

STATE OF ALABAMA

BALDWIN COUNTY

TO ANY SHERIFF OF THE STATE OF ALABAMA:

You are hereby commanded to summons Calvert Fire Insurance Company, a Corporation, to appear and plead, answer or demur within thirty days from the service hereto to the Bill of Complaint filed in the Circuit Court of Baldwin County, Alabama, by Claude G. Phillips, an individual d/b/a Phillips Motor Company.

Witness my hand this the 10 day of August, 1961.

Alice J. Duck
Alice J. Duck, Clerk

CLAUDE G. PHILLIPS an individual
d/b/a PHILLIPS MOTOR COMPANY

Plaintiff

VS

CALVERT FIRE INSURANCE COMPANY,
a Corporation

Defendant

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

AT LAW

NO. 4816

1.

The Plaintiff claims of the Defendant SEVEN HUNDRED DOLIA RS (\$700.00) the value of an automobile, which the Defendant, on the 5th day of November, 1960, insured against loss or injury by fire, lightning, transportation, theft and other perils in the policy of insurance mentioned, for the term of ONE (1) year, which authomobile was stolen on, to-wit, the 16th day of February, 1961, of which the Defendant has had notice.

FILED

AUG 10 1961

ALICE J. DUCK, CLERK
REGISTER

WILTERS, BRANTLEY & NESBIT

BY: Phillips & Nesbit

Attorneys for the Plaintiff

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
AT LAW

NO. _____

CLAUDE G. PHILLIPS an individual
d/b/a PHILLIPS MOTOR COMPANY

Plaintiff

VS

CALVERT FIRE INSURANCE COMPANY,
A Corporation

Defendant

Wilters, Brantley & Nesbit
Attorneys at Law
Robertsdale, Alabama

The State of Alabama

DEPARTMENT OF STATE

I, Bettye Frink, Secretary of State, of the State of Alabama, having custody of the Great and Principal Seal of said State, do hereby certify that the foreign corporation records on file in this office disclose that the attorney for service of process for Calvert Fire Insurance Company, a Pennsylvania corporation, is the Superintendent of Insurance of the State of Alabama.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State, at the Capitol, in the City of Montgomery, this 3 day of August One Thousand Nine Hundred and Sixty-one.

118



Bettye Frink
Secretary of State

PLAINTIFF'S AFFIDAVIT THAT TITLE 10, SEC. 192 IS APPLICABLE

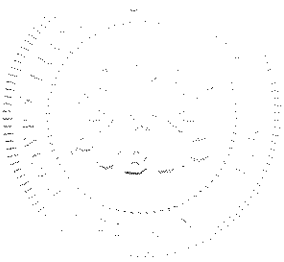
I certify that the Defendant, Calvert Fire Insurance Company, a Corporation, is and was prior to the 16th day of February, 1961, and is as of this date a non-resident of the State of Alabama; and that it did do business and enter into a contract of insurance with one Roy Wilson of Baldwin County, Alabama, in Robertsedale, Alabama, and that as a result of this contract the Plaintiff who was named as payee has a cause of action against the Defendant. Plaintiff further avers that according to the records of the Department of Insurance, State of Alabama, the Superintendent of Insurance of State of Alabama, Montgomery, Alabama, has been designated by the Defendant, Calvert Fire Insurance Company, as its true and lawful attorney or agent upon whom process may be served in any action accrued or accruing from its doing of business or performing of work or service in this state, or as an incident thereto by any such non-resident, or its agent, servant, or employee.

WILTERS, BRANTLEY & NESBIT

BY:

Phyllis S. Nesbit
Attorneys for the Plaintiff

Sworn to and subscribed to before me this 4th day of Aug., 1961.



FILED

AUG 10 1961

ALICE J. DUCK, CLERK
REGISTER

Delta W. Gwaltney
Notary Public,

1465

RECEIVED IN OFFICE
AUG 11 1961
M. S. BUTLER, Sheriff

2

Executed by serving 2 copies of
the within on William D. Page
Superintendent
of Insurance, State of Alabama
This The 14 day of Aug 19 61
Sheriff of Montgomery County
M. S. Butler,
By James D. S.

The Sheriff claims 2
miles at 10c per mile for a total
of \$ 20
M. S. Butler, Sheriff
Montgomery County, Ala.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

AT LAW

NO. 4816

CLAUDE G. PHILLIPS an individual
d/b/a PHILLIPS MOTOR COMPANY

Plaintiff

VS

CALVERT FIRE INSURANCE COMPANY,
A Corporation

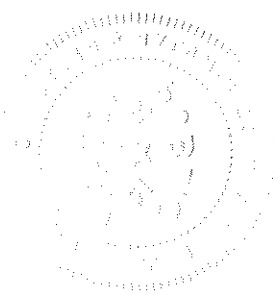
Defendant

FILED

AUG 10 1961

ALICE J. DUCK, CLERK
REGISTER

Walters, Brantley & Nesbit
Attorneys at Law
Robertsdale, Alabama



IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
AT LAW NO. 4816

CLAUDE G. PHILLIPS an individual }
d/b/a PHILLIPS MOTOR COMPANY }

Plaintiff

VS

CALVERT FIRE INSURANCE COMPANY,
A Corporation

Defendant

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

AT LAW

NO. _____

AMENDED COMPLAINT

Comes now the Plaintiff in the above styled cause and amends his
complaint to read as follows:

CLAUDE G. PHILLIPS an individual
d/b/a PHILLIPS MOTOR COMPANY and
ROY WILSON

Plaintiffs

VS

CALVERT FIRE INSURANCE COMPANY,
A Corporation

Defendant

1.

The Plaintiffs claim of the Defendant SEVEN HUNDRED DOLLARS (\$700.00)
the value of an automobile, which the Defendant, on the 5th day of
November, 1960, insured against loss or injury by fire, lightning, trans-
portation, theft and other perils in the policy of insurance mentioned,
for the term of ONE (1) year, which automobile was stolen on, to-wit,
the 16th day of February, 1961, of which the Defendant has had notice.

FILED

OCT 12 1961

ALICE J. DUCK, CLERK
REGISTER

WILTERS, BRANTLEY & NESBITT

BY:

Phyllis S. Nesbitt
Attorneys for the Plaintiff

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

AT LAW

NO. 4816

CLAUDE G. PHILLIPS an individual
d/b/a PHILLIPS MOTOR COMPANY and
ROY WILSON

Plaintiffs

VS

CALVERT FIRE INSURANCE COMPANY,
A Corporation

Defendant

AMENDED COMPLAINT

FILED

OCT 12 1961

ALICE J. DUCK, CLERK
REGISTER

WILTERS, BRANTLEY & NESBIT
Robertsdale, Alabama
Attorneys for the Plaintiffs

CLAUDE G. PHILLIPS, an
individual d/b/a Phillips
Motor Company, and ROY WILSON,

Plaintiffs,

VS.

CALVERT FIRE INSURANCE COMPANY,
a Corporation,

Defendant.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

AT LAW

NO. 4816

APPEAL BY DEFENDANT

Now comes the Defendant and appeals to the Court of
Appeals of Alabama from the final judgment rendered in this cause
in and by the Circuit Court of Baldwin County, Alabama, Law Side,
on to-wit, January 8, 1962.

DATED this 7th day of March, 1962.

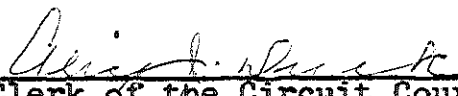

Attorney for Defendant

SECURITY FOR COSTS

I, the undersigned, do hereby acknowledge myself as
security for the costs of the appeal taken by the Defendant in this
cause.


Attorney for Defendant

Taken and approved on this the
7 day of March, 1962.


Clerk of the Circuit Court of Baldwin
County, Alabama.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
AT LAW NO. 4816

SUPERSEDEAS BOND

KNOW ALL MEN BY THESE PRESENTS: That we, Calvert Fire Insurance Company, a Corporation, as Principal, and the undersigned as Surety, are held and firmly bound unto Claude G. Phillips, an individual d/b/a Phillips Motor Company and Roy Wilson in the just and full sum of FOURTEEN HUNDRED DOLLARS (\$1400.00) for the payment of which, well and truly to be made and done, we bind ourselves, and each of us, our and each of our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 7th day of March,
1962.

The condition of the above obligation is such, that whereas, Claude G. Phillips, an individual d/b/a Phillips Motor Company and Roy Wilson obtained a judgment in the above styled cause in the Circuit Court of Baldwin County, Alabama, Law Side, on the 8th day of January, 1962, from which judgment the said Calvert Fire Insurance Company, a Corporation, has obtained an appeal returnable to the next term of the Court of Appeals of Alabama.

Now, therefore, if the said Calvert Fire Insurance Company, a Corporation, shall prosecute the said appeal to effect, and satisfy such judgment as may be rendered against it in said cause by the Court of Appeals then this obligation is to be null and void, otherwise to remain in full force and effect.

And we, and each of us, hereby waive all rights to or claim of exemption as to personal property either of us have now or may hereafter have, under the Constitution and Laws of Alabama,

and we hereby severally certify that we have property free from all encumbrance to the full amount of the above bond.

WITNESS our hands and seals this 7th day of March, 1962.

CALVERT FIRE INSURANCE COMPANY,
a Corporation, (SEAL)

By [Signature]
As its Attorney

FIDELITY AND CASUALTY COMPANY OF
NEW YORK, a Corporation, (SEAL)

By [Signature]
As its Attorney in Fact

Taken and approved on this the
7 day of March, 1962.

[Signature]
Clerk of the Circuit Court of Baldwin
Alabama.

FILED
MAR 7 1962
ALICE L. DUCK, CLERK
REGISTER

THE STATE OF ALABAMA }
 Baldwin County - Circuit Court }

TO ANY SHERIFF OF THE STATE OF ALABAMA — GREETING:

Whereas, at a Term of the Circuit Court of Baldwin County, held on the

8th day of January, 1962, ~~Monday~~, 1962, in a cer-

tain cause in said Court wherein CLAUDE G. PHILLIPS, an individual, d/b/a Phillips

Motor Co. and ROY WILSON Plaintiffs and CALVERT FIRE INSURANCE CO., A Corp.

Defendant, a judgement was rendered against said

Defendant

to reverse which Judgment, the said Calvert Fire Insurance Co., a Corp.

applied for and obtained from this office an APPEAL, returnable to the next

Term of our Court of Appeals Court of the State of Alabama, to be held at Montgomery,

on the day of 195 next, and the necessary bond

having been given by the said CALVERT FIRE INSURANCE CO., A Corp. by James R. Owen, as
 its attorney with ~~XXXXXXXX~~ FIDELITY & CASUALTY CO., OF New York, a Corp., sureties,
 by Walter Lindsey, as its Attorney in Fact,

CLAUDE G. PHILLIPS, an

Now, You Are Hereby Commanded, without delay, to cite the said ~~Walters, Brantley~~

Ind, d/b/a Phillips Motor Co. & Roy Wilson or Wilters, Brantley & Nesbit

, attorney, to appear at the next Term of our

Court of Appeals
 said Supreme Court, to defend against the said Appeal, if they think proper.

Witness, ALICE J. DUCK, Clerk of the Circuit Court of said County, this 9th

day of March, A. D., 1962.

Attest:

Alice J. Duck, Clerk.

Received 9 day of Mar. 1962
and on 12 day of March 1962
I served a copy of the within Citation
on Walters, Brantley &
Nesbit
By service on Walters

TAYLOR WILKINS, Sheriff
By W. A. Zerbe S.
O m

77,4816

CIRCUIT COURT
Baldwin County, Alabama

Claude G. Phillips

Vs. } Citation in Appeal

Calvert Fire Insurance Co

Issued _____ day of _____, 195____

To be served on

Walters, Brantley &
Nesbit

OCT 15 1962

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

OCTOBER TERM, 1962-63

1 Div. 902

Calvert Fire Insurance Company

v.

Claude G. Phillips, An Ind. d/b/a Phillips Motor Company

Appeal from Baldwin Circuit Court

JOHNSON, JUDGE

Appellee brought suit against appellant on a policy insuring against loss by theft. The case was tried by the court without a jury. Judgment was rendered for plaintiff and defendant appealed.

The complaint was as follows:

"The Plaintiff claims of the Defendant SEVEN HUNDRED DOLLARS (\$700.00) the value of an automobile, which the Defendant, on the 5th day of November, 1960, insured against loss or injury by fire, lightning, transportation, theft and other perils in the policy of insurance mentioned, for the term of ONE (1) year, which automobile was stolen on, to-wit, the 16th day of February, 1961, of which the Defendant has had notice."

2.

The defendant pled the general issue. Plaintiff offered evidence to show the existence of the policy sued on and the loss of the automobile by theft. Defendant offered no evidence. The appellant argues the one assignment of error which, in substance, is that the court erred in rendering judgment for plaintiff, this for the reason that plaintiff failed to prove his complaint. Specifically it is insisted, there was a complete absence of proof that notice of loss had been given to defendant. The case of National Life & Accident Ins. Co. v. Winbush, 215 Ala. 351, 110 So. 571, is authority for the proposition that an element of a prima facie case on a policy of insurance is proof of loss as required by the policy.

It is elemental that the burden is upon the plaintiff to prove his complaint. Central of Ga. R. Co. v. Cross, 192 Ala. 354, 68 So. 291. As we have shown, plaintiff alleged that notice of loss had been given to defendant.

Appellee agrees that notice of loss to the insurer is required by the policy and does not contend that the giving of notice was proved. The contention is that it was the burden of insurer to plead and prove the defense of failure of notice or proof of loss. This contention has been decided adversely to appellee in Life Ins. Co. of Virginia v. Hanback, 250 Ala. 643, 35 So. 2d 696, where it is said:

"The provisions of the policy introduced in evidence make proof of loss a condition precedent to recovery. When such a policy is sued on, the plea of the general issue casts on the plaintiff the burden of showing that due proof of loss has been made. If the policy does not make proof of loss a condition precedent to recovery, then failure of proof of loss must be specially pleaded."

Cases relied upon by appellee are not to the contrary. Sovereign Camp W. O. W. v. Dennis, 17 Ala. App. 642, 87 So. 616; National Fire Ins. Co. v. Lasseter, 224 Ala. 649, 141 So. 645; North Carolina Mutual Life Ins. Co. v. Terrell, 227 Ala. 410, 150 So. 319; National Fire Ins. Co. v. Kinney, 224 Ala. 586, 141 So. 350; Union Mutual Ins. Co. v. Peavy, 24 Ala. App. 116, 133 So. 300. The first of these dealt with a law entering into and modifying the contract. The next case dealt with reformation of an

3.

insurance contract. The next dealt with policy provisions entirely different from that here involved. The next dealt with demurrer to a replication as answer to a plea. The next dealt with the question of the sufficiency of the complaint which failed to allege the policy was in force.

Appellee further argues that by failing to raise the question of failure of proof of loss at the conclusion of the trial by asking for a new trial or for a ruling on the evidence, the appellant waived his right to have the matter considered on appeal.

By Section 260, Title 7, of the Code it is provided that where the case is tried by the court without a jury, "the finding of the court on the facts shall be subject to review without an exception thereto." Browne v. Giger, 221 Ala. 176, 128 So. 174.

In reviewing the case of Clepton v. State, 28 Ala. App. 533, 189 So. 779, which was tried by the Circuit Judge without the intervention of a jury, we find that this court said:

"In cases such as the one at bar, an exception is not necessary. The Court speaks through its judgments and if the judgment is not sustained by the testimony, as shown by the bill of exceptions, it cannot stand."

Since the judgment is not sustained by the record evidence, we have no alternative but to reverse it.

REVERSED AND REMANDED.

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE COURT OF APPEALS OF ALABAMA

1st Div., No. 902

Calvert Fire Insurance Company Appellant

v.

Claude G. Phillips, doing business as Phillips Motor Company Appellee

From Baldwin Circuit Court

The State of Alabama,
City and County of Montgomery.

I, Charles Bricken, Jr., Clerk of the Court of Appeals of Alabama, do hereby certify that the foregoing pages numbered from one to 3 inclusive, contain a full, true and correct copy of the opinion of said Court of Appeals in the above stated cause, as the same appears and remains of record and on file in this office.

Witness, Charles Bricken, Jr., Clerk of the Court

of Appeals of Alabama, at the Capitol, this the

16th day of October, 1962

Charles Bricken, Jr.
Clerk of the Court of Appeals of Alabama.

THE COURT OF APPEALS OF ALABAMA

1st Div., No. 902

Calvert Fire Insurance Company
Appellant

vs.

Claude G. Phillips, doing busi-
ness as Phillips Motor Company
Appellee

From Baldwin Circuit Court.

COPY OF OPINION

BROWN PRINTING CO., MONTGOMERY

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE COURT OF APPEALS OF ALABAMA

October Term 19 62

To the Clerk of the Circuit Court of Baldwin County, Greeting:

Whereas, the Record and Proceedings of the Circuit Court of said County, in a certain cause lately pending in said Court between

Calvert Fire Insurance Company, Appellant,

and

Claude G. Phillips, doing business as Phillips Motor Company Appellee,

wherein by said Court, at the _____ Term, 19____, it was considered adversely to said appellant____, were brought before our Court of Appeals, by appeal taken, pursuant to law, on behalf of said appellant_____.

Now, it is hereby certified, That it was thereupon considered by our Court of Appeals on the 16th day of October 1962, that said judgment of said Circuit Court be reversed and annulled, and the cause remanded to said Court for further proceedings therein; and that it was further considered that the appellee pay

the costs accruing on said appeal in this Court and in the Court below_____

Witness Charles Bricken, Jr., Clerk of the Court
of Appeals of Alabama, at the Capitol, this the
16th day of October 19 62

Charles Bricken Jr.
Clerk of the Court of Appeals of Alabama.

THE COURT OF APPEALS OF ALABAMA

October Term, 19 62

1st Div. No. 902

Calvert Fire Insurance Company

Appellant.....

v.

Claude G. Phillips, doing business as Phillips Motor Company

Appellee.....

From Baldwin Circuit Court

CERTIFICATE OF
REVERSAL

The State of Alabama,

County.

} Filed

this

FILED

19

OCT 17 1962

Alice J. Duck, CLERK
REGISTER

BROWN PRINTING CO., MONTGOMERY

CERTIFICATE OF APPEAL. (Civil Cases,)

No. 4816

Baldwin County, Circuit Court.

CLAUDE G. PHILLIPS, an Individual, d/b/a Phillips Motor Company and ROY WILSON,
Plaintiffs
vs.

CALVERT FIRE INSURANCE COMPANY, a Corporation,
Defendant.

I, Alice J. Duck Clerk of Circuit Court,
of Baldwin County, Alabama, hereby certify that in the
cause of CLAUDE G. PHILLIPS, an individual, d/b/a Phillips Motor plaintiffs
Company and ROY WILSON,
vs.

CALVERT FIRE INSURANCE COMPANY, a Corporation, defendant, which was tried and determined in this Court on the 8th day of January 19 62, in which there was a judgment for SEVEN HUNDRED and no/100 - - Dollars, in favor of the plaintiffs, (~~1000 judgment~~ ~~for~~ ~~the~~ ~~plaintiffs~~), the Defendant on the 7th day of March 19 62, took an appeal to the Court of Appeals of Alabama to be holden of and for said State.

I further certify that CALVERT FIRE INSURANCE COMPANY, A Corporation
filed security for cost of appeal, to the Court of Appeals Court, on
the 7th day of March 19 62, and that Calvert Fire Insurance Company,
a Corporation, by: James R. Owen, as Its Attorney, and Fidelity and Casualty Company,
of New York, a Corporation, by Walter Lindsey, as Its Attorney in Fact,
are sureties on the appeal bond.

I further certify that notice of the said appeal was on the 12
day of March 1962, served on Wilters, Brantley & Nesbit
as attorney of record for said appellee, and that the amount sued for
was Seven Hundred and no/100 - - - - - Dollars. (~~Or certain lands~~)
(~~Or personal property.~~)

Witness my hand and the seal of this Court, this the 9th
day of Mar March 19 62.

Clerk of the Circuit Court of
Baldwin County, Alabama.