201 VA 829

Return to
FILE COPY
Clerk, Supreme Court of Appeals
Richmond, Va.

# Record No. 5056

## In the Supreme Court of Appeals of Virginia at Richmond

## JR. JEFFERSON MIDKIFF, AN INFANT, ETC.

v.

## DONNIE GREEN MIDKIFF, AN INFANT

FROM THE CIRCUIT COURT OF FLOYD COUNTY

### RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel 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. 5056

---

VIRGINIA:

In the Clerk's Office of the Supreme Court of Appeals at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 4th day of August, 1959.

JR. JEFFERSON MIDKIFF, AN INFANT, ETC.,
Plaintiff in Error,

*against*

DONNIE GREEN MIDKIFF, AN INFANT, Defendant in Error.

---

From the Circuit Court of Floyd County

---

Upon the petition of Jr. Jefferson Midkiff, an infant who sues by his next friend, T. G. Jones, a writ of error was awarded him by one of the Justices of the Supreme Court of Appeals on July 29, 1959, to a judgment rendered by the Circuit Court of Floyd County on the 14th day of March, 1959, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Donnie Green Midkiff, an infant, and Wallace C. King were defendants; no bond being required.

# RECORD

* * * * *

## MOTION FOR JUDGMENT.

To the Honorable William Southall Jordan, Judge of said Court:

The undersigned, Jr. Jefferson Midkiff, who sues by T. G. Jones, his uncle and next friend, doth move the Court for judgment against Donnie Green Midkiff, an infant, and Wallace C. King, jointly and severally, in the sum of FIFTY THOUSAND DOLLARS ($50,000.00) for wrongs and injuries, the particulars of which are as follows, to-wit:

I.

On or about the 10th day of February, 1958, Donnie Green Midkiff, one of the defendants herein, was operating a 1955 Ford automobile over and along Route #221 in an easterly direction in Floyd County, Virginia.

II.

At the time and place aforesaid the Plaintiff, who is an infant of the age of 12 years, was riding as a guest passenger in said automobile and had no voice or control thereof.

III.

At the time and place aforesaid the Defendant, Wallace C. King, was driving a 1958 Ford automobile in a westerly direction along said highway.

page 2 }

IV.

At the time and place aforesaid the said defendant, Wallace C. King, did negligently, recklessly, and carelessly operate his said automobile so as to collide with the automobile in which the infant plaintiff was riding as a passenger; at the time and place aforesaid the said infant defendant did with gross negligence, recklessly and carelessly operate the said automobile then and there in his charge so as to collide with the automobile driven by said Wallace C. King.

V.

As a direct and proximate result of the gross negligence of the infant defendant, Donnie Green Midkiff, in the operation of the automobile then and there in his charge and as a direct and proximate result of the negligence of Wallace C. King in the operation of the automobile then and there in his charge, the infant plaintiff was caused to suffer severe injuries so that he was caused to have expended in his behalf for doctors, hospitals, and nurses and other care in order to cure himself of said injuries and was caused to be made sick, sore, and lame and to lose his earning capacity and to be permanently maimed, disabled, and disfigured all to his damage in the sum of FIFTY THOUSAND ($50,000.00D DOLLARS.

WHEREFORE, the plaintiff doth move the Court for judgment against the infant defendant, Donnie Green Midkiff, and adult defendant, Wallace C. King, jointly and severally.

And the plaintiff doth move the Court that a discreet and competent attorney practicing at the Bar of this Court be appointed as Guardian *ad litem* to defend the interest of the infant defendant about this cause of action.

This the 20th day of August, 1958.

JR. JEFFERSON MIDKIFF,
an infant, who sues by his uncle
and next friend, T. G. Jones.
By BROADDUS EPPERLY &
BROADDUS
Counsel.

Filed in the Clerk's Office the 20th day of August, 1958.

Teste:

W. E. SPENCER, Clerk.

• • • • •

page 3 } PROOF OF SERVICE.

Virginia:

In the Circuit Court of the County of Floyd:

LAW NO. .....

For: Donnie Green Midkiff,
Rt. 1, Floyd, Va.

Jr. Jefferson Midkiff, an infant
who sues, etc.

*v.*

Donnie Green Midkiff and W. C. King.

Returns shall be made hereon, showing service of Notice issued August 21, 1958, with copy of Motion for Judgment ..... filed August 20, 1958, attached:

• • • • •

Executed on the 21st day of August, 1958, in the County of Floyd, Virginia, by calling at the usual place of abode, Home, of Donnie Green Midriff and not finding him there, or any other person upon whom service could be made, I left a true copy of the above mentioned papers attached to each other, posted at the front door of his usual place of abode.

P. D. WILLIAMS
Sheriff, County of Floyd, Va.
By D. K. WALTERS, Deputy Sheriff.

Returned and filed the 21st day of August, 1958.

W. E. SPENCER, Clerk.

page 4 } PROOF OF SERVICE.

Virginia:

In the Circuit Court of the County of Floyd:

LAW NO. ....

For: W. C. King,
Floyd, Va.

Jr. Jefferson Midkiff, an infant who sues, etc.

*v.*

Donnie Green Midkiff and W. C. King.

Returns shall be made hereon, showing service of Notice issued August 21, 1958, with copy of Motion for Judgment ..... filed August 20, 1958, attached:

Executed on the 21st day of August, 1958, in the County of Floyd, Virginia, by delivering a true copy of the above mentioned papers attached to each other, to W. C. King in person.

O. D. WILLIAMS
Sheriff, County of Floyd, Va.
By D. K. WALTER, Deputy Sheriff.

Returned and filed the 21st day of August, 1958.

W. E. SPENCER, Clerk.

page 5 }

* * * * *

GROUNDS OF DEFENSE.

Comes now the defendant Wallace C. King, by his attorneys, and for his grounds of defense says that:

(1) The defendant Wallace C. King admits that at the time and place alleged in the motion for judgment he was driving a 1958 Ford automobile in a westerly direction along U. S. Route #221.

(2) The defendant Wallace C. King denies that at the time and place alleged in the motion for judgment he was operating his autmobile in a negligent, reckless or careless manner.

(3) The defendant Wallace C. King denies that he was guilty of any negligence which was the proximate cause of the accident complained of in the motion for judgment.

(4) The defendant Wallace C. King denies that he violated any duty owed to the plaintiff.

(5) The defendant Wallace C. King admits that at the time and place alleged in the motion for judgment the defendant Donnie Green Midkiff was operating the vehicle then and there in his charge in a grossly negligent manner, and the defendant Wallace C. King alleges that the grossly negligent manner in which the defendant Donnie Green Midkiff operated the automobile in his charge was the sole proximate cause of the accident complained of in the motion for judgment.

page 6 }

(6) While the defendant Wallace C. King denies

that he is legally responsible to the plaintiff in any way, he is not informed as to the nature and extent of the injuries which the plaintiff allegedly suffered and calls for strict proof of such injuries.

(7) All allegations not admitted herein are expressly denied.

Respectfully,

WALLACE C. KING
By Counsel.

WOODS, ROGERS, MUSE &
WALKER
301-319 Boxley Building
Roanoke, Virginia
Attorneys for Defendant Wallace C. King

Filed in the Clerk's Office August 28, 1958.

W. E. SPENCER, Clerk.

* * * * *

September 8, 1958.

Mr. W. E. Spencer, Clerk
Circuit Court of Floyd County
Floyd, Virginia

*Re*: Midkiff *v.* Midkiff and King

Dear Mr. Spencer:

Enclosed herewith is Responsive Pleading which we are asking you to file for us in the above styled case.

Since we do not know who the attorneys are for Mr. Wallace C. King, we are enclosing a copy of the Responsive Pleading and are requesting you to send this copy on to the counsel of record for Wallace C. King.

Thanking you, we are

Very truly yours,

D. P. & T.
DALTON, POFF & TURK

JCT:bb

Enclosures

page 7 }

* * * * *

RESPONSIVE PLEADINGS AND ANSWER OF DEFENDANT, DONNIE GREEN MIDKIFF.

To: The Honorable W. S. Jordon, Judge of said Court:

MOTION TO DISMISS.

Comes now the defendant, Donnie Green Midkiff, and respectfully moves the Court to dismiss as to him the motion for judgment heretofore filed against him and Wallace C. King in the Circuit Court of Floyd County, for the following reasons:

(1) The plaintiff and this defendant are brothers and are the unemancipated minor children of Mr. and Mrs. Midkiff, and reside in the home of their parents at Route 4, Floyd, Virginia, and for this reason, this action cannot be maintained by the plaintiff against the defendant.

(2) The plaintiff has by this motion for judgment attempted to join his action in tort for alleged personal injuries with the cause of action belonging to his parents or guardian to recover for the alleged expenses for curing or attempting to cure the infant plaintiff from the result of his alleged personal injuries; that these two causes of action are separate and belong to different parties and cannot be maintained as one by the infant plaintiff.

page 8 } MOTION FOR BILL OF PARTICULARS.

The Defendant, Donnie Green Midkiff, respectfully moves the Court to require the plaintiff to file a bill of particulars as to the alleged acts of negligence of the defendant, Donnie Green Midkiff and also moves the Court to require the plaintiff to file a bill of particulars as to the nature and extent of plaintiff's alleged injuries.

ANSWER AND GROUNDS OF DEFENSE.

Not waiving the foregoing motions, but insisting thereon,

this defendant for answer to the motion for judgment filed against him, et al., in the above styled action, answers and says:

(1) He admits as true the allegation in numbered paragraph 1 of said motion for judgment.

(2) He admits as true the allegation that plaintiff is an infant 12 years of age, and was riding as a guest passenger in the automobile operated by this defendant, but it is denied that the plaintiff had no voice or control in the operation of the vehicle.

(3) He admits as true the allegations contained in numbered paragraph 3 of said motion for judgment.

(4) He denies that he operated his vehicle recklessly or carelessly at the time and place alleged in said motion for judgment, but on the contrary, this defendant says that he was operating his automobile in a careful, prudent and non-negligent manner in conformity with the laws of the State of Virginia.

(5) He denies that he failed in any duty which he owed to plaintiff at the time and place of the accident in question and denies that plaintiff is entitled to recover anything whatsoever from him in this action.

(6) This defendant says that the sole proximate cause of the accident in question was the negligence of the defendant, Wallace C. King.

(7) This defendant says that even if he were guilty of some act or acts of negligence which he hereby expressly denies, then such act or acts of negligence would amount to only simple negligence and not gross negligence.

page 9 } (8) This defendant says that even if he were guilty of some act or acts of negligence, which he hereby expressly denies, then the defendant is guilty of contributory negligence and assumption of the risk, which would bar his recovery in this action.

(9) This defendant is not advised as to the nature and extent of plaintiff's alleged injuries and special damages and calls for strict proof thereof.

(10) This defendant denies each and every allegation in said motion for judgment which shows or in any way tends to show that he was guilty of any act or acts of negligence which was the proximate cause or in any way contributed to cause the accident in question.

And now having fully answered, this defendant asks to be hence dismissed with his costs.

Respectfully,

DONNIE GREEN MIDKIFF
By JAMES C. TURK
Of Counsel.

Filed in the Clerk's Office Sept. 9, 1958.

W. E. SPENCER, Clerk.

* * * * *

page 10 }

* * * * *

ORDER.

This day came the Plaintiff in person and by counsel and by next friend and filed his Motion for Judgment, to which the Defendant Donnie Green Midkiff, an infant, filed his Responsive Pleading, in which was contained a motion to dismiss based upon the fact that the Plaintiff and the Defendant Donnie Green Midkiff are brothers and are the unemancipated minor children of the same parents and reside in the home of their parents, and that motion was argued by counsel.

Whereupon, it appearing to the Court that the Defendant Donnie Green Midkiff is an infant of the age of seventeen years and resides in the home of his parents and is subject to their discipline and to their control, and it further appearing to the Court that the said Plaintiff is an infant brother of the defendant Donnie Green Midkiff and resides in the same household and it being conceded by all parties that neither of the said infants is emancipated under the statutes and laws of Virginia in such cases provided, although the automobile which the infant Defendant was driving at the time of the accident in question, as described in the Motion for Judgment and Responsive Pleadings, was in the name of and belonged to Donnie Green Midkiff, the infant Defendant, the Court is of opinion that the infant Plaintiff, Jr. Jefferson Midkiff, cannot maintain an action against his unemancipated minor brother for the alleged wrongs and injuries received on account of the alleged gross negligence of the infant De-

fendant, it is therefore ADJUDGED and ORDERED that the Motion for Judgment as against the infant
page 11 } Defendant, Donnie Green Midkiff, be, and the same is hereby dismissed and final judgment for the Defendant Donnie Green Midkiff is hereby granted, to which action of the Court the Plaintiff by Counsel excepts.

It further appearing to the Court that the cause of action against Wallace C. King will still remain upon the docket of this Court, and that the Plaintiff has announced his intention of appealing the decision of this Court as regards the dismissal of the infant Defendant, Donnie Green Midkiff, and all parties having agreed thereto, it is ADJUDGED and ORDERED that the action at law against the said Wallace C. King, the co-defendant herein, be, and the same is hereby continued upon the docket pending final action by the Supreme Court of Appeals upon the application for a writ of error by said infant plaintiff.

Enter: This 14 day of Mar., 1959.

W. S. JORDAN, Judge.

We have seen the foregoing order.

VIRGIL H. GOODE
JOHN D. EPPERLY for
Broaddus, Epperly & Broaddus,
Attorneys for the infant Plaintiff.

DALTON, POFF & TURK
By JAMES C. TURK
DALTON, POFF & TURK,
Attorneys for the infant
Defendant.

WOODS, ROGERS, MUSE & WALKER,
Attorneys for Wallace C. King.

JAMES C. TURK
Guardian *ad litem* for Donnie
Green Midkiff.

page 12 }

* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To: Donnie Green Midkiff, an infant, and Wallace C. King.

The undersigned, Jr. Jefferson Midkiff, an infant, who sues by T. G. Jones, his next friend, Plaintiff herein, hereby ap-

peals to the Supreme Court of Appeals of Virginia from a Final Order dismissing the Motion for Judgment as to the Defendant, Donnie Green Midkiff, an infant, entered in this cause on the 14th day of March, 1959, and doth hereby give notice that he intends to apply to the Supreme Court of Appeals for a writ of error for errors committed by the Trial Court in this cause as follows, to-wit:

The Court erred in sustaining a Motion to Dismiss the Motion for Judgment as to Donnie Green Midkiff, an infant, on the ground that the infant Plaintiff and the infant Defendant are brothers and are unemancipated minor children of the same parents and reside in the same household.

This 1st day of April, 1959.

JR. JEFFERSON MIDKIFF,
an infant, who sues by his next friend, T. G. Jones,
By BROADDUS EPPERLY & BROADDUS
Counsel.

Filed in Clerks Office Apr., 2, 1959.

W. E. SPENCER, Clerk.

* * * * *

page 15 }

* * * * *

CERTIFICATE.

I, W. E. Spencer, Clerk of the Circuit Court of the County of Floyd, Virginia, do certify that the appeal bond required of the Plaintiff, pursuant to his Notice of Appeal filed in this office on April 2, 1959, has been duly given, and a copy of said bond is attached hereto.

Given under my hand, this 22nd day of April, 1959.

W. E. SPENCER, Clerk
of Circuit Court of Floyd County, Va.

* * * * *

page 16 }

* * * * *

ORDER.

It appears according to the Motion for Judgment filed in this cause, that one of the defendants, to-wit: DONNIE GREEN MIDKIFF is an infant, under the age of twenty-one years;

IT IS ORDERED that James C. Turk, a discreet and competent attorney at law, practicing at the bar of this Court, be and he hereby is appointed as Guardian *ad Litem* for the said infant defendant, with leave to file such pleadings in his behalf as he may be so advised.

Enter this order, on May 28, 1959.

W. E. SPENCER, Clerk.

* * * * *

ORDER *NUNC PRO TUNC.*

This day came the Plaintiff, Jr. Jefferson Midkiff, and advised the Court that through inadvertence a Guardian *ad Litem* was not appointed by the Clerk of this Court in the above action although a prayer for such appointment was contained in the Motion for Judgment.

And it appearing to the Court that the Defendant, Donnie Green Midkiff, an infant, was represented at the hearing in this matter by James C. Turk, a discreet and competent attorney practicing at the bar of this Court, and that an answer and Motion to Dismiss were filed by the said James C. Turk and that the interests of the said Donnie Green Midkiff having been fully and completely protected, no impairment of his rights will occur hereby; and,

It further appearing to the Court that on the 28th day of May, 1959, the Clerk of the Circuit Court of Floyd County did enter an Order appointing the said James C. Turk Guardian *ad Litem* for the infant Defendant, it is therefore ADJUDGED and ORDERED that the said James C. Turk be treated as having been appointed Guardian *ad Litem* at the time of the hearing of this matter on the Motion to Dismiss and that the Answer and Motion to Dismiss filed on behalf of the infant Defendant, Donnie Green Midkiff, by the said

James C. Turk be treated as an answer of a Guardian *ad Litem* as fully and completely as if the same had been filed herein on the 6th day of September, 1958, that appearing to be the time of filing of the responsive pleadings on
page 17 } behalf of the said Donnie Green Midkiff and it shall not be necessary that further answer be filed on behalf of the said infant Defendant and the proceedings will continue as if the same had been filed and the said James C. Turk shall be treated as having appeared in the capacity of defense attorney representing Donnie Green Midkiff as well as his Guardian *ad Litem.*

Enter this 2 day of June, 1959.

W. S. JORDAN, Judge.

Requested by Broaddus, Epperly and
Broaddus and Virgil H. Goode, p. q.

JOHN D. EPPERLY

Approved:

JAMES C. TURK,
Counsel for Donnie Green Midkiff
and Guardian *ad Litem* for Donnie
Green Midkiff.

A Copy—Teste:

H. G. TURNER, Clerk.

# INDEX TO RECORD


| | Page |
|---|---|
| Writ of Error Awarded | 1 |
| Record | 2 |
| Motion for Judgment | 2 |
| Proof of Service | 3 |
| Proof of Service | 4 |
| Grounds of Defense | 5 |
| Letter from Messrs. Dalton, Poff & Turk to Mr. W. E. Spencer, Clerk | 6 |
| Responsive Pleadings and Answer of Defendant | 7 |
| Judgment—March 14, 1959 | 9 |
| Notice of Appeal and Assignments of Error | 10 |
| Certificate | 11 |
| Order—May 28, 1959 | 12 |
| Order *Nunc Pro Tunc*—June 2, 1959 | 12 |

## RULE 5:12—BRIEFS

**§1. Form and Contents of Appellant's Brief.** The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

**§2. Form and Contents of Appellee's Brief.** The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

**§3. Reply Brief.** The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

**§4. Time of Filing.** As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

**§5. Number of Copies.** Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel 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.

**§7. Effect of Noncompliance.** If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.