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Record No. 6905Supreme Court of Appeals
Richmond, Va.

In the
Supreme Court of Appeals of Virginia
at Richmond

D. M. LACKEY

v.

VIRGINIA SURETY COMPANY,
INCORPORATED

FROM THE CIRCUIT COURT OF CAROLINE 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.

IN THE
Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6905

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 29th day of February, 1968.

D. M. LACKEY, Plaintiff in error,
against

VIRGINIA SURETY COMPANY,
INCORPORATED, Defendant in error.

From the Circuit Court of Caroline County
Edward P. Simpkins, Jr., Judge

Upon the petition of D. M. Lackey a writ of error is awarded him to a judgment rendered by the Circuit Court of Caroline County on the 6th day of October, 1967, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Virginia Surety Company, Incorporated, was defendant; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of \$300, with condition as the law directs.

RECORD

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page 1 }

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MOTION FOR JUDGMENT

Plaintiff, by counsel, moves this Honorable Court for judgment in the amount set forth herein by virtue of the following facts, to-wit:

1. On or about December 7, 1958, a vehicle owned by the plaintiff herein was damaged in a collision on U. S. Route 301 approximately six and one-half miles north of Bowling Green, Virginia, in Caroline County, Virginia, when it was struck by a vehicle operated by James Edward Thomas who was killed as a result of the accident.

2. D. M. Lackey instituted suit in the Circuit Court of Caroline County, Virginia, against R. Garnett Brooks, Sheriff, Administrator of the Estate of James Edward Thomas, Deceased, and this case was tried in the Circuit Court of Caroline County, Virginia, and on September 24, 1964, judgment was entered in favor of the plaintiff, D. M. Lackey, against R. Garnett Brooks, Sheriff, Administrator of the Estate of James Edward Thomas, Deceased, in the sum of Four Thousand Two Hundred Sixteen and 98/100 Dollars (\$4,216.98) and Eighteen and 50/100 Dollars (\$18.50) costs.

3. Defendant in that case, by counsel, filed a notice of appeal and assignments of error along with petition
page 2 } for writ of error. On Wednesday, March 3, 1965, the Virginia Supreme Court of Appeals refused said writ of error and affirmed the judgment of the Circuit Court of Caroline County, Virginia (Exhibit "A" attached hereto).

4. Execution on the said judgment above referred to was had on March 26, 1965, and the return determined that there were no goods or chattels of the defendant upon which execution might be made (Exhibit "B" attached hereto).

5. At the time of the accident herein referred to, the defendant, VIRGINIA SURETY COMPANY, INCORPORATED, had in force and effect its automobile liability policy No. 63957, renewal of No. 62356, covering policy period May 7, 1958, to May 7, 1959. The named insureds in the said policy were D. M. Lackey and Golden Gift, Inc., and said policy afforded property damage liability coverage of Ten Thousand Dollars (\$10,000.00) and contained in said policy

was the provision known as "Severability of Interests" coverage under the property damage liability coverage wherein it is stated that the term "the insured" is used severally and not collectively. Said policy further contained the provision that an insured is any person using the vehicles covered under the policy with permission.

6. At the time and place of the said collision hereinbefore referred to James Edward Thomas was an employee of Golden Gift, Inc., a named insured under the policy referred to and the vehicle being operated by him was a vehicle listed as insured under the policy herein referred to and he was driving the same with the permission of Golden Gift, Inc.

7. The said James Edward Thomas was an insured under the said policy and entitled to coverage under the said policy and the defendant, VIRGINIA SURETY COMPANY, INCORPORATED, has wrongfully refused to pay the
page 3 } said judgment of the Circuit Court of Caroline County, Virginia, entered on September 24, 1964, and affirmed by the Virginia Supreme Court of Appeals on March 3, 1965.

8. The defendant, VIRGINIA SURETY COMPANY, INCORPORATED, at its expense furnished counsel to defend the said suit instituted in the Circuit Court of Caroline County, Virginia, and said counsel defended the said suit from its inception, through a motion to dismiss which was sustained, through an appeal to the Virginia Supreme Court of Appeals in which the case was reversed and remanded, through the trial on the merits, and through an attempted appeal from the judgment of the Circuit Court of Caroline County, Virginia, dated September 24, 1964.

9. Plaintiff avers that by reason of its actions as set forth in paragraph 8. hereof the VIRGINIA SURETY COMPANY, INCORPORATED, is estopped to deny coverage to R. Garnett Brooks, Sheriff, Administrator of the Estate of James Edward Thomas, Deceased.

WHEREFORE, plaintiff asks this Honorable Court for judgment for FOUR THOUSAND TWO HUNDRED SIXTEEN AND 98/100 DOLLARS (\$4,216.98) with interest from September 24, 1964, plus EIGHTEEN AND 50/100 DOLLARS (\$18.50) costs and the costs of this action.

D. M. LACKEY

By MICHAEL M. MONCURE, III
Counsel

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page 9 }

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ANSWER TO MOTION FOR JUDGMENT

* * * * *

The defendant, reserving unto itself the right to amend the said answer should it be deemed necessary, states the following:

(1) That the defendant admits the allegations contained in paragraph 1 of the motion for judgment, but avers that both vehicles involved in the collision were owned by D. M. Lackey.

(2) That the defendant admits the allegations contained in paragraph 2, but avers that prior to that date this Court had dismissed the action which was reversed on appeal.

(3) That the defendant admits the allegations contained in paragraph 3 of the motion for judgment.

(4) That for answer to paragraph 4, not being advised as to the truth or falsity of the allegations contained in paragraph 4, the defendant neither admits nor denies said allegations, but calls for strict proof thereof.

(5) That in response to paragraph 5, the defendant admits that it insured D. M. Lackey and Golden Gift, Inc., under its policy No. 63957, original of said policy now held page 10 } by D. M. Lackey, the production of which is hereby called for; the limit of said liability for property damage is correctly stated; a specimen copy of said policy is attached hereto, marked Exhibit A and made a part of this answer to motion for judgment; remainder of the allegations of said paragraph 5, being taken out of context, are denied with the averment that the policy should be read as a whole.

(6) That in response to paragraph 6, the defendant admits that James Edward Thomas was an employee of Golden Gift, Inc., the vehicles in question being leased by the plaintiff to Golden Gift, Inc., and the insurance policy thereon being carried in the joint names of D. M. Lackey and Golden Gift, Inc.

(7) That the defendant denies the allegations of paragraph 7 and calls for strict proof thereof.

(8) That the defendant admits the allegations contained in paragraph 8, but avers that said suit was expressly de-

fended under reservation of rights, notice to the assured and to R. Garnett Brooks, Sheriff, Administrator of the Estate of James Edward Thomas, deceased, being sent by registered mail October 6, 1960, with a further notice in regard to the same sent to the assured by registered mail, return receipt requested, on December 18, 1961, copies of said letters and post office receipts being attached hereto and marked Exhibits B and C.

(9) That for answer to paragraph 9, defendant states there is no question of estoppel in this case.

(10) That this action, being brought on a con-
page 11 } tract covering a period between May 7, 1958, and
May 7, 1959, and dated prior to that date, is barred
by the statute of limitations.

(11) That the policy contract itself bars recovery in this case in that under Exclusions, subsection (f), Coverage B, which is property damage liability, there is no recovery as to destruction of the assured's own property; subsection (f) states as follows:

“under coverage B, to injury to or destruction of property owned or transported by the insured, or property rented to or in charge of the insured other than a residence or private garage injured or destroyed by a private passenger automobile covered by this policy;”

and that the other provisions of said contract, specimen copy of same being filed as Exhibit A, precluded any recovery by a named insured, such as D. M. Lackey, against his own insurance company, the Virginia Surety Company, Incorporated, or any recovery by any person, firm or corporation deriving its rights through the named insured, D. M. Lackey.

(12) That the proper party plaintiff, if the plaintiff has a right of action, which the defendant expressly denies, would be D. M. Lackey and Golden Gift, Inc.

WHEREFORE defendant asks that no judgment be entered against it and that it may be permitted to recover its costs.

VIRGINIA SURETY COMPANY,
INCORPORATED
By Counsel

F. BYRON PARKER, p.d.
1103 State Planters Bank Building
Richmond, Virginia

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page 20 }

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STIPULATION OF FACT AND ISSUES PRESENTED

The Parties, by counsel, file the following as a stipulation of fact and issues presented in this case.

1. On December 7, 1958, a vehicle owned by the plaintiff was damaged in a collision on U. S. Route 1, in Caroline County, Virginia, when it was struck by a vehicle operated by James Edward Thomas, who was killed as a result of the accident. And the vehicle operated by James Edward Thomas was also owned by the plaintiff.

2. D. M. Lackey instituted suit in the Circuit Court of Caroline County, Va., against R. Garnett Brooks, Sheriff, Administrator of the estate of James Edward Thomas, deceased, for damages to the vehicle which was struck by the vehicle operated by James Edward Thomas; and this case was tried in the Circuit Court of Caroline County, Virginia. And on September 24, 1964, judgment was entered in favor of the plaintiff, D. M. Lackey, against R. Garnett Brooks, Sheriff, Administrator of the estate of James Edward Thomas, deceased, in the sum of \$4,216.98 and \$18.50 costs. Prior to the date of judgment, the Trial Court had dismissed the action which action of the Trial Court was reversed on appeal; and the case remanded for trial and tried on September 24, 1964.

3. The defendant in that case, by counsel, filed a notice of appeal and assignments of error along with page 21 } titution for writ of error, and on March 3, 1965, the Supreme Court of Appeals of Virginia refused said writ of error and affirmed the judgment of the Circuit Court of Caroline County, Virginia.

4. Execution on the said judgment above referred to was had on March 26, 1965, and the return determined that there were no goods or chattels of the defendant upon which execution might be made.

5. At the time of the accident herein referred to, the defendant, Virginia Surety Company, had in force and effect, its automobile liability policy, No. 63957 renewal of No. 62356 naming as insureds in the policy D. M. Lackey and Golden Gift, Inc. The policy period on the said policy was May 7, 1958, to May 7, 1959. A specimen copy of said policy

has been filed by the defendant, and the original of the said policy will be filed herein pursuant to order to be entered by this Court.

6. At the time and place of the said collision referred to, James Edward Thomas was an employee of Golden Gift, Inc., a named insured under the said policy. The vehicle being operated by him was a vehicle leased by the insured under the said policy to Golden Gift, Inc., and he was driving the same with the permission of Golden Gift, Inc. Both vehicles involved were leased by the plaintiff to Golden Gift, Inc., and the insurance policy thereon was carried in the joint names of D. M. Lackey and Golden Gift, Inc. A copy of the lease agreement is attached hereto.

7. There is no question of estoppel involved.

8. The insurance policy involved contains under exclusion subsection (f) coverage B, which is property damage liability, the following language: "This policy does not apply

"under coverage B, to injury to or destruction of property owned or transported by the insured, or property rented to or in charge of the insured other than a residence or private garage injured or destroyed by a private passenger automobile covered by this policy:"

page 22 } 9. The first issue involved is whether or not this action is barred by the statute of limitations as alleged in paragraph ten of the grounds of defense.

10. The second issue involved is whether or not the language contained in subsection (f), coverage B, herein before referred to, excludes coverage to James Edward Thomas, deceased as a result of the accident on December 7, 1958.

MICHAEL W. MONCURE, III
Attorney for Plaintiff

F. BYRON PARKER
Attorney For Defendant

Filed 6-28-67.

R. S. C.

Filed by agreement of counsel 7/12/67..

E. P. S., JR., Judge

* * * * *

* * * * *

This action came on this day to be heard upon the motion for judgment with exhibits filed therewith; answer of the defendant, Virginia Surety Company, Incorporated; the stipulation of fact and issues presented as agreed upon by counsel; the exhibits duly filed and made a part of the record; and was argued by counsel, the parties, by counsel, having agreed to waive a trial by jury and submit all questions of law and fact to the Court.

And the Court having considered the matter, doth Adjudge and Order that the plaintiff is not entitled to recover of the defendant in this action, and doth accordingly find a judgment in favor of the defendant, Virginia Surety Company, Incorporated; to which action of the Court the plaintiff, D. M. Lackey, objected and excepted on the grounds that the verdict is contrary to the law and the evidence.

Enter: Oct. 6, 1967.

EDWARD P. SIMPKINS, JR., Judge

I ask for this:

F. BYRON PARKER
Attorney for defendant

Seen, objected and excepted to:

MICHAEL W. MONCURE, III
Attorney for Plaintiff

* * * * *

* * * * *

NOTICE OF APPEAL

The plaintiff, D. M. LACKEY, hereby gives notice of appeal of the judgment entered in favor of the defendant herein on October 6, 1967.

MICHAEL W. MONCURE, III
921 Ross Building
Richmond, Virginia 23219
Attorney for D. M. Lackey

ASSIGNMENT OF ERROR

The Court erred in awarding judgment in favor of the defendant as such judgment is contrary to the Law and the evidence.

MICHAEL W. MONCURE, III
921 Ross Building
Richmond, Virginia 23219
Attorney for D. M. Lackey

Filed. 10/13/67.

R. S. C.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

INDEX TO RECORD

Page

Writ of Error Awarded.....	1
Record	2
Motion for Judgment.....	2
Answer to Motion for Judgment.....	4
Stipulation of Fact and Issues Presented.....	6
Judgment—October 6, 1967.....	8
Notice of Appeal and Assignments of Error.....	9