IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 800911

CLIFTON ALLEN,

Appellant,

v.

AETNA CASUALTY AND SURETY COMPANY,
A Connecticut Corporation,

Appellee.

JOINT APPENDIX

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APPENDIX

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MOTION FOR JUDGMENT

To: The Aetna Casualty and Surety Company
C/o Henry H. McVey, III, Registered Agent
1400 Ross Building
Richmond, Virginia 23219

YOU ARE HEREBY NOTIFIED that the undersigned, twenty-one (21) days after legal service of the within Motion for Judgment upon you, or as soon thereafter as I may be heard, will move the Circuit Court for the City of Hampton, Virginia, at the courthouse thereof, for a judgment against you in the sum of ONE HUNDRED FIFTY THOUSAND DOLLARS ($150,000.00) in compensatory damages and TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000.00) in punitive damages, which sums are due and owing by you to the undersigned for the damages, wrongs and injuries hereinafter set forth, to wit:

1. That heretofore, to wit, on or about December 3, 1973, the defendant, The Aetna Casualty and Surety Company, insured one Irving V. Behm, dentist, of 3116 Victoria Boulevard, Hampton, Virginia, under a policy of insurance numbered 50 DZ 37819, effective August 26, 1973.

2. That on or about that date, the plaintiff was in Dr. Irving V. Behm's office for dental treatment by the said Dr. Irving V. Behm; that during the course of this treatment Dr. Irving V. Behm carelessly and negligently caused foreign material to be swallowed by the plaintiff; that notwithstanding the fact that the plaintiff reported to the said Dr. Irving V. Behm that he had swallowed some of the material, Dr. Irving V. Behm completed his treatment and sent the plaintiff home; that as a result of swallowing the foreign material, the plaintiff began severe vomiting, and as a result suffered a ruptured esophatus, very nearly resulting in the death of the plaintiff.

3. The plaintiff asserts and alleges that as a direct and proximate result of the ruptured esophagus he sustained serious, permanent and progressive injuries to his body and person; that he incurred great mental anguish, suffering and pain, that he has incurred expenses in and about his cure; that he verily believes he will continue to incur expenses in an effort to effect his cure; that he has sustained loss of earnings and a diminution of earning capacity or ability; that he was rendered sick and disabled; that he has sustained injuries to his nervous system, tissues, ligaments and nerves; that he has sustained great shock; that he has been forced to endure great pain and suffering in the past, as well as mental anguish, and verily believes he will continue to endure great pain and suffering in the future; and that he has been caused to incur divers expenses incident to said injuries, all as a direct and proximate result of the ruptured esophagus, as aforesaid.

4. That a report of this incident of December 3, 1973 was made by Dr. Irving V. Behm to The Aetna Casualty and Surety Company, and this company, upon receiving such report, caused an investigation to be made concerning same.

5. That on or about December 3, 1973, the said The Aetna Casualty and Surety Company had in its employ, among others, one K. Wayne Logsdon, senior claim representative. That after making investigation certain recommendations were made as to the liability of the said Dr. Irving V. Behm, and because of said recommendations the said The Aetna Casualty and Surety Company made certain partial payment to the plaintiff.

6. That thereafter, the said The Aetna Casualty and Surety Company, acting by and through its agent, servant or employee, K. Wayne Logsdon, continued to confer with the plaintiff at various intervals while awaiting final

medical evaluation and bills. That during the course of several months the said K. Wayne Logsdon repeatedly stated to the plaintiff that his company would make a final settlement with him. That the said The Aetna Casualty and Surety Company, acting by and through its agent, servant or employee, K. Wayne Logsdon, did bargain for and obtain plaintiff's agreement not to retain counsel to prosecute his claim in exchange for the said The Aetna Casualty and Surety Company's promise to effect full and final settlement with him. That the said The Aetna Casualty and Surety Company, acting by and through its agent, servant or employee, did breach and violate its contract with the plaintiff on or about December 1, 1975.

WHEREFORE, the plaintiff asks judgment at the hands of the said Court, against the defendant, for its deliberate breach and violation in the sum of ONE HUNDRED FIFTY THOUSAND DOLLARS ($150,000.00) in compensatory damages and TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000.00) in punitive damages, and his costs in his behalf expended in this proceeding.

GIVEN under my hand this day of November, 1978.

CLIFTON ALLEN

By_____
Of Counsel

HALL, FOX AND ATLEE, P.C., p.q.
806 First and Merchants Bank Building
2600 Washington Avenue (P. O. Box 23)
Newport News, VA 23607

DEMURRER

The defendant comes and says that the Motion for Judgment is not sufficient in law by reason of the following:

Counsel 1. The allegations in the Motion for Judgment do not support, under any circumstances, a claim for punitive damages.

2. The allegations in the Motion for Judgment regarding a contract between the parties would, at best, be unenforceable as vague and indefinite.

3. The allegations in the Motion for Judgment reflect no damage having been sustained by the plaintiff by reason of those allegations.

THE AETNA CASUALTY AND SURETY COMPANY

By Richard Wright West
Of Counsel

Richard Wright West
WEST, STEIN, WEST & SMITH
Attorneys at Law
P.O.Box 257
Newport News, VA 23607
Counsel for Defendant

I certify that on 12/6/78
I mailed a true copy of the foregoing pleading to each counsel of record.
Richard Wright West p.d

ORDER

Came the parties, by counsel, upon the Demurrer of the defendant and the Court having heard argument and having maturely considered the same, doth SUSTAIN the Demurrer of the defendant and this action is DISMISSED, with Plaintiff having leave to amend within 30 days.

DATE:

ENTER:

Judge

I ask for this:

Counsel for Defendant

Seen and exception noted:

Counsel for Plaintiff

ASSIGNMENT OF ERROR

1. The Trial Court erred in sustaining the defendant's Demurrer, as the plaintiff's Motion for Judgment affirmatively states a cause of action upon which relief can be granted.