

206 Va 815

Record No. 6071

In the
Supreme Court of Appeals of Virginia
at Richmond

**UNITED STATES FIDELITY &
GUARANTY COMPANY**

v.

JOSEPH THOMAS BYRUM, ET AL.

FROM THE CIRCUIT COURT OF NANSEMOND 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.

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

4

Record No. 6071

United States Fidelity & Guaranty Company, Plaintiff in error,
against

Joseph Thomas Byrum, et al.

Counsel for defendants in error pray leave to cite
the following cases:

Drewry v. State Farm Mutual, 204 Va. 231, 129 S. E. 2d 681.

State Farm Insurance Co. v. Drewry, 191 Fed. Supp. 852
(W.D. Va. 1961).

Respectfully,

/s/ Marshall Andrews
Robert G. Winters
Counsel for Defendants

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(W.D. Va. 1961).

Respectfully,

\s/ Marshall Andrews
Robert G. Winters
Counsel for Defendants

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6071

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 15th day of January, 1965.

UNITED STATES FIDELITY & GUARANTY COMPANY,
Plaintiff in Error,

against

JOSEPH THOMAS BYRUM AND CELINA MUTUAL
INSURANCE COMPANY, Defendants in Error.

From the Circuit Court of Nansemond County
James C. Godwin, Judge

Upon the petition of United States Fidelity & Guaranty Company a writ of error and *supersedeas* is awarded it to a judgment rendered by the Circuit Court of Nansemond County on the 29th day of July, 1964, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Joseph Thomas Byrum and another were defendants; 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 three hundred dollars, with condition as the law directs.

RECORD

* * * * *

Filed in the Clerk's Office the 18th day of November, 1963.

Teste:

JOHN H. POWELL, Clerk
PEGGY B. BYRD, D. C.

MOTION FOR JUDGMENT.

Defendants are notified that plaintiff moves the Circuit Court of Nansemond County, Virginia, for judgment against them in the sum of Thirteen thousand, seven hundred and fifty (\$13,750.00) dollars, for this, to-wit:

1. March 31, 1961, Mallie R. Jernigan was driving his automobile in Nansemond County, Virginia, in which his son, Robert Ray Jernigan; his wife, Virginia H. Jernigan, and another son, Tony Brooks Jernigan, were riding, then proceeding north over and along Virginia State Highway No. 13 about 1.7 miles south of the City of Suffolk in Nansemond County, Virginia.

2. At the same time and place defendant, Joseph Thomas Byrum was driving in the same direction, an automobile owned by his mother, Pattie Perry Byrum, which said automobile was uninsured, and came in contact with the automobile operated by Mallie R. Jernigan.

3. At the time of the accident, Joseph Thomas Byrum was employed by Perry Farm Equipment Company, Incorporated, enroute to Norfolk, Virginia, on an errand for said page 2 } company.

4. As a result of the accident, Robert Ray Jernigan, fourteen years of age, was killed instantly and Mallie R. Jernigan, Virginia H. Jernigan and Tony Brooks Jernigan sustained personal injury.

5. Mallie R. Jernigan qualified as administrator of the estate of Robert Ray Jernigan, deceased, and as such brought action against Joseph Thomas Byrum and Perry Farm Equipment Company, Incorporated, for the death of said Robert Ray Jernigan.

6. December 3, 1962, judgment was awarded the administrator in the Circuit Court of Nansemond County in the sum of Twenty thousand (\$20,000.00) dollars, against Joseph Thomas Byrum and Perry Farm Equipment Company, Incorporated.

7. As a result of the trial of said cause, it being established that Joseph Thomas Byrum was guilty of negligence which caused the injuries sustained, plaintiff was bound for and paid the judgment on behalf of its insured, namely, Perry Farm Equipment Company, Incorporated, and subsequently settled with Mallie R. Jernigan for \$6,000; Virginia H. Jernigan, \$1,000.00, and Tony Brooks Jernigan, infant, \$500.00, for their respective damages and injuries and obtained full acquittance from each of them.

8. The automobile driven by Joseph Thomas Byrum at the time of the accident being uninsured, and Mallie R. Jernigan being insured against liability by contract with Celina Mutual Insurance Company of Celina, Ohio, as set forth in the caption, they became and are indebted to plaintiff for one-half of the sum paid out by plaintiff, to-wit; Thirteen thousand, seven hundred and fifty (\$13,750.00) dollars, plus counsel fees and costs.

Judgment is sought on behalf of plaintiff as aforesaid.

UNITED STATES FIDELITY
AND GUARANTY COMPANY
By CLYDE W. COOPER
Of Counsel.

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page 8 }

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Filed this the 9th day of December, 1963.

JOHN H. POWELL, Clerk
By EVELYN H. ARTMAN, D. C.

DEMURRER OF CELINA MUTUAL INSURANCE
CO. DEFENDANT.

The defendant, Celina Mutual Insurance Company, says that plaintiff's motion for judgment is not sufficient in law for the following reasons:

1. If plaintiff paid to Mallie R. Jernigan, as Administrator of the estate of Robert Ray Jernigan, deceased, the sum of \$20,000.00, as alleged in its motion for judgment, it made said payment voluntarily and without any judgment being entered against plaintiff, United States Fidelity & Guaranty Company. If the alleged payment was made under such circumstances, plaintiff is not entitled by law to recover any contribution from this defendant.

2. If plaintiff paid to Mallie R. Jernigan, as an individual, the sum of \$6,000.00, and paid to Virginia H. Jernigan, as an individual, the sum of \$1,000.00, and to Tony Brooks Jernigan, an infant, or to Mallie R. Jernigan, as father and next friend of Tony Brooks Jernigan, an infant, the sum of \$500.00, for their respective damages and injuries, as alleged in plaintiff's motion for judgment, it made said payments voluntarily and without any judgment being entered against plaintiff, United States Fidelity & Guaranty Company, and in fact without any judgment being entered against either Joseph Thomas Byrum, Perry Farm Equipment Company, Inc., or United States Fidelity & Guaranty Company. If the alleged payments were made under such circumstances, plaintiff is not entitled by law to recover any contribution from this defendant.

3. There is no privity of contract between plain-
page 9 } tiff and this defendant, Celina Mutual Insurance
Company, and there can be no recovery by plaintiff
from this defendant by means of any contract.

4. The statute laws of Virginia regarding uninsured motor vehicles in the situation alleged in plaintiff's motion for judgment are not for the benefit of plaintiff, but in any circumstances could only have been for the benefit of Mallie R. Jernigan, as Administrator of the Estate of Robert Ray Jernigan, deceased, Mallie R. Jernigan, Virginia H. Jernigan, and Tony Brooks Jernigan, as individuals. The benefits of the said laws could have accrued to said persons, as uninsured motorists, only if there had been no legal responsibility on the part of Perry Farm Equipment Company, Inc. The benefits of

the said laws are not assignable by the said individuals and did not pass to the plaintiff by subrogation.

5. Plaintiff's motion for judgment sets forth no grounds for legal relief against, or recovery from, this defendant.

CELINA MUTUAL INSURANCE
COMPANY
By MARSHALL ANDREWS
Counsel.

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page 35 }

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Received July 29, 1964.
JOHN H. POWELL, Clerk.

STIPULATION.

The parties stipulate as follows:

1. March 31, 1961, Mallie R. Jernigan was driving his automobile in Nansemond County, Virginia, in which his son, Robert Ray Jernigan, his wife, Virginia H. Jernigan, and another son, Tony Brooks Jernigan, were riding, then proceeding Northwardly along Virginia State Highway No. 13, about 1.7 miles South of Suffolk.

2. At the same time and place, Joseph Thomas Byrum, age *nineteen*, was driving an automobile owned by his mother, Pattie Perry Byrum, in the same direction, and said automobile was uninsured against public liability by any insurer, and came in contact with the automobile operated by Jernigan.

3. As a result of the accident, Robert Ray Jernigan, fourteen years of age, was killed, and Mallie R. Jernigan, Virginia H. Jernigan and Tony Brooks Jernigan each sustained personal injury.

4. Joseph Thomas Byrum was employed by Perry Farm Equipment Company, Incorporated, and en route to Norfolk, Virginia, to pick up tractor parts for his employer. Defendant claims, and Plaintiff denies, this fact rendered the Byrum automobile insured, because Byrum was on a mission for his employer, insured by United States Fidelity & Guaranty

Company, and that fact insured the Byrum auto-
page 36 } mobile.

5. Mallie R. Jernigan qualified as administrator of Robert Ray Jernigan, deceased, and brought an action in the Circuit Court of Nansemond County against Joseph Thomas Byrum and Perry Farm Equipment Company, Incorporated, seeking damages for the death of Robert Ray Jernigan.

6. December 3, 1962, in said Court, judgment was awarded Mallie R. Jernigan, as such administrator, in the sum of Twenty Thousand (\$20,000.00) Dollars against Joseph Thomas Byrum and Perry Farm Equipment Company, Incorporated, which judgment Plaintiff paid as insurer for Perry Farm Equipment Company, Incorporated. Counsel for Celina attended, but did not participate in the trial resulting in said judgment.

7. That trial established the negligence of Joseph Thomas Byrum, and that at the time of the accident mentioned, Joseph Thomas Byrum was acting in the course of his employment for Perry Farm Equipment Company, Incorporated. Subsequently, the claims for personal injuries of Mallie R. Jernigan, Virginia H. Jernigan and Tony Brooks Jernigan were settled by plaintiff for Six Thousand (\$6,000.00) Dollars, One Thousand (\$1,000.00) Dollars, and Five Hundred (\$500.00) Dollars, respectively, and were paid by United States Fidelity & Guaranty Company, as insurer for Perry Farm Equipment Company, Incorporated, and Plaintiff obtained complete releases for said claims and judgment. The limit of Plaintiff's claim here is \$22,500.

8. There was no policy of insurance on the Byrum automobile at the time of the accident. At that time, Mallie R. Jernigan, driver of the other automobile involved in this accident, and successful claimant, was insured against public liability with Celina Mutual Insurance Company of Celina, Ohio, defendant, as set forth in the caption. This action was instituted against Celina Mutual Insurance Company by United States Fidelity & Guaranty Company for
page 37 } reimbursement of the sums paid out by plaintiff in
this cause by reason of the facts hereinabove set
forth.

The pleadings are made a part of this stipulation.

Filed July 29, 1964.

JAMES C. GODWIN

page 38 }

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ORDER.

This action came on to be heard on the 29th day of July, 1964, upon plaintiff's motion for judgment and amended motion for judgment, and demurrer of the defendant, Celina Mutual Insurance Company, thereto; and was argued by counsel.

Upon consideration of which, and the Court not being advised of its decision upon the matter raised in the demurrer aforesaid, took the same under advisement. And the Court having considered the said motion for judgment, amended motion for judgment, and the demurrer of the said defendant, Celina Mutual Insurance Company, and now being advised of its decision, doth Adjudge and Order that the said demurrer be, and it is hereby, sustained, and that the said motion for judgment and amended motion for judgment be, and the same are hereby dismissed as to the defendant, Celina Mutual Insurance Company, but continued as to the defendant, Joseph Thomas Byrum.

To which ruling and action of the Court in sustaining the demurrer and dismissing said motion for judgment and amended motion for judgment as to the defendant, Celina Mutual Insurance Company, the plaintiff duly excepted. And the plaintiff indicating its intention to apply for an appeal to the Supreme Court of Appeals of Virginia from this order, it is further ordered that the execution of this order be, and the same is hereby suspended for a period of sixty days from the date this order is entered.

Enter July 29th, 1964.
JAMFS C. GODWIN, Judge.

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page 39 }

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To John H. Powell, Clerk, Circuit Court of Nansemond
County, Suffolk, Virginia:

United States Fidelity & Guaranty Company hereby gives
notice of appeal from final judgment rendered in this cause
on July 29th, 1964, to the Supreme Court of Appeals of Vir-
ginia, and assigns the following errors:

That the Court erred in

- (1) Sustaining defendants' demurrer.
- (2) Entering final judgment for defendant. Celina Mutual
Ins. Co.

You are further requested to promptly make up the record
in this cause in accordance with Part 5, Paragraph 5, of the
Rules of the Supreme Court of Appeals of Virginia.

Respectfully,

UNITED STATES FIDELITY &
GUARANTY COMPANY
By THOS. L. WOODWARD
Of Counsel for Plaintiff.

Filed this the 6th day of August, 1964.

JOHN H. POWELL, Clerk
By J. M. CULPEPPER, D. C.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

	Page
Writ of Error and <i>Supersedeas</i> Awarded	1
Record	2
Motion for Judgment	2
Demurrer	4
Stipulation	5
Judgment—July 29, 1964	7
Notice of Appeal and Assignments of Error	8