard the evidence on one side but I believe you have a hard task of accepting or rejecting on one side. We feel we have preponderated in this case. We feel we have done everything we could to see that you got the actual facts in the case. I only ask that you simply do what you consider to be your sworn duty to try it according

to the law and evidence and to be fair and just. I have no reason to think you will not, and I thank you.

Mr. Rosenberger: If your Honor please, before the case is submitted to the jury I would like the benefit of a conference.

(In chambers).

Mr. Rosenberger: If your Honor please, in view of the statement of counsel in his closing argument wherein he agreed with Mr. Whitehead someone was entitled page 476 } to a verdict in damages, I feel it is my duty representing the interest of the defendant as guardian *ad litem* and defending the insurance carrier that the Court should instruct the jury that if the identity of the driver of the vehicle is not proved by a preponderance of the evidence then the jury should not return a verdict for damages for anyone.

Mr. Watkins: He has already done it.

Mr. Rosenberger: Not in this language and besides the argument really is in conflict with the Instruction No. 10 that the Court said that there might be one of four verdicts and I think counsel's opinion is improper in the argument and I don't think that should bind me in the event the jury decides to return a verdict for damages so I offer this instruction as Instruction C-11. I have just written it and I don't have any copy.

The Court: My impression is under these other instructions this is certainly covered not once but several times but if it is necessary I will get those other instructions and read them.

page 477 } Mr. Rosenberger: Your Honor, Instruction C-8 said if it did not preponderate that Leech was the driver then they could not return a verdict for Beasley and Instruction C-9 said if it did not preponderate that Beasley was driving—

The Court: Mr. Rosenberger, I think after the instructions have been given to the jury and the case has been argued by counsel then for the Court to give an instruction like this to the jury just before they retire to consider their verdict may indicate the Court has some bias or prejudice for someone and I think it would highly prejudicial and for that reason I refuse it.

Mr. Rosenberger: I offer the instruction and except to the Court's refusal for the reasons stated.

The Court: I will mark it "Refused".

(In the courtroom—jury present).

The Court: Lady and gentlemen of the jury, you are about to retire to your room to consider your verdict in the case. The first thing you do when you retire is to elect one of your number as foreman of the jury. He pre-
page 478 } sides over your deliberations; however, he participates in the discussion of the case and has a voice and of course votes along with the rest of you.

The Clerk has given you a blank piece of paper with just the name of the case on it for you to write your verdict on. When you decide which verdict you agree upon you will turn to Instruction C-10 which is the last instruction in this group I have given you and there are all the possible forms of verdicts in that instruction. You will then follow that according to what you have found the facts to be. Now, after you have considered of your verdict and arrived at a verdict just sound the buzzer and the Sergeant will come and get you. You may now retire.

Note: After the jury had retired for a few minutes they sounded the buzzer and returned into the courtroom.

The Court: Have you arrived at a verdict?

A Juror: No, sir. Your Honor, we would like
page 479 } to have the testimony so we could look at it.

The Court: We have a stenographer taking the testimony down but it has not been transcribed. You are entitled to any exhibits that have been introduced and that would include all of the photographs.

The Juror: Then we would like to have the photographs.

The Court: Give them all of the photographs so they will have the benefit of all of them.

You were asking for the evidence. You are talking about the written words that have been testified to and written down. You want to read certain parts of the testimony?

The Juror: Yes, sir.

The Court: That is not available at this time. You will have to rely on your own memory.

Note: The jury again retired to the jury room and after deliberating returned into Court, having found verdicts in favor of both defendants on their counter-claim against the plaintiff and after the jury was discharged the
page 480 } following motion was made:

Mr. Rosenberger: If your Honor please, the plaintiff, by counsel, moves the Court to set aside the verdict of the jury in favor of Duane Beasley and the verdict of the jury in favor of Corinne M. Johnson, Administratrix, against Thomas D. Leech for damages and enter judgment for the plaintiff, Thomas D. Leech, *non obstante veredicto*, or in the alternative, to grant the plaintiff a new trial on the ground that the verdicts are contrary to the law and the evidence and without evidence to support them; for the action of the Court in refusing to grant separate trials of the three claims of personal injuries, as the plaintiff, Thomas D. Leech, could not obtain a fair trial because of the many issues and conflicting interests and the inability to defend counter-claims of the defendants on the question of speed and other circumstances bearing on the question of gross negligence, and because other counsel for the plaintiff admitted gross negligence; because the plaintiff has to take inconsistent positions that the principal witness was telling
page 481 } the truth about speed but not as to the identity of the driver, and because of argument of other plaintiff's counsel "that someone is entitled to a verdict"; for the action of the Court in refusing to strike the evidence of the defendants, Duane Beasley and Corinne M. Johnson, Administratrix, at the conclusion of the evidence; for the action of the Court in granting Instructions A and B for the defendant Beasley; for the action of the Court in granting Instructions A-1 and B-1 for the defendant, Corinne M. Johnson, Administratrix; for the action of the Court in refusing plaintiff's Instructions C-4, C-5, C-6 and C-11.

The Court: Mr. Rosenberger, I think the Court has gone into it as fully as I possibly could and I overrule your motion in both cases and order that the judgment be entered on the verdicts returned by the jury in each case.

Mr. Rosenberger: The plaintiff, by counsel, excepts for the reasons stated.

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A Copy—Teste:

H. G. TURNER, Clerk.

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