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Clerk, Supreme Court of Appeals
Richmond, Va.

# Record No. 6995

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

## NATIONWIDE MUTUAL INSURANCE COMPANY

v.

## FRED E. MARTIN, ASSIGNEE, ETC.

FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

### 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

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**Record No. 6995**

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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 Friday the 7th day of June, 1968.

Nationwide Mutual Insurance Company, Plaintiff in error,

*against*

Fred E. Martin, Sr., Assignee of
Symple Construction Corporation, Defendant in error.

---

From the Circuit Court of the City of Virginia Beach
Paul W. Ackiss, Judge

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Upon the petition of Nationwide Mutual Insurance Company a writ of error is awarded it to a judgment rendered by the Circuit Court of the City of Virginia Beach on the 2nd day of January, 1968, in a certain motion for judgment then therein depending, wherein Symple Construction Corporation was plaintiff and the petitioner 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 $300, with condition as the law directs.

## RECORD

* * * * *

page 1 }

* * * * *

### MOTION FOR JUDGMENT

The undersigned, plaintiff in the caption, hereby moves the court for a judgment against you, Nationwide Mutual Insurance Company, defendant in the caption, and in favor of the undersigned in the amount of $12,851.30, due the undersigned, for this, to-wit:

1. That on, to-wit, the 4th day of January, 1967, you, by and through your duly authorized agent, entered in to a contract of insurance with the undersigned numbered 53 IM 937 769, whereby, for a certain premium to you in that behalf, you did insure the undersigned against loss by theft and other perils therein stated, in respect to certain materials and supplies stored in the City of Virginia Beach, Virginia, which undersigned expected to use in connection with a certain subcontract it was then and there engaged in with the City of Virginia Beach for the construction of a pipe line in said city.

2. That between the hours of 4:00 P.M. on January 11, 1967, and the following morning at 8:00 A.M., parties unknown to the undersigned, and without the knowledge or consent of the undersigned, unlawfully stole, removed and carried away from the location where same were stored in said city, certain of the materials and supplies insured under the terms of the aforesaid policy, as follows:

| | |
|---|---|
| One Griffin Wellpoint pump SN 2018 of the value | $ 4,000.00 |
| 1180 LF 6″ Wellpoint header pipe of the value | 3,776.00 |
| 265 Ea. Wellpoints @ 18.50 of the value | 4,902.50 |
| 2 Ea. 3″ x 25′ Suction hose @ 86.40 of the value | 172.80 |
| Total | $12,851.30 |

3. That you were duly notified of said loss and were furnished with Proof of Loss by letter dated March 3, 1967, listing the above mentioned materials.

4. Notwithstanding your promise to pay under
page 2 } the terms of your insurance contract, you have refused to pay the sum demanded, wherefore, under-

signed moves the court for judgment as aforesaid, in the amount of $12,851.30, plus interest from January 11, 1967, and costs of court.

SYMPLE CONSTRUCTION CORPORATION,

By Fred E. Martin
Counsel

* * * * *

Filed in the Clerk's Office the 12th day of May, 1967.

John V. Fentress, Clerk
Billy W. Ballan, D. C.

* * * * *

page 4 }

* * * * *

GROUNDS OF DEFENSE

Now comes the defendant by counsel and for its Grounds of Defense to the Motion for Judgment herein states:

1. It admits the issuance of a policy of insurance as alleged in Paragraph 1 of the plaintiff's Motion for Judgment herein but denies that the plaintiff is entitled to any sums or benefits thereunder.

2. The defendant denies the allegations of Paragraph 2 of the plaintiff's Motion for Judgment.

3. Without waiving the foregoing the defendant states that even if the plaintiff is entitled to recover under said policy of insurance, which again is expressly denied, then in that event said recovery would be limited to items alleged to have been stolen in the official offense report of the police department of the City of Virginia Beach dated January 16, 1967, and limited further by the signed statement of John C. Ellis, President, Symple Construction Corporation, dated January 20, 1967.

4. The defendant further alleges that the style of the suit herein is improper and will at the proper time move

page 5 } The Court to amend style of this suit in accordance with an agreement executed by the Symple Construction Company on April 10, 1967, authorizing Fred E.

Martin, Attorney, to sue in the name of the Symple Construction Company for the use and benefit of Fred E. Martin, Attorney.

5. The defendant denies each and every other material allegation contained in said Motion for Judgment and denies that it is indebted to the plaintiff in any sum.

NATIONWIDE MUTUAL INSURANCE COMPANY

By Palmer S. Rutherford, Jr.
Of Counsel

Filed May 29, 1967.

John V. Fentress, Clerk

By R. Garrett, D. C.

* * * * *

page 7 }

* * * * *

MOTION

Now comes the defendant by counsel and moves this Court for the entry of an order requiring plaintiff to amend the style of this action in accordance with a certain assignment dated April 10, 1967 whereby the real party in interest in the above captioned matter is Fred E. Martin, attorney. A copy of said assignment is attached hereto.

NATIONWIDE MUTUAL INSURANCE CO.

By Palmer S. Rutherford, Jr.
Of Counsel

* * * * *

Filed July 14, 1967.

John V. Fentress, Clerk

By R. H. West, D. C.

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* * * * *

In the Circuit Court of the City of Virginia Beach on the 20th day of July, 1967.

* * * * *

This day came the parties, by counsel, and the defendant, by counsel, moved the Court for a continuance due to the absence of a material witness, which motion the Court doth sustain, and said case is continued.

* * * * *

page 8a }

* * * * *

MOTION FOR ORDER CONFIRMING COMPROMISE

Fred E. Martin, Assignee of Symple Construction Corporation in the captioned case, now moves the court to enter an Order confirming a compromise settlement entered into between Fred E. Martin, Assignee, and Palmer Rutherford Esquire, counsel of record for the defendant, based upon the following facts:

1. That the captioned was heretofore set for trial and continued on motion of the defendant for lack of a material witness not duly subpoened, and was thereafter again set for trial on September 7, 1967; that during the latter part of August, negotiations between counsel for plaintiff assignee and defendant relative to a compromise were carried on; that counsel for defendant asked plaintiff's assignee whether he would accept a settlement based upon the value of the items reported to the Virginia Beach Police, to-wit, $2600.00, and counsel for defendant said that he would recommend settlement on this basis, to which plaintiff's assignee agreed; that thereafter, on the 5th day of Sept., 1967, counsel for defendant informed plaintiff's assignee that defendant had authorized him to make a firm offer of settlement in the amount of $2,000.00 in compromise settlement of the case, and plaintiff's assignee was to give defendant a hold-harmless agreement in respect to two notices of lien from judgment creditors of plaintiff, Symple Construction Corporation, and plaintiff's

assignee agreed to accept said $2,000.00 offer in full compromise and settlement of the case and execute said hold harmless agreement; that notice of said Assignment, dated April 10, 1967, together with the original thereof was duly served on the defendant's Agent, and counsel for the defendant, by Motion filed in this case on the 13th day of July, 1967, advised plaintiff's assignee by copy of said motion, that defendant would move the court to require plaintiff to amend the pleadings in this case to show that Fred E.
page 8b } Martin, Assignee was the real party in interest in this case; that after said offer and acceptance thereof by plaintiff's assignee on the 5th day of September, 1967, defendant notified the Clerk of this court to remove the case from the trial docket as same was in process of settlement; that defendant now refuses to make settlement in accordance with its aforesaid compromise and settlement, which should now be confirmed by order of this court.

Fred E. Martin

* * * * *

page 9 }

* * * * *

RIXEY AND RIXEY

Attorneys and Counselors at Law
1000 Maritime Tower
Norfolk, Virginia
Phone Madison 2-6655
P. O. Box 3183
November 22, 1967

Clerk of the
Circuit Court of the
City of Virginia Beach
Virginia Beach, Virginia

Re: Symple Construction Corp.
v. Nationwide Mutual Insurance Co.
Law Docket No. 9981

Dear Sir:

Please subpoena the following to appear on behalf of the defendant in your Court on December 5, 1967 at 10:00 A.M.:

Saverio Carollo
4504 Constitution Court
Virginia Beach, Virginia

Vernon E. Curran
4705 Barger Street
Chesapeake, Virginia

Bill Bridges
4413 Minneola Drive
Apt. 101
Virginia Beach, Virginia

Officer C. W. Forbes
Virginia Beach Police Dept.
Virginia Beach, Virginia

James English
Bayside Professional Bldg.
Virginia Beach, Virginia

G. C. Wakefield
Nationwide Insurance Co.
1721 Cromwell Drive
Norfolk, Virginia

Raymond James Richardson
4848 Witch Duck Road
Virginia Beach, Virginia

I enclose three checks payable to the respective serving officers. I further attach a note addressed to Officer Forbes and would appreciate your attaching it to his subpoena.

Issued November 24, 1967.

KM

page 10 }

* * * * *

Very truly yours,

RIXEY AND RIXEY
By Palmer S. Rutherford, Jr.

PSRJr:lh
Encls.

page 11 }

* * * * *

RIXEY AND RIXEY

Attorneys and Counselors at Law
1000 Maritime Tower
Norfolk, Virginia
Phone Madison 2-6655
P. O. Box 3183

November 22, 1967

Clerk of the
Circuit Court of the
City of Virginia Beach
Virginia Beach, Virginia

Re: Symple Construction Corp.
v. Nationwide Mutual Insurance Co.
Law Docket No. 9981

Dear Sir:
The defendant hereby requests a jury for the trial of the above captioned matter on December 5, 1967.

Very truly yours,

RIXEY AND RIXEY
By Palmer S. Rutherford, Jr.

PSRJr:lh

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* * * * *

FRED E. MARTIN & SON

Attorneys and Counsellors at Law
909 Royster Building
Norfolk, Virginia
Phone 622-2383

Nov. 24, 1967

Palmer Rutherford Esquire,
Maritime Tower,
Norfolk, Va. 23510

Dear Mr. Rutherford: RE: Martin Assignee of Symple Constr. Corp. v. Nationwide, Law 9981

In the sworn statement given you by R. J. Richardson, he refers to a Griffin Wellpoint Pump, painted red, brought to him by John C. Ellis, Jr. about the middle of December, 1966, which he still had in his possession, according to his statement, on Sept. 6, 1967.

If you intend to call Mr. Richardson as a witness of the trial of this matter on Dec. 6, 1967, and question him regarding this Griffin Wellpoint pump, then as a prerequisite thereto, I shall ask the court to require the production of this pump at the trial, or prior to the trial at a time and place where it can be examined by me.

I further wish to advise you, that you should have associate counsel with you at the trial on December 6th, as circumstances may arise where it may be necessary to call you as an adverse witness.

Please advise me on Monday, the 27th, regarding the above, in order that I may have ample time to ask the court to require the production of this wellpoint pump, unless you can arrange it.

Very truly yours,

Fred E. Martin

FEM/m
c/c to Judge Ackiss

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* * * * *

FRED E. MARTIN & SON

Attorneys and Counsellors at Law
909 Royster Building
Norfolk, Virginia 23510
Phone 622-2383

Nov. 28, 1967

Clerk's Office,
Circuit Court of Virginia Beach Law Docket 9981

RE: Symple Construction Corporation v. Nationwide Insurance Co.

Please issue the following subpoena for witness to appear for the plaintiff on the 5th day of December, 1967:

Jerry T. Womack, 8217 Fernwood Drive, Norfolk, Va.

Please mail to Norfolk City Sergeant. Check for his fee enclosed.

Fred E. Martin

Issued November 29, 1967.

* * * * *

page 15 } KNOW ALL MEN BY THESE PRESENTS, That the undersigned, for value received, does hereby assign unto Fred E. Martin, Attorney, all of its right, title and interest in and to the proceeds of a claim against Nationwide Insurance Company under policy No. 53 IM 937 769, for a loss which occurred under the terms of said policy on or about the 11th day of January, 1967, when certain materials covered under said policy were stolen or removed without the knowledge and consent of the undersigned from the premises where same were stored in the City of Virginia Beach, Virginia; claim having been made for said loss in the amount of $12,000.00 or more; and undersigned does hereby further authorize and direct said Nationwide Insurance Company to pay to Fred E. Martin, Attorney, the proceeds from the settlement of said claim; and in the event payment is refused to institute suit in the name of the undersigned for the use and benefit of said Fred E. Martin, Attorney.

Witness the following signature and seal this 10th day of April, 1967.

SYMPLE CONSTRUCTION CORPORATION,

By John C. Ellis, Jr.
President

Atteste:

Jacqueline P. Ellis
Secretary

Filed December 15, 1967.

P. M. A.

page 16 }

* * * * *

ORDER

This cause came on for hearing on December 5, 1967 on motion of Fred E. Martin, Sr. of counsel for Symple Construction Corporation and assignee of the claim herein and was argued by Mr. Martin and counsel for Nationwide Mutual Insurance Company;

And it appearing to the Court that a compromise settlement was entered into in the amount of Two Thousand Dollars ($2,000.00) between Fred E. Martin as assignee of Symple Construction Corporation and counsel for Nationwide Insurance Company on September 5, 1967;

And it further appearing that on September 6, 1967, Raymond James Richardson gave a statement under oath before a court reporter which statement, if true, presented a jury question as to whether the Symple Construction Corporation had sustained the loss alleged in the Motion for Judgment herein or whether the said Symple Construction Corporation through John C. Ellis, Jr., its president, had hidden away the property alleged to have been stolen in the Motion for Judgment herein;

And it further appearing to the Court that the said, Raymond James Richardson, had been interviewed by representatives of the Nationwide Insurance Company prior to the settlement referred to above and that said Richpage 17 } ardson had denied any knowledge of facts surrounding the circumstances which form the basis for the Motion for Judgment herein;

And it further appearing that the Nationwide Insurance Company refused to *consumate* the settlement on the grounds that the statement of Richardson of September 6 indicated fraud and relieved Nationwide Insurance Company from its agreement made prior to knowledge of said fraud;

And it further appearing to the Court after argument that said settlement should be confirmed, wherefore it is ADJUDGED, ORDERED, and DECREED that said settlement is and the same is hereby confirmed on the grounds that Fred E. Martin, Sr., assignee of the claim of the Symple Construction Corporation under policy number 53 IM 937769 issued to the Symple Construction Corporation by the Nationwide Insurance Company on January 4, 1967 did take his assigned claim free and clear of fraud, if any, of the Symple Construction Corporation through John C. Ellis, Jr., its president;

And the Court further finds that the Nationwide Insurance Company did not know of the evidence contained in the statement of Raymond James Richardson given on September 6, 1967 before a court reporter; prior to the said settlement;

And the Court further finds that it was the duty of the Nationwide Insurance Company to use due diligence to investigate fully as to possible fraud and all other circumstances before entering into a compromise settlement and that such due diligence was not used;

And the Court further finds that Nationwide Insurance

Company is estopped from now asserting that the compromise is not binding and the Nationwide Insurance Company is ordered to pay to Fred E. Martin, Sr., assignee of Symple Construction Corporation the sum of Two Thou-
page 18 } sand Dollars ($2,000.00) provided however that said Fred E. Martin, Sr. give to the Nationwide Insurance Company a hold harmless agreement which will protect it against any and all lien holders or creditors of the Symple Construction Corporation of which the Nationwide Insurance Company may or may not have actual or constructive notice as the date hereof.

To all of which action of the Court, the defendant by counsel duly objects and excepts.

WE ASK FOR THIS:

.....

Of Counsel, plaintiff

SEEN AND OBJECTED TO:

Palmer S. Rutherford, Jr.
Of Counsel, defendant

Refused as offered December 15, 1967.

P. W. A.

page 19 }

* * * * *

OPINION

This case came on for hearing on December 5th, 1967, on motion of Fred E. Martin, Assignee of Symple Construction Corporation, for an Order confirming a compromise settlement agreement between said assignee and counsel for respondent in the sum of two thousand ($2,000.00) dollars, entered into on September 5th, 1967, and on further motion of respondent to set aside the compromise agreement by respondent since the 5th day of September, 1967, tending to show fraud on the part of John C. Ellis, Jr., President of Symple Construction Corporation.

The record in this cause shows that the alleged loss occurred on January 11th, 1967. Suit was instituted May 12th,

1967, and the case was set for trial on July 20th, 1967, and was continued on motion of respondent because of the absence of a material witness, and was thereafter re-set for trial on September 7th, 1967, and the compromise settlement was agreed upon on September 5th, 1967.

page 20 } The respondent says it is entitled to have the compromise settlement agreement set aside and the issue of fraud heard by a jury. In support of this they offer the sworn *ex parte* deposition of one Raymond James Richardson, whereas, this same witness had previously advised respondent that he knew nothing about the alleged theft of the property sued for.

The respondent had from January 11th, 1967, the date of the alleged loss by theft, until September 5th, 1967, to make any investigation it felt necessary to defend its interest in this suit.

They are now saying that the court should accept the second statement of Richardson, which it is alleged is contrary to his previous statement, as the basis for setting aside a solemn compromise entered into by counsel of record for both parties.

The court finds that respondent did not exercise due diligence to ascertain the facts it now relies upon. The respondent's motion is analagous to a motion for a new trial on after-discovered evidence. The recent case of *Fulcher* v. *Whitlow,* 208 Va. 34, decided June 12, 1967, appears to cover the situation in the case at bar. There, after a trial and a verdict for the defendant, plaintiff moved for a new trial on the ground of after-discovered evidence. The trial court granted a new trial, which resulted in a verdict and judgment for plaintiff. In reversing this judgment, Justice Carrico speaking for the court, after stating the general principles governing the granting of motions for new trials on the ground of after-discovered evidence, stated at page 38, as

page 21 } follows:

"We focus our attention upon the application of the second of the quoted rules, that is, that a party who seeks a new trial on the ground of after-discovered evidence must show that he used reasonable diligence to secure such evidence before the earlier trial. It is not sufficient merely to say that the evidence could not have been discovered by the use of due diligence. The applicant for a new trial must set forth in affidavits facts showing what his efforts were to obtain the evidence and explaining why he was prevented from securing it. 13 Mich. Jur., New Trials, § 27, pp. 649-650; 39 Am. Jur., New Trial, § 163, p. 170."

The only reason given by respondent in the instant case is that Richardson in his first statement said he knew nothing of the matter, whereas, in his second statement he claimed to know more. The respondent has not shown what its efforts were to obtain the evidence it now offers, in the form of an *ex parte* deposition taken without notice to the plaintiff, prior to September 5, when it negotiated the compromise settlement agreement, nor has it explained why it was prevented from securing it.

The court is not impressed with the two contradictory statements offered on behalf of the witness Richardson as the basis for setting aside the compromise settlement and reopening this case.

The motion of plaintiff is sustained and the Court will enter such an order.

Paul W. Ackiss, Judge

January 2, 1968

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* * * * *

## ORDER CONFIRMING COMPROMISE AGREEMENT

This day came the plaintiff assignee, by counsel, and the defendant by counsel, and the plaintiff assignee moved the court to enter an order confirming the compromise settlement agreed by counsel for both parties, and the defendant moved the court to set aside the compromise agreement.

And it appearing to the court that a compromise settlement was entered into in the amount of $2,000.00 between Fred E. Martin as assignee of Symple Construction Corporation and counsel for Nationwide Insurance Company on September 5, 1967; that on September 6, 1967, Raymond James Richardson gave a statement *ex parte* under oath before a court reporter to the effect that John C. Ellis, Jr., President of Symple Construction Corporation had hidden away some of the property alleged in the Motion for Judgment to have been stolen; that Raymond James Richardson had been interviewed by representatives of the defendant prior to the settlement of September 5, 1967, and had denied any knowledge of facts concerning theft of property which is the basis for the Motion for Judgment; that defendant refused to consummate the settlement on the ground that the statement of Richardson indicated fraud, and thereby relieved defendant of its compromise agreement made prior to obtaining said statement from Richardson; that neither

Fred E. Martin, Assignee of Symple Construction Corporation, nor Nationwide Insurance Company was aware of the statement of Raymond James Richardson, given on September 6, 1967, before entering into the compromise settlement agreement of September 5, 1967;

Upon consideration whereof, after argument of counsel, it appearing to the court that defendant failed to exercise due diligence to ascertain the facts contained in the page 23 } statement of said Richardson prior to making the compromise settlement of September 5, 1967, the motion of the defendant is denied and the motion of the plaintiff assignee is granted, and

It is ORDERED that defendant pay to Fred E. Martin, Assignee the sum of $2,000.00, with interest thereon from September 5, 1967, and his taxable costs; provided, however, that said Fred E. Martin give defendant a hold-harmless agreement to protect it from the claims of lien holders of Symple Construction Corporation of which it has actual notice; to all of which action by the court, the defendant by counsel duly objects and excepts.

Enter January 2, 1968.

P. W. A., Judge

Seen:
Fred E. Martin, p.q.

Seen and objected to:
Palmer S. Rutherford, Jr., p. d.

page 24 }

* * * * *

## ASSIGNMENTS OF ERROR

Pursuant to the above mentioned rule, the defendant, Nationwide Mutual Insurance Company, assigns the following error:

1. The Trial Court erred in sustaining the Motion of Fred E. Martin, Assignee of Symple Construction Corporation and confirming a compromise settlement agreement between said assignee and counsel for the defendant.

2. The Trial Court erred in refusing to allow defendant to present evidence in support of its allegation of fraud in connection with the claim underlying the compromise settle-

ment agreement, even though witnesses were present in the courtroom and ready to testify.

page 25 } 3. The Trial Court erred in ruling on the Motion of the plaintiff to confirm the compromise settlement agreement solely from the argument of counsel without allowing testimony proffered by defendant to be presented.

4. The Trial Court erred in ruling that the defendant failed to use due diligence in investigating the underlying claim, and further erred in refusing to allow defendant to put on any evidence in regard to the diligence used in investigating the claim.

5. The Trial Court erred in ruling that the defendant did not show what its efforts were to obtain evidence of fraud when the Court refused to allow defendant to put on such evidence.

6. The Trial Court erred in ruling that the contradictory statements of witness Richardson were not a basis for setting aside the compromise settlement, and further erred in refusing to allow witness Richardson to testify although he was present in the courtroom for that purpose.

NATIONWIDE MUTUAL INSURANCE COMPANY

By Palmer S. Rutherford, Jr.
Of Counsel

* * * * *

Filed February 19, 1968.

John V. Fentress, Clerk
By R. H. West, D. C.

* * * * *

page 27 }

* * * * *

STATEMENT OF PROCEEDINGS IN THE CHAMBERS OF THE HONORABLE PAUL W. ACKISS, JUDGE ON DECEMBER 5, 1967

The above captioned matter came on for hearing on Decem-

ber 5, 1967 upon the motion of Fred E. Martin, assignee of Symple Construction Corporation for an order confirming a compromise settlement between said assignee and counsel for defendant. A jury trial had been requested by letter from counsel of defendant dated November 22, 1967 in accordance with the local procedures of the Circuit Court of the City of Virginia Beach.

On the date of trial, counsel for defendant asked the Court for a pre-trial conference to narrow the issues to be tried.

In chambers before Judge Ackiss were Fred E. Martin, assignee of Symple Construction Corporation appearing *pro se* and Palmer S. Rutherford, Jr., counsel of record for Nationwide Mutual Insurance Company.

Counsel advised the Court that it was stipulated that the settlement of the underlying cause of action had been consummated by telephone on September 5, 1967 for the sum of Two Thousand Dollars ($2,000.00) and that said settlement took place prior to any knowledge on the part of the parties or their counsel that Raymond James Richardson would on the following day, September 6, 1967, offer a statement in connection with the underlying claim.

page 28 } The Court was advised that witnesses were available and present in the courtroom to testify in support of the defendant's claim of fraud. In particular, Raymond James Richardson was available to testify in accordance with the statement which he gave under oath on September 6, 1967.

The Court indicated that it would enter judgment for Fred E. Martin and thereafter took the Bench and made a statement at the request of counsel for the defendant which is offered as record in this case. The statement was made in order to apprise the many witnesses in the courtroom and the jury veniremen which were present as to why the case would not be tried that morning.

The foregoing narrative statement reflects to the best of our recollection the events which transpired in the chambers of The Honorable Paul W. Ackiss, Judge on the morning of December 5, 1967.

Enter May 23, 1968.

P. W. A.

Filed March 1, 1968.

John V. Fentress, Clerk
By R. Garrett, D. C.

page 2 }

* * * * *

Stenographic transcript of proceedings had upon the trial of the above-entitled cause in said court on December 5, 1967, before the Honorable Paul W. Ackiss, judge of said court.

APPEARANCES: Mr. Fred E. Martin for the plaintiff
Messrs. Rixey and Rixey (Mr. Palmer S. Rutherford, Jr.) for the defendant

page 3 } (The court and counsel for both sides retired to chambers, at which time a motion was heard and ruled upon and after which the court and counsel returned to the courtroom, where the following occurred:)

The Court: The Court has held that the compromise settlement heretofore entered into between the parties is a *bona fide* settlement, and that there was a duty upon the Nationwide Insurance Company to ascertain under all the circumstances whether or not there was any fraud involved in this case. They had this man; they had his statement; and settlement was made after the statement. Therefore, the Court concludes that the settlement is binding.

And all of the witnesses can be excused.

Mr. Rutherford: Note the exception of the defendant to the ruling of the Court.

The Court: And note your exception.

Mr. Rutherford: For the grounds stated in chambers.

page 4 } JUDGE'S CERTIFICATE

I, Paul W. Ackiss, judge of the Circuit Court of the City of Virginia Beach, State of Virginia, who presided over the trial of the case of the *Symple Construction Corporation* v. *Nationwide Insurance Company,* on December 5, 1967, do hereby certify that the foregoing is a true and correct transcript of the trial of said cause, including all the evidence adduced, all the exhibits offered in evidence, as well as all of the objections to the evidence or any part thereof offered, admitted, rejected, or stricken out, together with all motions and objections of the parties, all rulings of the court thereon, and all exceptions of the parties thereto, together with all other incidents of the trial of said cause.

I further certify that this certificate has been tendered to and signed by me within the time prescribed by section 8-330 of the Code of Virginia for tendering and signing bills of exception and certificates of record, and that reasonable notice in writing has been given to the attorneys for the of the time and place at which said certificate has been tendered.

This record was tendered to me on the day of

page 5 } 1967.

Given under my hand this 1st day of March, 1967.

Paul W. Ackiss, Judge

page 6 } CLERK'S CERTIFICATE

I, John V. Fentress, clerk of the Circuit Court of the City of Virginia Beach, State of Virginia, do hereby certify that the foregoing is a true and correct copy of all of the testimony, exhibits, and other incidents of the trial of the case of the *Symple Construction Corporation, plaintiff,* v. *Nationwide Mutual Insurance Company,* on December 5, 1967, together with the original exhibits therein referred to, if any, duly initialed and authenticated by the judge who presided over the trial of said cause, and that the same were lodged and filed with me as clerk of said court on the 1st day of March, 1967.

Richard R. Garrett, Deputy Clerk

* * * * *

A Copy Teste:

Howard G. Turner, Clerk

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