

OCT 25 1982

RICHMOND, VIRGINIA

IN THE
Supreme Court of Virginia

AT RICHMOND
RECORD NO. 81-2227

DELORES DAVIS

Appellant

v.

AMERICAN INTER INSURANCE EXCHANGE

Appellee

and

RITA DAVIS

Appellant

v.

AMERICAN INTER INSURANCE EXCHANGE

Appellee

JOINT APPENDIX

Andrew M. Sacks, Esq.
SACKS, SACKS, & LARKIN
405 F & M Bank Building
Norfolk, Virginia 23501

Counsel for Appellants

Richard A. Saunders
FURNISS, DAVIS & RASHKIND
203 Plaza One Building
P. O. Box 3746
Norfolk, Virginia 23514

Counsel for Appellees

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12789

NORFOLK CIRCUIT
COURT
LAW DIVISION
100 ST. PAUL'S BLVD.
Phone: 441-2476

VIRGINIA:

30th

In the Clerk's Office of the Circuit Court of the City of Norfolk, on the.....day

of **April**....., 19 **81**

RITA DAVIS.....Plaintiff.....

~~Removal~~

vs. Appeal Docket No. **L81-887**.....

AMERICAN INTERINSURANCE EXCHANGE.....

.....Defendant.....

NOTICE

To: **AMERICAN INTERINSURANCE EXCHANGE**.....Appellee,
c/o Richard A. Saunders, Atty.
1312 First Virginia Bank Tower
Norfolk, Virginia.....

Take notice that the Clerk of the Circuit Court of the City of Norfolk, which said Court has
~~removed~~
cognizance of the appeal in the above styled case, has received the said papers; the writ tax has
been paid; and the deposit on account of Court costs to be incurred has been paid; and that said
~~removed~~
appeal has been docketed in said Clerk's Office. This case may be set by filing and serving the
required praecipe in accordance with the rules of Court.

TESTE: HUGH L. STOVALL, Clerk

By .....D.C.

Herman A. Sacks

.....
Counsel for appellant.

NORFOLK CIRCUIT
COURT
LAW DIVISION
100 ST. PAUL'S BLVD.
Phone: 441-2476

VIRGINIA:

In the Clerk's Office of the Circuit Court of the City of Norfolk, on the.....**30th**.....day

of...**April**....., 19...**81**

DELORES DAVIS

Plaintiff.....

~~Removal~~

vs. Appeal Docket No.**L81-886**.....

~~AMERICAN INTERINSURANCE EXCHANGE~~

Defendant.....

NOTICE

To:..... Appellee,

~~AMERICAN INTERINSURANCE EXCHANGE~~

c/o Richard . . Saunders, Atty.

~~1312 First Virginia Bank Tower~~

~~Norfolk, Virginia~~

Take notice that the Clerk of the Circuit Court of the City of Norfolk, which said Court has cognizance of the ~~removal~~ appeal in the above styled case, has received the said papers; the writ tax has been paid; and the deposit on account of Court costs to be incurred has been paid; and that said ~~removal~~ appeal has been docketed in said Clerk's Office. This case may be set by filing and serving the required praecipe in accordance with the rules of Court.

TESTE: HUGH L. STOVALL, Clerk

By.......... D.C.

Herman A. Sacks

Counsel for appellant.

VIRGINIA: IN THE GENERAL DISTRICT COURT OF THE CITY OF NORFOLK
CIVIL DIVISION

RITA DAVIS,

*

Plaintiff,

*

v.

*

NOTICE OF MOTION FOR JUDGMENT

AMERICAN INTERINSURANCE EXCHANGE,
a foreign corporation,

*

*

Defendant.

NOTICE is hereby given that on the 15th day of March, 1981, at 10:00 o'clock a.m., or as soon thereafter as the undersigned may be heard, the undersigned will move the Judge of the Norfolk General District Court, Civil Division, for a judgment against you in the sum of \$719.00, with interest from August 5, 1980, the amount due the undersigned from you for this, to-wit: That on the 5th day of August, 1980 the undersigned obtained a judgment against one Preston B. Powell, an uninsured motorist, for the sum of \$700.00 plus \$19.00 costs, for damages and personal injuries sustained by the undersigned in an automobile accident alleged to be due to the negligence of one Preston B. Powell; that you are the insurance carrier of Delores Davis, the owner of the said automobile insured by you and the mother of the plaintiff; that pursuant to the statutes of Virginia, the plaintiff is entitled to recover from you the amount of the aforementioned judgment and costs, together with the costs of this proceeding.

RITA DAVIS

I hereby certify that I mailed
a true copy of this Notice to the
defendant this 11th day of February,
1981.

By

Herman A. Sacks, Of Counsel

Dated: February 11, 1981

IN DEBT

Before the Judge

of , Virginia, on , 19

Judgment is that the Plaintiff recover of the Defendant \$ with interest
from till paid, and \$ Attorney's fees
and \$ costs.

Due by

Judge

Docket No. _____

Returnable:

March 15, 1981 at 10:00 a.m.

(ita Davis,

Plaintiff,

v.

American Interinsurance Exchange
Indianapolis, Indiana,

Defendant.

(Herman A. Sacks, Esquire
SACKS, SACKS AND LARKIN
405 First & Merchants Bank Building
Norfolk, Virginia 23510

VIRGINIA: IN THE GENERAL DISTRICT COURT OF THE CITY OF NORFOLK

DELORES DAVIS,

Plaintiff

vs.

AMERICAN INTERINSURANCE EXCHANGE
Indianapolis, Indiana,

Defendant

NOTICE OF MOTION FOR JUDGMENT

TAKE NOTICE that on December 3, 1980 at 10:00 A.M., o'clock
or as soon thereafter as the undersigned may be heard, the undersigned will move the
General District Court of the City of Norfolk, Virginia, Civil Division,
at the Courtroom thereof in Norfolk, Virginia, for a judgment against
you for the sum of \$ 1,119.00, with interest from August 5, 1980
until paid, ~~XXXXXXXXXXXXXXXXXXXXXXXX~~, together with the cost incident to this
proceeding, all of which is justly due from you to the undersigned, by virtue of a judgment
obtained by plaintiff in this Court against one Preston B. Powell, an uninsured motorist, for his
negligently striking an automobile operated by him into an automobile operated by plaintiff, which
carried automobile liability insurance with the defendant.

I hereby certify that I mailed a true copy
of the foregoing Notice of Motion For Judgment to
the defendant on the 18th day of November, 1980.

DELORES DAVIS

By

Herman A. Sacks
Of Counsel
Herman A. Sacks

Dated: November 19, 1980

IN DEBT

Before the Judge

of

, Virginia, on

, 19

Judgment is that the Plaintiff recover of the Defendant \$
from till paid, and \$
and \$ costs.

with interest
Attorney's fees

Due by

Judge

A F F I D A V I T

STATE OF VIRGINIA,

City of

, to-wit:

I, the undersigned, a Notary Public for the City aforesaid, do certify that
(the Plaintiff or his Agent) made statement
under oath that he is Agent of the above named Plaintiff, and that the amount due by
Defendant(s) to Plaintiff by reason of
is \$, with interest from, plus \$
Attorney's fees and costs; that such amount is unpaid and justly due.

Sworn to and subscribed before me this _____ day of _____, 19____.
My Commission expires: _____

Notary Public

3A

DELORES DAVIS,

Plaintiff

vs.

AMERICAN INTERINSURANCE EXCHANGE, INC.
Indianapolis, Indiana,

Defendant

NOTICE OF MOTION FOR JUDGMENT

TAKE NOTICE that on December 3, 1980 at 10:00 A.M., o'clock or as soon thereafter as the undersigned may be heard, the undersigned will move the General District Court of the City of Norfolk, Virginia, Civil Division at the Courtroom thereof in Norfolk, Virginia, for a judgment against you for the sum of \$ 1,119.00 , with interest from until paid, ~~XXXXXXXXXXXXXXXXXXXXXXXXXXX~~ together with the cost incident to this proceeding, all of which is justly due from you to the undersigned, by virtue of a judgment obtained by plaintiff in this Court against one Preston B. Powell, an uninsured motorist, for his negligently striking an automobile operated by him into an automobile operated by plaintiff, which carried automobile liability insurance with the defendant.

I hereby certify that I mailed a true copy of the foregoing Notice of Motion For Judgment to the defendant on the 18th day of November, 1980.

DELORES DAVIS

By Herman A. Sacks
Of Counsel
Herman A. Sacks

Dated: November 18, 1980

IN DEBT

Before the Judge

of , Virginia, on

, 19

Judgment is that the Plaintiff recover of the Defendant \$ with interest
from till paid, and \$ Attorney's fees
and \$ costs.

Due by _____ Judge

A F F I D A V I T

STATE OF VIRGINIA,

City of , to-wit:

I, the undersigned, a Notary Public for the City aforesaid, do certify that (the Plaintiff or his Agent) made statement under oath that he is Agent of the above named Plaintiff, and that the amount due by Defendant(s) to Plaintiff by reason of is \$, with interest from , plus \$ Attorney's fees and costs; that such amount is unpaid and justly due.

Sworn to and subscribed before me this _____ day of _____, 19____.
My Commission expires: _____

Notary Public

36 Hy

VIRGINIA: IN THE NORFOLK GENERAL DISTRICT COURT, CIVIL DIVISION

RITA DAVIS,

Plaintiff

v.

DOCKET NO. C 81-10-225

AMERICAN INTERINSURANCE
EXCHANGE,

Defendant

ANSWER

Now comes the American Interinsurance Exchange, by counsel, and for its Answer to the Notice of Motion for Judgment filed against it says as follows:

1. It admits that a judgment was obtained by Rita Davis against Preston B. Powell on August 5, 1980, in the amount of \$700.00, but it has no information with which to either admit or deny that the said Preston B. Powell was an uninsured motorist and demands strict proof thereof.

2. It admits that Delores Davis was insured by it at the time of the accident and did have uninsured motorist coverage as required by statute.

3. It specifically denies that any sums are due to Rita Davis by the American Interinsurance Exchange because of the failure of Rita Davis to comply with the mandatory provisions of Virginia Code Section 38.1-381(e1), which provision requires that:

Any insured intending to rely on the coverage required by paragraph (b) of this section shall, if any action is instituted against the owner or operator of an uninsured motor vehicle, serve a copy of the process upon the insurance company issuing the policy in the manner prescribed by law, as though such insurance company were a party defendant...

4. It affirmatively alleges that the plaintiff did not serve the American Interinsurance Exchange as required by statute in the case of Rita Davis versus Preston B. Powell.

5. It affirmatively alleges that the case of Rita Davis versus Preston B. Powell may not be re-opened by this Court since much more than 7 months have elapsed since the judgment was obtained and since Virginia Code Sections 16.1-97 and 8.01-428 do not allow that case to be re-opened more than 30 days after judgment was obtained; when the sole purpose for re-opening the case is to serve the plaintiff's own insurance company.

6. It affirmatively alleges that the American Interinsurance Exchange has no liability to Rita Davis and asks that the Notice of Motion for Judgment exhibited against it be dismissed.

AMERICAN INTERINSURANCE EXCHANGE

By Richard A. Saunders
Of Counsel

Richard A. Saunders, Esquire
Furniss, Davis and Rashkind
P. O. Box 3746
Norfolk, VA 23514

I hereby certify that a true copy of the foregoing pleading was delivered to all counsel of record this 21 day of ~~March~~^{April}, 1981.

Richard A. Saunders

VIRGINIA: IN THE NORFOLK GENERAL DISTRICT COURT, CIVIL DIVISION

DELORES DAVIS,

Plaintiff

DOCKET NO. C80-46-440

v.

AMERICAN INTERINSURANCE
EXCHANGE,

Defendant

ANSWER

Now comes the American Interinsurance Exchange, by counsel, and for its Answer to the Notice of Motion for Judgment filed against it says as follows:

1. It admits that a judgment was obtained by Delores Davis against Preston B. Powell on August 5, 1980, in the amount of \$1,100.00, but it has no information with which to either admit or deny that the said Preston B. Powell was an uninsured motorist and demands strict proof thereof.

2. It admits that Delores Davis was insured by it at the time of the accident and did have uninsured motorist coverage as required by statute.

3. It specifically denies that any sums are due to Delores Davis by the American Interinsurance Exchange because of the failure of Delores Davis to comply with the mandatory provisions of Virginia Code Section 38.1-381(e1), which provision requires that:

Any insured intending to rely on the coverage required by paragraph (b) of this section shall, if any action is instituted against the owner or operator of an uninsured motor vehicle, serve a copy of the process upon the insurance company issuing the policy in the manner prescribed by law, as though such insurance company were a party defendant...

4. It affirmatively alleges that the plaintiff did not serve the American Interinsurance Exchange as required by statute in the case of Delores Davis versus Preston B. Powell.

5. It affirmatively alleges that the case of Delores Davis versus Preston B. Powell may not be re-opened by this Court since much more than 7 months have elapsed since the judgment was obtained and since Virginia Code Sections 16.1-97 and 8.01-428 do not allow that case to be re-opened more than 30 days after judgment was obtained, when the sole purpose for re-opening the case is to serve the plaintiff's own insurance company.

6. It affirmatively alleges that the American Interinsurance Exchange has no liability to Delores Davis and asks that the Notice of Motion for Judgment exhibited against it be dismissed.

AMERICAN INTERINSURANCE EXCHANGE

By Richard A. Saunders
Of Counsel

Richard A. Saunders, Esquire
Furniss, Davis and Rashkind
P. O. Box 3746
Norfolk, VA 23514

I hereby certify that a true copy of the foregoing pleading was delivered to all counsel of record this 21 day of ^{April}~~March~~, 1981.

Richard A. Saunders

VIRGINIA: IN THE NORFOLK GENERAL DISTRICT COURT, CIVIL DIVISION

DELORES DAVIS,

Plaintiff,

v.

DOCKET NO. C80-46-440

AMERICAN INTERINSURANCE
EXCHANGE,

Defendant.

APPLICATION FOR REMOVAL

Comes now the defendant, by counsel, and files its Application for Removal of the above-styled matter to the Circuit Court of the City of Norfolk, Virginia, and in support thereof says as follows:

1. That the amount in controversy exceeds \$1,000.00 exclusive of interest, attorney's fees and costs.
2. That the defendant has filed an affidavit of substantial defense setting forth its grounds of defense.
3. That the defendant hereby tenders to be paid to the Clerk of the Circuit Court of the City of Norfolk, Virginia, the writ tax and costs of the Circuit Court of the City of Norfolk in the amount of \$20.00.

4. That the defendant hereby tenders to be paid to the plaintiff the sum of \$12.00, for her accrued Court costs herein.

WHEREFORE, your defendant prays that the above-styled matter be removed to the Circuit Court of the City of Norfolk, Virginia, in accordance with §16.1-92 of the Code of Virginia, as amended.

AMERICAN INTERINSURANCE EXCHANGE

By Richard A. Saunders
Of Counsel

Richard A. Saunders, Esquire
FURNISS, DAVIS and RASHKIND
Post Office Box 3746
Norfolk, Virginia 23514

Furniss, Davis and Rashkind
Attorneys at Law

VIRGINIA: IN THE NORFOLK GENERAL DISTRICT COURT, CIVIL DIVISION
DELORES DAVIS,

Plaintiff,

v.

Docket No. C80-46-440

AMERICAN INTERINSURANCE
EXCHANGE,

Defendant.

AFFIDAVIT OF SUBSTANTIAL DEFENSE

STATE OF VIRGINIA

City of Norfolk, to-wit:

Richard A. Saunders, being duly sworn, appeared before
me and made oath as follows:

1. That he is the attorney for American Interinsurance
Exchange, defendant in the above-styled matter.
2. That said defendant has a substantial defense to
the plaintiff's claim asserted in the above-styled matter.
3. That the grounds of such defense are that the
American Interinsurance Exchange has no obligation to pay the
judgment rendered on August 5, 1980, against Preston B. Powell,
an alleged uninsured motorist, since the plaintiff has failed
to comply with the provisions of §38.1-331(e1) of the Code
of Virginia.


Richard A. Saunders, Esquire

SUBSCRIBED and SWORN to before me in my City and State
aforesaid on this ____ day of December, 1980.

Notary Public

My Commission Expires: _____

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

RITA DAVIS,

Plaintiff

v.

LAW NO. L81-887

AMERICAN INTERINSURANCE EXCHANGE,

Defendant

*

*

*

DELORES DAVIS,

Plaintiff

v.

LAW NO. L81-886

AMERICAN INTERINSURANCE EXCHANGE,

Defendant

MOTION FOR SUMMARY JUDGMENT

Now comes the defendant, American Interinsurance Exchange, by counsel, and pursuant to Rule 3:18 of the Rules of Court, moves this Court for summary judgment in its favor by reason of the following:

1. That this is a suit on an insurance policy claiming protection under the uninsured motorist coverage, in which the primary issues are whether the uninsured motorist carrier was served with process as required by statute before the judgments were obtained against the uninsured defendant, or in the alternative, whether the uninsured motorist carrier waived its right to demand service of process as required by statute.

2. That the plaintiffs have set forth all of the facts upon which they intend to rely in proving either that the uninsured motorist carrier was served with process, or that the uninsured motorist carrier waived its right to demand service of process.

3. That the facts contained in said Answers to Interrogatories, if true, are not sufficient in law to prove either that the uninsured motorist carrier was served with process as required by statute, or that the uninsured motorist carrier waived its right to demand service of process.

WHEREFORE, your defendant respectfully moves this Honorable Court for the entry of summary judgment in its favor.

AMERICAN INTERINSURANCE EXCHANGE

By *Richard A. Saunders*
Of Counsel

Richard A. Saunders, Esquire
FURNISS, DAVIS and RASHKIND
P. O. Box 3746
Norfolk, VA 23514

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record this 24 day of July, 1981.

Richard A. Saunders



FOURTH JUDICIAL CIRCUIT OF VIRGINIA
CIRCUIT COURT OF THE CITY OF NORFOLK

JOHN W. WINSTON
JUDGE

100 ST. PAUL'S BOULEVARD
NORFOLK, VIRGINIA 23510

August 19, 1981

Andrew M. Sacks, Esquire
Sacks, Sacks & Larkin
P. O. Box 3291
Norfolk, Virginia 23514

Richard A. Saunders, Esquire
P. O. Box 3746
Norfolk, Virginia 23514

Re: Delores Davis
v. American Interinsurance Exchange
At Law No. L-81-886; and
Rita Davis
v. American Interinsurance Exchange
At Law No. L-81-887

Gentlemen:

Carrier defendant in each case seeks summary judgment in its favor, asserting that it was not served with process in the manner prescribed by law when it was notified of earlier suits against Preston B. Powell, an uninsured motorist, brought by its insureds, the present plaintiffs. It relies upon the provisions of Virginia Code § 38.1-381 (e 1.) and the holdings in Creteau v. Phoenix Assurance Co., (1961) 202 Va. 641, and Roenke v. Virginia Farm Bureau Ins. Co., (1968), 209 Va. 128.

But since those cases were decided by our Supreme Court the statutory law of process has been simplified. Legal process is still required to be served in the manner set forth by Virginia statute and by court rules. Virginia Code § 8.01-287 and § 38.1-381 (e 1.). But such process which timely reaches the person to whom it is directed is now sufficient although not served or accepted as those statutes or rules provide. Virginia Code § 8.01-288. And this is so whether the "person" to whom it is directed is an individual or a corporation. (See Code Revisers' Note to § 8.01-288).

Andrew M. Sacks, Esquire
Richard A. Saunders, Esquire
August 19, 1981

Page 2

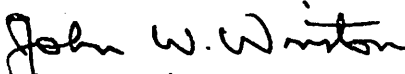
Here the facts on which carrier defendant relies to support its motion clearly show that it was not served with process in any formal manner whatsoever. The provisions of Virginia Code § 8.01-301 were not followed. Instead plaintiffs through their counsel sent a letter (by certified mail) to defendant enclosing copies of the previously filed motions for judgment and stating that the trials were to take place on August 5, 1980. One Bill Wood reportedly called plaintiffs' counsel on the telephone before such trials and confirmed receipt of these motions for judgment by defendant, stated that he would decide whether to retain counsel to contest the cases. Nothing further was heard from defendant until after judgments were obtained.

Such facts do not establish any waiver of service of legal process by the carrier defendant. But they do purport to show that before trial the process may have reached a representative of the defendant with power to act on its behalf in response to same. Whether it did so and whether such notice was timely sent and received cannot be determined by way of this motion at this time.

The procedure followed here is fraught with unnecessary danger to the eventual success of the litigation undertaken. Yet such informal service of process is now permissible. Its use requires the denial of defendant's motion for summary judgment at this time, pending further development of the facts.

Counsel for plaintiffs is directed to present a proposed order setting out the court's ruling and noting defendant's objection over counsel's endorsement.

Very truly yours,


John W. Winston
Judge

JWW:se

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

RITA DAVIS,

Plaintiff

v.

LAW NO. L81-887

AMERICAN INTERINSURANCE EXCHANGE,

Defendant

* * *

DELORES DAVIS,

Plaintiff

v.

LAW NO. L81-886

AMERICAN INTERINSURANCE EXCHANGE,

Defendant

ORDER

This cause came on this day to be heard upon the defendant's Motion for Summary Judgment in its favor against the respective plaintiffs; upon the pleadings, Interrogatories, Answers to said Interrogatories, the documents, and all other papers filed in the above cases, and was argued by counsel.

It appearing to the Court that although the pleadings do not establish any waiver of service of legal process by the defendant in the earlier suit filed by the plaintiffs against Preston B. Powell, such pleadings do purport to show that before trial the process may have reached a representative of the defendant with power to act on its behalf in response to same, but whether it did so and whether such notice was timely sent and received cannot be determined by way of this Motion and thus is it hereby ADJUDGED, ORDERED and DECREED that the defendant's Motion for Summary Judgment is denied at this time, pending further development of the facts.

13

ENTER:

Judge

I Ask For This:

_____p.q.

Seen and Objected to:

_____p.d.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

DELORES DAVIS,

Plaintiff,

vs.

AMERICAN INTERINSURANCE EXCHANGE,

Defendant.

LAW NUMBER L-81-886

RITA DAVIS,

Plaintiff,

vs.

AMERICAN INTERINSURANCE EXCHANGE,

Defendant.

LAW NUMBER L-81-887

TO: Mr. Richard A. Saunders

NOTICE: Please take notice that on the _____ day of _____, 1981, the undersigned will present to the Honorable John W. Winston, Judge, a stenographic report of testimony and other proceedings in the trial of the above-entitled case for certification by said Judge, and will, on the same date, make application to the Clerk of said Court, for a transcript of the record in said case, for the purpose of presenting same to the Supreme Court of Appeals of Virginia, with a petition for an appeal and supersedeas to the final judgment of the trial court in said case.

Messrs. Sacks, Sacks, & Larkin

By: _____
Attorney

Legal service of the above is hereby accepted
this _____ day of _____, 1981.

Attorney for the defendant.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

DELORES DAVIS,

Plaintiff,

vs.

AMERICAN INTERINSURANCE EXCHANGE,

Defendant.

LAW NUMBER L-81-886

RITA DAVIS,

Plaintiff,

vs.

AMERICAN INTERINSURANCE EXCHANGE,

Defendant.

LAW NUMBER L-81-887

Stenographic transcript of the testimony
introduced and proceedings had upon the trial of the above-
entitled case in said Court, on October 1, 1981, at 10:00 a.m.,
before the Honorable John W. Winston, Judge.

-----o0o-----

APPEARANCES: Messrs. Sacks, Sacks, & Larkin
By: Mr. Andrew M. Sacks, appearing on
behalf of the plaintiffs.

Messrs. Furniss, Davis & Rashkind
By: Mr. Richard A. Saunders, appearing
on behalf of the defendant.

-----o0o-----

I N D E X

<u>WITNESS</u>	<u>ADVERSE</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>
HERMAN A. SACKS		13, 26	34	
BRUCE STEWART	37	41	42	43

-----o0o-----

E X H I B I T S

<u>EXHIBIT</u>	<u>DESCRIPTION</u>	<u>MARKED FOR IDENTIFICATION</u>	<u>RECEIVED IN EVIDENCE</u>
Plaintiff's Exhibit 1	Letter dated July 24, 1980	15	36
Plaintiff's Exhibit 2	Letter dated August 13, 1980	27	36
Plaintiff's Exhibit 3	Letter dated September 5, 1980	28	36
Plaintiff's Exhibit 4	Letter dated September 11, 1980	30	36
Plaintiff's Exhibit 5	Letter dated September 17, 1980	31	36

-----o0o-----

1 THE COURT: All right, gentlemen, we have
2 on the docket this morning the case of Delores Davis
3 and Rita Davis against American Interinsurance
4 Exchange, Law Docket Numbers L-81-886 and 887.

5 When I was last involved in this matter
6 I ruled on a summary judgment filed by American
7 Interinsurance Exchange claiming that the motion
8 should be overruled at that time pending the
9 further presentation of evidence on the subject of
10 service of process. And I take it this matter is
11 on the docket this morning in order that the
12 defendant may seek to develop evidence that would
13 support his motion.

14 Is that where we are?

15 MR. SAUNDERS: Well, today, Judge, we're
16 here to try the case against the insurance company
17 on all issues as a practical matter.

18 THE COURT: Including the one of service?

19 MR. SAUNDERS: Yes, sir, Your Honor,
20 service on the uninsured defendant in the earlier
21 case.

22 THE COURT: Of course, the Motion for
23 Summary Judgment is subject to the jurisdiction of
24 the Court.

25 MR. SAUNDERS: No, it's not, because we're

1 not attacking the service in this case, we are
2 attacking the service in the previous case. And
3 so what we are saying is that they have failed to
4 comply with both the policy and the statute in
5 order to make a claim under the uninsured motorist
6 coverage. So, it's not really the jurisdiction as
7 opposed to their failure to comply and take the
8 appropriate steps to make the proper claim.

9 THE COURT: Maybe I used the wrong term.
10 The effect is that these ladies have gotten a
11 judgment in the past against somebody that they
12 say is an uninsured motorist and now they're seeking
13 to collect those judgments from American Interinsurance
14 Exchange on the theory that it is a carrier for an
15 uninsured motorist which has been properly served
16 the process and notice of this suit and therefore is
17 subject to the jurisdiction of this Court.

18 MR. SAUNDERS: Well, there really is no
19 attack on the jurisdiction of the Court, the attack
20 is on the previous case, which is not really the
21 main evidence in the case, but it's not really before
22 the Court here.

23 THE COURT: Okay, I'll try to state it
24 again.

25 In the previous case everything went fine

1 except that you say that they did not properly
2 notify the uninsured motorist carrier, American
3 Interinsurance Exchange, and therefore they have
4 no right to now seek to recover the judgment from
5 that company.

6 MR. SAUNDERS: Exactly, Judge.

7 THE COURT: In essence, that is jurisdiction,
8 but I accept your modification.

9 We're here, then, to try the matter in
10 its entirety, including that aspect; is that right?

11 MR. SAUNDERS: Yes, sir, Your Honor.

12 THE COURT: All right.

13 Are you ready to proceed, Mr. Sacks?

14 MR. SACKS: If Your Honor please, we are,
15 but there is one preliminary matter, Your Honor,
16 that I do feel duty bound to bring to the Court's
17 attention. It has now become apparent to myself and
18 Mr. Herman Sacks - we're both obviously in the same
19 firm. It has become apparent that Mr. Sacks, Herman
20 Sacks, will have to take the witness stand. Up until
21 this time, Your Honor, it was not absolutely certain
22 that that would be the case. We had thought perhaps
23 the matter would be disposed of in some other manner.
24 It has not been and I feel duty bound, as does Mr.
25 Herman Sacks, to bring to the Court's attention the

1 disciplinary rule of DR 5-101 which elucidates at
2 least the ABA standards about witnesses in a case
3 or attorneys in a case who must become witnesses
4 in that case and what they're supposed to do.

5 We're asking the Court's permission to
6 proceed today. We would submit that the matters
7 that will be testified to are really matters that
8 might fall into one of these exceptions: There's
9 an exception, if the testimony will relate solely
10 to an uncontested matter, or if the testimony will
11 relate solely to a matter of formality. And then
12 there's one, Your Honor, sort of a catchall exception
13 that's if refusal to withdraw from the case would
14 work a substantial hardship on the client because
15 of the distinctive value of the lawyer or his firm
16 as counsel in the particular.

17 We feel, again, Your Honor, duty bound
18 to bring it to His Honor's attention. I believe
19 the defense counsel would have no objection to our
20 firm remaining in the case. And if Mr. Sacks does
21 take the witness stand - but I think it's a matter
22 certainly for the Court's discretion and we bring it
23 to Your Honor's attention.

24 THE COURT: Mr. Saunders, do you have
25 any problem with that problem?

1 MR. SAUNDERS: No, sir, Your Honor. We
2 were aware of this problem all along. It was
3 something that if all parties agreed to it then
4 it would be okay. We certainly have no objection
5 to it.

6 THE COURT: All right. Mr. Sacks, then,
7 will remain a counsel in the case until such point
8 as he feels it necessary to withdraw and take the
9 witness stand. At that point he will do so and the
10 case will proceed with the younger Mr. Sacks as the
11 acting attorney for the plaintiffs in this case.

12 MR. SACKS: Thank you very much, Your
13 Honor.

14 THE COURT: All persons who are going
15 to testify in the case would you please stand and
16 raise your right hand and be sworn.

17
18 (Whereupon, the witnesses were
19 duly sworn by the Court.)
20

21 THE COURT: Mr. Sacks, call your first
22 witness.

23 MR. SACKS: If Your Honor please, I just
24 might state very briefly the facts of the case by
25 the way of interrogatory answers. I don't know

1 whether it would be helpful to the Court to just
2 briefly highlight those points about the real
3 contested facts and those are, Your Honor, that the
4 question really is whether or not the process that
5 the Court has already ruled was properly adhered
6 to in terms of the statute, whether it was timely
7 sent and received, number one, and number two, was
8 it received by someone on behalf of the defendants
9 who had power to act.

10 Those really, Your Honor, I would submit,
11 are the only two questions before us today. And
12 Mr. Sacks will testify as to the various steps that
13 he took beginning with the letter that he sent back
14 in July of 1980 to the defendant insurance company
15 in which he enclosed copies of the process and which
16 notified that company of the return day of the
17 process. He will testify, Your Honor, about the
18 'phone call that he received several days prior to
19 the return day from someone that he recalls as a
20 Bill Wood. It may be that it was a Bill Wile or
21 someone like that, but it was someone who identified
22 himself clearly as an agent on behalf of the defendant
23 and who asked Mr. Sacks if he was going to try the
24 cases that he had sent notice about and who also
25 told Mr. Sacks that he had not decided yet whether

1 or not he would retain counsel in the area to
2 defend those cases. And finally, who asked Mr.
3 Sacks to send him copies of any judgments or the
4 abstracts of any judgments if any were so obtained.

5 Furthermore, Your Honor, after the return
6 day when these matters were heard in the General
7 District Court and judgments were obtained Mr. Sacks
8 will tell His Honor about a letter dated August 13,
9 1980, wherein he enclosed copies of the abstracts.
10 And he advised Mr. Wood, or this agent who had
11 contacted Mr. Sacks, that if he intended to appeal
12 the cases that he had ten days and if he didn't
13 intend to appeal we would appreciate an early
14 response so that we could attempt to collect the
15 judgments.

16 Finally, there was a letter on September 5
17 from Mr. Sacks to the same Bill Wood, an agent of
18 American Interinsurance Exchange who had called
19 Mr. Sacks on an earlier occasion, indicating the
20 appeal deadline and return and that we would
21 appreciate satisfaction of the judgments.

22 And finally, Your Honor, there was a
23 response by letter from a Mr. William Wile, an
24 agent on behalf of the defendant, who indicated
25 that because, in his opinion, the defendants had

1 not been properly served with process they were not
2 going to pay the judgments. And Mr. Sacks will tell
3 you about this letter that he sent to Mr. Wile
4 indicating his surprise at their sudden change of
5 position.

6 So in effect, Your Honor, we would submit
7 that unless the defendant has substantial evidence
8 to the contrary it will be uncontradicted that
9 Mr. Sacks had contact both orally and in writing
10 with the company in question, that it was timely
11 received because there was a telephone call by
12 someone who identified himself as an agent who
13 indicated and acknowledged that he had received
14 such copies of process. And he had done that, he
15 had made that call, Your Honor, before the return
16 day, all of which shows that the process which
17 was served in the case was timely sent and received
18 by someone with power to act on behalf of the
19 defendants.

20 MR. SAUNDERS: Your Honor, may it please
21 the Court. Very briefly, I want to remind the
22 Court that this is a suit on an insurance policy,
23 that is, the plaintiff's burden of proof to show
24 he has complied with all the terms and conditions
25 of the policy and of the statute which governs that

1 policy. The evidence will be that there will be
2 insufficient evidence to prove that.

3 I submit to the Court that the evidence
4 will be insufficient to prove both that process
5 was timely received and that it was received by a
6 proper agent. More importantly though, I submit to
7 the Court that the insurance company is a foreign
8 reciprocal insurer who had, according to the statute,
9 an appointed Secretary of the Commonwealth who had
10 agents to receive process in this state. There was
11 never process served upon any agent whatsoever in
12 the state as required.

13 THE COURT: All right.

14 Mr. Sacks, Mr. Andrew Sacks, call your
15 first witness.

16 MR. SACKS: If Your Honor please, we
17 would call Mr. Herman Sacks to the witness stand.

18 THE COURT: All right. Mr. Sacks is now
19 out of the case as counsel and will sit at counsel
20 table with you if he likes, but you will do the
21 questioning, Mr. Andrew Sacks.

22 All right, come on up, Mr. Ferman Sacks.

23 MR. SACKS: If Your Honor please, there
24 are two letters that we will tender into evidence
25 and I think we can stipulate that the copies of those

1 letters will be authentic, there will be no need to
2 proffer the originals.

3 MR. SAUNDERS: Yes, sir, Your Honor.
4

5 HERMAN A. SACKS,
6 called as a witness, having been first
7 duly sworn, was examined and testified
8 as follows:
9

10 DIRECT EXAMINATION
11

12 BY MR. SACKS:

13 Q Will you please give your name for the
14 reporter?

15 A Herman A. Sacks.

16 Q And, Mr. Sacks, what is your present
17 occupation?

18 A Lawyer.

19 Q And where are you employed?

20 A I'm a partner in the firm of Sacks, Sacks,
21 & Larkin in Norfolk.

22 Q Now, Mr. Sacks, directing your attention
23 back to the month of June - of the time period of June and
24 July of 1980, did you have occasion to be retained by several
25 family members named Davis?

1 A Yes, by Delores Davis and Rita Davis for
2 claims against the defendant for damages sustained in an
3 automobile accident due to the defendant's negligence.

4 Q Just roughly, a rough estimate, when were
5 you so retained by them?

6 A Sometime before the 24th of July, I don't
7 know the exact date.

8 Q Now, what, if any, efforts did you make
9 to locate the defendant, Preston Powell, in order to serve
10 process on him?

11 A We tried several times and he couldn't
12 be found. I wrote letters which came back undelivered.

13 Q What, if any, conclusion did you come to
14 as an attorney about the failure to find Preston Powell?

15 A That he had probably left this location.

16 Q At that point what procedure did you
17 feel it was necessary to implement in order to serve your
18 clients?

19 A At that time I brought a warrant sent to
20 the Civil Court against Preston Powell for both these plaintiffs.
21 On the same day I wrote a letter to this company.

22 Q Maybe we can just have this --

23 MR. SACKS: Your Honor, may I approach
24 him?

25 Maybe we should have this marked for

1 identification.

2

3

(Whereupon, the foregoing letter dated July 24, 1980, was marked for identification as Plaintiff's exhibit Number 1.)

5

6

7 BY MR. SACKS:

8

9

Q Now, this has been marked P-1 for identification. What is that?

10

11

A July 24.

12

13

Q What is that you hold in your hands?

14

15

A I wrote - sent this to the defendant, Preston Powell, for damages sustained in an automobile accident and Mr. Powell was an uninsured motorist. Mrs. Davis had an insurance policy with them which covered her in case she was hurt by an uninsured motorist. I also sent a copy of the Motion for Judgment to the defendant on the 24th of July.

17

18

Q What was the return day of the Motion for judgment?

19

20

A August the 5th.

21

22

Q What was the date of the letter that you sent?

23

24

A July 24th.

25

Q The next communication that you had with anybody from the --

1 A About three or four days before the return
2 day some man called me up, and I thought his name was Bill
3 Wood, and said he was representing the company and wanted
4 to know if I wanted to try the case on that date.

5 Q How many days before the return day?

6 A About three or four.

7 MR. SAUNDERS: Excuse me, Your Honor, I
8 would object to the hearsay of any agent of the
9 company. I think that the only way that hearsay
10 would be admissible is if it was proved that he was,
11 in fact, an agent of the company. And the statute
12 is clear that agency may not be established by the
13 extrajudicial declarations of an agent. And there
14 must be some proof of agency before those declarations
15 can be admitted.

16 THE COURT: Mr. Sacks, Mr. Andrew Sacks,
17 what do you say to the objection?

18 MR. SACKS: If Your Honor please, I would
19 submit there are two responses on it. First of all,
20 since this is a suit on an insurance policy and
21 since we have the material question in the case as to
22 whether or not an agent of the company did, in fact,
23 receive timely process and timely notice, I would
24 submit that the rules of evidence could not be
25 so rigid and so strict as to bind us from not

1 being able to show that, but --

2 THE COURT: What is the law on the subject?

3 I don't care about the rigidity, what is the law in
4 Virginia on this point? There must be a law or a
5 rule on it.

6 MR. SACKS: Well, Your Honor, I have
7 understood the trend to be, certainly in the Courts
8 around the country and the medical system that an
9 agent --

10 THE COURT: We're not in a medical system,
11 we're in a court in this state. What is the
12 Virginia law on the point is all I want to know from
13 both of you?

14 MR. SACKS: Well, Your Honor, I must be
15 frank, I'm not sure what the latest decision is,
16 but there's an alternative response that deals with
17 an agents statements, it wouldn't be offered for the
18 truth of what was said, but merely for the fact of
19 utterance. The question is whether or not an
20 agent timely received the process with the power to
21 accept this process and whatever he said, that fact
22 of utterance shows, Your Honor --

23 THE COURT: Well, I don't think Mr. Saunders
24 questions the principle that you speak to, but he
25 questions the proof of that notice and acknowledgment

1 by the agent.

2 What have you got, Mr. Saunders, on the
3 subject?

4 MR. SAUNDERS: Your Honor, in Michie's
5 Jurisprudence at Section 114 they say this: "Agent
6 as Witness - If it is desired to establish the
7 agency by the alleged agent himself, he must be
8 called as a witness --"

9 And the cases cited say, "Ordinarily, the
10 extrajudicial statements and admissions of an
11 alleged agent are not admissible as evidence to
12 prove that the alleged agency relationship did exist."

13 Another case, "Where one claims to be the
14 agent of another, or acts as the agent of another,
15 his authority so to act cannot be proved by the
16 declaration or act or conduct of the agent alone."
17 And that's the Bardach Iron and Steel Company versus
18 Charleston Port Terminals, 143 Va. 656.

19 The problem in this case is that the only
20 thing they have to prove the receipt is this
21 telephone conversation from someone who identified
22 himself as Bill Wood. According to the testimony
23 that would be hearsay as to him identifying himself
24 as an agent for the company and we would object to
25 that.

1 THE COURT: All right. Let me see your
2 authority and I'll have to go look it up because this
3 is the gist of the case apparently.

4 Mr. Sacks, why don't you step down.
5 There's no point in you sitting up there in that
6 position when I'm going to have to look up some
7 law. You might as well be more comfortable so why
8 don't you take a step down for the moment.

9 MR. SACKS: If Your Honor please, may
10 we just have the cite?

11 THE COURT: I'll give you the whole thing
12 because I'm going to the Law Library and look at
13 this section he's talking about.

14 Is it just Section 114 you're referring
15 to?

16 MR. SAUNDERS: That's the only one now,
17 Judge. All of these sections deal with the act of
18 proving the agency, but that's the only one I think
19 is pertinent to this particular point.

20 THE COURT: Well, 115 deals with the
21 authority of the agent to bind the principal.

22 MR. SAUNDERS: I think that's after the
23 agency has been proven, I think that deals primarily
24 with that situation. The situation we have is
25 proving the agency itself.

1 THE COURT: All right. Let's take a brief
2 recess.

3
4 (Whereupon, there was a brief
5 recess in the taking of testimony.)
6

7 MR. SACKS: If Your Honor please, I
8 realize Your Honor's been working and I don't want
9 to preempt Your Honor, but I did want to be heard
10 very briefly if that is possible because we were
11 caught somewhat by surprise. We've had an opportunity,
12 ourselves, to consider the question and also the
13 pleadings in the case.

14 THE COURT: All right, sir.

15 MR. SACKS: If Your Honor please, the
16 first point that I bring to the Court's attention
17 and what I believe it was hitting at initially is
18 this: All of the material pleadings in the case,
19 Your Honor, the defendant's have filed would
20 indicate that the only defense being urged today
21 that could be urged is that there was a failure to
22 serve the process according to the statutory
23 provision. Even in his opening statement counsel for
24 the defendant made some reference to the service to
25 the Secretary of the Commonwealth, this kind of thing.

1 The defendant attempted to remove this
2 case from the General District Court at one time.
3 Their substantial defense, Your Honor, the one they
4 really cite is the one that the provision of
5 Section 38.1-381 Sub. (e1) had not been complied
6 with. And in their answer, Your Honor - it's the
7 same defense in their answer to the Motion for Judgment
8 in the case.

9 So I would submit to the Court that the
10 well established principle that each party must be
11 held to his pleadings would control here, that agency
12 is just not a material question.. It hasn't been
13 raised at any point until today. Nobody has ever
14 denied that there was any agency relationship and
15 nobody has ever said that was a material question
16 in the case. Now, for the first time, Your Honor,
17 here at the trial the defendants introduce that
18 objection. We're caught by surprise not only as a
19 practical matter, but as a legal matter.

20 But I would submit to Your Honor with
21 respect that it is clear that in this situation the
22 question of whether or not somebody who had power
23 to act did in fact receive these documents can be
24 proved by their own statements. That really is the
25 issue in the case. That was the issue that Your Honor

1 fashioned in his previous opinion. And that, I
2 would submit is really where we're at.

3 There is also a case, Your Honor, and
4 Mr. Sacks points it out to me, of N-a-g-l-e versus
5 Syer, which is not in this uninsured motorist area,
6 but stands for the principle that if a counsel takes
7 one position at one point in time he can't then be
8 heard to take a completely inconsistent position
9 such as we have here.

10 And just to interpose the agency question,
11 it's never been a material question. There's no
12 question about master-servant relationship or anything
13 like that, Your Honor. It's really a simple question
14 as to whether or not the acts and declarations of
15 this person are consistent with this company having
16 received this material.

17 THE COURT: Is that all?

18 MR. SACKS: Well, Your Honor, I had some
19 other points about agency in general. I could
20 submit proof of agency by other means. In Michie's
21 there's at least one case from Virginia that says
22 that agency can be proved in many ways and only one
23 of those is by the direct testimony of the agent
24 himself. So I would ask that the Court consider all
25 of those in its ruling.

1 THE COURT: The Court will sustain the
2 motion to disregard and not submit testimony into
3 the record of the contents of the telephone
4 conversation to which Mr. Sacks was about to refer.
5 The Court will allow that evidence to go into the
6 record, since we have a court reporter here to
7 vouch the record, and allow the Court of Appeals to
8 properly review the situation in its entirety. The
9 Court will also allow it for the purpose that should
10 there be other evidence to establish agency then,
11 as Mr. Andrew Sacks says, the Court can consider
12 the oral testimony - excuse me, not the testimony,
13 but the oral conversation of an alleged agent as
14 part of the question of whether agency has been
15 proven and the authority of the agent to act.

16 There are a number of cases on this
17 subject in Virginia, which quote this general rule.
18 One of them is Griffith against Electrolux Company,
19 176 Va. 378, decided in 1940 on Page 399. The
20 Virginia Supreme Court recites the general rule
21 adhered to in Virginia.

22 "The general rule is that in order to
23 render admissions of corporate officers or agents
24 admissible against the corporation they must have
25 been made while such officers or agents were acting

1 for the corporation and within the scope or apparent
2 scope of their authority. The declarations or
3 admissions must be made in their official capacity
4 and not in their capacity as individuals.

5 "Neither are the admissions or statements
6 of an alleged agent that he was the agent of another
7 evidence of that agency, but the fact must be proved
8 by other evidence."

9 The Court does not feel that the defendant
10 corporation has waived or in any way not preserved
11 its right to contest agency. I think it's clear
12 from its answers in this case that it does not
13 accept responsibility because it was not properly
14 served.

15 The Court feels that standing alone, any
16 statements made by an alleged agent over the telephone
17 to Mr. Sacks cannot be proved by the testimony of
18 Mr. Sacks and will therefore rule as I stated
19 earlier that the evidence is not admissible at this
20 time.

21 MR. SACKS: We will respectfully except.

22 THE COURT: I can very easily blot that
23 part of it out and deal with the case without
24 considering that conversation if that's the only
25 thing that we have that relates to agency.

1 MR. SACKS: All right, Your Honor.

2 THE COURT: Do you want to put Mr. Sacks
3 on for that purpose and for anything else you might
4 have?

5 MR. SACKS: If Your Honor please, may I
6 have a brief moment?

7 THE COURT: Certainly.

8 MR. SAUNDERS: Your Honor, before we get
9 into too much on this, Mr. Andrew Sacks has advised
10 me he has a hearing at 2:00 in Richmond and it will
11 be impossible to try all of this case today. If
12 we're to have a lengthy vouching of the record it
13 may be to our advantage to do this --

14 THE COURT: I think the record can be
15 vouched in less time than it takes you to state
16 your objection, so let's go ahead with it.

17 MR. SAUNDERS: Yes, sir, Your Honor.

18 MR. SACKS: If Your Honor please, as to
19 those portions of conversation that have been ruled
20 inadmissible, at this point do you want me to
21 preface in any way the questions I assume will go in?

22 THE COURT: No, he has just said he got
23 a telephone call from somebody, now he's going to
24 recite for the record only the contents of that
25 telephone conversation.

1 MR. SACKS: I understand, but I think
2 there was one other conversation like that, I'm not
3 sure.

4 THE COURT: This is three or four days
5 before the scheduled trial date.

6
7 DIRECT EXAMINATION (Continued)

8
9 BY MR. SACKS:

10 Q Would you relate for the record the
11 contents of your conversation that you - of the telephone
12 call that you received three or four days prior to the return
13 day of the warrant?

14 A It was with some man who I thought gave
15 his name as Bill Wood and he asked me if I was going to try
16 the case on the 5th. I said we were. Then I asked him if
17 he was going to have local counsel defend the case. He said
18 he did not know. So I told him I was going to try it anyhow
19 and if I got a judgment I would let him - send him a copy of
20 it.

21 Q Was there anything else, anything further
22 with regard to that conversation.

23 A Then I tried the case and - that's the
24 end of that conversation.

25 Q What was the next event in this?

1 A Then the next letter --

2 Q Was the case tried?

3 A The case was tried on the 5th of August
4 and judgments obtained for both plaintiffs for the amounts
5 set up in the warrants.

6 And then on September the 5th --

7 Q Was there - when was the next correspondence
8 that you forwarded to him?

9 A On September the - let me get the letter
10 here. On August the 13th, 1980, I wrote Mr. Wood as follows --

11 Q May I just have that so the Court can mark it?

12 MR. SACKS: If Your Honor please, we'd
13 like this marked.

14

15 (Whereupon, the foregoing letter
16 dated August 13, 1980, was marked
17 for identification as Plaintiff's
Exhibit Number 2.)

18 BY MR. SACKS:

19 Q I show you what's been marked as P-2.
20 Would you identify that for us?

21 A "Pursuant to our conversation over the
22 telephone, in compliance with your request, we are enclosing
23 herewith abstracts of respective judgments obtained in the
24 above matters.

25

1 "Judgment in favor of Delores Davis v.
2 Preston Powell of \$1100 and \$19 costs and judgment of Rita
3 Davis v. Preston Powell of \$700 and \$13.50 costs.

4 "If you have not appealed those cases we
5 would appreciate an early remittance. If you will make a
6 remittance make the drafts payable to each defendant and
7 Herman A. Sacks as their attorney and upon receipt of your
8 drafts we will mark the judgment 'Satisfied.' If you want
9 the parties to sign Releases you may enclose your forms and
10 they will be executed.

11 "Your prompt attention to this matter will
12 be highly appreciated."

13 I received no reply to that.

14 Q What was the next correspondence?

15 A The next correspondence was on September 5th.

16 Q May I have that?

17
18 (Whereupon, the foregoing letter
19 dated September 5, 1980, was
20 marked for identification as
21 Plaintiff's Exhibit Number 3.)

22 BY MR. SACKS:

23 Q I show you what's been marked P-3 for
24 identification. Would you tell the Court what that is?

25 A It reads as follows: "On the 13th we sent

1 you respective copies of the judgments obtained in the above
2 matter against Preston Powell, an uninsured motorist, showing
3 the amount of the judgments and costs and suggested to you
4 that if you did not appeal those cases that we would appreciate
5 an early remittance.

6 "Evidently you have not appealed the cases
7 and the judgments are now final. Will you let us know promptly
8 what you intend to do in the matter?

9 "If you will send us drafts in the
10 respective amounts as I suggested in our aforementioned letter
11 to you we will have the judgments marked 'satisfied' and if
12 you want our clients to sign releases send your forms along
13 with the drafts and we will have them execute the releases
14 likewise."

15 I received no reply to that.

16 Q Did any of these letters which you -
17 Mr. Sacks, do you need this? I think maybe you should hold
18 onto it.

19 A No, I'm through with that.

20 Q Did any of these letters that you have
21 described so far come back to your office?

22 A And also they were addressed to Mr. Wood
23 at the defendant's address in Indianapolis.

24 Q What was the next correspondence?

25 A In the middle of September I received a

1 letter from Mr. William R Wile.

2 Q May I have that so the Court can mark it?

3

4

(Whereupon, the foregoing letter
dated September 11, 1980, was
marked for identification as
Plaintiff's Exhibit Number 4.)

5

6

7

8 BY MR. SACKS:

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Q I show you what's been marked as P-4 for
identification. Could you tell us what that is?

A Letter dated September 11, 1980. I
received a letter from Mr. William R. Wile as follows: "In
view of the fact that American Interinsurance Exchange was
not served with process and named as a party to the actions
of the uninsured motorist carrier of Delores Davis in the suits
of Delores Davis and Rita Davis versus Preston Powell, an
alleged uninsured motorist, we respectfully deny any liability
to pay the judgments previously obtained against Preston
Powell."

On September 17 I replied to Mr. Wile as
follows: - do you want the letter?

Q Yes, sir.

What address had you been using on these
letters? Was it the same?

A The defendant's address, American

1 Interinsurance Exchange, Indianapolis, Indiana, 46206.

2 MR. SACKS: Your Honor.

3
4 (Whereupon, the foregoing letter
5 dated September 17, 1980, was
6 marked for identification as
7 Plaintiff's Exhibit Number 5.)

8 BY MR. SACKS:

9 Q I show you what's been marked as P-5 for
10 identification.

11 A Mr. Wile, same address.

12 "I was somewhat surprised to read your
13 letter of the 11th insistent which I received this morning
14 stating that American Interinsurance Exchange does not intend
15 to pay the above claims, because it was not made a party to
16 the action and that it was not served with process.

17 "I did not think that American Interinsurance
18 Exchange had to be made a party defendant to the action.

19 "However, the American Interinsurance
20 Exchange received copies of the Motions for Judgment which
21 were mailed to it by certified mail on July 24, 1980, showing
22 that the cases were to be tried in that Court there named on
23 August 5, 1980.

24 "The American Interinsurance Exchange Group
25 had ample notice of the time and place of trial.

1 "As further corroboration American
2 Interinsurance Exchange had received copies of the Motion for
3 Judgment, shortly thereafter a Mr. Wood called me over the
4 long distance telephone stating that the company had received
5 those notices and discussed the cases and said he would decide
6 whether he would retain local counsel to contest the cases.

7 "I also advised him that the American
8 Interinsurance Exchange had ten days time to appeal the cases
9 after date of judgment.

10 "It is my opinion that American
11 Interinsurance Exchange had ample notice of the pendency of
12 the action in order to protect its interest and they have
13 such notification in this case.

14 "I'm enclosing herewith the copies of
15 the letters to American Interinsurance Exchange and to Mr. Wood.

16 "You may discuss the matter with Mr. Wood
17 who I assume represents American Interinsurance Exchange and
18 verify the above statements.

19 "So in view of the above facts if American
20 Interinsurance Exchange shall deny liability then we will have
21 to bring action against it to recover the amount of the
22 judgments and the additional cost incurred in connection with
23 the filing of the suits.

24 "You will note that in compliance with
25 Mr. Wood's request over the telephone I mailed him certified

1 copies of the judgments shortly after they were entered.

2 "Your prompt attention to this matter
3 will be highly appreciated."

4 I received no reply to that.

5 Q After you sent that letter dated
6 September 17, 1980, what was the next communication that you
7 had with anybody from the defendant?

8 A Then I brought action against the defendants
9 for both plaintiffs. At the trial of the case --

10 MR. SAUNDERS: Your Honor, I object to
11 anything that went on at the trial of the case in
12 which we are appealing.

13 THE COURT: Is that relevant here, Mr.
14 Andrew Sacks?

15 MR. SACKS: I think that it would not be.

16 THE COURT: I sustain the objection.

17 MR. SACKS: All right, Your Honor.

18
19 BY MR. SACKS:

20 Q Now, Mr. Sacks, just one or two more.
21 Have you had any conversations or communications with or from
22 the defendants or any agent of the defendant since the time
23 you wrote your letter of September 17, 1980?

24 A No.

25 MR. SACKS: If Your Honor please, I believe

1 that's all unless Mr. Sacks has anything further
2 to add to those items you've illuminated for us.

3 THE WITNESS: It would be a waiver, but,
4 Of course, I can't testify.

5 MR. SACKS: I think at this point, Your
6 Honor, we would have no further questions of this
7 witness.

8 THE COURT: Mr. Saunders, do you want to
9 inquire?

10 MR. SAUNDERS: Yes, sir, I have a few
11 things, Your Honor.

12

13 CROSS-EXAMINATION

14

15 BY MR. SAUNDERS:

16 Q Your letter of July 24, Mr. Sacks, the
17 first letter that you wrote, I think that's Plaintiff's Exhibit
18 Number 1, the address you have on there is American Interinsurance
19 Exchange, Indianapolis, Indiana, 46206; correct?

20 A That's the address on the policy.

21 Q But you did not place on there any street
22 address or post office box or anything like that?

23 A No.

24 Q You do not know when this letter was received
25 by American Interinsurance Exchange, if ever, do you?

1 A No, but I know that Mr. Wood called me
2 two days before the return day.

3 Q Two or three days before?

4 A So I assume they got the letter and the
5 letter was not returned to us.

6 Q But you don't know when they received
7 the letter?

8 A He had to receive it before he called me.

9 Q There was never any service made upon any
10 agent of the American Interinsurance Exchange here in
11 Virginia, was there?

12 A No.

13 MR. SAUNDERS: That's all that I have.

14 THE COURT: Thank you, Mr. Sacks, you may
15 step down.

16
17 (Witness excused.)

18 -----oOo-----

19
20 MR. SACKS: Your Honor, we would give you
21 those exhibits that we have. We would move, Your
22 Honor, that those exhibits be entered into evidence.
23 I think I failed to make that formal motion.

24 THE COURT: I've marked them for
25 identification.

1 Mr. Saunders, Do you have any objection
2 to them now being admitted?

3 MR. SAUNDERS: No, sir.

4 THE COURT: All right, let me have them
5 and I'll mark them for evidence.

6 P-1 through P-5 are now marked admitted
7 for identification.

8
9 (Whereupon, the foregoing letters
10 previously marked for
11 identification as Plaintiff's
12 Exhibits 1 through 5 were
13 received in evidence.)

14 THE COURT: Do the plaintiffs rest?

15 MR. SACKS: If Your Honor please, we
16 would have one further witness. We'd like to call
17 Mr. Stewart as an adverse witness, this gentleman
18 who sits with Mr. Saunders. I believe he's a
19 representative from the company.

20 THE COURT: All right.

21 MR. SACKS: And I would ask, Your Honor,
22 leave to cross-examine this defendant as an adverse
23 witness in view of his position with the defendant.

24 THE COURT: Is there any problem with
25 that, Richard?

MR. SAUNDERS: No, sir, Your Honor.

1 THE COURT: Your name, sir?

2 THE WITNESS: Bruce Stewart.

3 THE COURT: Mr. Stewart is called as an
4 adverse witness by the plaintiffs.

5 MR. SACKS: Thank you, Your Honor.

6
7 BRUCE STEWART,
8 called as an adverse witness,
9 having been first duly sworn,
10 was examined and testified follows:

11
12
13 ADVERSE EXAMINATION

14
15 BY MR. SACKS:

16 Q Mr. Stewart, what is your present position
17 with the company in question in this case?

18 A I'm the claim manager of the Virginia
19 office.

20 Q And where are you located?

21 A 4610 West Grove Court, Virginia Beach.

22 Q How long have you been affiliated with
23 this company?

24 A Since April 30, 1979.

25 Q And prior to that time were you also

1 affiliated with other insurance companies?

2 A Yes, sir.

3 Q How long have you been in the claims
4 business?

5 A I'm in my twenty-eighth year.

6 Q And what - just briefly, what are your
7 functions and duties now, what is it, the claims?

8 A I'm the claim department manager.

9 Q What does that function entail?

10 A I exercise administrative authority over
11 the claim department personnel as well as technical supervision
12 to accomplish the general admission of --

13 Q You have had ample --

14 A Generally oversee the admission of the
15 claim department to see to the prompt and proper disposition
16 of meritorious claims.

17 Q And my question to you, sir, was, you
18 have had ample opportunity then to work with individual claim
19 agents as they work with attorneys and others who are making
20 claims against your insurer?

21 A Yes, sir.

22 Q Now, Mr. Stewart, isn't it true that your
23 company often receives correspondence from attorneys, whether
24 it's been claim letters or letters setting out a certain
25 position on a policy coverage or whatnot?

1 A Yes, sir, that's true.

2 Q And that is an occurrence which is quite
3 frequent with your company, is it not?

4 A Yes, sir.

5 Q And isn't it true that as part of the
6 ordinary and usual business procedure the claims agent to
7 whose attention that letter may be brought will contact that
8 attorney either by 'phone or by mail?

9 A Yes, sir.

10 Q And it's not unusual for letters to come
11 into your office all over the country from other locations
12 throughout the country, is it?

13 A Yes, sir, that's true.

14 Q That's true? And in fact, when those
15 letters come in the standard procedure would be to contact
16 that attorney by the fastest way practical?

17 A Yes, sir.

18 Q All right.

19 And finally, I ask you this, Mr. Stewart:
20 You've heard the testimony, have you not, that there was
21 some contact from one of your offices in Indianapolis with
22 a witness, Herman Sacks?

23 A Yes, sir.

24 Q And without going into the contents of
25 that conversation or what was said, you didn't find anything

1 unusual about that communication coming from your office to
2 an attorney who had written a letter to that office, did you?

3 A No, sir.

4 Q All right, sir.

5 MR. SACKS: If Your Honor please, that's
6 all I have of this witness.

7 THE COURT: Who is Bill Wood?

8 THE WITNESS: Bill Wood?

9 THE COURT: Yes, sir.

10 THE WITNESS: I've never heard of him,
11 sir.

12 MR. SACKS: Your Honor, may I follow that
13 up with one question?

14 THE COURT: Yes, sir.

15 MR. SACKS: Thank you.

16
17 BY MR. SACKS-

18 Q Who is - do you know Bill Wile?

19 A Yes, sir.

20 Q Who is he?

21 A He's an employee of the company in the
22 claim department in Indianapolis.

23 Q Is he a duly authorized agent of the
24 company?

25 A He's an agent of the company, yes, sir.

1 THE COURT: You don't have to answer that
2 if you don't know. If you do know you're welcome
3 to do so.

4 THE WITNESS: Well, I don't know everything
5 about Bill Wile because he's in Indianapolis. My
6 knowledge of what he does is a knowledge based on
7 knowing he's a claim representative, so his authority
8 extends to the duties of a claim representative.

9
10 BY MR. SACKS:

11 Q And he would have the authority, would
12 he not, to make telephone calls on behalf of the company to
13 attorneys making inquiries about claims?

14 A Yes, sir.

15 Q All right.

16 And he does go by the name, Bill - was
17 he William Wile or Bill?

18 A Yes, sir.

19 MR. SACKS: Your Honor, that's all I have.

20
21 DIRECT EXAMINATION

22
23 BY MR. SAUNDERS:

24 Q Mr. Stewart, does Bill Wile have the
25 authority to accept a service of process on behalf of the

1 corporation?

2 A No, sir.

3 Q Is he an officer of American Interinsurance
4 Exchange?

5 A No, sir.

6 Q What was his position at the time that
7 this occurred in July, August and September of last year?

8 A He was a legal examiner.

9 Q And did that place him in charge of any
10 department of the company?

11 A No, sir.

12 Q Explain very briefly what he did as
13 legal examiner as far as you know.

14 A He was a claim representative and did all
15 the functions of a claim representative or examiner in
16 connection with matters in litigation.

17 MR. SAUNDERS: That's all.

18 MR. SACKS: If Your Honor please, I just
19 have one or two on recross, if I might. I guess
20 it's redirect.

21 THE COURT: Go ahead.

22

23 CROSS-EXAMINATION

24 BY MR. SACKS:

25 Q Mr. Stewart, when your agents - well, let

1 me rephrase that. Isn't it true that often times your claim
2 agents will receive what is referred to by some as courtesy
3 suit papers sent to them by an attorney?

4 A Yes, sir.

5 Q Isn't it true this agent knows that in
6 the ordinary course of their business they're to turn those
7 papers over to someone who is to take those matters up with
8 the company's attorneys?

9 A That's right.

10 Q So that if Mr. Wile or any agent in
11 Indianapolis were to have received suit papers by any means
12 wouldn't it be his duty in the course of his employment to
13 turn those over to that person who does ordinarily handle
14 those?

15 A Yes, sir.

16 Q All right, sir.

17 MR. SACKS: That's all I have, Your Honor.

18

19

REDIRECT EXAMINATION

20

21 BY MR. SAUNDERS:

22 Q Is your company's policy when you receive
23 suit papers or letters or anything of that nature to waive
24 your right --

25

MR. SACKS: I object to the leading, Your

1 Honor. I think he's getting into a leading question.

2 MR. SAUNDERS: Judge, I don't think that
3 it's that leading, if it is at all.

4 THE COURT: Just rephrase it, Richard.

5

6 BY MR. SAUNDERS:

7 Q What is the - when the company receives
8 something in the mail, suit papers, courtesy papers, as
9 counsel has referred to it, what does the company do with
10 regard to - or what was the company's policy with regard to
11 service and service of the process in a lawsuit? What is the
12 company's policy with regard to that?

13 A Well, normally we determine, first of all,
14 whether service is proper.

15 Q And if service was not proper what does
16 the company do in those instances?

17 A It varies case to case depending on the
18 case.

19 Q Throughout this period you were working
20 down here in the Virginia Beach office?

21 A Yes, sir.

22 Q And your knowledge of what occurred up
23 in Indianapolis, what is that based upon?

24 A It's pretty limited. I can tell you what
25 our procedure here is.

1 Q What your procedure here is?

2 A Yes, sir.

3 Q What information do you have regarding
4 the procedures up in Indianapolis?

5 A During all of this time we didn't handle
6 our own legal in Virginia and no matter how we're notified of
7 a suit, whether it be by courtesy copies or letter, we simply
8 refer it to the legal in Indianapolis and I never see the case
9 again. I can only speculate as to what their procedures are.
10 I know what mine would be.

11 Q Okay.

12 THE COURT: Any other questions of
13 Mr. Stewart?

14 MR. SACKS: If Your Honor please, we have
15 none.

16 THE COURT: Thank you, Mr. Stewart, you
17 may step down.

18
19 (Witness excused.)

20

21

-----oOo-----

22

23

24

THE COURT: Now, Richard, do you want to
hold him to put him on the stand later?

25

MR. SAUNDERS: Yes, sir, Your Honor.

1 THE COURT: Or let him go to Richmond?

2 MR. SAUNDERS: No, it's counsel for the
3 plaintiff who needs to go to Richmond.

4 THE COURT: Oh, excuse me, I thought it
5 was your witness.

6 All right, sir. The plaintiff rests?

7 MR. SACKS: Your Honor, we rest.

8 THE COURT: Mr. Saunders.

9 MR. SAUNDERS: Your Honor, at this time
10 I would move to strike the plaintiff's evidence on
11 a number of grounds. First and foremost is, as the
12 Court is fully aware, Section 38.1-381 (e1) requires
13 service upon the insured motorist carrier in the
14 manner prescribed by law as though such insurance
15 company were a party defendant.

16 The Court has previously ruled that if
17 the evidence today showed that the process reached
18 a representative with the power to act on its behalf
19 and if such process reached the representative in
20 a timely fashion then it would be valid service.
21 The facts today - and again, I would submit to the
22 Court that the plaintiff, of course, has the burden
23 of proving those two elements and that they complied
24 properly with the provisions of the statute with
25 regard to those two elements.

1 First of all, as to whether the suit
2 papers reached an appropriate representative, I
3 submit that there's been no evidence that it has
4 so reached an appropriate representative. The
5 only evidence was that Mr. Wile, if he is the one
6 that actually received it, that he was a
7 representative of the company.

8 The statute is clear that in order to have
9 service upon a corporation you must serve an officer,
10 director - and when it is a foreign company you
11 would serve an officer or director or registered
12 agent either one or the Secretary of the Commonwealth.
13 So I would submit there has been no service upon
14 an appropriate representative.

15 Maybe more importantly than that though
16 I would submit to the Court that there has been
17 no evidence that the process was received in a
18 timely fashion. This case, the original case
19 against the uninsured defendant, Preston Powell,
20 was tried in the General District Court and
21 accordingly, those statutes apply, 16.1-82; the
22 statute dealing with service of a motion in the
23 General District Court. That section says that,
24 "The plaintiff shall deliver to the officer or
25 other person serving the motion an original Motion

1 for Judgment --" et cetera, "-- but the motion must
2 be served not less than five days before the return
3 day."

4 The evidence is clear in this case that
5 at most, even if the plaintiff can prove that the
6 defendant received it, the only evidence that he
7 had was it was received or he got a call two or
8 three days before the return day. There's been
9 absolutely no evidence - and again, it's his burden
10 of proof, they haven't prevailed on this - no
11 evidence as to the timeliness of it.

12 Finally, Judge, there is another issue
13 that we have not raised before and I think it is
14 most important to raise, that is the question as to
15 whether the service upon an agent in Indianapolis,
16 Indiana, is valid to effect service for a suit
17 when there's no service upon an agent here in
18 Virginia.

19 That is an issue that was not raised by
20 counsel before. I think it's a very important one.
21 In fact, I have prepared a short memorandum of law
22 on that issue. In essence, as I'm sure the Court
23 is aware, the statute requires service upon an
24 agent here in Virginia. Usually that is some agent
25 of the company, officer or director or is the

1 registered agent Secretary of the Commonwealth or
2 whatever. In this particular case there was no
3 service whatsoever in Virginia.

4 The law is clear, and going back to the
5 old case of Pennoyer versus Neff, personal judgment
6 is not valid against a nonresident upon whom no
7 personal service of process within the state was
8 made.

9 There is a statute on point, Section
10 8.01-320, entitled, "Personal service outside of
11 Virginia equivalent to order of publication."
12 Even if you ruled there was service, that it was
13 timely, the most that we have in this case is service
14 outside the Commonwealth of Virginia. Therefore,
15 it is essentially the same as an order of publication.
16 The law is settled that a personal order of
17 publication is not valid to render personal
18 jurisdiction upon a defendant.

19 Virginia Code Section, the insurance
20 section, 38.1-381 (e1) requires the uninsured
21 motorist carrier be served as though such insurance
22 company were a party defendant. If the insurance
23 carrier was actually a party then the service
24 attempted in this case would not be valid accordingly.

25 I submit that it leaves no other conclusion

1 but that the service made in this case, even if it's
2 timely, even if it's on an authorized representative,
3 which we submit it is not, but even if it is, it
4 cannot be valid by the company when there's been
5 no service here inside Virginia. And we would move
6 to strike the plaintiff's evidence.

7 THE COURT: All right, Mr. Andrew Sacks.

8 MR. SACKS: May it please the Court --

9 THE COURT: Have you got a copy of this
10 memorandum?

11 MR. SACKS: I do, Your Honor, I just
12 received it.

13 THE COURT: Have you had a chance to
14 read it?

15 MR. SACKS: I have glanced at it briefly.

16 THE COURT: Why don't you take time to
17 read it and I'll do the same? There's no point in
18 either one of us trying to discuss something we
19 haven't read.

20
21 (Whereupon, there was a brief
22 recess in the proceedings.)

23
24 THE COURT: All right, Mr. Andrew Sacks,
25 are you ready?

1 MR. SACKS: Yes, sir, Your Honor, I am.

2 THE COURT: Have you had ample time to
3 look at the memo?

4 MR. SACKS: Yes, sir, I have.

5 THE COURT: All right, sir, go ahead.

6 MR. SACKS: If Your Honor please, I'll
7 direct my argument first to this question which is
8 contained in the memorandum. That's the one that
9 was last raised.

10 Your Honor, I have spoken about waiver
11 earlier today and I understand that Your Honor has
12 ruled differently, but I would submit with respect
13 that at least to this argument, Your Honor, and
14 I will address its merits in a minute, but even
15 for a procedural basis it is well established, I
16 would submit, that the question of personal
17 jurisdiction is waivable subject matter or
18 jurisdiction may not be waived, it may not be raised
19 in a Court of Appeals for the first time.

20 The question of personal jurisdiction
21 has never been raised, Your Honor, until this
22 minute. Mr. Saunders, himself, has frankly told
23 that to the Court. This is a new argument not
24 raised - or a new point not raised before. To argue,
25 Your Honor, that their one defense in their Answer

1 that failure to comply with the Virginia Code
2 Section 38.1-381 Sub. (e) is ground enough to
3 encompass personal service, Your Honor, strains the
4 jurisdiction procedure.

5 THE COURT: I disagree with you. I
6 overrule the point.

7 Go ahead and address on the merits, not
8 on technical facts. It was raised properly because
9 it was addressed in his Answer.

10 MR. SACKS: All right, Your Honor.

11 In addition to that, on the merits of
12 the question, Your Honor, this Court has already
13 ruled that process - that service of process was
14 proper in this case as far as the actual procedure
15 that was undertaken. And although the Court has
16 noted that there are more preferable procedures
17 the Court has ruled the procedure used in this case
18 was proper according to the statute, pointing out
19 that, we submit, quite properly that the new statutes
20 that have come into effect, procedural statutes, are
21 the ones that permit this kind of service.

22 The only questions in the case, of course,
23 are factual ones, did it arrive there on time and
24 was it received by someone who had some authority.

25 The statute that the Court utilized in its

1 ruling, Section 8.01-295 reads - and I'm paraphrasing
2 to some extent, but I think I have it, that section
3 provided that if process appears to be duly served,
4 as it was in this case, and is good in other realms,
5 as I submit to Your Honor it was in this case, it
6 shall be deemed valid although not directed to an
7 officer, as it was not in this case, or if directed
8 to any officer though excused by some other person.

9 Now, I would submit to the Court that
10 whether the company was in Indiana or whether it
11 was in Virginia, at this point it makes no difference
12 because the process that was duly served and good
13 in other realms, as I understand the Court has
14 ruled, was received. The evidence is clear before
15 the Court it did get there and it got there, I
16 would submit, by the circumstantial evidence even
17 without the agent's declarations that it got there,
18 and was received by someone with power to act or
19 who knew he should have forwarded it to somebody --

20 THE COURT: Mr. Sacks, you will agree, will
21 you not, the point was never raised either by you
22 or by Mr. Saunders or referred to by me in my
23 previous opinion?

24 MR. SACKS: As to the personal jurisdiction
25 question?

1 THE COURT: Yes, sir.

2 MR. SACKS: I will agree with that.

3 THE COURT: I'll admit it wasn't considered
4 by me because we were acting on the basis of the
5 service that was attempted in Indiana, was it on
6 somebody to give notice to this corporation who had
7 the power to act and was it timely. Those are the
8 only two things we're talking about and I didn't
9 even have in mind the fact that this was an out-of-
10 state service when I ruled that everything was
11 proper with the exception of the question of agency.

12 And I'll call your attention to the fact
13 that 295 refers to the sheriff within the
14 territorial boundaries described by 295, his city
15 or his county or any contiguous county or city.
16 And 295 can very well be taken to mean the sheriff
17 of the cities or counties of Virginia may execute
18 such process. In other words, that section may be
19 entirely limited to Virginia process. So I think
20 it's an open question that has not been previously
21 addressed by you, gentlemen, or by the Court and I
22 think it's a timely question for decision here.

23 MR. SACKS: May I give to you another
24 statutory section?

25 THE COURT: Certainly.

1 MR. SACKS: Again, I read in Section 295
2 and again, I would submit this supersedes even 294
3 and 8.01-288 --

4 THE COURT: That's the one I made reference
5 to - excuse me.

6 MR. SACKS: That's correct, Your Honor.

7 THE COURT: I made reference to it in the
8 body of my opinion?

9 MR. SACKS: That is correct, Your Honor.
10 That's the one I really cite. 295 caught my eye
11 as I was reading this memorandum for the first
12 time, but 288, I would submit, does control. I
13 think it's arguable that 295 is applicable, but
14 288 is clear, "Process which has reached the person
15 to whom it is directed within the time prescribed
16 by law, if any, shall be sufficient although not
17 served or accepted as provided in this chapter."

18 That sounds to the plaintiff, Your Honor,
19 as if that statute which the Legislature passed is
20 directed to supersede any of these procedures, even
21 the fact that it may have been an out-of-state
22 corporation. If the process reached the person to
23 whom it was directed that is sufficient as long as
24 it was timely even though it was not served - and
25 I think that's the argument the defendants have

1 raised, it wasn't served according to the chapter,
2 this chapter.

3 I would submit that that legitimizes this
4 procedure, Your Honor. We all admit that certainly
5 there may be more preferable ways to do it, but
6 in this case, which Your Honor has before you there
7 isn't any question, at least in our minds, and I
8 read Your Honor's opinion, even though you did not
9 address this specific question, as being broad
10 enough to encompass even this situation that 288,
11 that expensive securitive position the Legislature
12 has passed is what controls. It may be that the
13 Legislature didn't intend for something that broad,
14 but that obviously can only be changed by legislative
15 mandate. But it's on the books and I would submit
16 it was passed for cases just like this. Certainly
17 there have been statutory changes and all attorneys
18 have adjusted to those and I would submit that the
19 point about personal service would not be grounds
20 to strike the evidence, Your Honor.

21 THE COURT: All right.

22 Now, you don't have to address the second
23 point about the service not being timely, just talk
24 about the first point about agency, if you will.

25 MR. SACKS: All right, Your Honor.

1 As to the agency question, assuming, of
2 course, that the agency is properly before the Court,
3 as the Court has ruled, we would submit, first of
4 all, that even not taking the declarations of the
5 one agent over the telephone, there is ample
6 circumstantial evidence, Your Honor, there's ample
7 other evidence, and maybe I should characterize,
8 to prove agency. And I recall when I was reading
9 Michie's excerpts that it's clear that agency can
10 be proved in a number of different ways. I jotted
11 down --

12 THE COURT: How is it proved here?

13 MR. SACKS: It was proved by various facts.
14 The conduct of the agent is admissible. The
15 declarations, perhaps, are not, but the fact that
16 a telephone call was made to Mr. Sacks as a result
17 of a letter that he wrote.

18 THE COURT: Suppose Bill Wood is a janitor
19 and he picked this letter up off somebody's desk at
20 eight o'clock at night and took it on himself to
21 call Mr. Sacks; would that be agency?

22 MR. SACKS: Your Honor, that would not be,
23 but I would submit to the Court with all due respect
24 that the preponderance of the evidence here, and I
25 would submit that's all we have to show - it's possible.

1 yes, somebody might have picked it up. It's
2 possible somebody made a crank telephone call. It's
3 possible Mr. Herman Sacks imagined it all.

4 THE COURT: It's possible Bill Wood is
5 Bill Wile.

6 MR. SACKS: That's true, but as Shakespeare
7 said, "What's in a name?"

8 The fact of the matter is everything is
9 consistent with agency and there's nothing
10 inconsistent with it. In fact, the record shows
11 on September 17th when Mr. Sacks wrote his final
12 letter incorporating everything he had written to
13 Bill Wood in the past including his conversations
14 and previous correspondence and that was sent to
15 Bill Wile. Bill Wile never responded and I would
16 submit that there's a principle of evidence there
17 that if in the ordinary course of business a letter
18 of confirmation is sent to which no response is
19 received within a reasonable time the statements
20 therein ought to be taken as admitted. That
21 substantiates the agency principle.

22 I note in Michie's it states that agency
23 can be shown by a subsequent ratification by the
24 principal. Here's a letter with the letterhead on
25 it - it's Exhibit P-4, I think - from the American

1 Interinsurance Exchange company.

2 THE COURT: After the judgments and
3 after the appeal time had run out.

4 MR. SACKS: That's correct, Your Honor,
5 but there was nothing cited in there about - the
6 only position they take is that they weren't served
7 properly. They don't deny this was an agent with
8 the company. They don't deny that Mr. Sacks had
9 written and called them. And then they had the
10 chance, Your Honor, after he received the letter
11 to perform their professional responsibility and
12 write him back and they didn't do it. So I would
13 submit to Your Honor the evidence preponderates as to
14 agency even if you do not take the one declaration
15 of the agent. It's been shown.

16 How do we explain a competent attorney -
17 and now I stand as an attorney representing him
18 and not as firm member, but how do we explain a
19 competent attorney who writes letters and in response
20 to a telephone call who incorporates copies of the
21 letters and sends them to Mr. Wile? The preponderance
22 of the evidence, Your Honor, which is uncontradicted,
23 is that these things occurred. The only thing the
24 defendants can show to contradict agency is the
25 vague possibility that they might urge to the Court.

1 but the clear evidence before the Court
2 preponderates toward agency, Your Honor.

3 I think the cases in Virginia are clear
4 that the conduct and circumstantial evidence can
5 show agency. I think those cases were designed
6 to protect a company from a person such as a truck
7 driver or somebody like that just simply saying, I
8 am their agent and that's the only way it can be
9 proven. Then there's a dispute about whether or
10 not he was even hired by the company in the scope
11 of employment.

12 In this case, Your Honor, I would submit
13 that it has been shown and the only thing we haven't
14 brought, Your Honor, is Mr. Wood or Wile himself.
15 But I submit that would be an unnecessary burden on
16 any party. Even the defendants didn't produce him.

17 So we ask the Court to consider that --
18 well, there's just -- Your Honor, there's one other
19 point. Mr. Sacks, himself, actually argued this
20 case, I believe it's the Friedan case. When a
21 letter is directed -- when it's shown that a letter
22 has been written and duly addressed and mailed in
23 the ordinary course of business then the presumption
24 is that it got to where it went. There's no
25 evidence in this case that any of the letters were

1 returned or anything like that. So I would ask
2 Your Honor to apply the preponderance standard and
3 find that agency has been shown sufficient enough
4 to hold these defendants responsible and that's all
5 we ask.

6 If Your Honor please, that's all I have
7 unless Your Honor has any questions of the plaintiff.

8 THE COURT: All right.

9 MR. SACKS: Thank you, Your Honor.

10 MR. SAUNDERS: Does the Court want to
11 hear from me again?

12 THE COURT: No, it's not necessary.

13 The Court is of the opinion that the
14 plaintiffs have not shown that process in this case
15 reached a representative of the defendant insurance
16 company with power to act on its behalf in advance
17 of the trial of the cases of Delores Davis and Rita
18 Davis against Preston Powell in the General District
19 Court of the City of Norfolk. The Court will therefore
20 sustain the motion to strike the plaintiff's evidence
21 and enter judgment for the defendant corporation in
22 each of the cases.

23 Just for purposes of the record, the Court
24 will also deny the motion to strike as it relates to
25 the timeliness of the service of process because if

1 there was valid service it was certainly there in
2 time for the defendant to have acted in advance
3 of the trial in the General District Court. The
4 facts indicating that the first notice from Mr.
5 Herman Sacks to American Interinsurance was dated
6 July the 24th, 1980, in the form of Exhibit P-1,
7 the letter addressed to American Interinsurance
8 Exchange, Indianapolis, and the facts also relate
9 that the trial date was August the 5th, 1980, and
10 the 'phone conversation occurred three or four days
11 before August the 5th, so I can't say that if there
12 was service on a representative of the defendant
13 with power to act on its behalf it was not timely
14 sent.

15 The Court will reserve ruling on the
16 third basis for the motion to strike that being that
17 even if legal service was obtained, even if service
18 was obtained in accordance with the statute, Virginia
19 Code Section 8.01-288, it was not in compliance with
20 Statute 38.1-381 (e1) since that service was
21 attempted on an out-of-state corporation and not
22 upon any representative in Virginia. And I would
23 like time to look at the memorandum of law further
24 and to look at a reference to a law review article
25 in act of the cumulative supplement to 8.01-288

1 dealing with the question of obtaining jurisdiction
2 on a corporation in Virginia cited in 12 University
3 of Richmond Law Review. I only ask that you gentlemen
4 not go run for the book until I get a chance to
5 look at it.

6 I'll give you a quick answer by 'phone
7 so the record can show what I rule on your various
8 motions, Mr. Saunders.

9 MR. SAUNDERS: Okay, Judge.

10 THE COURT: But it is sustained on the
11 first ground and may well be sustained on the third.
12 I think for the purposes of everyone it should be
13 a ruling that is in the record so that you'll know
14 exactly what each side has a right to complain of.

15 MR. SAUNDERS: Your Honor, for the record,
16 I would note my exception to your ruling of the
17 second issue raised.

18 THE COURT: You may note your exception
19 to my ruling of the first and whoever loses on the
20 third one I'll note your objection to my ruling of
21 that.

22 MR. SACKS: Thank you, Your Honor.

23 THE COURT: If there's nothing further
24 Court will stand adjourned.

25 -----o0o-----

1 COMMONWEALTH OF VIRGINIA:

2 CITY OF NORFOLK, to-wit:

3
4
5 I, Susan E. Goodwin, a Court Reporter,
6 certify that the foregoing is a correct transcript of the
7 testimony adduced and proceedings had in the cases of
8 DELORES DAVIS and RITA DAVIS versus AMERICAN INTERINSURANCE
9 EXCHANGE, tried in said Court on October 1, 1981.

10 I further certify that I am not a
11 relative or employee or attorney or counsel of any of the
12 parties, or a relative or employee of such attorney or
13 counsel, or financially interested in the action.

14 Given under my hand this 20th day of
15 November, 1981.

16
17
18 Susan E. Goodwin
19 Court Reporter
20
21
22
23
24
25

LAW OFFICES
SACKS, SACKS, PERKINS & LARKIN

FIRST & MERCHANTS NATIONAL BANK BUILDING
CORNER MAIN AND BANK STREETS
POST OFFICE BOX 3291

NORFOLK, VIRGINIA 23514

AREA CODE 804
TELEPHONE 623-2753

HERMAN A. SACKS
STANLEY E. SACKS
WILLIAM L. PERKINS, III
GIRARD C. LARKIN, JR.
JAMES C. LEWIS
HENRY PAUL DOUFFARD

VIRGINIA BEACH OFFICE
916 SOUTH LYNNHAVEN ROAD
VIRGINIA BEACH, VIRGINIA 23452
TELEPHONE (804) 468-2300
REPLY TO: Norfolk

July 24, 1980

American Interinsurance Exchange
Indianapolis, Indiana 46206

Re: Delores Marie S. Davis

Gentlemen:

We represent Delores Davis and Rita Davis in their respective claims for damages against one Preston Powell as a result of the alleged negligence of the said defendant in an automobile accident which occurred on August 7, 1978.

We have been unable to locate the defendant and since time was getting short we instituted an action at law and we served a process on the Division of Motor Vehicles. Since we don't believe that the defendant will be found we will have to proceed against him as an uninsured motorist within the meaning of our statute.

Mrs. Delores Davis and her daughter, Rita Davis, were in their automobile at the time they were injured, and Mrs. Davis at that time carried liability insurance with your company as evidence by your policy number 2-810-176, which was in force at that time. We are, therefore, giving you notice of the pendency of the action as we intend to look to you for payment if and when we obtain a judgment against the above-named defendant.

We are enclosing herewith a copy of the above actions which are pending in the General District Court of this City, Civil Division.

Very truly yours,

SACKS, SACKS, PERKINS & LARKIN

By
Herman A. Sacks

HAS:skd

7

LAW OFFICES
SACKS, SACKS, PERKINS & LARKIN

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VIRGINIA BEACH OFFICE
916 SOUTH LYNNHAVEN ROAD
VIRGINIA BEACH, VIRGINIA 23452

TELEPHONE (804) 468-2300

REPLY TO:

August 13, 1980

Norfolk

Mr. Bill Wood
American Interinsurance Exchange
Indianapolis, Indiana 46206

Re: Delores Davis v. Preston Powell
Rita Davis v. Preston Powell

Dear Mr. Wood:

Pursuant to our conversation over the telephone,
in compliance with your request, we are enclosing herewith
abstracts of respective judgements obtained in the above matters.

Judgement in favor of Delores Davis v. Preston Powell
of \$1100 and \$19 costs and judgement of Rita Davis v. Preston
Powell of \$700 and \$13.50 costs.

If you have not appealed those cases we would appreciate
an early remittance. If you will make a remittance make the
drafts payable to each defendant and Herman A. Sacks as their
attorney and upon receipt of your drafts we will mark the
judgement "Satisfied." If you want the parties to sign Releases
you may enclose your forms and they will be executed.

Your prompt attention to this matter will be highly
appreciated.

Very truly yours,

SACKS, SACKS, PERKINS & LARKIN

By: Herman A. Sacks

HAS:ml
Enc.

LAW OFFICES
SACKS, SACKS, PERKINS & LARKIN

FIRST & MERCHANTS NATIONAL BANK BUILDING
CORNER MAIN AND BANK STREETS
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NORFOLK, VIRGINIA 23514

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VIRGINIA BEACH OFFICE
916 SOUTH LYNNHAVEN ROAD
VIRGINIA BEACH, VIRGINIA 23452

TELEPHONE (804) 468-2300

REPLY TO:

HERMAN A. SACKS
STANLEY E. SACKS
WILLIAM L. PERKINS, III
GERARD C. LARKIN, JR.
JAMES C. LEWIS
HENRY PAUL BOUFFARD

September 5, 1980

Norfolk

Mr. Bill Wood
American Interinsurance Exchange
Indianapolis, Indiana 46206

Re: Delores Davis v. Preston Powell
Rita Davis v. Preston Powell

Dear Mr. Wood:

On the 13th ult., we sent you respective copies of the judgements obtained in the above matter against Preston Powell, an uninsured motorist, showing the amount of the judgements and costs and suggested to you that if you did not appeal those cases that we would appreciate an early remittance.

Evidently you have not appealed the cases and the judgements are now final. Will you let us know promptly what you intend to do in the matter.

If you will send us drafts in the respective amounts as I suggested in our aforementioned letter to you we will have the judgements marked "satisfied" and if you want our clients to sign releases send your forms along with the drafts and we will have them execute the releases likewise.

Your early attention to this matter will be appreciated.

Very truly yours,

SACKS, SACKS, PERKINS & LARKIN

By: Herman A. Sacks

HAS:ml

81
P-3

AMERICAN UNDERWRITERS GROUP

4720 KINGSWAY DRIVE
P.O. BOX 7009
INDIANAPOLIS, INDIANA 46207
259-6300

September 11, 1980



Mr. Herman A. Sacks
Attorney at Law
Sacks, Sacks, Perkins & Larkin
P.O. Box 3291
Norfolk, VA 23514

RE;	Insured:	Delores Davis
	Claim No.:	185101V
	D/L:	8-07-78

Gentlemen:

In view of the fact that American Interinsurance Exchange was not served with process and named as a party to the actions as the uninsured motorist carrier of Delores Davis in the suits of Delores Davis and Rita Davis versus Preston Powell, an alleged uninsured motorist, we respectfully deny any liability to pay the judgments previously obtained against Preston Powell.

Very truly yours,

Wm R. Wile

William R. Wile
Legal Examiner

WRW/cah



AMERICAN UNDERWRITERS, INC. • AMERICAN INTERINSURANCE EXCHANGE
AMERICAN INTERSTATE INSURANCE COMPANY OF GEORGIA
AMERICAN INTERSTATE INSURANCE CORPORATION OF WISCONSIN

LAW OFFICES

SACKS, SACKS, PERKINS & LARKIN

FIRST & MERCHANTS NATIONAL BANK BUILDING

CORNER MAIN AND BANK STREETS

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NORFOLK, VIRGINIA 23514

AREA CODE 804

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916 SOUTH LYNNHAVEN ROAD

VIRGINIA BEACH, VIRGINIA 23452

TELEPHONE (804) 468-2300

HERMAN A. SACKS

STANLEY E. SACKS

WILLIAM L. PERKINS, III

GIRARD C. LARKIN, JR.

JAMES C. LEWIS

HENRY PAUL BOUFFARD

September 17, 1980

REPLY TO: Norfolk

Mr. William R. Wile
American Underwriters Group
4720 Kingsway Drive
P. O. Box 7009
Indianapolis, Indiana 46207

Re: Delores Davis v Preston Powell
Rita Davis v Preston Powell

Gentlemen:

I was somewhat surprised to read your letter of the 11th instant which I received this morning stating that American Interinsurance Exchange does not intend to pay the above claims, because it was not made a party to the action and that it was not served with process.

I did not think that American Interinsurance Exchange had to be made a party defendant to the action.

However, the American Interinsurance Exchange received copies of the Motions For Judgment which were mailed to it by certified mail on July 24, 1980 showing that the cases were to be tried in that Court there named on August 5, 1980.

The American Interinsurance Exchange Group had ample notice of the time and place of trial.

As further corroboration American Interinsurance Exchange had received copies of the Motion For Judgment, shortly thereafter a Mr. Wood called me over the long distance telephone stating that the company had received those notices and discussed the cases and said he would decide whether he would retain local counsel to contest the cases.

I also advised him that the American Interinsurance Exchange had ten days time to appeal the cases after date of judgment.

It is my opinion that American Interinsurance Exchange had ample notice of the pendency of the action in order to protect its interest and they have such notification in this case.

SACKS, SACKS & PERKINS

Page 2

I'm enclosing herewith the copies of the letters to American Interinsurance Exchange and to Mr. Wood.

You may discuss the matter with Mr. Wood who I assume represents American Interinsurance Exchange and verify the above statements.

So in view of the above facts if American Interinsurance Exchange shall deny ability then we will have to bring action against it to recover the amount of the judgments and the additional cost incurred in connection with the filing of the suits.

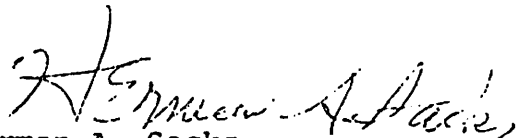
✓ You will note that in compliance with Mr. Wood's request over the telephone I mailed him certified copies of the judgments shortly after they were entered.

Your prompt attention to this matter will be highly appreciated.

Very truly yours,

SACKS, SACKS, PERKINS & LARKIN

BY


Herman A. Sacks

HAS:mw

Enc.



FOURTH JUDICIAL CIRCUIT OF VIRGINIA
CIRCUIT COURT OF THE CITY OF NORFOLK

JOHN W. WINSTON
JUDGE

100 ST. PAUL'S BOULEVARD
NORFOLK, VIRGINIA 23510

October 2, 1981

Andrew M. Sacks, Esquire
Sacks, Sacks & Larkin
P. O. Box 3291
Norfolk, Virginia 23514

Richard A. Saunders, Esquire
Furniss, Davis & Rashkind
P. O. Box 3746
Norfolk, Virginia 23514

Re: Delores Davis and Rita Davis
v. American Interinsurance Exchange
At Law No. L-81-886 and L-81-887

Gentlemen:

At the conclusion of plaintiffs' evidence during the joint trial of these causes on yesterday, counsel for the defendant carrier moved to strike plaintiffs' evidence and enter summary judgment for the defendant. Three grounds were given: (1) Code § 38.1-381 (e 1) was not complied with because the insureds in their earlier suits against uninsured motorist Preston B. Powell did not serve a copy of the process upon the now defendant carrier "in the manner prescribed by law, as though such insurance company were a party defendant"; (2) Such service as was attempted was not timely so as to allow the carrier to file its pleadings or take other action allowed by law before trial of the Powell suits on August 5, 1980; and (3) Such service as was attempted was accomplished outside of Virginia and could not form the basis for a personal judgment against the defendant in light of Code § 8.01-320.

The court ruled that if process had been served "in the manner prescribed by law", it was timely served under the facts, since Mr. Herman Sacks' letter notice dated July 24, 1980, gave the carrier plenty of time to appear and defend the two liability suits against Powell then pending in the General District Court and scheduled for trial on August 5, 1980. The carrier objected to this ruling.

Andrew M. Sacks, Esquire
Richard A. Saunders, Esquire
October 2, 1981

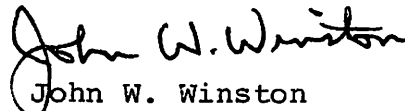
Page 2

The court further ruled that process had not been served "in the manner prescribed by law" and sustained the defendant's motion to strike on that ground. To that ruling plaintiffs objected. In so ruling the court held there was no evidence to support a finding that process ever reached a representative of the defendant with power to act on its behalf in response to same. It declined to allow Mr. Herman Sacks to testify regarding his telephone conversation with Bill Wood, the alleged carrier representative in Indianapolis, Indiana, and thereafter adhered to that ruling since no other evidence concerning agency ever came in. Thus, tho Code § 8.01-288 now recognizes the validity of process which reaches the foreign corporation to whom it is directed within the time prescribed by law, even if not served as directed by Code § 8.01-301, it did not so reach such person here.

Finally, the court reserved a ruling on the third ground of defendant's motion until it could study the memorandum of law handed up during argument. Having done so and having considered the Virginia statutes as well as authorities, the court now overrules the motion to strike as so grounded and notes defendant's objection. For the effect of Code § 8.01-288 is to authorize a personal judgment against a foreign corporation in certain cases (Code §§ 8.01-328.1, 13.1-111 and 13.1-274) where personal service is obtained outside Virginia upon its representative with power to act. Carrier's reliance upon Code § 8.01-320 is therefore misplaced.

Judgment has been entered in favor of the defendant and copy of the trial order so reciting is now enclosed.

Very truly yours,


John W. Winston
Judge

JWW:se

encl.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

DELORES DAVIS,

Plaintiff

v.

LAW NO. L-81-886

AMERICAN INTERINSURANCE EXCHANGE,

Defendant

* * *

RITA DAVIS,

Plaintiff

v.

LAW NO. L-81-887

AMERICAN INTERINSURANCE EXCHANGE,

Defendant

MEMORANDUM OF LAW

The Court has previously overruled the defendant's Motion for Summary Judgment since the plaintiffs' pleadings indicated that the Notice of Motion for Judgment may have reached the defendant, although not served in the usual manner. However, the Court has not previously considered the effect of the longstanding rule that a Court may not acquire personal jurisdiction over a non-resident defendant unless there has been service of process upon an appropriate agent within the Commonwealth.

In the present case, the only service purportedly effected upon the defendant insurance carrier was made upon a representative of the defendant in Indianapolis, Indiana. Even if Virginia Code §8.01-288 permits the plaintiff to serve process by mail as done in the earlier suits against Preston B. Powell, such service was made outside of the Commonwealth and thus can have only the same effect as any process served upon a defendant outside the Commonwealth would have; namely, to give the Court only in rem jurisdiction.

Virginia Code §8.01-320 entitled, "Personal service outside of Virginia equivalent to order of publication," specifically provides that service made upon a non-resident defendant out of the Commonwealth "...shall have the same effect, and no other, as an order of publication duly executed." (emphasis added). The law is well settled that personal jurisdiction cannot be obtained against a party served with an order of publication and that such service gives the Court only in rem jurisdiction. Burks Pleading and Practice, 4th Ed., §42. The landmark decision of Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565 (1877), specifically held that a personal judgment is not valid against a non-resident upon whom no personal service of process within the State was made.

Even the Long Arm Statute requires service of process upon some agent within the Commonwealth (Virginia Code §8.01-329), since anything less would violate the due process guarantee under the Fourteenth Amendment and the Constitution of Virginia.

Virginia Code §38.1-381(e1) requires the uninsured motorist carrier be served, "as though such insurance company were a party defendant." If the insurance carrier was actually a party, then the service purportedly effected upon it would not be valid to obtain jurisdiction over it. Accordingly, since the statute requires that it be served as if it were a defendant, the inescapable conclusion is that the service made upon it does not comply with the statutory mandate contained in Virginia Code §38.1-381(e1).

Respectfully submitted,

AMERICAN INTERINSURANCE EXCHANGE

By *Richard A. Gault*
Of Counsel

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK
on the 1st day of October, 1981.

DELORES DAVIS Plaintiff

vs L81-886

AMERICAN INTERINSURANCE EXCHANGE Defendant

RITA DAVIS Plaintiff

vs L81-887

AMERICAN INTERINSURANCE EXCHANGE Defendant

ORDER

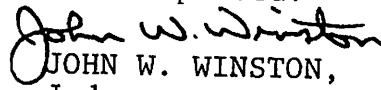
This day came the plaintiffs, by counsel, and the defendant by Bruce Stewart, its representative, and by counsel, and none of the parties demanding a jury, the whole matter of law and fact was heard and determined by the Court.

Thereupon at the conclusion of the plaintiffs' evidence, the defendant, by counsel, moved the Court to strike the plaintiffs' evidence and enter summary judgment in its behalf, which motion after having been fully heard and maturely considered by the Court is sustained on one of the defendant's grounds, to which action of the Court, the plaintiffs and defendant, by counsel, note their exception.

Whereupon it is considered and Ordered by the Court that as to Action at Law styled Delores Davis vs. American Interinsurance Exchange Law Docket No. L81-886: That the said plaintiff take nothing for her motion for judgment as to the said defendnt, and that the said defendant recover of the said plaintiff its costs about its defense herein expended.

Office of
HUGH L. STOVALL
Clerk of the
Circuit Court
Norfolk, Virginia

It is further considered and Ordered by the Court that as to Action at Law styled Rita Davis vs. American Inter-insurance Exchange, Law Docket No. L81-887: That the said plaintiff take nothing for her motion for judgment as to the said defendant and that the said defendant recover of the said plaintiff its costs about its defense herein expended.


JOHN W. WINSTON,
Judge

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

RITA DAVIS,	*	
Plaintiff,	*	LAW NO.
v.	*	<u>L81-887</u>
AMERICAN INTERINSURANCE EXCHANGE,	*	
Defendant,	*	
and	*	
DELORES DAVIS,	*	
Plaintiff,	*	LAW NO.
v.	*	<u>L81-886</u>
AMERICAN INTERINSURANCE EXCHANGE,	*	
Defendant.	*	

MOTION TO VACATE AND SET ASIDE
THE JUDGMENTS OF THE COURT AND
GRANT A NEW TRIAL

COME NOW the plaintiffs, Delores Davis and Rita Davis, by counsel, and, pursuant to the applicable provisions of the Code of Virginia, and the Rules of the Supreme Court of Virginia, move this Honorable Court for an Order directing that the judgments of the Court in favor of the defendant against the respective plaintiffs be vacated and set aside and a new trial be awarded on the following grounds:

1. That the judgments of the Court are contrary to the law and the evidence;

2. That the Court erred in sustaining the defendant's Motion to Strike the plaintiffs' evidence and directing that judgments be entered for the defendant, because plaintiffs had proven a prima facie case which shifted the burden of production to the defendant;

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SACKS, SACKS
& LARKIN

NORFOLK, VIRGINIA

VIRGINIA BEACH, VIRGINIA

3. That the Court misconstrued Virginia Code §8.01-288 et seq. in holding that there was no evidence to support a finding that process ever reached a representative of the defendant with power to act on its behalf in response to same, because §8.01-288 et seq. does not require proof that any particular person or agent received said process but only that process has reached the individual or corporation to whom it was directed within the time prescribed by law.

WHEREFORE the plaintiffs, Delores Davis and Rita Davis, by counsel, move this Honorable Court for the entry of an Order in accordance with the Motion contained herein.

DELORES DAVIS
and
RITA DAVIS

By Andrew M. Sacks
Of Counsel

Andrew M. Sacks, Esquire
SACKS, SACKS AND LARKIN
404 F&M National Bank Building
Norfolk, Virginia 23510

CERTIFICATE OF SERVICE

I do hereby certify that a true copy of the foregoing Motion to Vacate and Set Aside the Judgment of the Court and Grant a New Trial was mailed to Richard A. Saunders of Furniss Davis & Rashkind, P.O. Box 3746, Norfolk, Virginia 23514 on the 13th day of October, 1981.

Andrew M. Sacks

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

DELORES DAVIS,

Plaintiff,

v.

AMERICAN INTERINSURANCE EXCHANGE,

Defendant.

LAW NO: L81-886

COPY

NOTICE OF APPEAL

Pursuant to the provisions of the Rules of the Supreme Court of Virginia, the plaintiff, Delores Davis, hereby files Notice of her appeal from a final judgment of the Circuit Court of the City of Norfolk, the Honorable John W. Winston, presiding, entered in said Court on October 1, 1981, sustaining the Motion of the Defendant to Strike the Plaintiff's Evidence and Entering Judgment in Favor of Said Defendant.

The transcript of the incidents of the trial will be filed within the time limits prescribed by Statute.

DELORES DAVIS

By Andrew M. Sacks
Of Counsel

Andrew M. Sacks, Esquire
SACKS, SACKS, AND LARKIN
405 F & M National Bank Building
Norfolk, Virginia 23510

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Appeal was mailed to Richard A. Saunders, Esquire, Furniss, Davis & Rashkind, 203 Plaza One Building, Norfolk, Virginia, 23510, this 23rd day of October, 1981.

Andrew M. Sacks

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

RITA DAVIS,

Plaintiff,

v.

AMERICAN INTERINSURANCE EXCHANGE,

Defendant.

*

*

*

LAW NO: L81-887

*

*

FILE COPY

NOTICE OF APPEAL

Pursuant to the provisions of the Rules of the Supreme Court of Virginia, the plaintiff, Rita Davis, hereby files Notice of her appeal from a final judgment of the Circuit Court of the City of Norfolk, the Honorable John W. Winston, presiding, entered in said Court on October 1, 1981, sustaining the Motion of the Defendant to Strike the Plaintiff's Evidence and Entering Judgment in Favor of Said Defendant.

The transcript of the incidents of the trial will be filed within the time limits prescribed by Statute.

RITA DAVIS

By Andrew M. Sacks
Of Counsel

Andrew M. Sacks, Esquire
SACKS, SACKS, AND LARKIN
405 F & M National Bank Building
Norfolk, Virginia 23510

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Appeal was mailed to Richard A. Saunders, Esquire, Furniss, Davis & Rashkind, 203 Plaza One Building, Norfolk, Virginia, 23510, this 23rd day of October, 1981.

Andrew M. Sacks

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

RITA DAVIS,

Plaintiff

LAW NO. L81-887

v.

AMERICAN INTERINSURANCE EXCHANGE,

Defendant

* * *

DELORES DAVIS,

Plaintiff

LAW NO. L81-886

v.

AMERICAN INTERINSURANCE EXCHANGE,

Defendant

ORDER

This cause came on for a hearing on October 15, 1981, upon the plaintiffs' Motion to Vacate and Set Aside the previous judgment of the Court entered on October 1, 1981, and to grant a new trial, and was argued by counsel.

After a full hearing and mature consideration by the Court, it is hereby ADJUDGED, ORDERED and DECREED that the plaintiffs' Motion be and hereby is denied, to which action of the Court the plaintiffs note their exception.

ENTER:

Judge

I Ask For This:

p.d.

Seen and Excepted to:

p.q.

further proceedings.

ENTER:

Judge

WE ASK FOR THIS:

p.q.

SEEN AND OBJECTED TO:

p.d.

SACKS, SACKS & LARKIN

ASSIGNMENTS OF ERROR

1. The Court erred in striking the evidence on behalf of the plaintiffs.
2. The Court erred in holding that the burden was on the plaintiffs to prove that the process was received by one who was authorized by the defendant to receive or accept service of process.
3. The Court erred in not entering judgment for the respective plaintiffs against the defendant for the amounts they obtained judgments for against Preston B. Powell.


ASSIGNMENTS OF CROSS-ERROR

1. The Court erred in finding that process which reaches an insurance company, though not actually served in the manner prescribed by law, is effective to invoke the uninsured motorist coverage, notwithstanding the mandatory language of Section 38.1-381(e1) of the Code of Virginia, as amended.

2. The Court erred in holding that the receipt of process by the insurance company three or four days before the return date in a General District Court action, if proved, would be sufficient and timely process.

3. The Court erred in holding that Section 8.01-288 of the Code of Virginia, as amended, is effective to authorize a personal judgment against a foreign reciprocal insurer notwithstanding the fact that the process was not received by any agent of the defendant within the Commonwealth of Virginia.

AMERICAN INTERINSURANCE EXCHANGE

By 
Of Counsel

Richard A. Saunders, Esquire
FURNISS, DAVIS and RASHKIND
P. O. Box 3746
Norfolk, VA 23514

SS. DAVIS AND RASHKIND
ATTORNEYS AT LAW