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Record No. 6682

In the Supreme Court of Appeals of Virginia at Richmond

CARROLL T. FUNKHOUSER, ADMR., ETC.

v.

RALPH LEE MILLION

FROM THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

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. 6682

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 18th day of April, 1967.

CARROLL T. FUNKHOUSER, ADMINISTRATOR OF THE ESTATE OF JEAN E. FUNKHOUSER, DECEASED, Plaintiff in error,

against

RALPH LEE MILLION, Defendant in error.

From the Circuit Court of Prince William County
Arthur W. Sinclair, Judge

Upon the petition of Carroll T. Funkhouser, Administrator of the estate of Jean E. Funkhouser, deceased, a writ of error is awarded him to a judgment rendered by the Circuit Court of Prince William County on the 26th day of October, 1966, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Ralph Lee Million and another were defendants; no bond being required.

RECORD

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page 29 }

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7th day of July, 1965,

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page 33 }

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21st day of July, 1965,

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page 64 }

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This is an action for the alleged wrongful death of the plaintiff's intestate occurring as the result of a collision between an automobile which she was driving and one owned by defendant Barrett Construction and Realty Corporation and operated by defendant Ralph Lee Million, allegedly the agent, servant and employee of Barrett. The accident occurred on Virginia State Road 234, in Prince William County, Virginia, on 21 December, 1962. Barrett answered and denied negligence on its part, denied that Million was its agent, servant and employee, denied that Million was operating its vehicle with its permission and charged the decedent with specific acts of negligence causing or contributing to her injuries and resulting death.

Process was served on Million on 29 April, 1964, and he has failed to file any responsive pleadings or any pleadings whatsoever except a motion hereinafter referred to.

On 8 May, 1964, Barrett filed a motion for a stay of the proceedings against it on the ground that a state trooper who investigated the accident was a material witness but that the officer was serving in the Armed Forces of the United States in Germany. Argument on this motion was heard 15 July, 1964, at which time it appeared from

page 65 } argument of counsel for Barrett that the officer was a vital witness to its defense. The matter was continued to 14 August, 1964, to permit counsel to ascertain when the officer might be available. On 2 September, 1964, an order was entered without objection on the part of the plaintiff's counsel, staying the proceedings as to Barrett until the investigating officer became available as a witness.

On 27 July, 1964, counsel for the plaintiff moved for a default judgment against Million and put on evidence relating not only to damages but also the manner in which the accident happened. Upon conclusion of this hearing, the court took the matter under advisement and did not make an award of damages against Million at the time upon ground that if upon trial of the issues between the plaintiff and Barrett it may appear that there was no negligence on the part of Million, then any judgment entered against him by default should be set aside. The court relied upon the case of *Ashby* v. *Bells, Admr.,* 80 Va. 819 as its authority for its action. On 25 June, 1965, counsel for Barrett filed a motion on behalf of Million for leave to file responsive pleadings on behalf of the latter. The motion recited that Barrett's carrier had declined to enter any appearance initially for Million because of certain circumstances involved, but that subsequently Million had agreed with the carrier that the employment by the latter of counsel to represent Million would not prejudice the carrier.

On 15 December, 1965, an order was entered permitting the plaintiff to voluntarily non-suit his action against Barrett.

Million's motion to file responsive pleadings was argued in the Fall of 1966. The delay was occasioned by page 66 } the lengthy illness and absence of the trial judge. The court was of the opinion that under the circumstances disclosed, Million should be denied the right to file responsive pleadings but dismissed the plaintiff's action on the ground that no negligence on Million's part had been shown and further that the evidence had shown contributory negligence on the part of the plaintiff's decedent.

The court is keenly aware that its ruling appears contrary to the law but the unusual circumstances surrounding the case prevent me, in good conscience, from awarding a judgment against the defendant even though he be in default. Rule 3:19 of the Rules of Court plainly state when a defendant is in default and provides in part, "The Court shall on motion of the plaintiff enter judgment for the amount appearing to be due. If the relief demanded is unliquidated damages, the Court shall hear evidence and fix the amount

thereof,***." In *Levine* v. *Lacy,* 204 Va. 297, Mr. Justice Buchanan, speaking for the Court, said, "Under the specific terms of Rule 3:19, supra, he was not entitled to notice of any further proceedings in the case, including the time of hearing evidence as to damages and the fixing of the amount thereof by the Court."

I am also aware that the failure to answer may be said to operate as an admission by the defendant of the negligence charged to him. Despite these things, however, my position is simply that the plaintiff voluntarily undertook to produce evidence as to liability and utterly failed to prove one single act of negligence against the defendant, but more important,

page 67 } if it may be successfully argued that this failure can be disregarded in view of the effect of the defendant's failure to appear and defend, is the conclusive evidence of the contributory negligence of the plaintiff decedent, appearing from the plaintiff's own case. The evidence, not produced at any request of the trial court, placed the decedent on her wrong side of the roadway, colliding with the right front of the defendant's vehicle. For the sake of brevity, I would merely state that I do not agree with the contentions of plaintiff's counsel as to how it may be conjectured the accident happened and the inferences which may be drawn.

Having undertaken to produce proof of liability and, I believe, failing in such undertaking, I cannot shut my eyes and go back to the state of the pleading in order to grant judgment for the plaintiff against this defendant.

A copy of a proposed order accompanies this memorandum opinion.

ARTHUR W. SINCLAIR, Judge

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FINAL ORDER

* * * * *

This day came the plaintiff, by counsel, and the defendant, Ralph Lee Million, by counsel, pursuant to the plaintiff's motion for a default judgment and award of damages against the defendant and the defendant's motion that he be permitted to file responsive pleadings.

And the court having heard argument of counsel on said motion doth deny the motion of the defendant, Ralph Lee Million, for leave to file responsive pleadings to the plaintiff's motion for judgment.

And the court doth further deny the motion of the plaintiff for default judgment and award of damages against the aforesaid defendant, and it is adjudged and ordered that the plaintiff's motion for judgment be, and the same is hereby dismissed.

And to the ruling of the court denying leave to file responsive pleadings, the said Ralph Lee Million, by counsel, expressly excepts, and to the further ruling of the court denying a judgment for the plaintiff and dismissing the plaintiff's motion for judgment, the said plaintiff, Carroll T. Funkhouser, by counsel, expressly excepts.

It is further ordered and adjudged that the memorandum opinion shall be, and is hereby made a part of the record in this case.

page 69 } And this order is final.

Enter: October 26, 1966.

ARTHUR W. SINCLAIR, Judge.

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page 71 }

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ASSIGNMENTS OF ERROR

Now comes plaintiff by counsel and respectfully makes the following assignments of error in this case:

1. The Court erred in not entering a Judgment in favor of plaintiff and divided among statutory beneficiaries of plaintiff's decedent.
2. The Court erred in entering a summary Judgment for defendant Million in this case.

Respectfully,
RALPH LUCIAN PAYNE, p.q.

* * * * *

Filed Dec. 2, 1966. LEDA S. THOMAS, Clerk.

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page 1 }

* * * * *

Manassas, Virginia
July 27, 1964.

The above-entitled Matter came on for hearing before the Honorable Arthur W. Sinclair, a Judge of the Circuit Court of Prince William County, Virginia, in Prince William County, Manassas, Virginia at 11:15 o'clock a.m.

APPEARANCES:

On behalf of the Plaintiff:

RALPH L. PAYNE 106 North Pitt Street, Alexandria, Virginia.

page 2 } PROCEEDINGS

The Court: Mr. Payne?

Mr. Payne: Your Honor, I have two witnesses to be sworn.

The Court: The case of Carroll T. Funkhouser, Administrator against Ralph Lee Million.

Whereupon,

CARROLL T. FUNKHOUSER and WELCA DE WEIR BRASWELL, JR. were duly sworn by the Clerk of the Court.

Mr. Payne: Your Honor, as the Court knows, the defendant was served four months ago and there has been no response so we are proceeding on default judgment against him and we will put on proof for damage ex parte.

The Court: You never had response to the letter that you sent me a copy of?

Mr. Payne: No, sir.

The Court: All right. Proceed.

You may have a seat right here.

Whereupon,

CARROLL T. FUNKHOUSER, having previously been duly sworn, was called as a witness and was examined and testified as follows:

Carroll T. Funkhouser

DIRECT EXAMINATION

By Mr. Payne:

Q. Will you state your name, please?

A. Carroll T. Funkhouser.

page 3 } Q. What was your wife's name, sir?

A. Jean E. Funkhouser.

Q. Are you the Administrator of her estate?

A. Yes, sir.

Q. And *di* you qualify and sign the bond book, as required by law?

A. Yes, sir.

Q. Did you do that December 24, 1962?

A. I don't know the date but I signed it?

Q. Is that the paper?

A. Yes.

Q. All right, sir.

Mr. Payne: Your Honor, I'd like to offer a copy of the death certificate and the funeral bill for Baker Funeral Home as exhibits.

The Court: All right. The certificate will be Exhibit 1, the Certificate of Administration is No. 1, and the Baker Funeral Home bill, No. 2.

(The documents were marked as Plaintiff's Exhibits Nos. 1 and 2, respectively, for identification, and were received in evidence.)

By Mr. Payne:

Q. Would you state, please, for the benefit of the Court the names and ages of yourself and of the children of deceased?

A. Carroll T. Funkhouser—me—I am 46 years

page 4 } old. I was 45 then. I am 46 now.

Q. And the children of the deceased?

A. Bonnie Jean Branson was 13 at the time, and she'd be 14 now, I guess. Carol Ann Funkhouser was ten and she'd be eleven. Dorothy Funkhouser, she was *none,* and she's 10, and Betty Joe Funkhouser was 1, and she's now 2.

Q. How many children, Mr. Funkhouser?

A. Four.

Q. Three of those are yours?

A. Yes.

Carroll T. Funkhouser

Q. What is the other child's name?
A. Bonnie Jean Branson.
Q. With whom does the other child live?
A. With her grandmother.
Q. You are bringing this action for yourself and the four children of the deceased?
A. Yes, sir.
Q. And it is your desire the children share and share alike?
A. Yes.
Q. Mr. Funkhouser, at the time of your wife's death, were you and your wife living together?
A. Yes, sir.
Q. And was she working?
A. She was working, yes, sir.
Q. For whom was she working?
page 5 } A. For Acme Market in Woodbridge.
Q. How long had she been working?
A. I really don't know but she'd been working with Acme, I guess, off and on since she was 14 years old.
Q. Did she work most of the year '62?
A. Yes.
Q. And the year '61?
A. Yes, sir.
Q. For the past several years before her death, she worked?
A. Yes, sir.
Q. Did she bring the money home?
A. Yes.
Q. Did she contribute the money to the support of the family?
A. Yes.
Q. And you and Mrs. Funkhouser worked together for the family?
A. Yes, sir.
Q. And together you supported the children?
A. Yes, sir.
Q. Did she do the shopping for the family?
A. She did most of it.
Q. She buy the groceries?
A. I bought most of the groceries. She did the clothing, mostly.
Q. Did she run the home, take care of the cleaning and fixing the meals, schedule things for Sunday School
page 6 } and picnic, things like that?

Carroll T. Funkhouser

A. Yes, sir.

Q. Was she the one that taught the children their prayers?

A. Yes.

Q. Was she very close to the children?

A. Very close, yes.

Q. Were the children close to her?

A. Yes.

Q. And as far as all these little children, they were girls, did she discipline more than you or vice versa?

A. She was kind of lenient with them and I think she wanted me to—

Q. Did she do the family washing and ironing?

A. Yes.

Q. I believe at the time of your wife's death, you worked in Washington?

A. Yes.

Q. While you were working in Washington, who stayed with the children here?

A. She stayed with the children.

Q. Who drove the children to the doctor, and places like that?

A. Either one of us that was able to at the time. If she had the time, she took them and if I did, I took them.

Q. Who checked to see that the older children went to school?

A. My wife did.

page 7 } Q. At the time of her death, was she in good health except for the accident?

A. Yes.

Q. This happened just before Christmas. Was she preparing for Christmas at the time?

A. Yes.

Q. What was her birthday?

A. Christmas day.

Q. How old was your wife at the time of her death?

A. She would have been 32 Christmas day, I believe.

Q. And did her loss upset the children?

A. Oh, yes.

Q. Have you noticed whether or not the children still miss their mother?

A. Well, they *walk* about her a lot.

Q. You kept the records for the income tax returns, did you not?

Carroll T. Funkhouser

A. Yes, sir, I did.

Q. I show you a W-2 form—part of it's torn off, but can you read it?

A. Yes.

Q. What is the amount of money reported for the year?

A. $4,232.18.

Q. And was she expected to work until the children were all grown?

page 8 } A. Oh, yes.

Q. And what was the age of the youngest child at that time?

A. One.

Q. One year old?

A. Yes.

Q. Since the death of your wife, have you been required to secure any outside help with the children?

A. Yes.

Q. What outside help have you been forced to secure?

A. I have a housekeeper that lives in.

Q. What is her monthly rate?

A. $45, plus board and room.

Q. Would you estimate the value of board and room?

A. I wouldn't be able to do that. I wouldn't know.

Q. Do you know what the charge would be if you furnished the board and room?

A. Well, if I had to board and room somebody, it would probably be $3 or $4 per day.

Q. All right.

Mr. Payne: Your Honor, that's all the questions I have of this witness.

The Court: You may step down.

(Witness excused.)

Mr. Payne: Your Honor, I'd like to offer this withholding statement in evidence.

page 9 } The Court: That will be Exhibit No. 3.

(The document so referred to was marked as Plaintiff's Exhibit No. 3 for identification, and was received in evidence.)

Mr. Payne: Will you take the stand, please?

Whereupon,

WELCA DE WEIR BRASWELL, JR., having previously been duly sworn, was called as a witness, and was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Payne:

Q. Will you state your name and address, please?

A. Welca DeWeir Braswell.

Q. Are you a Senior or Junior?

A. Junior.

Q. What's your address?

A. 225 Loman Drive, Manassas.

Q. You are a long-time resident of this county, are you not?

A. Yes, sir.

Q. On the 21st day of December, 1962, were you driving along Route 234 between Lake Jackson and Manassas in your truck?

A. Yes—I assume this is the day of the accident.

Q. Was it morning or afternoon?

A. Morning.

Q. Did you see a station wagon in front of you?

A. Yes.

page 10 } Q. And what were the weather conditions, either snowing or raining, or what?

A. Very light snow falling, about four inches *or* snow or more on the ground.

Q. How far were you behind the station wagon when you first saw it?

A. When I first saw it, about three or four blocks.

Q. And did you get any closer than three or four blocks?

A. Yes, within 150 yards before the collision.

Q. Did there come a time when you saw the brake lights of this station wagon go on?

A. Yes.

Q. What happened from then on when you saw the station wagon's brake lights go on?

A. There was two other people riding with me and I said to one of them, "He's slowing down but I don't know why." The other fellow with me said, "Yes, he is." I said, "I guess I'd better slow down a little bit, too."

Welca De Weir Braswell, Jr.

Then I said, "He's hit something." And I observed a small car on his front right moving away from his rapidly.

Q. Was it visible to the left of this station wagon, so far as you were concerned?

A. Yes.

Q. Could you see up the road to the left of the station wagon?

A. Yes.

page 11 } Q. Up until the time the station wagon had collided with this other car, had you seen the other car?

A. No, sir.

Q. In other words, all the time you were behind this truck, you did not see this other car and the car was in front of the truck. Is that your testimony?

A. I would have to assume, since it was smaller and the station wagon was larger, and I hadn't see it until the collision.

Q. Where was the other car when you first saw it?

A. You mean, the Renault?

Q. Yes, sir.

A. It was in front of the station wagon on the right hand side, almost on the shoulder or where the shoulder would be.

Q. And at no time did you see this car to the left side of the car, as far as you were concerned?

A. No, sir.

Q. And you say that the station wagon brake lights came on. What was the time which passed from the time you first noticed the brake lights of the station wagon and the collision, if you can give it?

A. I would only be able to guess. I would say 15 or 20 seconds, approximately.

Q. Did you yourself have any trouble stopping?

A. No, sir.

Q. How fast was the station wagon travelling?

A. About 35 miles an hour.

page 12 } Q. How fast were you travelling when the brake lights went on in the station wagon?

A. About the same or a little faster.

Q. What did you do when you saw the Renault—

The Court: Didn't you say it was moving away rapidly?

The Witness: Yes, sir. I saw it in front.

Welca De Weir Braswell, Jr.

The Court: Did'nt you say it was moving away rapidly? I understood you to say when you saw it, it was moving away rapidly. Did you see the actual impact?

The Witness: No, sir, not the actual impact.

By Mr. Payne:

Q. When you first saw the Renault, what did you do?

A. I pulled around the side of the station wagon and pulled off on the shoulder of the road.

Q. Did you go back to where the Renault was?

A. Yes.

Q. And what did you see then?

A. I saw a lady wedged behind the steering wheel of the Renault. The windshield was out. I put a *clanket* over the windshield to keep the snow out.

Q. Did you see any tracks leading from the other side of the road to the Renault, car tracks?

A. No, sir.

Q. Then there was no evidence that this woman had come across from the opposite side of the road in front

page 13 } of the traffic lane in which you were traveling?

A. I didn't look for anything like that.

Mr. Payne: I have no further question, Your Honor.

The Court: All right, sir. You may step down.

(Witness excused.)

Mr. Payne: Mr. Funkhouser, these three children of Mrs. Funkhouser are living with you?

Mr. Funkhouser: Yes, sir.

Mr. Payne: Would you have them stand? Where's the other child?

Mr. Funkhouser: In Baltimore with her grandmother.

The Court: That's all the evidence you have?

All right, sir, I am going to consider this matter before rendering judgment, Mr. Payne.

Mr. Payne: With regard to this matter, Your Honor, I'd like to make a brief statement regarding the damages.

This deceased was making over $4200 a year, and it was her intention to work until at least the youngest child was grown up, and at $4200 a year, over a nine-year period, that would exceed the $35 thousand maximum allowed by law, and it's clear that she was a good mother and wife who looked

after the children. She was hard-working. They lost a great deal and they were shocked by her untimely death at this time of the year, and the horrible way in which she was lost.

If the Court would allow, we ask the maximum,
page 14 } and my arrangement is one-third the recovery with the Administrator.

The Court: Mr. Funkhouser?

Mr. Funkhouser: Yes, sir.

The Court: Mr. Funkhouser, as I understand it, it is your wish or request that, in the event a judgment was entered in your favor, that the Court go ahead and apportion this recovery between you and the children.

Mr. Funkhouser: Yes.

The Court: Are you the sole support of these children?

Mr. Funkhouser: Yes, sir.

The Court: Do you realize that if the Court did this, that the money would have to be held for these children, assuming you ever collected, until they were 21 years of age?

Mr. Funkhouser: Yes, sir.

The Court: And a guardian would have to be appointed. Knowing this, you still make that request?

Mr. Funkhouser: Yes, sir.

The Court: That's all.

Mr. Payne: Your Honor, there is one point I'd like to make with regard to the liability in this, if the Court will bear with *be* another moment.

The only evidence can be was that this woman was on the side of the road with the traffic when the station wagon struck her, followed by Mr. Braswell's car, and there was plenty of time for the station wagon to be stopped because
page 15 } at no time was the Renault visible from the left of the station wagon by Mr. Braswell from his seat as the driver of his car or else the station wagon overtook this vehicle and this testimony shows the man applied his brakes and slowed down and did not stop until after he struck the car, and I believe there was a period of 15 seconds or more that it would take to stop under any conditions, and Mr. Braswell has testified he had no trouble whatsoever in controlling his car.

Thank you, sir.

The Court: All right, sir.

(Whereupon, at 11:35 o'clock, a.m., the hearing in the above-entitled matter was concluded.)

RALPH L. PAYNE, p.q.

The within transcript was tendered to and signed by me on December 9, 1966.

ARTHUR W. SINCLAIR, Judge
Circuit Court of Prince George
County, Va.
L. E. ATHEY, Deputy Clerk

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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