207 VA 736

Return to
FILE COPY
Clerk, Supreme Court of Appeals
Richmond, Va

# Record No. 6308

## In the

## Supreme Court of Appeals of Virginia

## at Richmond

---

## AETNA CASUALTY AND SURETY COMPANY

## v.

## K. C. KELLAM, ET AL.

---

FROM THE CIRCUIT COURT OF ACCOMACK 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.

IN THE

# Supreme Court of Appeals of Virginia

AT RICHMOND.

---

**Record No. 6308**

---

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 1st day of December, 1965.

AETNA CASUALTY AND SURETY COMPANY,
Plaintiff in error,

*against*

K. C. KELLAM, VERNON LEE BAILEY AND
DORY ROGERS SAMPLE, JR., Defendants in error.

---

From the Circuit Court of Accomack County
Jefferson F. Walter, Judge

---

Upon the petition of Aetna Casualty and Surety Company a writ of error is awarded it to a judgment rendered by the Circuit Court of Accomack County on the 8th day of June, 1965, in a certain proceeding then therein depending wherein the said petitioner was plaintiff and K. C. Kellam and others 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

* * * * *

page 1 ]

* * * * *

### MOTION FOR DECLARATORY JUDGMENT

To the above styled Defendants:

You are hereby notified that the undersigned will move the Circuit Court for the County of Accomack for a declaratory judgment in accordance with § 8-578 *et seq.*, Code of Virginia (Repl. Vol. 1957), construing a certain contract of insurance between Dory Rogers Sample, Jr. and The Aetna Casualty and Surety Company, the same being Policy No. 58CA113976, covering the period from the 9th day of October, 1963, to the 9th day of October, 1964, which said policy contains the standard uninsured motorist endorsement as required by the statute laws of the State of Virginia as provided by § 38.1-381, *Code of Virginia* (Repl. Vol. 1953) (as amended 1964).

An actual antagonistic assertion and denial of rights under said contract of insurance and incorporated statutory provisions have arisen as hereinafter set forth:

1. That on the 8th day of February, 1965, one of the defendants herein, the said K. C. Kellam, instituted in this honorable Court a motion for judgment by his mother and next friend, Willie Mae Kellam, against the said

page 2 ] Vernon Lee Bailey, one of the defendants herein, under the style of "*K. C. Kellam, an infant under twenty-one years of age, who sues by Willie Mae Kellam, his mother and next friend,* v. *Vernon Lee Bailey,* which case is presently pending before this honorable Court, alleging that the defendant therein, the said Vernon Lee Bailey, caused by his negligence injuries and damages to the plaintiff therein, the said K. C. Kellam, to the extent of $25,000.00.

2. The said motion for judgment alleges that the said K. C. Kellam and Vernon Lee Bailey were each operating vehicles owned by the said Dory Rogers Sample, Jr. with the knowledge, consent, and permission of the latter, and further alleges that on the 24th day of September, 1964, the said Vernon Lee Bailey while operating the vehicle of Dory

Rogers Sample, Jr. by his negligence proximately caused a collision with the vehicle driven by the said K. C. Kellam resulting in injury to the said K. C. Kellam.

3. That in paragraph numbered 6 of the said motion for judgment it is alleged that the defendant therein, the said Vernon Lee Bailey, was an uninsured motorist as defined by the statute laws of the State of Virginia at the time and place of the above described collision and that because of this fact the plaintiff therein, the said K. C. Kellam, intended to rely upon the coverage provided for in such cases under the uninsured motorist endorsement in said *said* policy issued by the undersigned to the said Dory Rogers Sample, Jr., the same being Policy No. 58CA113976.

4. That the undersigned in accordance with the statutory rights set forth at § 38.1-381 (e)(1), *Code of Virginia* (Repl. Vol. 1953) (as amended 1964), filed an answer and grounds of defense specifically in its own name and not in the name of the defendant therein, the said Vernon Lee Bailey, wherein it was set forth and is here reaffirmed that the said K. C. Kellam and Vernon Lee Bailey were not only driving the vehicles belonging to the said Dory Rogers Sample, Jr. page 3 ] with his knowledge, consent, and permission but they were occupying the status of employees of the said Dory Rogers Sample, Jr. and the vehicles were being operated during the course of and within the scope of this employment.

5. It was further set forth by the undersigned in the said answer and grounds of defense filed specifically in its own name that the policy of insurance issued to Dory Rogers Sample, Jr. heretofore described contained the standard exclusionary clause in respect to employees of the insured, the said Dory Rogers Sample, Jr., said exclusionary clause being more particularly set forth as follows:

> (d) under Coverage A, to bodily injury or to sickness, disease or death of any employee of the Insured, arising out of and in the course of (1) domestic employment by the Insured, if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law, or (2) other employment by the Insured;

The undersigned alleged in its answer and grounds of defense that by virtue of said exclusion and by virtue of the status of the plaintiff and defendant therein, the said K. C. Kellam and Vernon Lee Bailey, as employees of the said

Dory Rogers Sample, Jr. the said policy provided no coverage to the said Vernon Lee Bailey in respect to the injuries, if any, received by the said K. C. Kellam.

6. It was further alleged in said answer and grounds of defense filed on behalf of the undersigned that although the said Vernon Lee Bailey is not afforded coverage by the terms of the policy in respect to the injuries, if any, sustained by K. C. Kellam, the said Vernon Lee Bailey was not an uninsured motorist within the meaning of §38-381, *Code of Virginia* (Repl. Vol. 1953) (as amended 1964) and the uninsured motorist endorsement contained in said policy. It was denied therein that the said K. C. Kellam could properly rely upon the provisions of said statute and endorsement.

page 4 ] 7. That the undersigned here alleges that the said K. C. Kellam may not rely upon the uninsured motorist statute as set forth above or the uninsured motorist endorsement in said policy of insurance issued to the said Dory Rogers Sample, Jr. by the undersigned and heretofore particularly described.

WHEREFORE, the undersigned moves the Court to determine whether or not the said K. C. Kellam, one of the defendants herein and the plaintiff in the motion for judgment presently pending before this Court, may rely upon the uninsured motorist statute set forth above and the standard uninsured motorist endorsement contained in the above described policy and to determine the status of the said Vernon Lee Bailey, one of the defendants herein and the defendant in the motion for judgment presently pending before this Court, as either insured or uninsured within the meaning of said statute and endorsement, and to enter an order consonant with such determination and to take such further action in the aforesaid suit presently pending in this honorable Court under the style of "*K. C. Kellam, an infant under twenty-one years of age, who sues by Willie Mae Kellam, his mother and next friend,* v. *Vernon Lee Bailey*" as it may deem fit or may be advised.

THE AETNA CASUALTY AND
SURETY COMPANY
By Counsel.

★ ★ ★ ★ ★

Filed in the Clerk's Office the 4th day of March, 1965.

* * * * *

_____, Clerk
MILDRED G. NELSON, D.C.

* * * * *

page 8 ]

* * * * *

## ANSWER TO MOTION FOR DECLARATORY JUDGMENT

Now comes the defendant, K. C. Kellam, for his Answer to Motion for Declaratory Judgment filed against him and others, and answers and says as follows:

1. That he admits the allegations set forth in Paragraph No. 1;
2. That he admits the allegations set forth in Paragraph No. 2;
3. That he admits the allegations set forth in Paragraph No. 3, except that he does not have knowledge of the policy number;
4. That he admits the allegations set forth in Paragraph No. 4, except that he neither admits nor denies that the vehicle being operated by him at the time of the accident, was being operated during the course of and within the scope of his employment;
5. That he admits the plaintiff herein alleged in his Answer and Grounds of Defense that the policy issued to Dory Rogers Sample, Jr. contained the standard exclusion clause in respect to employees, but he denies that said standard exclusion clause relieves the plaintiff herein from the duty of providing uninsured motorist coverage as provided for by

page 9 ] Statute to the said K. C. Kellam;

6. That he admits the plaintiff herein made the allegations as outlined in Paragraph No. 6, but this defendant alleges that the plaintiff, The Aetna Casualty and Surety Company, has affirmatively asserted that the said Vernon Lee Bailey was an uninsured motorist in that it did

not provide coverage for him at the time and place of the accident out of which this action arose, and by reason thereof, the said K. C. Kellam is entitled to rely, and does rely upon the uninsured motorist statute, and the policy of insurance in effect on the motor vehicle owned by Dory Rogers Sample, Jr., and at the time being operated by K. C. Kellam, with the knowledge and consent of the said Dory Rogers Sample, Jr.;

7. That he denies the allegation set forth in Paragraph No. 7, and to the contrary, alleges that he may rely upon the uninsured motorist statute and the uninsured motorist endorsement in said policy of insurance.

Having fully answered the Motion, this defendant unites in the prayer that this Court determine in this proceeding whether or not he may rely upon the uninsured motorist statute, and the standard uninsured motorist endorsement contained in the policy.

K. C. KELLAM
By WILLIAM KING MAPP
Of Counsel

★ ★ ★ ★ ★

Filed March 29, A.D., 1965

Teste: J. FULTON AYRES, Clerk
By MILDRED S. NELSON, Dy.

page 10 ]

★ ★ ★ ★ ★

## FACTS STIPULATED BY COUNSEL FOR THE PLAINTIFF, AYERS AND HARTNETT, AND COUNSEL FOR THE DEFENDANT K. C. KELLAM, MAPP & MAPP

1. That on the 8th day of February, 1965, one of the defendants herein, the said K. C. Kellam, instituted in this court a motion for judgment by his mother and next friend, Willie Mae Kellam, against the said Vernon Lee Bailey, one of the defendants herein, under the style of "*K. C. Kellam, an infant under twenty-one years of age, who sues by Willie Mae*

*Kellam, his mother and next friend* v. *Vernon Lee Bailey,*" which case is presently pending before this court, alleging that the defendant therein, the said Vernon Lee Bailey, proximately caused by his negligence injuries and damages to the plaintiff therein, the said K. C. Kellam, to the extent of $25,000.00.

2. That on the 24th day of September, 1964, at approximately 5:30 A.M. the said K. C. Kellam and Vernon Lee Bailey were each operating vehicles owned by Dory Rogers Sample, Jr. with the knowledge, consent and permission of the latter and while in the course of being employed by the latter.

page 11 ] 3. That the plaintiff herein, the Aetna Casualty and Surety Company, had issued a certain policy of insurance to the said Dory Rogers Sample, Jr. in respect to the said vehicles, said policy bearing No. 58CA-113976 and being made a part of this stipulation.

4. That the said Aetna Casualty and Surety Company denied coverage in the said policy of insurance to the defendant, Vernon Lee Bailey, in the tort action set forth in paragraph numbered 1.

5. The issue to be determined is whether by virtue of the said policy of insurance issued by the plaintiff herein and its incorporated uninsured motorist endorsement, together with the Virginia statutes, in such cases made and provided, the defendant herein, K. C. Kellam, and the plaintiff in the tort action set forth in paragraph numbered 1 may properly rely upon the uninsured motorist coverage provided by said statutory provisions and said policy in the said tort action.

We consent to this stipulation.

DANIEL HARTNETT
Of counsel for the plaintiff

WILLIAM KING MAPP
Of counsel for the defendant,
K. C. Kellam

Filed:
J.F.W.
Judge
Date 4/22/65

★ ★ ★ ★ ★

page 17 ]

★ ★ ★ ★ ★

This day came the plaintiff and the defendant, K. C. Kellam, and the defendant, Dory Rogers Sample, Jr., all by Counsel, there having been no appearance herein by Vernon Lee Bailey, upon the pleadings herein filed, facts stipulated by Counsel for the plaintiff and Counsel for the defendant, K. C. Kellam, and the Court having heretofore maturely considered arguments of Counsel, the Court doth find and hold that by virtue of the policy of insurance issued by the plaintiff, and its incorporated uninsured motorists endorsement, together with the Virginia statutes, the defendant herein, K. C. Kellam, and the plaintiff in a certain tort action pending in this Court styled *"K. C. Kellam, an infant under twenty-one years of age, who sues by Willie Mae Kellam, mother and next friend* vs. *Vernon Lee Bailey,"* referred to in Paragraph No. 1 of the Stipulation of Facts, may properly rely upon the uninsured motorists coverage provided by said statutory provisions in said tort action.

It is further adjudged and ordered that in the tort action pending in this Court styled *"K. C. Kellam, an infant, who sues by Willie Mae Kellam, his mother and next friend* vs. *Vernon Lee Bailey,"* the plaintiff be permitted to proceed with his action and be permitted to rely upon the uninsured motorists provisions as set forth in the statutes of the State of Virginia, as alleged in said Motion for Judgment, and that this ruling be *res adjudicata* as to Special Plea No. 1, and that part of the Answer and Grounds of Defense denying that the said K. C. Kellam can properly rely upon the provisions of the uninsured motorists statutes of the State of Virginia.

page 18 ]

It is finally ordered that this proceeding be, and the same hereby is, dismissed at the plaintiff's costs.

The plaintiff duly excepted to the findings and holdings in this Order, and to the entry of same.

We ask for this:

WILLIAM KING MAPP,
Of Counsel for K. C. Kellam

Seen:
R. NORRIS BLOXAM,
Counsel for Dory Rogers Sample, Jr.

Seen and objected to:
DANIEL HARTNETT,
Counsel for The Aetna Casualty and Surety Company

Enter this order: June 8, 1965

JEFF F. WALTER,
Judge of the Circuit Court for the County of Accomack

★ ★ ★ ★ ★

page 19 ]

★ ★ ★ ★ ★

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

★ ★ ★ ★ ★

The said The Aetna Casualty and Surety Company hereby files and sets forth the assignment of error, which is as follows, towit:

(1) That the Court erred in entering the said order of the 8th day of June, 1965, permitting the defendant, K. C. Kellam, who is also the plaintiff in a certain tort action pending in the said Court under the style of *K. C. Kellam, and infant, etc.* v. *Vernon Lee Bailey,* to properly rely in said tort action upon the uninsured motorist endorsement contained in the policy issued by the said Company numbered 58 CA 113976, said policy having been formerly file herein, and permitting the said K. C. Kellam to rely on the uninsured motorist statutes in such cases made and provided.

THE AETNA CASUALTY AND
SURETY COMPANY
By Counsel.

★ ★ ★ ★ ★

page 21 ]

* * * * *

## ORDER

This day came the plaintiff, the Aetna Casualty and Surety Company, by its counsel, Ayers and Hartnett, and the defendant, K. C. Kellam, by his counsel and guardian *ad litem,* William King Mapp, and Vernon Lee Bailey by his counsel and guardian *ad litem,* R. Norris Bloxom, and it being represented to the court by all counsel and guardians *ad litem* that the order entered herein on the 8th day of June, 1965, erroneously set forth that Dory Rogers Sample, Jr. appeared by R. Norris Bloxom, his attorney, and that Vernon Lee Bailey did not appear, whereas the true facts are that the said R. Norris Bloxom appeared as counsel for the said Vernon Lee Bailey and not as counsel for Dory Rogers Sample, Jr., and that the said Dory Rogers Sample, Jr. did not answer or appear although duly served with process.

Now on motion of Ayres and Hartnett, William King Mapp, and R. Norris Bloxom, all counsel of record in this cause, it is ordered that the said order entered on the 8th day of June, 1965, be and it is hereby amended to conform to the actual facts as herein above set forth and that in all other respects said order of June 8, 1965, remain the same.

page 22 ] The Clerk is directed to record this order on the Common Law Order Book and file the same in the proceedings in this cause.

* * * * *

Enter this order.
CHARLES M. LANKFORD JR
Judge
Date July 8, 1965

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

# INDEX TO RECORD


| | page |
|---|---|
| Writ of Error Awarded | 1 |
| Record | 2 |
| Motion for Declaratory Judgment | 2 |
| Answer | 5 |
| Facts Stipulated by Counsel | 6 |
| Judgment — June 8, 1965 | 8 |
| Notice of Appeal and Assignment of Error | 9 |
| Order — July 8, 1965 | 10 |