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Record No. 6868

In the
Supreme Court of Appeals of Virginia
at Richmond

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

v.

BERNARD WHITE, et al.

FROM THE CIRCUIT COURT OF THE CITY OF STAUNTON

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. 6868

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 10th day of January, 1968.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, Plaintiff in error,

against

BERNARD WHITE AND NELLIE L. WHITE, Defendants in error.

From the Circuit Court of the City of Staunton
William S. Moffett, Jr., Judge

Upon the petition of Nationwide Mutual Fire Insurance Company a writ of error is awarded it to a judgment rendered by the Circuit Court of the City of Staunton on the 1st day of June, 1967, in a certain motion for judgment then therein depending, wherein Bernard White and another were plaintiffs and the petitioner was defendant.

And it appearing that a *supersedeas* bond in the penalty of $1,500, conditioned according to law, has heretofore been given in accordance with the provisions of section 8-477 of the Code, no additional bond is required.

RECORD

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page 1 }

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MOTION FOR JUDGMENT

* * * * *

The plaintiff hereby moves the Circuit Court of the City of Staunton for judgment against the defendant, Nationwide Mutual Fire Insurance Company, for the sum of One Thousand Sixty-five and 30/100 Dollars ($1,065.30) with interest from February 1, 1966, along with the costs of this proceeding, for this, to-wit:

1. That defendant issued to plaintiffs Homeowners Policy No. 53MP459-232 for a term of three years beginning July 23, 1965, and expiring July 23, 1968, covering the plaintiff's dwelling located at 1716 Vinson Street, Staunton, Virginia, said policy being in effect at all times from July 23, 1965.

2. That under said policy defendant insured the plaintiffs against physical injury to their said dwelling resulting from the weight of ice, snow or sleet as well as damages resulting from the collapse of said residence or any part thereof.

3. That in January, 1966, as a result of the weight of ice, snow or sleet, physical injury was done to the dwelling and contents owned by the plaintiffs at 1716 Vinson Street and same was damaged as a result thereof in the amount of One Thousand Sixty-five and 30/100 Dollars ($1,065.30).

4. That in January, 1966, as a result of a collapse of a part of the plaintiff's dwelling said dwelling and contents were damaged in the amount of One Thousand Sixty-five and 30/100 Dollars ($1,065.30).

page 2 } 5. That the defendant is liable to the plaintiffs and owes them the amounts sued for by reason of the facts stated herein.

Respectfully submitted,

BERNARD WHITE
NELLIE L. WHITE

* * * * *

Filed in the Clerk's Office of the Circuit Court of the City of Staunton, Va., the 29 day of April, 1966.

Teste: G. FRANKLIN REESE, Dep. Clerk

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page 4 }

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GROUNDS OF DEFENSE

* * * * *

The grounds of defense of the defendant, Nationwide Mutual Fire Insurance Company, to a motion for judgment filed against it in the Circuit Court of the City of Staunton, Virginia, by the plaintiffs, Bernard White and Nellie L. White:

1. Defendant admits the allegations contained in the first paragraph of said motion for judgment.
2. Defendant admits the allegations contained in the second paragraph of said motion for judgment, but says that they are subject to the exclusions and limitations elsewhere contained in said policy.
3. Defendant denies the allegations contained in the third paragraph of said motion for judgment, except as to a certain metal awning constituting a part of the plaintiffs' premises.
4. Defendant denies the allegations contained in the fourth paragraph of said motion for judgment, except as to said metal awning which had an original value of Sixty Dollars and Thirty-two Cents ($60.32).
5. Defendant denies the allegations contained in the fifth paragraph of said motion for judgment.

Respectfully submitted,

NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY

By Counsel

page 5 } TIMBERLAKE, SMITH & THOMAS
by WAYT B. TIMEBRLAKE, JR.
Industrial Bank Building
Staunton, Virginia

* * * * *

Filed Circuit Court Clerk's Office City of Staunton, Va., May 6, 1966, 10:45 AM.

By G. F. REESE, D.C.

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page 8 }

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JUDGMENT

* * * * *

On the 3rd day of May, 1967, came the plaintiffs, Bernard White and Nellie L. White, in person and by counsel, and likewise came the defendant, Nationwide Mutual Fire Insurance Company, by counsel, thereupon both the plaintiffs and the defendant having waived trial by jury and requested that all matters of law and fact be submitted to the Court for determination, the Court having fully heard the evidence and arguments of counsel, and have maturely considered same, finds for the plaintiffs in the sum of One Thousand Forty-five and 30/100 Dollars ($1,045.30), with interest from February 1, 1966. It is therefore ADJUDGED AND ORDERED that the said Bernard White and Nellie L. White recover and have judgment aaginst Nationwide Mutual Fire Insurance Company in the sum of One Thousand Forty-five and 30/100 Dollars ($1,045.30), with interest from February 1, 1966, together with their costs herein incurred, to which action of the Court the defendant excepts.

Enter: 6/1/67.

WM. S. MOFFETT, Judge

* * * * *

page 9 }

* * * * *

ASSIGNMENTS OF ERROR

1. The trial court erred in holding that the defendant's policy of insurance, designated as Homeowners Policy, sued upon by the plaintiffs, covered the damages alleged to have been suffered by the plaintiffs.

2. The trial court erred in holding that the damages alleged to have been suffered by the plaintiffs arose from perils insured against in said policy of insurance.

3. The trial court erred in finding that the alleged damages suffered by the plaintiffs arose from the weight of ice, snow or sleet on the insured structure.

Given under our hand this 13th day of June, 1967.

NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY

By WAYT B. TIMBERLAKE, JR.
Its Counsel

* * * * *

page 10 }

* * * * *

Filed Circuit Court Clerk's Office City of Staunton, Va., Jun 13, 1967, 12:14 PM.

BY E. H. P., D.C.

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page 4 }

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Mr. Timberlake:

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page 6 }

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* * * By the same token, we think that evidence in the authorities, which we will submit to your Honor, would clearly demonstrate that neither under paragraph 13 or under paragraph 14 of this policy was there a collapse within the legal sense, except your Honor, as to the canopy covering the backdoor or backporch of Mr. White's home, which did collapse by virtue of snow, ice or sleet coming off of the roof—or falling from the roof and hitting the roof of that canopy and, of course, causing it to collapse. * * *

* * * * *

BERNARD WHITE

DIRECT EXAMINATION

By Mr. McPherson:

Q. Mr. Bernard White? Your name is Mr. Bernard White?
A. Yes, sir.
Q. Where do you live, Mr. White?
A. 1716 Vinson Street, Staunton.
Q. What is your occupation?
A. I am Assistant Grocery Manager, Farm Bureau.
Q. How long have you been so employed?
page 7 } A. Twelve years, sir.
Q. Do you own your own home?
A. Yes, sir.
Q. Do you and your wife own that together?
A. Yes, sir.
Q. And that's at 1716 Vinson Street?
A. That's right, sir.
Q. Mr. White—

Judge Moffett: Mr. McPherson, I might ask you and Mr. Timberlake to adjust your microphones, there in front of you, so that we might hear all of this. Thank you, sir.

By Mr. McPherson:

Q. Mr. White, did you have a homeowners policy of insurance covering your home with the Nationwide Mutual Fire Insurance Company?
A. Yes, sir.
Q. Is this the policy of insurance?
A. Yes, sir.
Q. Your Honor, we offer this as plaintiff's exhibit, but we would like to have leave to withdraw it.

Judge Moffett: Any objection, Mr. Timberlake?

Mr. Timberlake: No, I have no objection to the introduction of the exhibit. I think that if and when it is withdrawn, why of course it should be replaced with a duplicate or a *photostate* of the policy for the record.

Judge Moffett: Mr. McPherson, in the event it is withdrawn, I would ask you to replace it with a duplicate or a copy.

Bernard White

By Mr. McPherson:

Q. Mr. White, was that policy still in effect in January and February of 1966?

A. Yes, sir.

Q. Is it still in effect now?

page 8 } A. Yes, sir.

Q. Now, would you tell us what the weather conditions were in the middle and latter part of January of last year?

A. Well, as I stated before most of our snows came on Saturdays, and I believe the first one came—the first heavy snow was on the 22nd of January, and during that time—that week to the following Saturday, which was the 29th, we had another big snow.

Q. Did you have any trouble with any leakage during this period of time?

A. Around the 26th I believe it was, it started leaking all across the ceiling of my dining room and then around 2:00 the next morning we were awakened with water falling in our faces, the bed was wet, coming in from the ceiling in the bedroom. When finding that I checked my living room and the water was coming in all across the living room ceiling, which is on the front of the house. And from there back to the back part of the house, where the bedroom, and I have a den, the water was coming down the walls and filling up the light fixtures.

Q. It was leaking on the front and the back of the house?

A. The two rooms on the front, the living room and dining room and on the back, the den and the bedroom.

Q. Did you have any leaking on the sides of your house?

A. Only on the dining room which has an L, well I wouldn't say an L, but it was a dormer over the dining room and on one side a small portion of it, it was coming in.

Q. Well, in how many rooms was there leakage?

A. There were four rooms.

Q. Now, sir, how many of those rooms had leaking in the ceiling, as opposed to the wall?

page 9 } A. All four of them.

Q. And was there leaking on the walls, too, or just on the ceiling?

A. Well, it was coming in the ceilings of the four rooms, also down the walls.

Q. All right, sir, what did you do?

A. I called Mr. Painter, a roof man, and at the time he was snowed in and unable to get to my aid.

Bernard White

Q. Do you know what day you called him? Can you recall, now?

A. Around the 29th.

Q. Did you receive any advice from Mr. Painter?

A. Well, due to him—Mr. Painter's not being able to get into the city, he advised me to pull the gutter off, which I had a helper to pull the gutter off the following day which was on the 30th.

Q. All right, sir, what happened after that?

A. Well, we was still continuing to get the water inside. Of course, we had ice all over the attic of the whole house, front and back, anywhere from a inch and a-half to two inches thick.

Q. This is ice in your attic?

A. Yes, sir. The insulation was all soaked and each night we would go up with ice picks and such, and chop the ice away from the rafters, as much as could.

Q. This is on the inside of your house?

A. On the inside of the attic, in order to keep it from all coming in during the day when it did melt a little bit.

Q. When was Mr. Painter able to get there?

A. Around the 2nd—I would say it was the end of the 1st or 2nd.

page 10 } Q. That would be the 1st or 2nd of February?

A. That's right.

Q. And what did Mr. Painter do after he got there?

A. Well, at that time he tried to get some of the snow off of the roof. I believe it was the following day, he sent several men out to clean the roof off his best and put a temporary roof on it.

Q. How long was it before you detected the leaking had stopped?

A. Not until after all the ice was out of the attic.

Q. Do you remember how long you were having this trouble? How many days and weeks or whatever it was?

A. Well, I would say it was well over a week.

Q. Then what damage was done to the inside of your house?

A. Well, by the wat—the ice and the water being in the attic, it seemed to follow along the ceiling rafters or beams, whichever, causing the plaster to dip and where there's—where there's every 2 x 4, or whatever runs arcoss the ceiling, I have a dip, in all the ceilings, where it isn't cracked. Of course, the plaster, the paint is popping loose.

Q. Have you had any—have you had any of this re-plastered?

Bernard White

A. No, sir, I haven't.
Q. Have you had it repainted?
A. No, sir.
Q. Have you gotten estimates on those jobs?
A. Yes, sir.

Mr. Timberlake: Your Honor, I might say for the benefit of the Court that I examined these estimates yesterday with Mr. McPherson and agreed that it would not be necessary for him to call the individuals who made them.

page 11 } Judge Moffett: Very well.

Q. From whom did you receive your estimates for plastering work, Mr. White?
A. Mr. Hill Hoy.
Q. What was the amount of that estimate?
A. $340.00.

Mr. McPherson: We offer the estimates in exhibit your Honor.
Judge Moffett: It will be received and marked plaintiff's exhibit No. 2.

Q. Who gave you an estimate on the painting?
A. Mr. James Campbell.
Q. What was the amount of that estimate?
A. $115.00.
Q. Is this that estimate?
A. Yes, sir.

Mr. McPherson: We offer this as exhibit 3.
Judge Moffett: All right, we will mark it exhibit 3.

Q. Mr. White, was any damage done to a canopy at your house?
A. Yes, sir.
Q. Where is the canopy?
A. The canopy is over a back door going out of my den.
Q. Is it still up?
A. No, sir.
Q. What happened to it?
A. Well, when the ice and such—when I went out one evening after I got home from work, it was folded up like an accordian laying in the ground.
Q. Have you had that replaced?

A. No, sir.
Q. Have you had an estimate made of what it would cost to replace it?
page 12 } A. Yes, sir.
Q. From whom did you receive that estimate?
A. Mr. Perkins.
Q. And for what outfit—what company does he work?
A. Vico Products.
Q. What is the amount of that estimate?
A. $60.38.

Mr. McPherson: We offer this as exhibit 4.
Judge Moffett: Mr. Timberlake, your understanding applies to all of these?
Mr. Timberlake: Yes, sir.
Judge Moffett: All right, this will be received and marked for identification as plaintiff's exhibit 4.

Q. Mr. White, did Mr. Painter, your roofing contractor, did he replace your roof?
A. Yes, sir, he did.
Q. And what other work did he do?
A. He replaced the roof and also all of the guttering.
Q. You had taken the guttering down before he got there?
A. Yes, sir.
Q. And he replaced the guttering?
A. Yes, sir.
Q. Could he use the old guttering or did he have to use new guttering?
A. Not any of it could be used.
Q. What was the amount of Mr. Painter's bill?
A. You want the—all of the total?
Q. Yes.
A. The total was $640.00.
Q. Have you paid that?
A. Yes, sir, I have.
Q. And is this the bill that you received from him?
page 13 } A. Yes.

Mr. McPherson: We offer this as the next exhibit, your Honor.

Q. Mr. White, before Mr. Painter did his work, what did the roof look like? What was the condition of the shingles?
A. Well, very few of them could be seen from the ice and snow on them.

Mr. Timberlake: Now what was that, I didn't hear that?
Judge Moffett: Will you repeat that.
Mr. McPherson: Very few of them could be seen because of the ice and snow.

Q. Did—before Mr. Painter did his work, did any of the ice and snow fall from the roof?
A. Very little of it. The ice was holding it up there.
Q. When Mr. Painter came, had you been on the roof when Mr. Painter came?
A. No, sir, I hadn't.
Q. When you were in the attic, what could you see as far as the roof was concerned?
A. Well, at that time, the only thing that you could see was the ice on the inside.
Q. Had any of the ice and snow fallen before Mr. Painter got there?
A. What ice had come off—

Mr. Timberlake: You are asking him of his knowledge or—
Mr. McPherson: Yes, of your knowledge.

A. What little bit of ice had come off, the shingles were stuck to it.
page 14 Q. And where were those shingles and ice?
A. They were laying in the ground on the shrubbery.
Q. So some ice had fallen, and in the ice were some shingles?
A. Yes, sir.
Q. Was this in just certain areas or was it a general condition? Where were the shingles, in front, in back?
A. Well, where I noticed it mostly were in the back.
Q. Did you notice if there were any in the front?
A. No, I didn't.
Q. Did you look?
A. No, sir, most of my water at that time was coming in the back.
Q. How deep was the snow then, do you recall?
A. That's hard to say, it was—I don't recall the exact measurement of it, but we did have snows just about every Saturday and very little melting in between.
Q. Was anything else damaged other than your roof, the plastering, the painting and this canopy?
A. We had damage to our draperies which were water circled, because the water coming down the walls filled the

tracks in between the windows, and we also had to cut the ice out of the windows each night to keep it from running in the floor, and the shrubbery across the back and the front of the house.

Q. Was the shrubbery, was it killed or just damaged?

A. Well, it was broken.

Q. Did you replace it?

A. I haven't as yet.

Q. What has your wife done to the draperies?

A. We still have them, we didn't have them cleaned pending this.

Q. Your witness.

page 15 } CROSS EXAMINATION

By Mr. Timberlake:

Q. Mr. White, I just have several questions I wanted to ask you. Did I understand that you noticed these several shingles frozen to the ice at the back of your house after Mr. Painter or after the guttering had been removed?

A. No.

Q. When did you notice it?

A. Well, as I say, what little ice did come off of its own was before that last snow, between then.

Q. And of course, by the same token, it was before the guttering was removed?

A. Yes, sir.

Q. Now, when did this canopy over the back door collapse?

A. It collapsed with the second snow, it must have been the 29th.

Q. And that was before Mr. Painter got there?

A. Yes, sir.

Q. As I understand, everything that you did in regard to this condition that developed as the result of these snows prior to your communicating with Mr. Painter was on the inside of the house?

A. Yes, sir.

Q. And that was directed towards stopping or reducing the leakage?

A. Yes, sir.

Q. And then after you communicated with Mr. Painter, and after he came there, the guttering was pulled off and subsequently Mr. Painter undertook to put on a temporary roof?

A. Yes, sir.

Q. To avoid or stop the leakage, is that correct?

A. Yes, sir.

page 16 } Q. Mr. White, I hand you a picture, a photograph, and ask you if that is a fair representation of a portion of your house after this condition developed as you described?

A. Yes, sir.

Q. And what portion of the house does this picture show?

A. This is the front of the house showing the living room and an entrance hall.

Q. And what does that show as far as the roof is concerned? Does that show a temporary roof?

A. Yes, sir, it does.

Q. That Mr. Painter had applied?

A. Yes, sir.

Q. And, of course, it also shows, does it not, the prior removal of the guttering?

A. Yes, sir.

Mr. Timberlake: Your Honor, I would like to offer this photograph as defendant's exhibit A, and this made part of the record.

Judge Moffett: Any objection, Mr. McPherson?

Mr. McPherson: No, sir.

Judge Moffett: All right, it will be so received, and so marked.

Q. Now, Mr. White, I hand you another photograph and ask you if that is a—likewise a fair representation of your house, a portion of your house, after this difficulty occurred?

A. Yes, sir.

Q. And what portion of the house does this photograph show?

A. This is on the north side showing the section of the dining room.

Q. And the window that appears in there, is that the dining room window?

page 17 } A. Yes, sir.

Q. And that also shows some temporary covering on a portion of the roof, does it not?

A. Yes, sir.

Q. And it further shows the prior removal of the guttering?

A. Yes, sir.

Mr. Timberlake: Your Honor, we would like to offer this as defendant's exhibit B.

Judge Moffett: All right, Mr. McPherson do you have any objection to any of these pictures?

Mr. McPherson: No, sir.

Judge Moffett: All right, it will be so received.

Q. Likewise, Mr. White, I hand you a third photograph, and ask you if that fairly shows a portion of your house following the difficulty?

A. Yes, sir.

Q. And what portion of the house does that show?

A. That is across the back.

Q. And that likewise shows the prior removal of the guttering, does it not?

A. Yes, sir.

Q. And does it show the absence, removal or droppage of certain shingles on the roof?

A. Yes, sir.

Q. And the door that appears in this photograph, is that the door over which the canopy had been installed?

A. Yes, sir.

Q. That's the back door.

A. Yes, sir.

Q. And the window in the photograph what room is that?

A. That is from the bedroom.

Q. Bedroom window.

page 18 } Mr. Timberlake: Your Honor, we would like to offer this as defendant's exhibit C.

Judge Moffett: All right, it will be so received.

* * * * *

FRED H. PAINTER

DIRECT EXAMINATION

By Mr. McPherson:

Q. Mr. Painter, what is your name, sir?

A. Fred H. Painter.

Q. What is your age?

A. Forty-four.

Q. And occupation?

A. Roofing contractor.

Q. Sir?
A. Roofing contractor.
Q. Where do you live?
A. Route 3, Staunton, Virginia.
Q. Where is that?
A. About four miles east on Route 254.
Q. Mr. Painter, did you at any time in January, 1966, receive a call from Mr. White?
A. I did.
Q. At that time, did he request some assistance from you?
A. Yes, sir.
Q. Were you able to go to his house at the time of the call to help him?
A. No.
Q. And for what reason?
A. I was snowbound.
Q. You couldn't get out?
page 19 } A. No.
Q. Did you give him some advice over the telephone for temporary relief?
A. Yes, sir, I told him to remove the guttering from his house.
Q. Do you know how many days later it was that you were able to go to his house?
A. Oh, two or three, and I can't say which.
Q. All right, sir, when you went there, tell the Court what you found.
A. I found the roof covered with snow, water leakage in the house, and that's about it, I guess, plenty of snow and ice.
Q. What did you do?
A. At that time, I didn't do much of anything. I tried to take some ice off, because there was so much snow I couldn't remove it so we could see if we could relieve the leakage problem on that one particular day. This was about all that I could do at that time.
Q. So you got up on the roof?
A. Yes, sir.
Q. What did you find up there as far as the shingles were concerned?
A. Well, it was so much snow you couldn't hardly tell much, but there was—the snow was beginning to slip and the shingles were going with it. At the top part where the snow was off, everything seemed to be in fine order but down at the bottom this was where the damage was, and the shingles was

Fred H. Painter

removing, going from the roof and the water was leaking in at the lower side.

Q. When these shingles would go from the roof, where would they end up?

A. They fell on the ground.

Q. When you got there did you see any shingles on the ground?

page 20 } A. Yes, sir, some.

Q. Were you in the inside of the house?

A. I went in the rooms, yes, sir.

Q. Would you describe the type of damage that was done there?

A. Well, there was—they had wet walls and wet ceilings. They were wet at that time, I couldn't say what the outcome was because—

Q. Were you in the attic?

A. No, sir.

Q. Now, you say the day you went there you tried to remove some ice and snow, but you couldn't do much else. What did you do later?

A. I went back and where the—after the snow and ice slipped down enough that we could get it off the following day, we went, it melted loose, we went back and took the snow off and put some black felt on where the shingles had pulled off so that it wouldn't be any more damage and tried to stop the water from coming in until we could roof his house.

Q. When you got the snow off and you could see the roof, what was the condition of it?

A. At the lower edge, the shingles were broke up bad.

Q. The shingles were what?

A. Broken badly, and tabs of them which we call the lower part of it, about five inches of the lower part, it's divided up into tabs and we call it tabs, they were broken off.

Judge Moffett: What was that? I didn't hear that.

A. The tabs of the roofing.

Judge Moffett: The tabs?

A. Yeah, the lower five inches we speak of it in the roofing business as tabs and—

Mr. Timberlake: Is that a part of the shingles?

A. Yes, sir, that's the exposed part.

page 21 } Mr. McPherson: Would you draw a picture of what—what do you call the shingles?

A. What do I call the shingles? A shingle is three foot long by twelve inches. A shingle is three foot long by twelve inches and five inches of it is exposed to the weather and seven inches is what we call the lap and head lap.

Q. Well show the Court—this is one shingle?

A. Right, that's the way it's made up.

Q. Wait until Mr. Timberlake comes up. And what is the dimension of the shingle?

A. The shingle would be three—thirty-six inches across this way and it's twelve inches up this way. Now up to where I have drawed these little marks here it is five inches to there, and then it would be seven the rest of the way, meaning it would be twelve inches. Now, a shingle is normally nailed here and here which Mr. White's was. Now actually this here would have a little cut in it here, over here to make it match these when they were butted together. And this, down below here, we call each one of these sections a little tab of the shingle and each one of them is twelve inches, right here. And this is the portion that broke off the shingle, the lower portion, the lower five inches.

Mr. McPherson: Well show us how much of this shingle would be covered by the shingle that overlapped it.

A. Well, the shingle that overlapped would be covered from this point to this point, the last seven inches, the upper seven inches.

Q. Would you draw a line across here showing the dividing line between what would be overlapped and what wouldn't?

A. Right.

page 22 } Q. There actually would be — nails would be covered up or not covered up?

A. Yes, the nails would be covered. It actually comes right across, just like this.

Q. So what would be exposed to the elements would be this portion down here?

A. Right.

Q. Now, what damage were you finding to the shingles and the lower portions of the roof?

A. These portions were broken off. It might be one tab off of one shingle, it could be all three, some places it was all three and then other places it would be one, and some places it would be two, that would be missing from each individual shingle.

Fred H. Painter

Q. And where would those tabs be?
A. On the ground.

Mr. McPherson: Your Honor, we wish to offer this as an exhibit.

Q. Did you find any damage to anything other than the roof or the roofing itself?
A. At the time we didn't. Later when we went to put it on we did find damage to one board.
Q. Where was that board?
A. But now the canopy and stuff was laying in the yard, I don't know. It was on the lower edge of the roof—on the back—ah, in the vicinity of where the canopy was, right over top of the canopy I think.
Q. What damage did you find to that board?
A. It was busted, split.
Q. Was that a roofing board?
page 23 } A. Yes, sir.
Q. Now what did you do after you got the snow off, Mr. Painter?
A. We put the felt on, the black felt which we normally do on the lower edge down where the shingles were broken off and run it up under the good shingles until we could get to work and then we started the house and re-roofed it completely.
Q. Well, how far back on that roof would there be shingles that were broken off?
A. About three, four or five feet or something, so many rows. I did know at the time but I don't know right at this time.
Q. You did know how many rows back but you don't remember now?
A. I did but forgot.
Q. All right, sir. What did you do for permanent repairs?
A. We removed all the old roofing and started from the sheeting and put a new roof on.
Q. Would it have been possible to have just put on the lower part of the roof?
A. Possible, but it would have been an odd—it would not matched the rest of the roof.
Q. Was it possible to match the old roof?
A. No, sir.
Q. So it all would be one color it was necessary to put an entire new roof on?

A. Right.

page 24 } Q. Now, did you find any trouble anywhere else other than at the bottoms of the roof?

A. Not a great deal. Might be one here and there but I couldn't say what caused it.

Q. Where would there be that would be here and there, would they just be at random or—

A. At random or.

Q. Was the damage on both sides, on the front and on the back, or just on one portion?

A. On the front and back, the greater proportion on the back.

Q. After you removed the snow and the ice and you were up on the roof, where these shingles were torn off, what could you see? What was underneath?

A. Well in spots there would be boards and some spots it would be the top part of the shingles.

Q. And where there were boards, would the boards be flush with one another or would they be—there be a distance between them.

A. Flush I would say. We have a variation of cracks from a quarter of an inch down.

Q. Could you see into the attic?

A. Yes.

Q. Through these cracks?

A. Yes, sir.

Q. How long have you been in the roofing business, Mr. Painter?

A. I have been a contractor in the roofing business since 1954.

Q. What did you do before that?

page 25 } A. I was a roofer since 1939.

Judge Moffett: I didn't catch that, sir.

A. I was a roofer since 1939.

Mr. McPherson: Have you been on your own since '54?

A. 1954.

Q. You have people working under you?

A. Yes, sir.

Q. How many?

A. Eight.

Q. Would you describe the pitch of Mr. White's roof?

Fred H. Painter

A. Well, Mr. White has what we call a ten-twelve pitch. That's a ten-inch rise every twelve inches.

Q. That doesn't mean much to me either—

A. That's a fairly steep roof. It's a little more than the average today.

Q. Now would you tell the Court what in your opinion caused these shingles that were on the ground to come off?

Mr. Timberlake: Your Honor, I object to that question. I think this witness can tell what he saw, what conditions he observed, but I don't think it's in evidence that he—he may have, but I don't think it is in evidence that he installed this roof or that he had ever seen the roof—examined the roof until he went out here after the snowfall or snowfalls and after the guttering had been removed.

Mr. McPherson: Your Honor, this gentleman is a roofing contractor and has been in the roofing business for many, many years, and we certainly feel that he's been qualified as an expert in his field and should be able to answer that question.

Judge Moffett: Mr. McPherson, this seems to be pretty close to the question that the Court may have to decide this contract, and under the *Ramsey* case which went
page 26 } up from Lexington, in which we had an expert testifying, the Court of Appeals held that the expert witness could not testify as to the issue which the Court or jury had to decide. So, in keeping with that decision I'd have to save your point.

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page 28 }

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CROSS EXAMINATION

By Mr. Timberlake:

Q. Mr. Painter, as I understand you didn't examine this house or the roof thereon until some two or three days after Mr. White initially called you?

A. That's right.

Q. And I believe he testified that he called you on January 29th, so it would have made the—probably the 2nd day or 3rd day of February?

page 29 } A. That's right.

Q. That would be the year 1966, this past year?
A. Yes, sir.
Q. And at the time you arrived at his house to examine the house and examine the roof, the guttering had been removed, had it not?
A. Yes, sir.
Q. And you don't know what procedure was used in the removal of that guttering, yourself?
A. No, sir.
Q. And you don't know, of your own knowledge, to what extent, if any, any of these—any of this ice or any of the broken portions of shingles had fallen prior to the removal of the guttering, do you?
A. No, sir.
Q. How did you go about taking the snow off the roof when you went out there?
A. Took a shovel and went to the top of the roof and shoveled it off.
Q. And I believe you testified that you saw a roofing board that was broken?
A. Yeah. After when we started the roofing that we did we found one.
Q. Sir?
A. Yes, sir. We did on the bottom, when we started the roofing, not this first time I was there, but later when I started the roofing, I did.
Q. You noticed that a board—roof board was broken after you started doing the repair work?
A. Right.
Q. That was—the board was still on the roof?
page 30 } A. Yes, sir.
Q. Then it was just a break in it?
A. That's right.

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page 31 }

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BERNARD WHITE

RE-CROSS EXAMINATION

By Mr. Timberlake:
Q. Mr. White, as I recall, you called Mr. Painter on Janu-

ary 29th which was after the last of this series of snows, is that correct?

A. Yes, sir.

Q. And told him of your problem and I believe you testified that he advised then and there that the gutter be pulled off, that he was snowbound and couldn't come to you, is that correct?

A. Yes, sir.

Q. When did you remove the guttering?

A. It was removed on the following day of the 30th, on Sunday.

Q. And who removed it?

A. James Shifflett.

Q. Were you present when the guttering was removed?

page 32 } A. Yes, sir.

Q. And did you assist?

A. Well I was on the ground. He was on the ladder.

Q. And it was simply a question of his going up on the ladder from place to place around your house and just more or less manually yanking the guttering off?

A. Well, it wasn't quite that easy. Not any of the gutter came off in the whole sections. They had to be cut with a, I believe he used a chisel—and they came off in sections I would say three—three, four feet long.

Q. So as I understand, generally, he would go up on the ladder and cut the guttering into three or four foot sections and then each of those sections would be pulled loose from the—from the boarding?

A. Yes, sir.

Q. And just dropped to the ground?

A. Yes, sir.

Q. I think that is all I wanted to ask.

RE-DIRECT EXAMINATION

By Mr. McPherson:

Q. Mr. White, I don't remember if I asked you this. I think not, but do you remember how much snow there was in these different snows?

A. You asked that before and I couldn't—

Q. You didn't know?

A. It was plenty deep but—well at the time that we were taking the gutter off, it was well over three feet around the house.

Bernard White

Q. When was it that you first noticed some parts of the shingles on the ground?

page 33 } A. Some of it was noticed—it was the latter part of the week before the last snow the 29th. I noticed a few chunks of ice that had come off and were laying in the back yard with the shingles frozen to it.

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A Copy—Teste:

Howard G. Turner, Clerk.

INDEX TO RECORD

	Page
Writ of Error Awarded	1
Record	2
Motion for Judgment	2
Grounds of Defense	3
Judgment—June 1, 1967	4
Assignments of Error	4
Proceedings	5
Witnesses:	
Bernard White	6, 21
Fred H. Painter	14