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Clerk, Supreme Court of Appeals
Richmond, Va.

# Record No. 5252

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

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## FLORENCE SMITH

v.

## COMBINED INSURANCE COMPANY OF AMERICA

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FROM THE CIRCUIT COURT OF FRANKLIN COUNTY

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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

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## Record No. 5252

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VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 12th day of October, 1960.

FLORENCE SMITH, Plaintiff in Error,

*against*

COMBINED INSURANCE COMPANY OF AMERICA, Defendant in Error.

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From the Circuit Court of Franklin County

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Upon the petition of Florence Smith a writ of error is awarded her to a judgment rendered by the Circuit Court of Franklin County on the 28th day of March, 1960, in a certain action at law then therein depending wherein the said petitioner was plaintiff and Combined Insurance Company of America was defendant; upon the petitioner, or some one for her, 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

* * * * *

page 7 } INSTRUCTION 1.

The Court instructs the jury that an accident, as used in the policy of insurance in question, is defined as an event that takes place without one's foresight or expectation, an event that proceeds from an unknown cause, or is an unusual effect of a known cause, and, therefore, not expected.

Granted.

L. J.

page 8 } INSTRUCTION 2.

The Court instructs the jury that the fact that Earl B. Smith was a fugitive from justice at the time he met his death is not in itself material in determining whether or not he died accidentally.

Granted.

L. J.

page 9 } INSTRUCTION 3.

The Court instructs the jury that if it appears to the satisfaction of the Jury by clear and convincing evidence that the deceased, Earl Smith, voluntarily and wilfully placed himself in such a position as to have reasonably anticipated that he was in danger of death or great bodily injury as a probable consequence of his action, and that as a direct result thereof the barn was burned and his death ensued in the burning of the barn, then you shall find your verdict for the defendant, the Insurance Company.

Granted.

L. J.

page 10 } INSTRUCTION 4.

The Court instructs the jury that even though you may believe from the evidence in this case that the deceased, Earl Smith, voluntarily and wilfully placed himself in a dangerous position, before you can find a verdict for the defendant, it is further necessary that you believe from the evidence that he

reasonably anticipated that he was in danger of death or great bodily harm as a probable consequence of his act, and if you believe that the burning of the barn resulting in the death of the decedent, Smith, could not be reasonably anticipated as a probable consequence of his act, then you should find your verdict for the plaintiff, Florence Smith, in the amount of $1,200.00.

Granted.

L. J.

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STATEMENT OF FACTS AND OPINION.

Filed 27 day of Feb. 1960.

Teste:

EDWIN GREER, Clerk.

page 43 }

* * * * *

This is on a motion to set aside a jury verdict of Twelve Hundred ($1,200.00) Dollars awarded the plaintiff, Florence R. Smith, in an action brought on an accident policy of insurance issued by The Combined Insurance Company of America (hereafter called Company) to one Earl Smith, now deceased. In order to arrive at a proper understanding it is necessary to give a brief summary of the pertinent facts of the case since the same was not taken by a court reporter.

Florence Smith, age 25, and mother of two chidren, age 7 and 8, was married to the deceased insured in 1950. On *Setpember* 25, 1956 Florence Smith at her own expense applied for and was issued by the Company an accident policy of insurance which is filed as "Exhibit No. 1," with Florence Smith as beneficiary in event of death. The policy has been kept in force and was in force when on July 25, 1959 the insured, Earl Smith, was found dead following the burning of a barn on the farm of Lewis Smith.

The policy provides for indemnity for loss of life, limb, sight or time resulting from accidental bodily injuries as

therein limited and provided. The pertinent parts of the policy provides as follows:

page 44 } "In consideration of the payment * * * and subject to the provisions, definitions, statements and limitations contained herein, the Company does hereby insure the owner of this policy * * *, against loss resulting directly and independently of all other causes from accidental bodily injuries received while this policy is in force and which loss or injuries are in no way caused or contributed to by disease, (hereafter referred to as 'such injuries.')"

Then follows specific Accident Indemnity and is divided in sections. The section under which this claim is filed is Section B, and provides as follows, so far as it is applicable to this proceeding.

"*Section B—Loss of Life, Sight and Limbs Indemnity—Any Accident.*"

"If 'such injuries' shall be sustained by the insured and shall be effected by any accident: * * * (sets out specific types of accidents) * * * while within any burning building in which the Insured is burned by fire or suffocated by smoke" or * * *

The facts as to the death are as follows: On July 25, 1959 Earl B. Smith was a fugitive from justice, wanted on two warrants issued against him for murder in the City of Martinsville. On the same day his wife, Florence R. Smith, had been to the Sheriff of Franklin County asking for protection from her husband and even to the extent of letting her stay in jail. The enforcement officers had information as to his whereabouts and with a search warrant several officers about 3:30 p. m. went to the farm of Lewis Smith, grandfather of Earl B. Smith, in hopes of finding him and making the arrest. After searching the residence and several out buildings they were in the act of searching a large cattle barn, 60 by 40 feet and 25 to 30 feet high. Two page 45 } state troopers had entered the barn and Deputy Sheriff John Davis and State Trooper Martin were at a door in the act of entering when a shot was fired from the loft of the barn hitting Trooper Martin in the chest seriously, almost fatally wounding him. In 10 or 15 seconds thereafter a second shot was heard from the loft and according to Deputy John Davis movement was heard from the

loft. The officers immediately gave attention to Trooper Martin, but still keeping the barn under observation.

Calls were made for additional help and a number of officers arrived, together with armored cars sent from Wytheville and Appomattox. Later in the afternoon a public address system was set up. Over it Earl Smith was urged to come out and give up. His father called saying, "Earl, this is your daddy. For God sake come out. This is driving your mother crazy."

Earl Smith did not come out and while the barn was surrounded, no shots were fired by any officers and the only shots heard were the two previously mentioned.

State Trooper Riddle, who was with the first group of officers at the Smith farm and who was an expert in use of tear gas, both from army training and as a State Police, first fired three tear gas bombs in the barn about 15 minutes after the shots from the barn were fired and then later after 7:40, after Smith had been called, he shot some 20 or 25 tear gas projectiles or bombs into the barn through doors and windows. On account of the gas and fumes some of the officers had to move back to avoid the same. Sheriff McBride, who was present, describes the fumes or gas as giving the
page 46 } appearance of smoke coming out of the barn. Soon after the tear gas bombs or projectiles were discharged it was found that the barn was on fire, and it was completely burned, nothing being saved.

According to Trooper Riddle, the tear gas projectiles were labeled non-inflammable and were not supposed to set off a fire, however, in his experience he had known fire to be started when they were set off.

During all this time no one saw the insured, Earl Smith, in fact he was never seen. The only evidence of anyone being in the barn was the discharge of the two shots from the barn loft, and some movement from the loft soon thereafter. It was specifically stated that no one intended to set the barn on fire and no shots were fired by the police or others, except the tear gas.

After the fire an unidentifiable body, or a portion of a body, the skull, arms and legs being absent, was found in the debris, also a 22 rifle with one discharged shell in the chamber near by. Dr. F. B. Wolf, a physician and coroner, examined and x-rayed the body and by comparison with other x-rays made by him of Earl B. Smith at the hospital previously for spinal injuries was able to identify it as that of Earl B. Smith. There is no denial that it was his body and that he was in the barn when it burned. In fact it is admitted for this record.

It is contended by the plaintiff that death was caused by accidental body injuries, or that the death was accidental within the terms of the policy of insurance.

page 47 } The defendant filed two grounds of defense. First, suicide and the second was that this was not an accident within the meaning of the policy, that the insured was a fugitive from justice, barricaded against the officers and his death was not accidental.

During the trial and at the completion of the evidence the court ruled that the evidence was not sufficient to support the defense of suicide and gave instructions defining an accident; that the fact the insured was a fugitive from justice did not preclude recovery; and whether or not the insured, Earl Smith, willfully and voluntarily placed himself in such a position as to reasonably have expected to receive serious injury or death as a direct result thereof and whether or not the burning of the barn and his resulting death was a direct result thereof.

Of course the verdict of the jury being for the plaintiff the sole question now is should the verdict be set aside as a matter of law.

Irrespective of all other questions raised in the case and paraphrasing the statement in *Ocean Accident etc. Corp* v. *Glover*, 165 Va. 283, (285), 182 S. E. 221, the determinative question is one of law—whether or not the death of the insured was an accident and fell within the coverage of the policy of insurance.

Notice that the policy insured "against loss resulting directly and independently of all other causes from accidental bodily injuries" and is referred to throughout the policy as "Such Injuries." Under Section B—Loss of Life,

page 48 } etc., it is stated: Such Injuries (meaning accidental bodily injuries) shall be sustained by the Insured and shall be effected in any accident: "* * * while within any burning building in which the Insured is burned by fire or suffocated by smoke." It must also be noted that the policy does not contain any exemption clauses such as for "violation of law," "committing a felony," etc., commonly found in both life and accident policies.

"Accident," "accidental" and "accidental means" are defined and discussed in *Ocean Accident etc. Corp.* v. *Glover* (*supra*) and reference to this case is made without quoting. In the definition of an "accident" it will be noted that reference is made to "an event that takes place without one's foresight or expectation." Numerous definitions can be

obtained by reference to 1 W & P 252 under "accident" and following through other phrases connected with accident. In the cases and definitions considerable discussion is given to distinguishing between "accident" and "accidental means." In some instances this distinction may be proper, but for the purpose of this case the court does not think so and feels that what Justice Cardozo said in his dissenting opinion in *Landres* v. *Phoenix Mutual Life Ins. Co.,* 291 U. S. 491, 78 L. Ed. 934 (938), 54 S. Ct. 461, is appropriate here: "The attempted distinction between accidental results and accidental means will plunge this branch of the law into a 'Serponian Bog.' "

Some of the rules which may guide in this case may be stated as follows:

page 49 } "Whether an injury is 'accidental' is to be determined from the standpoint of the person injured. If the injury comes to him through external force, not of his choice or provocation, then to him the injury is accidental." *Herrell* v. *Hicock,* (1937) (Ohio) 13 N. E. (2d) 358.

"If the insured does something which culpably provokes or induces the act causing the injury or death, then the result is not 'accidental' within double indemnity clause of a life policy, but if he is wholly free from culpability himself, the result is accidental as to him, though it may have been within the deliberate intent of the aggressor." *McCrary* v. *New York Life Ins. Co.,* 84 Fed. (2d) 790, (8th Cir.), (1936).

The court would invite a reading of the discussion in this last mentioned case of *McCrary* v. *New York Life Ins. Co.,* as set out at page 792, and also *Accidental Life Ins. Co.* v. *Halcomb,* (5th Cir.), (1925), 10 Fed. (2d) 125 at page 127, (1, 2), and which case cites the much quoted case of *Taliaferro* v. *Travelers Protective Ass'n.,* 80 F. 368, 25 C. A. A. 494, which holds that where the insured is the aggressor, and knew, or should have anticipated, that the other might kill him in the encounter, the death is not accidental.

This is indicated to be the law in Virginia though it be in connection with a different question, the court said in *Mutual Benefit Health Ass'n.* v. *Ryder,* 166 Va. 446, (450), 185 S. E. 894:

"One who assaults another, or voluntarily enters into an affray and is hurt, has not suffered an accident. But if assaulted he may defend himself. Any injury which he sustained in so doing is accidental." (cases cited)

This is also followed in West Virginia in *Beckley Nat. Ex. Bank* v. *Provident Life & Accident Co.,* (1939), 2 page 50 } S. E. (2d) 256, which holds that when one committing a humiliating and brutal assault upon another is killed, the killing is a natural sequence and not an accident.

In discussing the general rule in *Tabor* v. *Commercial Casualty Ins. Co.,* (W. Va.) 139 S. E. 656 giving consideration to an injury brought on by the insured's misconduct the court said:

"The test seems to be: Did the insured appreciate that by doing the act he was putting his life in hazard." (citing cases).

It may be argued that the officers did not intend to burn the barn or to do the insured any serious bodily harm. This may be so, in fact the officer who discharged the tear gas into the barn so stated, but also stated he had known fire to be caused by the same. However, a review of the facts shows that the deceased was a fugitive from justice, wanted for murder, and while being sought by the officers, seriously wounded one of them. He was armed, barracaded in a barn, defying the law to the extent of deliberately attempting to take the life of anyone who approached. We come back to the test: "Did the insured appreciate, by the act, he was putting his life and limb in hazard." We have to apply the "reasonable" rule, would a reasonable person anticipate injury. The only sensible answer is that he must have, or certainly should have, reasonably anticipated or expected that every effort would be made to secure his arrest and that such effort might result in injury, even fatal injury, certainly if he continued resistance and defied all requests and pleas to surrender. This sad death was brought on by the page 51 } deliberate act of the insured and is a natural sequence of his acts and is not accidental.

In *DeMello* v. *John Hancock Mutual Life,* 281 Mass. 190, 183 N. E. 255, where the insured worked on a boat smuggling liquor in violation of federal law, a coast guard boat approached and gave warnings to stop. This was not heeded, a machine gun was fired at the hull with no intention of killing the insured, but he did receive a mortal wound. The deceased did not have charge of the boat and could not have stopped it. The court held this was no accident, that the insured was shot and killed while violating a federal law and is presumed to have known that the boat containing liquor

might be fired on by the members of the coast guard and he might be killed.

In *Sellers* v. *John Hancock Mutual Life,* (1941 Mo. App.) 149 S. W. (2d) 404, a suit by a beneficiary on double indemnity in policy, the insured and a companion held up a driver of an automobile, kidnapped the occupants but later released them. The enforcement officers a day or so afterwards ran up on the insured and companion, identified themselves, one submitted to arrest and the insured fled, was shot at and killed. The court held this was no accident and held, and set aside a jury verdict, saying:

"So in this case, the ultimate question is, whether the insured, in fleeing arrest, was to be charged with reasonable anticipation that officers would use all reasonable means at their disposal, including their weapons, to prevent his escape, so that in electing to presue such course of conduct, he is to be deemed to have voluntarily and deliberately put his life at stake and to have taken the chance of being mortally wounded."

page 52 } In *Scarbrough* v. *World Insurance Co.,* 94 S. E. 588, 244 N. C. 502, the deceased, Midgett, was insured under an accident policy, the event occurred in Norfolk, while drinking and after a conversation, made an aggravated assault upon one Baldwin, the deceased was pushed and fell off of the porch, striking his head on a water meter on the ground and killed. The court held this was not an accident and said:

"When the policy insures against loss through accidental means, the principal seems generally upheld that if the death of the insured, although in a sense unforeseen and unexpected, results directly from the insured's voluntary act and aggressive misconduct, or when the insured culpably provoked the act which causes the injury and death, it is not death by accidental means, even though the result may be such as to constitute an accident." (citing 45 C. J. S. 779)

There is quite an interesting discussion in 23 A. L. R. (2d) 1105 on "Liability under life or accident policy not containing a violation of law clause, for death or injury resulting from violation of law by insured," and a reading of this annotation and examining some of the cases cited pro and con, clearly shows that under the facts of the case at bar no recovery

should be allowed under the theory of accidental death. A reading of the cases cited and after close observation of the facts of a number, sustains this holding.

The defendant has cited several cases which the court feels are in point, and will not be analyzed but referred to only, namely:

*Piotrowski* v. *Prudential Ins. Co.*, 252 N. Y. S. 313.
*Metropolitan Life Ins. Co.* v. *Roma*, 50 Pac. (2d) 1142.
*Price* v. *Business Men's Assurance Co.*, 67 S. W. (2d) 186.
*Wells* v. *New England Mutual Life*, 43 A. 126.

page 53 } In the annotation in 23 A. L. R. (2d) 1105 et seg. there were numerous instances where there were life insurance policies and did not contain exceptions as to violation of law where recovery was denied when the insured by voluntary culpable acts provoked the acts resulting in death. In the same annotation there are instances in which recovery was allowed but a close reading of the facts as stated before indicates a difference or some distinguishing features. In some instances where there was recovery on the grounds of a vested interest by the beneficiary who could not be responsible for the loss, it will be found that most if not all were life insurance policies. In others where there was an alleged violation of the law, the violation was of such a nature that the insured would not reasonably anticipate that an injury would result, such as drinking wood alcohol in a cocktail, in violation of law; shot when fleeing from a misdemeanor; trespassing on railroad, etc. Of course in such cases the result could not be anticipated.

As to public policy in Virginia, while not exactly in point, a reading of the case of *Security Life Ins. Co.* v. *Dillard*, (1915), 117 Va. 401, 84 S. E. 656, dealing with suicide and the case of *Northwestern Life Ins. Co.* v. *McCue*, 223 U. S. 246, 32 S. Ct. 221, 56 L. Ed. 419, 28 L. R. A. (N. S.) 57, where recovery on life policy was denied when insured was convicted of murder and electrocuted. In view of these cases and the general rule according to a majority of the courts would justify the holding that there was no accident within the policy under the facts in this case.

page 54 } An order may be drawn setting aside the verdict of the jury and entering judgment for the defendant, making reference to this opinion.

2/26/60.

L. JONES.

page 55 }

* * * * *

THIS DAY, came the Defendant, by its attorney, and the Plaintiff, by her attorney, and the Court having maturely considered the Motion of the Defendant to set aside the verdict of the jury on grounds assigned in Writing heretofore returned herein, the above styled action having been tried before the Court and a jury, and the jury having returned its verdict for the plaintiff; the Court is of the opinion, after hearing argument of counsel and considering briefs filed, and doth sustain said motion of the defendant that the verdict of the jury be set aside as being contrary to the law and evidence as is set forth in a statement of facts and opinion filed on February 26, 1960.

It is therefore ADJUDGED and ORDERED that the said verdict of the jury heretofore returned on December 10, 1959, be, and same is, hereby set aside, and by this order judgment is entered for the defendant, and the plaintiff shall receive nothing from the defendant.

And nothing further remaining to be done, the clerk is ordered to strike this action from the docket. The plaintiff excepted upon the ground assigned in his written statement filed this date.

Enter this 28 day of March, 1960.

L. JONES, Judge.

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NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

To the Clerk of the Circuit Court of Franklin County:

Counsel for Florence Smith, the Plaintiff in the above styled case in the Circuit Court of Franklin County, Virginia, hereby gives notice of appeal from the order entered in this case on March 28, 1960, and sets forth the following assignment of error:

(1). That the Court erred in setting aside the verdict of the

Jury on the grounds that the verdict was contrary to the law and the evidence.

DAVID B. WORTHY
Counsel for Florence Smith.

Filed 16 day of May 1960.

Teste:

EDWIN GREER, Clerk.

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STIPULATION.

IT IS HEREBY STIPULATED by and between the parties, by their respective counsel, that the statement of facts in the Trial Court's opinion of February 26th, 1960, may be treated as an agreed narrative statement for the purpose of the record, there having been no reporter at the trial.

The parties respectfully suggest the following corrections:

(1) On Page 2 of the opinion, there should be added to the covering language of the policy the following: "* * * while at home, at work, at play, or in any other activity whatsoever."

(2) On page 2 "Lewis" Smith should be Luther.

(3)) For the phrase "a 22 rifle" there should be substituted "the metal portion of a 30-30 rifle."

(4) It is further stipulated and agreed by and between the parties that Instructions 1, 2, 3, and 4 were prepared by the Court. These Instructions were not objected to or excepted to by either plaintiff or defendant, and were given to the Jury.

(5) It is further stipulated and agreed by and between the parties that the defendant at the conclusion of the plaintiff's evidence made a motion to strike the plaintiff's evidence:

page 60 } 1. On the grounds that the plaintiff's evidence failed to make out a *prima facie* case in that the plaintiff's own testimony showed the death was an act of suicide; and

2. That the death of the insured could not have been an accident within the meaning of the policy in that the insured was a fugitive from justice at the time of his death and had barricaded himself against the officers and for those reasons it would have been against public policy to allow the plaintiff to recover. The Court denied both motions of the defendant, and the defendant noted exceptions. The motions of the defendant were renewed at the conclusion of all the testimony, and again denied, and the defendant noted his exceptions.

It is further stipulated and agreed by and between the parties that the plaintiff at the conclusion of all the testimony moved to strike the defendant's evidence, which motion was denied, and the plaintiff noted his exceptions.

Dated: This 19th day of May, 1960.

FLORENCE SMITH
By Counsel.

COMBINED INSURANCE COMPANY OF AMERICA
By Counsel.

DAVID B. WORTHY
HUTCHERSON AND GREER
Rocky Mount, Virginia
Attorneys for Plaintiff.

WILLARD R. FINNEY
Rocky Mount, Virginia
Attorney for Defendant.

The foregoing stipulation is approved this 25 day of May 1960.

L. JONES, Judge.

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ASSIGNMENTS OF CROSS-ERROR.

To the Clerk of the Circuit Court of Franklin County, Virginia:

Counsel for Combined Insurance Company of America, the Defendant in the above style case in the Circuit Court of Franklin County, Virginia, hereby files its assignment of cross-error, as follows:

(1) That the Court erred in not granting the motion of the Defendant that the evidence of the Plaintiff be struck on the grounds that:

(A) The Plaintiff's evidence failed to make out a *prima facie* case in that the Plaintiff's own testimony showed the death was an act of suicide and not an accident; and,

(B) That the Plaintiff could not recover because it was not in dispute that Earl Smith was at the time of his death a fugitive from justice, wanted on two warrants issued against him for murder, and had barricated himself against the police officers, and for that reason it would be against public policy to allow the Plaintiff to recover.

WILLARD R. FINNEY
Counsel for Combined Insurance
Company of America.

Filed 24 day of May 1960.

Teste:

EDWIN GREER, Clerk.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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