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Clerk, Supreme Court of Appeals
Richmond, Va

Record No. 5194

In the Supreme Court of Appeals of Virginia at Richmond

NATIONWIDE MUTUAL INSURANCE COMPANY

v.

JEWEL TEA COMPANY, INCORPORATED

FROM THE CIRCUIT COURT OF WYTHE 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. 5194

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 10th day of June, 1960.

NATIONWIDE MUTUAL INSURANCE COMPANY, Appellant,

against

JEWEL TEA COMPANY, INCORPORATED, Appellee.

From the Circuit Court of Wythe County

Upon the petition of Nationwide Mutual Insurance Company, a corporation, an appeal is awarded it from a decree entered by the Circuit Court of Wythe County on the 26th day of January, 1960, in a certain chancery cause then therein depending wherein Ralph D. Hilten and the said petitioner were plaintiffs and Jewel Tea Company, Incorporated, was defendant; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

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Filed in the Clerk's Office this 27 day of May, 1959.

Teste:

J. E. CROCKETT, Clerk
By EMILY J. WILLIAMS, D. C.

ORIGINAL BILL.

To the Honorable Jack M. Matthews, Judge:

Your Complainants, Ralph D. Hilten and Nationwide Mutual Insurance Company, respectfully show unto the Court the following matters as entitling them to equitable relief:

(1) Complainant, Nationwide Mutual Insurance Company, is engaged in the business of selling automobile indemnity insurance. In the course of its business it issued to Ralph D. Hilten of Rural Retreat, Virginia, a policy of automobile indemnity insurance on a 1953 Chevrolet automobile.

(2) On or about the 17th day of December, 1956, while the said Chevrolet automobile was being operated by Randolph Hilten, son of the said Ralph D. Hilten, it was involved in a collision in Wythe County, Virginia, with a 1957 Ford automobile owned and operated by Dr. F. F. Buck of Rural Retreat, and in which one James C. Lyons was riding. The accident happened on Route 680, known as the Black Lick Road, in Wythe County, about in front of the home of W. T. Musser.

(3) In this accident the automobile of Dr. F. F. Buck was damaged and the said Lyons received personal injuries. The damage to the Buck automobile and the injuries received by the said Lyons were caused by the concurring negligence of Jewel Tea Company through its driver and agent, and the said Randolph Hilten. The facts of the accident were as follows: Highway No. 680 runs in a generally north and south direction and just north of the point of the

page 4 } accident there is a sharp curve to the west. The W. T. Musser home is on the west side of the road

and there is a high bank in his front yard and a stone wall at the base of the bank, which obstruct the vision of motorists rounding this curve. The Jewel Tea Company truck, a panel delivery truck, was parked on the west side of the road, partly on the hard surface and partly off, as above stated, just south of the point of the curve. The Hilten car was proceeding in a southerly direction and when it rounded the curve just north of the Musser home the Buck car was proceeding in a northerly direction entering the curve from the south. Randolph Hilten cut his car to the left to go around the Jewel Tea truck and about that time the Buck car proceeding in the north bound lane came around the Jewel Tea truck and the Buck car and the Hilten car collided.

(4) Complainants aver that the driver of the Jewel Tea truck was acting as agent and servant of the said Jewel Tea Company at the time of the accident and was working in and about the business and affairs of the said Company; that the said driver was negligent in parking or stopping the said Jewel Tea Company delivery truck in such a manner as to impede or render dangerous the use of the highway by others, including the said Dr. F. F. Buck and James C. Lyons, and that the said Randolph Hilten was negligent in operating the said Chevrolet automobile without having the same under proper control and without keeping a proper lookout, and that the negligence of both proximately caused the collision. At the time of the accident the said Randolph Hilten was on his own business and affairs and was not acting as agent of the said Ralph D. Hilten.

(5) In order to avoid the expense of litigation and in view of the liability of the said Jewel Tea Company and the said Randolph Hilten (who was covered for liability insurance under the policy of the said Ralph D. Hilten under the omnibus coverage clause) to the said Dr. F. F. page 5 } Buck and James C. Lyons for their property damage and personal injuries, Complainant, Nationwide Mutual Insurance Company, entered into negotiations promptly with the said Dr. F. F. Buck and the said Lyons for the settlement of their claims and as a result of said negotiations, was able to effect settlements with both of them by the payment of $1,655.74 to the said Buck for his property damage and $900.00 to the said Lyons for his personal injuries. Complainants aver that these settlements were reasonable and that by reason of the same, considerable expense and probable verdicts for amounts in excess of the settlements were saved to the said Jewel Tea Company and to Complainant, Nationwide Mutual Insurance Company. The

said Nationwide Mutual Insurance Company undertook to obtain contribution from the said Jewel Tea Company of one-half of said payments, $1,277.87, but the said Jewel Tea Company has refused to pay to said Nationwide Mutual Insurance Company one-half of said settlements or any part of said settlements. The payments of $1,655.74 to the said Buck and $900.00 to the said Lyons were made in settlement of their claims on January 21, 1957, by said Nationwide Mutual.

(6) Complainants aver further to the Court that the negligence of the Jewel Tea Company in this collision, through its driver, has been judicially determined in an action of Ralph D. Hilten against the said Jewel Tea Company for the damages to the said Chevrolet automobile of the said Ralph D. Hilten in this collision. In this action the issue was whether or not the Jewel Tea Company driver was negligent and whether his negligence was a proximate cause of the collision. The jury returned a verdict in favor of Ralph D. Hilten against the said Jewel Tea Company, thus establishing that the negligence of the Jewel Tea Company's driver was a proximate cause of the collision. The said Jewel Tea Company applied for a writ of error from this judgment to the Supreme Court of Appeals of Virginia and said writ was refused. Thus there has been a final judicial determination that the Jewel Tea Company through its agent was negligent and that said negligence was a proximate cause
page 6 } of this collision.

(7) Complainant, Nationwide Mutual Insurance Company, avers to the Court that it is entitled to be subrogated to the right of Ralph D. Hilten to contribution because of the settlements made by it on behalf of the said Ralph D. Hilten under its policy of indemnity insurance issued to him.

(8) Complainant, Nationwide Mutual Insurance Company, avers that the amounts paid by it in settlement of the claims of the said Buck and said Lyons should be borne one-half by the said Jewel Tea Company. Although Complainant, Nationwide Mutual Insurance Company, believes that the negligence of the said Jewel Tea Company's driver in parking his truck partly on the hard surface on this sharp curve was a primary cause of the collision, nevertheless, it was of opinion that there was evidence of negligence on the part of Randolph Hilten, the driver of the automobile of Ralph D. Hilten, and that it was important that the claims of the said Buck and the said Lyons be settled promptly and, therefore, entered into negotiations for the settlement of these claims, as aforesaid.

(9) Complainants aver to the Court that they are entitled to contribution from said Jewel Tea Company as the torts for which the settlements were made were mere acts of negligence and involved no moral turpitude.

In consideration of the premises and forasmuch as your Complainants are remediless, save alone in a court of equity where such matters are properly cognizable, they pray that Jewel Tea Company, Incorporated may be made a party respondent to this suit and required to answer the same but answer under oath is waived; that the said Jewel Tea Company be required to pay, by way of contribution, to Complainants the sum of One Thousand Two Hundred Seventy-seven Dollars and Eighty-seven Cents ($1,277.87) on account of the aforementioned settlements made with the said Dr. F. F. Buck and James C. Lyons by reason of the property damage and personal injuries received by them in the collipage 7 } sion resulting from the negligence of the said Jewel Tea Company and the said Randolph Hilten, together with costs. And Complainants pray that they be granted all such other, further and general relief as the nature of their case shall require or to equity shall seem meet. And Complainants will ever pray, etc.

Respectfully,

RALPH D. HILTEN AND
NATIONWIDE MUTUAL INSURANCE COMPANY
By Counsel.

G. P. YOUNG
CAMPBELL & CAMPBELL , p. q.

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Filed in the office of the Clerk of the Circuit Court of Wythe County, Virginia this 22 day of June 1959 at 12:15 P. M.

Teste:

J. E. CROCKETT, Clerk
By EMILY J. WILLIAMS, Dep. Clk.

DEMURRER.

To the Honorable Jack M. Matthews, Judge of the said Court:

Comes now the Defendant, Jewel Tea Company, Incorporated, by Counsel, and says, that the bill in this cause is insufficient in law and should be dismissed for the following reasons:

1. There is no *idenity* of interest in this cause and the former case of Ralph D. Hilton against Jewel Tea Company, Inc.

2. There is no privity of parties in this cause and in the former case of Ralph D. Hilton against this Defendant.

3. Ralph D. Hilton was a bailor and his son, Randolph Hilton, was a bailee; and because the said Randolph Hilton was not the agent of the said Ralph D. Hilton, the latter was permitted to prosecute an action at law against this Defendant without making his son and, or, Dr. F. F. Buck joint and several Defendants as joint tort-feasors; and under the rules of Court this Defendant was not permitted to require joinder of the said Randolph Hilton and the said F. F. Buck as Defendants and joint tort-feasors.

4. As bailor, and being free from any negligence, the said Ralph D. Hilton was not liable to F. F. Buck and James C. Lyons for damages at all. They had no right of action against Ralph D. Hilton. Their only right of action was against Randolph Hilton and the Jewel Tea Company, Inc.

page 10 } So, any payment made to them by Ralph D. Hilton was purely voluntary and cannot support a claim based on either subrogation or contribution: although the Insurance Company may have been liable to F. F. Buck and James C. Lyons, by reason of carrying the insurance on the said Ralph D. Hilton's car.

5. If, therefore, the Insurance Company voluntarily paid F. F. Buck $1,655.74 for property damage, and James C. Lyons, $900.00 for personal injuries, occasioned by the negligence of Randolph Hilton and, or, Jewel Tea Company and, or, Dr. F. F. Buck, himself, the Insurance Company voluntarily did so without having the negligence of the said Buck or the said Randolph Hilton adjudicated, and is therefore, not entitled to contribution. If subrogated, the Insurance Company was subrogated to the rights of Ralph D. Hilton, whose only right of action has been satisfied. If the Insurance Company was subrogated to the rights of Randolph Hilton, then it cannot recover because Randolph Hilton had

no rights: His negligence is admitted. The only right of contribution existing in this case is that of the Jewel Tea Company, Inc., against Randolph Hilton and, or, F. F. Buck.

6. Furthermore, the statute expressly restricts contribution to a wrongdoer. It has been adjudicated that Ralph D. Hilton was not a wrongdoer; and he cannot now claim to be one in order to obtain the benefit of contribution.

7. The required *idenity* of parties is absent from this cause; the required privity of parties and mutuality of subject matter are likewise absent.

8. If the Insurance Company is subrogated to the rights of F. F. Buck, then the liability of the Defendant, as well as the amount of damages, is the right to which the Insurance Company has been subrogated, and this right has not been adjudicated. And if the Insurance Company has been subrogated to the rights of James C. Lyons, the liability of this Defendant, the amount of damages, as well as the liability of F. F. Buck and Randolph Hilton have not been adjudicated; because the verdict in the case of *Ralph D. Hilton* v. *Jewel Tea Company, Inc.* adjudicated nothing except the

page 11 } concurring negligence of this Defendant and Randolph Hilton only. And the former judgment is not even admissible in evidence in an action at law to determine the negligence of F. F. Buck and Randolph Hilton, and this Defendant, with respect to the claims of Buck and Lyons, and should be stricken out of the bill.

For the foregoing reasons, Defendant, by Counsel, moves the Court to dismiss Complainants' bill.

Respectfully,

JEWEL TEA COMPANY,
INCORPORATED
By THOS. F. WALKER
Counsel.

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Filed in the office of the Clerk of the Circuit Court of Wythe County, Virginia this 22 day of June 1959 at 12:20 P. M.

Teste:

J. E. CROCKETT, Clerk
By EMILY J. WILLIAMS, Dep. Clk.

RESPONSIVE PLEADINGS.

To the Honorable Jack M. Matthews, Judge of the said Court:

Respondent, JEWEL TEA COMPANY, INCORPORATED, for responsive pleadings, says:

1. The motion filed in this cause by the Complainants is insufficient in law, and moves the Court to strike it out and dismiss the bill, and assigns the following grounds for this motion and its answer:

2. Code Section 8-627 provides for contribution among wrongdoers when the wrong involves no moral turpitude.

3. Ralph D. Hilton is not a proper party to this suit. He was not a wrongdoer. As bailor, he sued the Defendant in an action at law and recovered a verdict against Defendant, denying that the bailee, his son, Randolph Hilton, was his agent, admitting the negligence of Randolph Hilton and alleging negligence on the part of the driver of Defendant's truck. Ralph D. Hilton therefore does not come within either the letter or the spirit of statutory contribution; and his appearance as a Complainant in this cause is prejudicial to the rights of the Defendant.

4. If, however, Ralph D. Hilton is either a necessary or proper party to this suit, then, the Complainants are estopped and barred from prosecuting this suit against the Respondent for failure to join the alleged claims, or splitting the alleged claims, in the action at law brought by the Nationwide Mutual Insurance Company, in the name of
page 13 } Ralph D. Hilton, and as subrogee of the said Ralph D. Hilton, and because the claim of the said James C. Lyons is now barred by the statute of limitations, and because the claims of Ralph D. Hilton, himself, and Dr. F. F. Buck are both property damage claims, standing on the same basis with reference to the liability of the Insurance Company and could not have been split without releasing and abandoning the claim for damages to the Buck car.

5. Neither Dr. Buck nor James C. Lyons had any claim against Ralph D. Hilton as a joint tort-feasor or a wrongdoer. It therefore follows that neither the insured nor the insurer had any right to settle with either Buck or Lyons under Section 8-627 of the Code, and expect to establish a right of contribution against Defendant. Buck and Lyons should have brought suit against Randolph Hilton and the Jewel Tea Company, Inc. If Randolph Hilton was not the agent of Ralph D. Hilton, then Ralph D. Hilton owed Buck

and Lyons nothing, regardless of the fact that Ralph D. Hilton's car was insured by complainant Insurance Company; and the settlement made was purely voluntary and carried with it no right of subrogation or contribution.

The law does not permit Ralph D. Hilton to plead innocence in one case and guilt in another; innocence for the sake of subrogation, and guilt for the sake of contribution.

6. Respondent is not advised as to the reasonableness of the settlements made voluntarily by complainant Insurance Company with F. F. Buck and James C. Lyons and was entitled to notice of such proposed settlements if said insurance company intended to ask contribution; and avers that the negligence, if any, of the Jewel Tea Company was purely technical and remote and negligible when compared to the reckless driving of Randolph Hilton and that even in event of contribution, it should be required to pay only a negligible part of the settlement.

7. The releases signed by F. F. Buck and James C. Lyons released all wrongdoers, and Respondent expressly
page 14 } requests that these original releases be produced for inspection by Respondent.

8. Respondent denies that the facts and questions of negligence involved in this suit are *RES ADJUDICATA;* because the parties are different and the questions of negligence, gross negligence, and contributory negligence of the said F. F. Buck and the said James C. Lyons are involved in this suit, were not involved in the former action at law and have not been adjudicated; and for the same reason, a Court of Equity has no jurisdiction because both Buck and Lyons should proceed in actions at law against all of the Defendants, or one of the Defendants, or any intermediate number of Defendants, they, individually, might choose to sue.

Ralph D. Hilton was not the indemnitor of Randolph Hilton; neither Buck nor Lyons had any right of action against Ralph D. Hilton; and anyone subrogated to the rights of Ralph D. Hilton were therefore subrogated to nothing, and there can be no right of contribution in favor of his insurance carrier.

9. Respondent avers that the statute of limitations as to Dr. Buck's claim for property damage was five (5) years from the date of the accident and that Mr. James C. Lyons' claim for personal injury was one (1) year from the date of the accident; and that any claim made by Lyons against either Ralph D. Hilton, Randolph Hilton, or Dr. Buck, or this Respondent is barred by the statute of limitations for failure to prosecute the same as required by law; and that both the claim of Dr. Buck and Mr. Lyons is barred by law as to the

claimant Insurance Company which had no legal right to split the claims.

10. The physical facts as set out in paragraphs 2, 3 and 4 of Complainants' bill are in most instances substantially correct, but Respondent denies that it was guilty of any negligence contributing to the collision; that Randolph Hilton's negligence was the sole cause of the accident, except for the contributory negligence of Dr. F. F. Buck, who saw the Jewel Tea truck, should have anticipated meeting a

page 15 } Southbound car, and was clearly guilty of negligence in failing to use ordinary care to avoid the collision with the Hilton car, the driver of which was obviously guilty of reckless driving, which involved moral turpitude.

11. Respondent avers that the settlements made with Buck and Lyons were voluntary, an acknowledgment of liability, and that they were made unreasonably and without notice or opportunity to Respondent to consider its rights and liabilities in the matter, and that no right of contribution against Respondent by Complainants can possibly exist inasmuch as the insured was not a joint tort-feasor, as required by law for contribution, but was a mere bailor to whom the driver of his car was also liable in damages.

For the foregoing reasons, Respondent moves the Court to strike out and dismiss Complainants' bill; and if this is not done, to strike out and dismiss Ralph D. Hilton as a party to this suit, transfer it to the law side of the Court, and empanel a jury to adjudicate the questions of negligence involving Dr. Buck and Mr. Lyons, who should be made parties to this suit; and accordingly moves the Court to require the said F. F. Buck and James C. Lyons to be made parties to this cause if the same be not dismissed.

Respectfully,

JEWEL TEA COMPANY,
INCORPORATED
By THOS. F. WALKER
Counsel.

* * * * *

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* * * * *

In the Circuit Court for Wythe County, this January 26, 1960.

DECREE.

This cause came on this day to be heard on the Complainant's bill and the Defendants' demurrer and motion to strike and dismiss and was argued by Counsel.

ON CONSIDERATION WHEREOF, it appears to the Court that the demurrer and motion are well taken.

The Court doth therefore ADJUDGE, ORDER and DECREE:

THAT, the said demurrer and motion be, and hereby are, sustained; and that the Complainant's bill me, and hereby is, dismissed, with leave to file an amended bill, if it be so advised; and,

WHEREUPON, Complainant moved the Court for leave to amend the original bill by omitting Ralph D. Hilton as a party complainant, but in all other respects to remain the same, which leave is granted; and,

THEREUPON, the Defendant demurred and moved the Court to strike and dismiss the amended bill, which demurrer and motion are sustained by the Court; and,

It is ADJUDGED, ORDERED, and DECREED:

THAT, the said amended bill be, and hereby is, dismissed.

JACK M. MATTHEWS, Judge.

I ask for this:

THOS. F. WALKER
Attorney for Defendant.

Seen and objected to:

G. P. YOUNG
Attorney for Complainant.

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* * * * *

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

To J. E. Crockett, Clerk of the Circuit Court of Wythe County:

The undersigned, Counsel for Nationwide Mutual Insurance Company in the above-styled cause in the Circuit Court of Wythe County, hereby gives notice of appeal from the decree entered in this cause on January 26, 1960, and sets forth the following assignment of error:

(1) That the Court erred in sustaining Respondent's demurrer and motion to strike the original bill and amended bill and in dismissing this suit.

G. P. YOUNG
Counsel for Nationwide Mutual Insurance Company.

Filed in the office of the Clerk of the Circuit Court of Wythe County, Virginia this 10 day of Feb. 1960.

Teste:

J. E. CROCKETT, Clerk
By EMILY J. WILLIAMS,
Dep. Clerk.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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