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211 VA 751

Record No. 7398

In the
Supreme Court of Appeals of Virginia
at Richmond

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK

v.

WILLIAM HOWARD FUTRELL

FROM THE CIRCUIT COURT OF YORK 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. 7398

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 19th day of January, 1970.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, Plaintiff in error,

against

WILLIAM HOWARD FUTRELL, Defendant in error.

From the Circuit Court of York County
Robert T. Armistead, Judge

Upon the petition of The Fidelity and Casualty Company of New York a writ of error and *supersedeas* is awarded it to a judgment rendered by the Circuit Court of York County on the 29th day of July, 1969, in a certain motion for judgment then therein depending, wherein William Howard Futrell was plaintiff and the petitioner was defendant.

And it appearing that a suspending and *supersedeas* bond in the penalty of $18,000, conditioned according to law, has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

RECORD

* * * * *

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* * * * *

MOTION FOR JUDGMENT

The plaintiff hereby moves this honorable Court for judgment against the defendant, Fidelity and Casualty Company of New York, in the sum of $15,000.00 together with interest as provided for by law from the 21st day of February, 1967, and the costs incident thereto, which said sum is due for the following reasons:

1. That on or about October 5, 1964, plaintiff was driving an automobile on State Highway #168 near Queens' Creek Bridge in the County of York, Virginia, when an automobile driven by Robert E. Coleman veered on the wrong side of the road and struck the plaintiff head-on, causing the plaintiff to suffer severe injuries of a permanent nature and substantial medical expenses:

2. That Richard E. Coleman was an uninsured motorist as defined under section 38.1-381 Code of Virginia, 1950, as amended;

3. That neither said Robert E. Coleman nor the vehicle that he was driving had, in effect, any liability insurance policy of any type whatsoever;

4. That the vehicle being driven by the plaintiff was owned by the Noland Company, a corporation organized under the laws of the State of Virginia; that prior to the date of said accident, the defendant had issued to said Noland Company, Inc., a liability insurance policy covering the use of the vehicle being driven by the plaintiff which was in full force and effect on the date of the accident and said policy in compliance with the statutes of Virginia contained an uninsured motorist endorsement or provision;

5. That for the purpose of being compensated for the damages sustained, the plaintiff caused to be filed in the Circuit Court for the County of York, a Motion for Judg-
page 2 } ment and the style of this cause was "William Howard Futrell, Plaintiff, vs. Richard Edward Coleman and Richard Rexsamer Baker, Defendants," which action shall be hereinafter *refered* to as "said suit";

6. That as provided for by Statute, the plaintiff herein caused to be served a copy of said Motion for Judgment upon

the registered agent of the defendant herein upon the filing of said suit;

7. That subsequently, on or about the 15th day of September, 1966, an "Answer and Grounds of Defense of the Fidelity and Casualty Company of New York" was filed by the defendant herein.

8. That, when said suit came on to be tried, Philips N. Dowding, Esq., appeared as attorney on behalf of the Fidelity and Casualty Company of New York and participated in the defense of said suit at all stages during the trial.

9. That said suit was subsequently set for trial on February 17th, 1967, on which date trial began and the same was concluded on February 21st, 1967; that on February 21st, 1967, the jury rendered a verdict in the sum of $35,000.00 in favor of the plaintiff; that a certified copy of the Order of R. T. Armistead, Judge of the Circuit Court for the County of York, entering said verdict is made a part hereof by reference hereto; that an appeal from said Order was made to the Supreme Court of Appeals for the State of Virginia and the judgment at the lower Court was affirmed;

10. That Richard Rexsamer Baker, who was also joined as a defendant in said suit, appeared and was represented by counsel and at the conclusion of the plaintiff's evidence, moved to have the evidence as to him struck which the Court did and further granted a Motion for Summary Judgment in favor of said Richard R. Baker, and this was affirmed by the Supreme Court of Appeals;

11. That, by reason of a personal policy of liability insurance, State Farm Mutual Automobile Insurance Company was also served at the time of the institution of said suit, and this insurance company subsequently appeared at the trial by counsel; that the appeal to the Supreme Court of Appeals was made by State Farm Mutual Automobile Insurance Company; that said State Farm Insurance Company has now paid to the plaintiff herein the sum of $15,000.00 together with interest on $15,000.00 from February 21st, 1967, to the date such payment was made, together with costs as provided for by law;

page 3 } 12. That under the terms of the insurance policy issued by the defendant herein to the Noland Company, Inc., and in accordance with the statutes of the State of Virginia, covering the vehicle being driven by the plaintiff, the plaintiff herein is entitled to receive the sum of $15,000.00 and the defendant herein is liable to the plaintiff in said amount;

13. That under the terms of the insurance policy issued by the defendant herein to the Noland Company, Inc., and in

accordance with the statutes of the State of Virginia covering the vehicle driven by the plaintiff, the plaintiff herein is entitled to receive interest on said $15,000.00 from February 21st, 1967, to the date that such payment shall be made;

14. That under the terms of the insurance policy issued by the defendant herein to the Noland Company, Inc., and in accordance with the statutes of the State of Virginia covering the vehicle driven by the plaintiff, the plaintiff herein is entitled to receive interest on the sum of $35,000.00 from February 21st, 1967 to the date when payment shall be made, or that, in the alternative, the defendant herein will be liable for interest on ½ of said $35,000.00 during said period;

15. That demand for payment has been made but defendant herein has failed and refused to pay the same or any part hereof;

Wherefore, the undersigned, William Howard Futrell, prays for judgment against the defendant, Fidelity and Casualty Company of New York, in the sum of $15,000.00 together with interest from February 21st, 1967, as provided for by law together with the costs of this proceeding.

William Howard Futrell

By: B. M. Millner

* * * * *

Filed in the Clerk's Office the 19 day of Feb., 1969.

Teste;
Melville I. Bryant, Clerk
M. I. Bryant, D.C.

* * * * *

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ANSWER AND GROUNDS OF DEFENSE

For answer and grounds of defense to the Motion for Judgment, Defendant, the Fidelity and Casualty Company of New York, comes and says:

1. Defendant admits the allegations in paragraphs numbered 1, 2 and 3.

2. As to the allegations in paragraph 4, Defendant admits the issuance of a policy of liability insurance to Noland Company, Inc., but denies that said policy provides any cov-

erage of any nature whatsoever for the loss allegedly sustained by Plaintiff.

3. Defendant admits the allegations in paragraphs 5, 6 and 7.

4. As to the allegations in paragraph 8, Defendant admits that its attorney appeared and participated in the defense of said suit, but alleges that the correct name of its attorney is Phillips M. Dowding.

page 7 } 5. Defendant admits the allegations in paragraphs 9 and 10.

6. As to the allegations in paragraph 11, Defendant says that it has no knowledge of any payment made to Plaintiff by State Farm Mutual Automobile Insurance Company and further says that the allegations in this paragraph are irrelevant and immaterial to the issues involved in this action.

7. Defendant denies each and every allegation in paragraphs 12, 13, 14 and 15.

8. Defendant denies that there is any coverage available to Plaintiff under the policy of insurance issued by Defendant to Noland Company, Inc.

9. Defendant says that the policy of insurance issued by it to Noland Company, Inc. did not apply to the injuries sustained by Plaintiff as described in the Motion for Judgment, as said injuries were incurred by the Plaintiff during, and arose out of, the course of Plaintiff's employment by Noland Company, Inc., and coverage for said injuries is specifically excluded by the terms and provisions of said policy.

10. Defendant says that Plaintiff was not an "insured" within the meaning of the terms and provisions of the policy of insurance issued by Defendant to Noland Company, Inc. and there is no coverage available under said policy to Plaintiff.

11. Defendant says that Plaintiff has failed to comply with certain provisions of the Code of Virginia, as amended, which said compliance is a condition precedent to

page 8 } any recovery by the Plaintiff against the Defendant.

The Fidelity and Casualty Company
of New York

By Phillips M. Dowding
Of Counsel

* * * * *

Filed in the Clerk's Office, Circuit Court, York Co., Va. the 7 day of March, 1969.

Teste:
Melville I. Bryant, Clerk.
Estelle Good, D. C.

* * * * *

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EXHIBIT P-E

* * * * *

STIPULATION OF FACTS

The parties hereto agree upon a stipulation with respect to certain undisputed facts and that the same may be considered by the Court without the necessity of any further proof as follows:

1. That on or about October 5, 1964, the plaintiff was driving an automobile on State Highway #168 near Queens' Creek Bridge in the County of York, Virginia, when an automobile driven by Robert E. Coleman veered on the wrong side of the road and struck the plaintiff head-on, causing the plaintiff to suffer severe injuries of a permanent nature and substantial medical expenses;

2. That Richard E. Coleman was an uninsured motorist as defined under Section 38.1-381, Code of Virginia, 1950, as amended;

3. That neither said Robert E. Coleman nor the vehicle that he was driving had, in effect, any liability insurance policy of any type whatsoever;

4. That the vehicle being driven by the plaintiff was owned by the Noland Company, Inc., a corporation organized under the laws of the State of Virginia, and was being operated by the plaintiff with the permission of Noland Company, Inc.; that prior to the date of said accident, the defendant had issued to said Noland Company, Inc., a liability insurance policy covering the use of the vehicle being driven by the plaintiff which was in full force and effect on the date of the accident and said policy in compliance with the statutes of Virginia contained an uninsured motorist endorsement or provision; that a copy of said policy is attached hereto as Plaintiff's Exhibit A and the same is hereby introduced into evidence without the necessity of any formal proof.

5. That for the purpose of being compensated for the damages sustained, the plaintiff caused to be filed in the Circuit Court for the County of York, a Motion for Judgment and the style of this cause was *"William Howard Futrell, Plaintiff,* vs. *Richard Edward Coleman and Richard Rexsamer Baker, Defendants."* which action shall be hereinafter referred to as "said suit";

page 19 } 6. That as provided for by Statute, the plaintiff herein caused to be served a copy of said Motion for Judgment upon the registered agent of the defendant herein upon the filing of said suit;

7. That subsequently, on or about the 15th day of September, 1966, an "Answer and Grounds of Defense of the Fidelity and Casualty Company of New York" was filed by the defendant herein.

8. That, when said suit came on to be tried, Phillips M. Dowding, Esq., appeared as attorney on behalf of the Fidelity and Casualty Company of New York and participated in the defense of said suit at all stages during the trial.

9. That said suit was subsequently set for trial on February 17th, 1967, on which date trial began and the same was concluded on February 21st, 1967; that on February 21st, 1967, the jury rendered a verdict in the sum of $35,000.00 in favor of the plaintiff; that a certified copy of the Order of R. T. Armistead, Judge of the Circuit Court for the County of York is attached hereto as Plaintiff's Exhibit B and the same is hereby introduced into evidence without the necessity of any formal proof; that an appeal from said Order was made to the Supreme Court of Appeals for the State of Virginia and the judgment at the lower Court was affirmed;

10. That Richard Rexsamer Baker, who was also joined as a defendant in said suit, appeared and was represented by counsel and at the conclusion of the plaintiff's evidence, moved to have the evidence as to him struck which the Court did and further granted a Motion for Summary Judgment in favor of said Richard R. Baker, and this was affirmed by the Supreme Court of Appeals;

11. That, by reason of a personal policy of liability insurance, State Farm Mutual Automobile Insurance Company was also served at the time of the institution of the said suit, and this insurance company subsequently appeared at the trial by counsel; that the appeal to the Supreme Court of Appeals was made by State Farm Mutual Automobile Insurance Company; that said State Farm Insurance Company has now paid to the plaintiff herein the sum of $15,000.00 together with interest on $15,000.00 from February 21st, 1967, to the date such payment was made (Oct. 22, 1968),

together with costs as provided for by law; that the defendant alleges that such payment is irrelevant and immaterial to the issues involved in this action.

12. That the plaintiff at the time of the accident hereinabove referred to was an employee of the Noland
page 20 } Company, Inc., and was acting in the course of his employment and was engaged in the pursuit of company business when said accident occurred;

13. That the plaintiff has applied for and received full workmens compensation benefits for the injuries sustained in the aforesaid accident from Noland Company, Inc.'s workmens compensation carrier; that the plaintiff alleges that such payment is irrelevant and immaterial to the issues involved in this action.

Enter this the day of .

Judge

* * * * *

RTA, Judge

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MEMORANDUM OPINION

Never have I experienced more difficulty than in attempting to understand the cases which have been decided on this question.

Horne decided that a compensation carrier is not subrogated to an injured employee's claim against an uninsured motorist and that a settlement of the claim with his own carrier did not prejudice his right to seek workmen's compensation.

The factual situation in Kellam is somewhat obscure. If the parties involved in the accident were fellow servants, would that not have precluded a recovery in the first instance? It has been suggested that perhaps the employees were not covered by the Workmen's Compensation Act but if that were correct, it seems strange that the court would have said near the conclusion of the opinion "—require an em-

ployer who has provided workmen's compensation insurance for his employee also to provide coverage—"

The reasoning is difficult to follow. It is certainly questionable that, "Paragraph (h) of Section 38.1-381 provides that (a) and (b), thereof shall not apply to workmen's compensation policies—" as stated in the opinion. Paragraph (h) by its own terms applies to insurance companies, "insuring motor vehicles". It should be noted that in the *Acts of Assembly of* 1952 this section was under the title of "Liability Insurance Policies". (C. 462)

In *Stillwell* v. *Iowa Mutual* 205 Va. 258 the at-
page 43 } torney for the plaintiff contended that the exclusion of coverage to an employee injured during the course of his employment was void but relied on section 46.1-504 which obviously was not applicable. This was noted in the Kellam opinion but it was never considered if the contention might not be sound for a different reason, namely, being broader than that permitted by paragraph (h).

Almost since their inception, liability policies have excluded coverage in situations covered by workmen's compensation. Paragraph (h) was originally the concluding paragraph of Section 38.1-381 defining the "omnibus clause" and was intended to give legislative sanction to the existing practice. The typical exclusionary clause as is contained in policy in question "(c) to any employee with respect to injury to—another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of an automobile in the business of such employer" includes situations not covered by "the liability of an employer under any workmen's compensation of law."

When the uninsured motorist law was appended to 38.1-381 this paragraph was designated as (h) and it was made applicable to paragraph (b) requiring the uninsured motorist endorsement as well as (a) to which it formerly applied.

It could certainly have been argued that there was no reason for inserting paragraph (b) unless the legislature intended to exclude from the uninsured motorist endorsement cases covered by workmen's compensation but the carrier in Horne assumed that Horne was protected by the uninsured motorist endorsement and in the year following Horne's accident, the concluding part of paragraph (h) (Acts 1960 C 462) was added. This seemed to make it clear that employees were covered, especially when the court in Horne had adopted the interpretation of the Commission that 38.1-381 " 'did not apply to workmen's compensation policies, nor
page 44 } would the benefits provided by this section accrue to an employer who became liable for the payment

of workmen's compensation benefits through injury suffered by an employee in a motor vehicle *owned by the employer* and covered by automobile liability insurance when such employee was injured by an uninsured motorist who was legally liable for damages.' ".

Then came Kellam which held that an employee injured by another employee, *both operating cars provided by their employer* was not entitled to recover from the liability carrier either under the liability portion of the policy or the uninsured motorist endorsement. Thus poor Kellam who apparently was not entitled to workmen's compensation got nothing but Horne collected from both carriers.

Is the difference due to the fact that Horne was riding in his son's car while Kellam was in his employer's vehicle or is it because Kellam was injured by a fellow servant and Horne a stranger?

The answer can be found in the exclusionary clause quoted above and also in Kellam on page 738 of the Virginia Reports.

The dicta in Horne pertaining to "motor vehicle *owned by the employer*" is quoted above.

The dicta in Kellam is: "The effect of such prohibition would be to require an employer who has provided workmen's compensation insurance for his employee also to provide coverage for him in any bodily injury policy obtained by the employer to afford protection with respect to others who are not his employees."

I shall not undertake to reconcile the dicta in these two cases but the decisions are not in conflict. Kellam decided only that the exclusionary clause prevented a recovery under the liability portion of the policy because the injury was done to "another employee of the same employer—". page 45 } Since the coverage did not apply Kellam was not a person using a "—motor vehicle to which the insurance applies—" (Section 38.1-381 (c)). The court took the view that words "insurance applies" referred to the coverage in the particular accident and not the status of the vehicle. This reaches a strange result but it is consistent with *U.S.F & G* v. *Byrum* 206 Va. 815 in which it was held that an uninsured vehicle was not "uninsured" when operated by a driver who was covered under the circumstances of the case.

Kellam expressly stated that "—paragraph (h) was not designed to affect the liability of an *insured* employee—." Futrell was an *"employee or other insured"*, the "insurance applied" in this particular case, he was an *"insured* employee" and any exclusionary clause which prevents his recovery would contravene *statue.*

An order should be prepared finding for the plaintiff. I do not recall the question of interest being argued but the defendant and heirs had the use of the money and unless there is some good reason, interest should run from the date of the judgment.

7/19/69 RTA

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* * * * *

ORDER

Issue having been heretofore joined, this cause came on to be heard on June 24, 1969, at which time the parties filed an agreed Stipulation of Facts and certain evidence was introduced and the matter was argued by counsel and the Court in its Memorandum Opinion of 7/19/69 hath found that the Plaintiff is entitled to recover.

Whereupon, it is Considered by the Court that the plaintiff, William Howard Futrell, doth recover against the defendant, The Fidelity and Casualty Company of New York, in the sum of Fifteen Thousand ($15,000.00) Dollars, together with interest on the sum of Fifteen Thousand ($15,000.00) Dollars, at the rate of six per cent per annum from February 21, 1967, until paid, and his cost in this behalf expended, to which action of the Court, the defendant by counsel excepts and the plaintiff by counsel excepts to that portion of the order giving interest on the sum of Fifteen Thousand ($15,000.00) Dollars instead of Twenty Thousand ($20,000.00) Dollars during said date.

And since the defendant, The Fidelity and Casualty Company of New York, has indicated its intention to apply to the Supreme Court of Appeals of Virginia for a Writ of Error and *Supersedeas* to the judgment of this Court, it is Ordered that execution on the judgment hereinabove rendered be, and the same hereby is, suspended for a period of four months from this date; and, if the Defendant duly files a Petition for a Writ of Error in the Supreme Court of Appeals of Virginia, execution on the judgment is suspended until the Supreme Court of Appeals has acted upon said Petition; and if a Writ of Erro is granted in this case, it is Ordered that execution on the judgment be suspended until an opinion has been rendered by the said Supreme Court of Appeals; all of which is conditioned upon the Defendant, The Fidelity and Casualty Company of New York, or someone

for it, giving a bond, with corporate surety, in this Court within twenty-one (21) days from this date in the penalty of $18,000.00 conditioned according to law.

page 47 } Entered this 29 day of July, 1969.

RTA, Judge

We ask for that portion of Order giving judgment in the sum of $15,000.00 but except to that portion in not giving interest on $20,000.00 from February 21, 1967 until paid.

B. M. Millner

Have seen and duly excepted to:

Phillips M. Dowdy
Counsel for the Fidelity & Casualty Co. of New York

* * * * *

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* * * * *

NOTICE OF APPEAL AND
ASSIGNMENTS OF ERROR

Defendant, The Fidelity and Casualty Company of New York, hereby gives notice of its intention to appeal the judgment rendered herein by the Circuit Court for the County of York, Virginia, on July 29, 1969, to the Supreme Court of Appeals of Virginia, and makes the following assignments of error:

1. That the judgment of the Circuit Court for the County of York, entered herein on July 29, 1969, was contrary to the law and the evidence.

2. That the judgment of the Circuit Court for the County of York, entered herein on July 29, 1969, was without evidence to support it.

The Fidelity and Casualty Company
of New York

By Phillips M. Dowding
Of Counsel

* * * * *

Filed Sept. 9, 1969

M. I. Bryant, Clerk.

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ASSIGNMENT OF CROSS-ERROR

Notice is hereby given that the plaintiff, William Howard Futrell, does hereby assign the following assignment of cross-error:

(1) The Trial Court failed to hold that the interest clause of the Family Protection Coverage Endorsement (the uninsured motorist endorsement) of the automobile liability policy in evidence should be construed as creating a liability for interest on the entire unpaid amount of the judgment so as to render the insurer defendant liable for interest on such unpaid amount of the judgment awarded plaintiff until the amount of the policy limit plus interest on the entire amount unpaid has been tendered, offered or paid and, therefore, interest on the sum of $20,000.00 (the unpaid amount of the judgment) rather than the sum of $15,000.00 (the amount of the policy) should have been allowed from February 21, 1967 until paid.

(2) The Trial Court erred in failing to award interest at the rate of six per cent (6%) from February 21, 1967 until paid on the amount of $20,000 because the Trial Court should have held as a matter of law that where there is an excessive verdict rendered over the amount of liability or uninsured motorist coverage and there is an appeal to the Supreme Court of Appeals which is subsequently affirmed, then interest is allowable under the statutes and case law of the State of Virginia on the full amount of such excess and not on the amount of the policy as the Trial Court held, and therefore, interest should have been allowed on the sum of $20,000.00 from February 21, 1967 until paid rather than on the sum of $15,000.00 as ordered by the Court.

(3) In failing to award interest on the sum of $20,000.00 from February 21, 1967 until paid, the Trial Court erred in failing to follow the holding as set forth in the case of *Wilkerson* v. *Maryland Casualty Co.* (1953, DC Va) 119 F Supp 383, affd (CA4) 210 F2d 245.

page 53 } Given under my hand this 17th day of September, 1969.

William Howard Futrell

By B M Millner
Of Counsel for Plaintiff

* * * * *

page 1 }

* * * * *

Before Honorable Robert T. Armistead, Judge

June 24, 1969

Yorktown, Virginia

APPEARANCES:

B. M. Millner, Esq.,
W. Glover Garner, Jr., Esq.,
Counsel for the plaintiff

Phillips M. Dowding, Esq.,
Counsel for the defendant

* * * * *

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Mr. Millner: And, if the Court please, one further thing I have discussed with Mr. Dowding: It is agreeable with counsel that counsel would waive any requirement, if any, of the law or of the policy, for an execution to be issued against the insured motorist defendant and this requirement is waived, should it be required.

Mr. Dowding: That is correct, sir.

* * * * *

The Court: I would like to think about this for some time. I can remember, when the case came up, being a bit mystified, and I am not at all satisfied concerning that. I would like

to give some thought to it. It probably may be some time before you hear from me.

Mr. Dowding: And I assume the record will show—well, of course, it's not necessary—any judgment entered page 5 } by the Court, of course, would be effective as of the day you advise us?

The Court: Oh, of course.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk

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