Record No. 3986

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

ROBERT M. MILLER, et al

v.

FRED TOMLINSON, et als

From the Circuit Court of Bland County

RULE 5:12 — BRIEFS

§5. NUMBER OF COPIES. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel 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.

M. B. WATTS, Clerk

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned, and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of the record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) The opening brief of the appellant shall be filed in the clerk's office within twenty-one days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. The brief of the appellee shall be filed in the clerk's office not less than twenty-one days, and the reply brief of the appellant not less than two days, before the first day of the session at which the case is to be heard.

(b) Unless the appellant's brief is filed at least forty-two days before the beginning of the next session of the Court, the case, in the absence of stipulation of counsel, will not be called at that session of the Court; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) Counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel 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.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 3986

VIRGINIA:

In the Supreme Court of Appeals held at the Court-Library Building in the City of Richmond on Monday the 21st day of January, 1952.

ROBERT M. MILLER AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiffs in error,

against

FRED TOMLINSON, HARRY FOGLESONG AND ERNEST BIVENS, PARTNERS TRADING AS BLAND MOTOR SALES, Defendants in error.

From the Circuit Court of Bland County

Upon the petition of Robert M. Miller and State Farm Mutual Automobile Insurance Company a writ of error is awarded them to a judgment rendered by the Circuit Court of Bland county on the 8th day of August, 1951, in a certain notice of motion for judgment then therein depending wherein the said petitioner, Robert M. Miller, was plaintiff and Fred Tomlinson, Harry Foglesong and Ernest Bivens, partners trading as Bland Motor Sales, were defendants, 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 three hundred dollars, with condition as the law directs.

* * * * *

RECORD

page 7 } AMENDED MOTION FOR JUDGMENT

The undersigned, Robert M. Miller, moves the Circuit Court of Bland County for judgment against the defendants and each of them for the sum of $1,160.00, with interest thereon from the 14th day of June, 1950, until paid, together with the costs incident to this proceeding, which sum is justly due to the undersigned from the said defendants, for this, to-wit:

1. That heretofore, to-wit, on the 14th day of June, 1950, the said Fred Tomlinson, Earnest Bivens and Harry Foglesong, were conducting and operating a garage for the repair of automobiles at Bastian, in Bland County, and held themselves out to the public, and particularly to this plaintiff, as being competent and able to repair motor vehicles, and relying upon this the plaintiff delivered to the defendants at their garage and entrusted to their care and custody a certain GMC 1942 truck for the purpose of having the same repaired by the defendants, for a reward, and the defendants thereupn accepted said truck for repair and undertook to return the same to the plaintiff in good and proper condition, yet, notwithstanding the undertaking of the defendants, they
page 8 } have hitherto wholly failed to deliver said truck to the plaintiff and the said plaintiff avers that the value of the said truck was $1,160.00, which amount the plaintiff is entitled to recover from the defendants because of the failure of the defendants to redeliver said truck to the plaintiff.

2. And for this also, that heretofore, on the 14th day of June, 1950, the defendants were conducting and operating a garage at Bastian, in Bland County, for the general repair of motor vehicles, and then and there held themselves out to the public, and particularly to the plaintiff, as competent and capable to keep and repair motor vehicles, and on said date the plaintiff delivered to the said defendants at their garage at Bastian, Va., his GMC truck, 1942 model, to be repaired by the said defendants, and it then and there became and was the duty of the said defendants to repair and return

said truck to the plaintiff, but notwithstanding this said duty they have hitherto failed and refused to deliver the same, and the said plaintiff avers that the said truck was worth the sum of $1,160.00 and that because of the failure of the said defendants to deliver said truck to him he is entitled to recover from them the said sum of $1,160.00, with interest thereon from the 14th day of June, 1950, until paid, together with his costs in this behalf expended, which sum of money the defendants have hitherto wholly failed and refused to pay to the plaintiff.

3. And for this also, to-wit: that heretofore, on the 14th day of June, 1950, the defendants were conducting and operating a garage at Bastian, Va., for the general repair of motor
page 9 } vehicles and held themselves out to the public, and particularly to the plaintiff, as competent to engage in this business and to repair motor vehicles, and relying upon this fact the plaintiff then and there delivered to the defendants at their garage in Bastian his 1942 GMC Chevrolet truck to be repaired; and it then and there became and was the duty of the said defendants to use reasonable care to keep the said truck safely and to return it promptly to the plaintiff, but, notwithstanding their duty in this behalf, they negligently and carelessly, and with utter disregard of the safety of the property of other persons, and particularly of the plaintiff, permitted the said garage to catch on fire, and negligently and carelessly failed to use proper precautions to prevent the occurrence of fire, and negligently and carelessly failed to have proper equipment for extinguishing the fire, or if they did have such equipment, negligently and carelessly failed to use the same, and because of such negligence and carelesness on the part of the said defendants the said truck and its contents were completely destroyed, and said truck was of the reasonable value of $1,160.00, which amount the defendants have hitherto wholly failed to pay to the plaintiff although demand was made therefor, and although they were fully aware of the damage and injuries done by them to the undersigned by their careless, negligent and wrongful acts, nevertheless, they have hitherto wholly failed and refused to pay the value of said truck and, therefore, the plaintiff is entitled to recover from the said defendants the sum of $1,160.00, with interest thereon

from the 14th day of June, 1950, until paid, together with his costs in this behalf expended.

page 10 } Wherefore, the undersigned moves the Circuit Court of Bland County for judgment against the said defendants and each of them in the said sum of $1,160.00, with interest and costs as above stated.

Respectfully,
ROBERT M. MILLER,
By Counsel.

CAMPBELL & CAMPBELL, Counsel,
S. B. CAMPBELL,
Wytheville, Virginia.

A. A. CAMPBELL,
Wytheville, Virginia.

* * * * *

page 12 } ORDER

On July 23, 1951, came the plaintiffs, by Counsel, and also came the defendants, by Counsel, and the plaintiffs by counsel presented and asked leave to be permitted to file his amended notice of motion for judgment, which leave was granted and the amended notice of motion for judgment was in open court filed. Whereupon the defendants by counsel presented and asked leave to file their grounds of defense to the amended notice of motion for judgment, which leave was granted and said grounds of defense to said amended notice of motion for judgment were in open court filed.

It appearing that this action is for the benefit of another as well as for the plaintiff, upon motion of the defendants by counsel, the court directed that the amended notice of motion for judgment be so amended to show for whose benefit, other than the plaintiffs' this action is brought. The plaintiffs by counsel objected to the action of the court in requiring said amendment which objection was overruled and the plaintiffs by counsel excepted. Thereupon the plaintiffs by counsel amended the said notice of motion for judgment by adding immediately after the name of the plaintiff, "who sues for himself and for the State Farm Mutual Automobile Insurance Company, as their interests may appear."

Thereupon came a jury, to-wit: Clarence Starks, Kent

Tickle, J. C. Baker, J. D. Bogle, Arnold McPeak, Mrs. Bill Summers and Mrs. W. V. Blankenship, who were sworn and impannelled in the manner provided by law, and who after having heard the evidence, received instructions of the court and heard arguments of counsel, retired to their page 13 } room to consider of their verdict and after awhile returned into court and rendered a verdict in the words and figures, following, to-wit: "We the jury find the verdict in favor of the defendants. Arnold McPeak, Foreman."

Upon the jury being discharged, the plaintiffs by Counsel moved the court to set aside the verdict of the jury and enter up judgment for the plaintiff notwithstanding the verdict of the jury, and to award a new trial if judgment non obstante was not entered, and assigned grounds therefor at bar. Upon consideration whereof, the court doth overrule the said motions, and the plaintiff by counsel excepted.

And, now, on this the 8th day of August, 1951, it is therefore considered and ordered that in accordance with the jury's verdict, it is the judgment of the court that the plaintiffs take nothing by reason of this action, and that the defendants have and recover of the plaintiffs their costs in this behalf expended.

The plaintiffs by counsel expressing an intention to apply to the Supreme Court of Appeals of Virginia for a writ of error to the judgment of the court and upon the plaintiffs motion the execution of the foregoing judgment is suspended for sixty days upon the plaintiffs or some one for them executing bond in the penalty of $200.00 with security and conditioned according to law.

Requested:

J. L. DILLOW,
Counsel for defendants.

DAVID E. REPASS
Counsel for defendants

Examined:

S. B. CAMPBELL

Counsel for Plaintiffs

Enter this order: August 8th, 1951.

V. L. S., JR., Judge.

page 14 } NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

The plaintiffs in each of the above styled cases file this their notice of appeal and assign the following errors in each case:

1. The Court erred in refusing to strike the defendant's evidence.

2. The Court erred in granting any instructions for the defendant.

3. The Court erred in not entering up final judgment for the plaintiffs notwithstanding the verdict.

4. The Court erred in not setting aside the verdict of the jury and granting a new trial because of errors of law committed during the progress of the trial as follows:

a. In requiring the plaintiffs to endorse on the notice of motion that any recovery was for the benefit of the State Farm Mutual Automobile Insurance Company as its interest might appear.

b. In permitting counsel for the defendants to examine the jurors on their VOIR DIRE as to whether they were employed by, interested in or policyholders in the State Farm Mutual Automobile Insurance Company.

c. In not sustaining the objection of plaintiff's counsel
page 15 } to the argument of Mr. Dillow of counsel for the defendant that this suit had for its purpose the recompensing of an insurance company and that no verdict should be found against the defendants because all their property had been burned up.

d. Because of the admission in evidence of improper testimony as to a sign purportedly in the garage: "Not responsible in case of fire."

CURTIS O. CRABTREE,
ROBERT M. MILLER,
By Counsel

CAMPBELL & CAMPBELL
Wytheville, Virginia.

A copy: teste.

M. B. WATTS, Clerk.

INDEX TO RECORD