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Clerk's Office, Supreme Court of Appeals

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Record No. 7272

In the
Supreme Court of Appeals of Virginia
at Richmond

TRAVELERS INSURANCE COMPANY, ET AL.

v.

STANLEY N. TURNER

FROM THE CIRCUIT COURT OF ROCKINGHAM 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.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7272

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 17th day of June, 1969.

TRAVELERS INSURANCE COMPANY
AND VIRGINIA MUTUAL INSURANCE
COMPANY, Plaintiffs in error,

against

STANLEY N. TURNER, Defendant in error.

From the Circuit Court of Rockingham County
Hamilton Haas, Judge

Upon the petition of the Travelers Insurance Company and the Virginia Mutual Insurance Company a writ of error is awarded them to a final order entered by the Circuit Court of Rockingham County on the 14th day of December, 1968, in a certain motion for judgment then therein depending, wherein the said petitioners were plaintiffs and Stanley N. Turner was defendant; upon the petitioners, or some one for them, 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

* * * * *

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* * * * *

MOTION FOR JUDGMENT

The plaintiffs, The Travelers Insurance Company and The Virginia Mutual Insurance Company, hereby move the Circuit Court of Rockingham County, Virginia, at Harrisonburg, for judgment against the defendant, Stanley N. Turner, in the sum of Twenty-seven Thousand Five Hundred Dollars ($27,500.00), with interest from the 21st day of November, 1967, and the costs of this proceeding, for the damages and wrongs hereinafter set forth, to-wit:

1. That on May 17, 1967, the said Stanley N. Turner was engaged in business in the City of Harrisonburg as an agent and solicitor of insurance and that on said date Joseph Nelson Harter, whose automobile liability insurance had theretofore been written and carried through said Stanley N. Turner but had expired on said date, went to the office and place of business of said Stanley N. Turner to obtain a new liability insurance policy on his 1959 Plymouth automobile; that said Turner then and there offered and agreed to obtain such insurance for Harter and completed and obtained Harter's execution of an application for the insurance with Dairyland Insurance Company, a company duly qualified to do business in the State of Virginia, a copy of same being filed herewith; however, Turner then and there informed Harter that it would be necessary for him to make a cash payment page 2 } of Ninety-four Dollars ($94.00) and Harter arranged to return on May 19, 1967, to make said payment and complete the transaction;

2. That on May 19, 1967, said Harter returned to the place of business of said Stanley N. Turner and paid him the aforesaid funds, thus completing the application, at which time Turner assured Harter that he (Harter) had done all that was necessary and that he was covered by liability insurance on his said automobile;

3. That, according to the terms of said application, insurance thereunder was not bound until 12:01 A. M. on the day following the postmark of the envelope transmitting the said

application and premium payment to said Dairyland Insurance Company, and it therefore became and was the duty of said Turner to promptly mail the said application and premium deposit on May 19, 1967, in order to perform his undertaking with Harter to obtain insurance for him upon his said automobile;

4. That in violation of his said duty to Harter and counter to his express undertaking and agreement to afford him insurance, said Turner negligently failed and refrained from placing said envelope containing application and premium deposit to Dairyland Insurance Company in the mail until late in the afternoon of May 20, 1967, and then he placed it in a U. S. Mail box on the street in Harrisonburg at a time when he knew or should have known that it was after the hours for mail collection that day; accordingly, said envelope was not postmarked prior to May 21, 1967, and the insurance did not become effective before May 22, 1967;

5. That said Harter while believing that his automobile was covered by insurance, at approximately 10:45 P. M. on May 21, 1967, was involved in an accident in Rockingham County, Virginia, for which he was legally liable, between his automobile and one in which Galen Ray Howdyshell
page 3 } was a passenger; that said Galen Ray Howdyshell suffered extremely severe personal injuries resulting in permanent disability and thereafter brought suit in this court against said Harter for Five Hundred Thousand Dollars ($500,000.00) damages;

6. That plaintiffs, Travelers Insurance Company and Virginia Mutual Insurance Company, upon it appearing that said Harter was uninsured because of the facts hereinbefore set forth, became obligated under the Uninsured Motorist Endorsement of certain policies of insurance which they had issued to members of the family of Howdyshell and one Sammy Gene Lilly, the operator of the automobile in which Howdyshell was riding at the time of said accident, to defend the said suit and pay any judgment against Harter that might be awarded; and that pursuant to their said policy obligations, they undertook to defend Harter in said action and succeeded in effecting a compromise settlement of the plaintiff's claim in the amount of Twenty-five Thousand Dollars ($25,000.00), which settlement was duly approved by the Judge of the Circuit Court of Rockingham County as fair and reasonable under the facts and circumstances of the case; and that plaintiffs incurred the expense of Twenty-five Hun-

dred Dollars ($2500.00) in defending and settling said action on behalf of Harter;

7. That plaintiffs thereupon, on behalf of Harter, paid to or on behalf of Galen Ray Howdyshell said sum of Twenty-five Thousand Dollars ($25,000.00), for which said Harter then and there became indebted and obligated to plaintiffs, along with said legal expense of Twenty-five Hundred Dollars ($2500.00) in defending and settling said action between Howdyshell and Harter, all in accordance with the statute in such cases made and provided;

8. That defendant, Stanley N. Turner, became and was liable to said Joseph Nelson Harter for his failure page 4 } to afford him automobile liability insurance coverage as aforesaid, to the extent of Harter's damage or loss of Twenty-seven Thousand Five Hundred Dollars ($27,500.00) as hereinabove set forth, and that said Harter did duly assign his rights and claim against Stanley N. Turner to the plaintiffs, as shown by assignment of November 21, 1967, copy of which is filed herewith as Exhibit A.

WHEREFORE, plaintiffs are entitled to recover from said defendant, Stanley N. Turner, the said sum of Twenty-seven Thousand Five Hundred Dollars ($27,500.00), for which they pray judgment, along with interest from November 21, 1967, and their costs in this action.

The Travelers Insurance Company
and The Virginia Mutual Insurance Company

By Counsel

W. W. Wharton
Wharton, Aldhizer & Weaver
First National Bank Building
Harrisonburg, Virginia

Wayt B. Timberlake, Jr.
Timberlake, Smith & Thomas
First Security Bank Building
Staunton, Virginia

p. q.

Filed in the Clerk's Office the 3rd day of May, 1968.

Teste:

Nancy W. Carrier, D. C.

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ASSIGNMENT

For and in consideration of the release by Travelers Insurance Company and Virginia Mutual Insurance Company of all other and further claims against me arising and existing by virtue of my alleged liability, as an uninsured motorist, to Galen R. Howdyshell, as a result of a certain automobile accident which occurred in Rockingham County, Virginia, on the 21st day of May, 1967, I do hereby assign, transfer and set over to said Travelers Insurance Company and Virginia Mutual Insurance Company, all of my right, claim or chose in action against Stanley N. Turner, of Harrisonburg, Virginia, arising and existing by virtue of the failure of said Stanley N. Turner to obtain liability insurance coverage for me with Dairyland Insurance Company prior to the happening of the aforesaid accident.

I further agree to aid and assist said Travelers Insurance Company and Virginia Mutual Insurance Company in the prosecution of the aforesaid claim against Stanley N. Turner and to take no action which will or may prejudice the right or claim hereby assigned; and I further agree that said assignees may proceed in my name to enforce said right or claim.

Given under my hand and seal this 21st day of November, 1967.

Joseph Nelson Harter (SEAL)
Joseph Nelson Harter

State of Virginia
County of Rockingham, to-wit:

I, Gene F. Rahart, a notary public in and for the county and state aforesaid, do hereby certify that Joseph Nelson Harter, whose name is signed to the foregoing writing bearing date on the 21st day of November, 1967, has acknowledged the same before me in my said county.

My commission expires 7-14-69.

Given under my hand this 21st day of November, 1967.

Gene F. Rahart
Notary Public

* * * * *

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ORDER

THIS DAY came the defendant, by counsel, and asked leave of Court to make a late filing of his responsive pleadings in this case, and due cause having been shown, it is hereby ordered that the defendant be allowed until June 10, 1968 to file responsive pleadings.

ENTER: This 24th day of May, 1968.

H. H., Judge

* * * * *

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* * * * *

Filed in the Clerk's Office Rockingham County, Va. Jun 7 1968

Geo. W. Kemper, Clerk

DEMURRER OF DEFENDANT TO PLAINTIFFS' MOTION FOR JUDGMENT

For his demurrer to the plaintiffs' motion for judgment, the defendant Stanley N. Turner, by counsel, comes and states that the motion for judgment filed herein is not sufficient at law and should be dismissed for the following reasons:

(1) It does not state a claim upon which relief can be granted.

(2) The only right of action alleged in the motion for judgment is that of Joseph Nelson Harter against the defendant, and the plaintiffs are not lawfully subrogated to this right of action.

(3) The alleged assignment to the plaintiffs of the right of action of Joseph Nelson Harter is invalid as by its nature such a right of action is not lawfully assignable.

WHEREFORE, in view of the foregoing the defendant moves the Court to dismiss plaintiffs' motion for judgment.

Respectfully,

Stanley N. Turner

By T. T. Lawson
Of Counsel

page 9 }

Woods, Rogers, Muse, Walker & Thornton
105 Franklin Road, S. W.
Roanoke, Virginia
Attorneys for Defendant

* * * * *

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* * * * *

ORDER SUSTAINING DEMURRER

THIS DAY came the defendant and the plaintiffs by counsel upon the motion of the defendant for hearing on his demurrer to the motion for judgment, and the matter was argued by counsel;

And it appearing to the Court that the motion for judgment contains a misjoinder of claims sounding in tort and contract, which misjoinder is raised by the defendant's demurrer hereto, said demurrer is hereby sustained, and the motion for judgment adjudged not sufficient at law.

The plaintiffs duly objected to the entry of this order and save their exception thereto.

Thereupon the plaintiffs sought leave to file an amended motion for judgment, which leave is hereby granted, and the plaintiffs are allowed fifteen days from the entry of this order to serve upon counsel for the defendant their amended motion for judgment, and counsel for the defendant shall file his pleadings in response thereto within twenty-one days thereafter.

Enter this 12th day of August, 1968.

H. H., Judge

* * * * *

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We request the entry of this order:
T. T. Lawson, p. d.

We have seen this order:
W. W. Wharton, p. q.
W. B. Timberlake, p. q. by W.W.W.

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* * * * *

AMENDED MOTION FOR JUDGMENT

The plaintiffs, The Travelers Insurance Company and The Virginia Mutual Insurance Company, hereby move the Circuit Court of Rockingham County, Virginia, at Harrisonburg, for judgment against the defendant, Stanley N. Turner, in the sum of Twenty-seven Thousand Five Hundred Dollars ($27,500.00), with interest from the 21st day of November, 1967, and the costs of this proceeding, for the damages hereinafter set forth, to-wit:

1. That on May 17, 1967, the said Stanley N. Turner was engaged in business in the City of Harrisonburg as an agent and solicitor of insurance and held himself out to the public as such; and that on said date Joseph Nelson Harter, whose automobile liability insurance had theretofore been written and carried through said Stanley N. Turner but had expired on said date, went to the office and place of business of said Stanley N. Turner to obtain a new liability insurance policy on his 1959 Plymouth automobile; that said Turner then and there offered and agreed to obtain such insurance for Harter and completed and obtained Harter's execution of an application for the insurance with Dairyland Insurance Company, a company duly qualified to do business in the State of Virginia, a copy of same having been filed with the

page 13 } original motion for judgment; however, Turner then and there informed Harter that it would be necessary for him to make a cash payment of Ninety-four Dollars ($94.00) and Harter arranged to return on May 19, 1967, to make said payment and complete the transaction;

2. That on May 19, 1967, said Harter returned to the place

of business of said Stanley N. Turner and paid him the aforesaid funds, thus completing his undertaking and agreement with the defendant, Stanley N. Turner, at which time Turner assured Harter that he (Harter) had done all that was necessary and that he was covered by liability insurance on his said automobile;

3. That, according to the terms of said application, insurance thereunder was not bound until 12:01 A. M. on the day following the postmark of the envelope transmitting the said application and premium payment to said Dairyland Insurance Company, and it therefore became and was the duty of said Turner in the performance of his agreement to promptly mail the said application and premium deposit on May 19, 1967, and thus complete his undertaking with Harter to promptly obtain insurance for him upon his said automobile;

4. That in violation of his said duty to Harter and counter to his express undertaking and agreement to forthwith afford him insurance, said Turner failed and refrained from placing said envelope containing application and premium deposit to Dairyland Insurance Company in the mail until late in the afternoon of May 20, 1967, and then he placed it in a U. S. Mail box on the street in Harrisonburg at a time when he knew or should have known that it was after the hours for mail collection that day; accordingly, said envelope was not postmarked prior to May 21, 1967, and the insurance did not become effective before May 22, 1967;

page 14 } 5. That said Harter while believing that his automobile was covered by insurance, and relying upon Turner's agreement to afford him coverage as aforesaid and his statement and assurance that he was in fact covered by the insurance he had paid for, at approximately 10:45 P. M. on May 21, 1967, was involved in an accident in Rockingham County, Virginia, for which he was legally liable, between his automobile and one in which Galen Ray Howdyshell was a passenger; that said Galen Ray Howdyshell suffered extremely severe personal injuries resulting in permanent disability and thereafter brought suit in this court against said Harter for Five Hundred Thousand Dollars ($500,000.00) damages;

6. That plaintiffs, Travelers Insurance Company and Virginia Mutual Insurance Company, upon it appearing that said Harter was uninsured because of the facts hereinbefore set forth, became obligated under the Uninsured Motorist Endorsement of certain policies of insurance which they had issued to members of the family of Howdyshell and one Sammy

Gene Lilly, the operator of the automobile in which Howdyshell was riding at the time of said accident, to defend the said suit and pay any judgment against Harter that might be awarded; and that pursuant to their said policy obligations, they undertook to defend Harter in said action and succeeded in effecting a reasonable and proper compromise settlement of the plaintiff's claim in the amount of Twenty-five Thousand Dollars ($25,000.00), which settlement was duly approved by the Judge of the Circuit Court of Rockingham County as fair and reasonable under the facts and circumstances of the case; and that plaintiffs incurred the expense of Twenty-five Hundred Dollars ($2500.00) in defending and settling said action on behalf of Harter;

7. That plaintiffs thereupon, on behalf of Harter, paid to or on behalf of Galen Ray Howdyshell said sum of
page 15 } Twenty-five Thousand Dollars ($25,000.00), for which said Harter then and there became indebted and obligated to plaintiffs, along with said legal expense of Twenty-five Hundred Dollars ($2500.00) in defending and settling said action between Howdyshell and Harter, all in accordance with the statute in such cases made and provided;

8. That defendant, Stanley N. Turner, became and was liable to said Joseph Nelson Harter for his violation of his said agreement and undertaking with Harter to afford him automobile liability insurance coverage as aforesaid, to the extent of Harter's damage or loss of Twenty-seven Thousand Five Hundred Dollars ($27,500.00) as hereinabove set forth, and that said Harter did duly assign his rights and claim against Stanley N. Turner to the plaintiffs, as shown by assignment of November 21, 1967, copy of which was filed with the original motion for judgment as Exhibit A.

WHEREFORE, plaintiffs are entitled to recover from said defendant, Stanley N. Turner, the said sum of Twenty-seven Thousand Five Hundred Dollars ($27,500.00), for which they pray judgment, along with interest from November 21, 1967, and their costs in this action.

The Travelers Insurance Company
and The Virginia Mutual Insurance
Company

By Counsel

Filed in the Clerk's Office Rockingham County, Va. Aug 21 1968.

George W. Kemper, Clerk.

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DEMURRER OF DEFENDANT TO
PLAINTIFFS' AMENDED MOTION FOR JUDGMENT

For his demurrer to the plaintiffs' amended motion for judgment, the defendant Stanley N. Turner, by counsel, comes and states that the amended motion for judgment filed herein is not sufficient at law and should be dismissed for the following reasons:

(1) It does not state a claim upon which relief can be granted.

(2) The only right of action alleged in the amended motion for judgment is that of Joseph Nelson Harter against the defendant, and the plaintiffs are neither lawfully subrogated to this right of action or entitled to bring the same by reason of an assignment, as by its nature such right of action is not lawfully assignable.

WHEREFORE, in view of the foregoing the defendant moves the Court to dismiss plaintiffs' amended motion for judgment.

Respectfully,

Stanley N. Turner
by T. T. Lawson
Of Counsel

page 17 }

Woods, Rogers, Muse, Walker & Thornton
105 Franklin Road, S. W.
Roanoke, Virginia
Attorneys for Defendant

Filed in the Clerk's Office Rockingham County, Va. Sep 6 1968.

George W. Kemper, Clerk.

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* * * * *

FINAL ORDER

THIS DAY came the defendant and the plaintiffs by counsel upon the motion of the defendant for hearing on his demurrer to the plaintiffs' amended motion for judgment, and the matter was argued by counsel;

And it appearing to the Court that the claim against the defendant alleged in the amended motion for judgment is not one by law assignable nor one as to which the plaintiffs herein might be lawfully subrogated, the amended motion for judgment is accordingly adjudged not sufficient at law, and the demurrer thereto is hereby sustained and the case stricken from the docket.

The plaintiffs duly object to the entry of this order and save their exception thereto.

Enter this 14th day of December, 1968.

H. H., Judge

* * * * *

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We request the entry of this order:
T. T. Lawson, p. d.

We have seen this order:
W. W. Wharton, p. q.
W. B. Timberlake, Jr., p. q. by W.W.W.

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* * * * *

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

To: George W. Kemper, Clerk of the Circuit Court of Rockingham County, Virginia:

Notice of Appeal

The Travelers Insurance Company and The Virginia Mutual Insurance Company hereby give notice of their appeal from that certain final order entered herein by the Court on the 14th day of December, 1968.

Assignment of Error

The Court erred in sustaining the demurrer of the defendant to the plaintiffs' amended motion for judgment on the ground that the claim against the defendant alleged in the amended motion for judgment is not one by him assignable.

The Travelers Insurance Company
The Virginia Mutual Insurance Company

By W. B. Timberlake, Jr.
Of Counsel

* * * * *

Filed in the Clerk's Office Rockingham County, Va. Jan 10 1969.

George W. Kemper, Clerk.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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