
IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 920429

ANNA L. PHELPS,

Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., et al.,

Appellees.

JOINT APPENDIX
VOLUME 1

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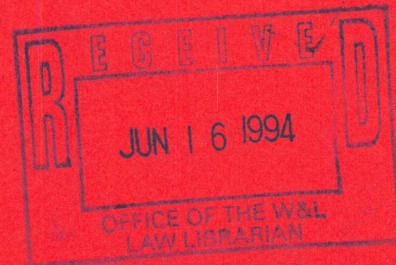
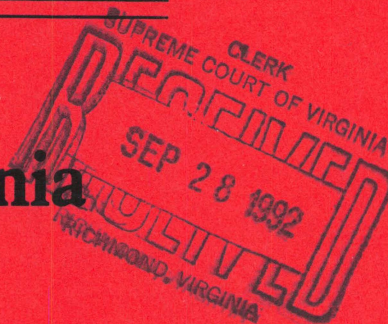


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VIRGINIA:

IN THE CIRCUIT COURT OF BEDFORD COUNTY

ANNA L. PHELPS,

Plaintiff,

v.) (

MOTION FOR DECLARATORY
JUDGMENT

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Serve: Brian K. Carlson, Registered Agent
1500 State Farm Boulevard
Charlottesville, Virginia 22909

Defendant.

Comes now your plaintiff, Anna L. Phelps, and moves for a declaratory judgment against the defendant, State Farm Mutual Automobile Insurance Company, on the grounds as follows:

(1) Anna L. Phelps is an individual who was involved in an accident in Bedford County, Virginia, on June 10, 1989.

(2) State Farm Mutual Automobile Insurance Company is an insurance company licensed and doing business in the State of Virginia.

(3) That Anna L. Phelps, the plaintiff, contracted for a policy of automobile insurance with State Farm Mutual Automobile Insurance Company and Policy No. 8370-661-C02-46-01 was issued to her. A copy of which is attached hereto as Exhibit "A".

(4) That the policy was in good standing on June 10, 1989.

(5) That after June 10, 1989, Anna L. Phelps properly reported her accident to the defendant.

RADFORD & WANDREI
ATTORNEYS AT LAW
BEDFORD, VIRGINIA
24523

1

1
Filed in the Clerk's Office the 27th day of Sept, 1989
Writ Tax \$ 5.00
Fee 45.00
Deposit 45.00
Paid 45.00
Clerk
D.C.

Process issued
9/29/89 comp

(6) That by letter dated July 24, 1989, J. William Dinwiddie, Claims Superintendent of the Tidewater, Virginia, Division, denied coverage because the vehicle Ms. Phelps was driving did not qualify as a "non-owned, temporary substitute or newly acquired automobile under your policy . . .". A copy of the denial letter is attached hereto as Exhibit "B".

(7) At the time of the accident, your plaintiff was driving a 1988 2-door Nissan owned by Mary C. Phelps, her sister.

(8) That Anna L. Phelps resides at 8319 Brookvale Court, Springfield, Virginia 22153.

(9) That Mary L. Phelps resides at 8319 Brookvale Court, Springfield, Virginia 22153.

(10) That a non-owned vehicle pursuant to the insurance policy means "an automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile".

(11) That the State Farm automobile insurance policy provides coverage to non-owned automobiles as set out in Coverage B of Part 1, Liability, of that policy.

(12) That Anna L. Phelps did not own the automobile involved in the accident.

(13) That the automobile involved in the accident was not furnished for the regular use of Anna L. Phelps.

(14) That a relative, under the terms of the policy, means

"a relative of the insured who is a resident of the same household".

(15) That Anna L. Phelps is a biological relative, i.e., sister, of Mary C. Phelps.

(16) That Anna L. Phelps and Mary C. Phelps were not "residents of the same household" within the meaning of that term.

(17) That, therefore, the 1988 2-door Nissan was a non-owned automobile under the terms of the policy.

WHEREFORE, your plaintiff prays that this Court declare that the vehicle Anna L. Phelps was driving on June 10, 1989, was a non-owned automobile under the provisions of State Farm Mutual Automobile Insurance Policy No. A370-661-46-01, and for such other and further relief as the nature of this case may require.

Respectfully submitted,

ANNA L. PHELPS

By: 

Of Counsel

R. Louis Harrison, Jr., p.q.
RADFORD & WANDREI
P. O. Box 1008
Bedford, Virginia 24523

FAMILY

Automobile Policy

COMBINATION FORM



State Farm Mutual Automobile Insurance Company

HOME OFFICE/BLOOMINGTON, ILLINOIS

The address of the Regional Office issuing this policy is shown at the bottom of the Declarations Page.

Policy Form 9346F.8

DECLARATIONS

POLICY PERIOD: The policy period shall be as shown in the Declarations under "Policy Period" and for such succeeding periods of twelve months each thereafter as the required renewal premium is paid by the insured on or before the expiration of the current policy period. The policy period shall begin and end at 12:01 A.M., standard time at the address of the named insured as stated herein. The premium shown is for the policy period indicated in the Declarations.

COVERAGES, LIMITS OF LIABILITY, PREMIUMS: The insurance afforded is only with respect to such of the coverages as are indicated in the Declarations by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all terms of the policy having reference thereto.

GARAGED: The owned automobile will be principally garaged in the declared town and state, unless otherwise stated in the exceptions.

LOSS PAYEE: Any loss under Part III is payable as interest may appear to the named insured and the Loss Payee, if any, shown in the Declarations and this insurance as to such additional interest shall not be invalidated by any act or negligence of the mortgagor or owner, nor any change in the title or ownership, nor by any error, or inadvertence in the description of the automobile until after notice of termination of the policy shall be given to the mortgage owner, conditional vendor, mortgagee or assignee stating when not less than 10 days thereafter such termination shall be effective; provided, the lien-holder shall notify the company within 10 days of any change of interest or ownership which shall come to the knowledge of said lien-holder and failure to do so will render this policy null and void.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

BLOOMINGTON, ILLINOIS

A Mutual Insurance Company Herein Called The Company

Agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to all of the terms of this policy:

PART I — LIABILITY

COVERAGE A — Bodily Injury Liability;

COVERAGE B — Property Damage Liability. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of:

A. bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury", sustained by any person;

B. injury to or destruction of property, including loss of use thereof, hereinafter called "property damage";

arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile, and the company shall defend any suit alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent; but the company may make such investigation and settlement of any claim or suit as it deems expedient.

Supplementary Payments. To pay, in addition to the applicable limits of liability:

(a) all expenses incurred by the company, all costs taxed against the insured in any such suit and all interest on the entire amount of any judgment therein which accrues after entry of the judgment and before the company has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the company's liability thereon;

(b) premiums on appeal bonds required in any such suit, premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, and the cost of bail bonds required of the insured because of accident or traffic law violation arising out of the use of an automobile insured hereunder, not to exceed \$100 per bail bond, but without any obligation to apply for or furnish any such bonds;

(c) expenses incurred by the insured for such immediate medical and surgical relief to others as shall be imperative at the time of an accident involving an automobile insured hereunder and not due to war;

(d) all reasonable expenses, other than loss of earnings, incurred by the insured at the company's request.

Persons Insured. The following are insureds under Part I:

(a) with respect to the owned automobile,

(1) the named insured and any resident of the same household,

(2) any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, and

(3) any other person or organization but only with respect to his or its liability because of acts or omissions of an insured under (a)(1) or (2) above;

(b) with respect to a non-owned automobile,

(1) the named insured,

(2) any relative, but only with respect to a private passenger automobile or trailer, provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission, and

(3) any other person or organization not owning or hiring the automobile, but only with respect to his or its liability because of acts or omissions of an insured under (b)(1) or (2) above.

The insurance afforded under Part I applies separately to each insured against whom claim is made or suit is brought, but the inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

Definitions. Under Part I:

"named insured" means the individual named as named insured in the declarations and also includes his spouse, if a resident of the same household;

"insured" means a person or organization described under "Persons Insured";

"relative" means a relative of the named insured who is a resident of the same household;

"owned automobile" means

(a) a private passenger, farm or utility automobile described in this policy for which a specific premium charge indicates that coverage is afforded;

(b) a trailer owned by the named insured;

(c) a private passenger, farm or utility automobile ownership of which is acquired by the named insured during the policy period, provided

(1) it replaces an owned automobile as defined in (a) above, or

(2) the company insures all private passenger, farm and utility automobiles owned by the named insured on the date of such acquisition and the named insured notifies the company within 30 days after the date of such acquisition of his election to make this and no other policy issued by the company applicable to such automobile, or

(d) a temporary substitute automobile;

"temporary substitute automobile" means any automobile or trailer, not owned by the named insured, while temporarily used with the permission of the owner as a substitute for the owned automobile or trailer when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction;

"non-owned automobile" means an automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile;

"private passenger automobile" means a four wheel private passenger, station wagon or jeep type automobile;

"farm automobile" means an automobile of the truck type with a load capacity of fifteen hundred pounds or less not used for business or commercial purposes other than farming;

"utility automobile" means an automobile, other than a farm automobile, with a load capacity of fifteen hundred pounds or less of the pick-up body, sedan, delivery or panel truck type not used for business or commercial purposes;

"trailer" means a trailer designed for use with a private passenger automobile, if not being used for business or commercial purposes with other than a private passenger, farm or utility automobile, or a farm wagon or farm implement while used with a farm automobile;

"automobile business" means the business or occupation of selling, repairing, servicing, storing or parking automobiles;

"use" of an automobile includes the loading and unloading thereof;

"war" means war, whether or not declared, civil war, insurrection, rebellion or revolution, or any act or condition incident to any of the foregoing.

Exclusions. This policy does not apply under Part I:

(a) to any automobile while used as a public or livery conveyance, but this exclusion does not apply to the named insured with respect to bodily injury or property damage which results from the named insured's occupancy of a non-owned automobile other than as the operator thereof;

(b) to bodily injury or property damage caused intentionally by or at the direction of the insured;

(c) to injury, sickness, disease, death or destruction with respect to which an insured under the policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability;

(d) to bodily injury or property damage arising out of the operation of farm machinery;

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

(f) to bodily injury to any fellow employee of the insured injured in the course of his employment if such injury arises out of the use of an automobile in the business of his employer, but this exclusion does not apply to the named insured with respect to injury sustained by any such fellow employee;

(g) to an owned automobile while used by any person while such person is employed or otherwise engaged in the automobile business, but this exclusion does not apply to the named insured, a resident of the same household as the named insured, a partnership in which the named insured or such resident is a partner, or any partner, agent or employee of the named insured, such resident or partnership;

(h) to a non-owned automobile while maintained or used by any person while such person is employed or otherwise engaged in

(1) the automobile business of the insured or of any other person or organization,

(2) any other business or occupation of the insured, but this exclusion (h) (2) does not apply to a private passenger automobile operated or occupied by the

named insured or by his private chauffeur or domestic servant or a trailer used therewith or with an owned automobile;

(i) to injury to or destruction of (1) property owned or transported by the insured or (2) property rented to or in charge of the insured other than a residence or private garage;

(j) to the ownership, maintenance, operation, use, loading or unloading of an automobile ownership of which is acquired by the named insured during the policy period or any temporary substitute automobile therefor, if the named insured has purchased other automobile liability insurance applicable to such automobile for which a specific premium charge has been made.

Financial Responsibility Laws. When this policy is certified as proof of financial responsibility for the future under the provisions of any motor vehicle financial responsibility law, such insurance as is afforded by this policy for bodily injury liability or for property damage liability shall comply with the provisions of such law to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

Limits of Liability. The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury sustained by one person as the result of any one occurrence; the limit of such liability stated in the declarations as applicable to "each occurrence" is, subject to the above provision respecting each person, the total limit of the company's liability for all such damages arising out of bodily injury sustained by two or more persons as the result of any one occurrence.

The limit of property damage liability stated in the declarations as applicable to "each occurrence" is the total limit of the company's liability for all damages arising out of injury to or destruction of all property of one or more persons or organizations, including the loss of use thereof, as the result of any one occurrence.

Other Insurance. If the insured has other insurance against a loss covered by Part I of this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other and collectible insurance.

PART II — EXPENSES FOR MEDICAL SERVICES

Coverage C — Medical Payments. To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services;

Division 1. To or for the named insured and each relative who sustains bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury", caused by accident,

(a) while occupying the owned automobile,

(b) while occupying a non-owned automobile, but only if such person has, or reasonably believe he has, the permission of the owner to use the automobile and the use is within the scope of such permission, or

(c) through being struck by an automobile or by a trailer of any type;

Division 2. To or for any other person who sustains bodily injury, caused by accident, while occupying

(a) the owned automobile, while being used by the named insured, by any resident of the same household or by any other person with the permission of the named insured; or

(b) a non-owned automobile, if the bodily injury results from

(1) its operation or occupancy by the named insured or its operation on his behalf by his private chauffeur or domestic servant, or

(2) its operation or occupancy by a relative, provided it is a private passenger automobile or trailer,

but only if such operator or occupant has, or reasonably believes he has, the permission of the owner to use the automobile and the use is within the scope of such permission.

Definitions. The definitions under Part I apply to Part II, and under Part II:

"occupying" means in or upon or entering into or alighting from.

Exclusions: This policy does not apply under Part II to bodily injury:

- (a) sustained while occupying (1) an owned automobile while used as a public or livery conveyance, or (2) any vehicle while located for use as a residence or premises;
- (b) sustained by the named insured or a relative while occupying or through being struck by (1) a farm type tractor or other equipment designed for use principally off public roads, while not upon public roads, or (2) a vehicle operated on rails or crawler-treads;
- (c) sustained by any person other than the named insured or a relative,
 - (1) while such person is occupying a non-owned automobile while used as a public or livery conveyance, or
 - (2) resulting from the maintenance or use of a non-owned automobile by such person while employed or otherwise engaged in the automobile business, or
 - (3) resulting from the maintenance or use of a non-owned automobile by such person while employed or otherwise engaged in any other business or occupation, unless the bodily injury results from the operation or occupancy of a private passenger

automobile by the named insured or, by his private chauffeur or domestic servant, or of a trailer used therewith or with an owned automobile;

- (d) sustained by any person while is employed in the automobile business, if the accident arises out of the operation thereof and if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law;
- (e) due to war.

Limit of Liability. The limit of liability for medical payments stated in the declarations as applicable to "each person" is the limit of the company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury as the result of any one accident.

Other Insurance. If there is other automobile medical payments insurance against a loss covered by Part II of this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible automobile medical payments insurance; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible automobile medical payments insurance.

PART III - PHYSICAL DAMAGE

COVERAGE D - (1) Comprehensive - Excluding Collision, (2) Personal Effects.

(1) To pay for loss caused other than by collision to the owned automobile or to a non-owned automobile. For the purpose of this coverage, breakage of glass and loss caused by missiles, falling objects, fire, theft or larceny, explosion, earthquake, windstorm, hail, water, flood, malicious mischief or vandalism, riot or civil commotion, or colliding with a bird or animal, shall not be deemed to be loss caused by collision.

(2) To pay for loss caused by fire or lightning to robes, wearing apparel and other personal effects which are the property of the named insured or a relative, while such effects are in or upon the owned automobile.

DEDUCTIBLE COMPREHENSIVE COVERAGE. To pay any loss payable under coverage D but it is agreed that the deductible amount, as shown on the declarations page by the number beside D, shall be deducted from the amount of each loss as to each automobile, other than loss by (a) fire or lightning, (b) smoke or smudge due to a sudden, unusual and faulty operation of any fixed heating equipment servicing the premises in which the automobile is located, or

(c) the stranding, sinking, burning, collision or derailment of any conveyance in or upon which the automobile is being transported.

If the policy affords insurance with respect to the collision coverage, breakage of glass caused by collision may, if the insured so elects, be treated as covered thereunder, subject to the terms thereof, instead of under the comprehensive coverage.

COVERAGE G - Collision. To pay for loss caused by collision to the owned automobile or to a non-owned automobile but only for the amount of each such loss in excess of the deductible amount stated in the declarations as applicable hereto.

COVERAGE H - Towing and Labor Costs. To pay for towing and labor costs necessitated by the disablement of the owned automobile or of any non-owned automobile, provided the labor is performed at the place of disablement.

Supplementary Payments. In addition to the applicable limit of liability:

- (a) to reimburse the insured for transportation expenses incurred during the period commencing 48 hours after a

theft covered by this policy of the entire automobile has been reported to the company and the police, and terminating when the automobile is returned to use or the company pays for the loss; provided that the company shall not be obligated to pay aggregate expenses in excess of \$10 per day or totaling more than \$300.

(b) to pay general average and salvage charges for which the insured becomes legally liable, as to the automobile being transported.

Definitions. The definitions of "named insured", "relative", "temporary substitute automobile", "private passenger automobile", "farm automobile", "utility automobile", "automobile business", "war" and "owned automobile" in Part I apply to Part III, but "owned automobile" does not include, under Part III, (1) a trailer owned by the named insured on the effective date of this policy and not described herein, or (2) a trailer ownership of which is acquired during the policy period unless the company insures all private passenger, farm and utility automobiles and trailers owned by the named insured on the date of such acquisition and the named insured notifies the company within 30 days after the date of such acquisition of his election to make this and no other policy issued by the company applicable to such trailer.

"Insured" means

(a) with respect to an owned automobile,

(1) the named insured, and

(2) any person or organization (other than a person or organization employed or otherwise engaged in the automobile business or as a carrier or other bailee for hire) maintaining, using or having custody of said automobile with the permission of the named insured and within the scope of such permission;

(b) with respect to a non-owned automobile, the named insured and any relative while using such automobile, provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission;

"non-owned automobile" means a private passenger automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile, while said automobile or trailer is in the possession or custody of the insured or is being operated by him;

"loss" means direct and accidental loss of or damage to (a) the automobile, including its equipment, or (b) other insured property;

"collision" means collision of an automobile covered by this policy with another object or with a vehicle to which it is attached or by upset of such automobile;

"trailer" means a trailer designed for use with a private passenger automobile, if not being used for business or commercial purposes with other than a private passenger, farm or utility automobile, and if not a home, office, store, display or passenger trailer.

Exclusions. This policy does not apply under Part III:

(a) to any automobile while used as a public or livery conveyance;

(b) to loss due to war;

(c) to loss to a non-owned automobile arising out of its use by the insured while he is employed or otherwise engaged in the automobile business;

(d) to loss to a private passenger, farm or utility automobile or trailer owned by the named insured and not described in this policy or to any temporary substitute automobile therefor, if the insured has other valid and collectible insurance against such loss;

(e) to damage which is due and confined to wear and tear, freezing, mechanical or electrical breakdown or failure, unless such damage results from a theft covered by this policy;

(f) to tires, unless damaged by fire, malicious mischief or vandalism, or stolen or unless the loss be coincident with and from the same cause as other loss covered by this policy;

(g) to loss due to radioactive contamination;

(h) under coverage G, to breakage of glass if insurance with respect to such breakage is otherwise afforded;

(i) to loss of or damage to any device or instrument designed for the recording, reproduction, or recording and reproduction of sound unless such device or instrument is permanently installed in the automobile;

(j) to loss of or damage to any tape, wire, record disc or other medium for use with any device or instrument designed for the recording, reproduction, or recording and reproduction of sound.

Limit of Liability. The limit of the company's liability for loss shall not exceed the actual cash value of the property, or if the loss is of a part thereof the actual cash value of such part, at time of loss, nor what it would then cost to repair or replace the property or such part thereof with other of like kind and quality, nor, with respect to an owned automobile described in this policy, the applicable limit of liability stated in the

declarations; provided, however, the limit of the company's liability (a) for loss to personal effects arising out of any one occurrence is \$100, and (b) for loss to any trailer not owned by the named insured is \$500.

Other Insurance. If the insured has other insurance against a loss covered by Part III of this policy, the

company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability of this policy bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible insurance.

PART IV — AUTOMOBILE DEATH INDEMNITY, TOTAL DISABILITY COVERAGE AND SPECIFIC DISABILITY BENEFITS

INSURING AGREEMENTS

1. COVERAGES

Division 1 — Death Indemnity

To pay the principal sum stated in the exceptions in the event of the death of the insured which shall result directly and independently of all other causes from bodily injury caused by accident and sustained by the insured while in or upon, or while entering into or alighting from, or through being struck by, an automobile, provided the death shall occur (1) within ninety days after the date of the accident, or (2) within fifty-two weeks after the date of the accident and during a period of continuous total disability of the insured for which weekly indemnity is payable under the total disability coverage.

Division 2 — (a) Dismemberment and Loss of Sight Benefits

(b) Fractures and Dislocations Benefits

To pay the highest applicable amount stated in the following Tables for loss as enumerated therein, in the event of bodily injury, caused by accident and sustained by the insured while in or upon, or while entering into or alighting from, or through being struck by, an automobile, provided loss under Table I be sustained by the insured within ninety days from such accident.

As respects any insured, (1) any amount for which the company is obligated or has made payment under Division 2 shall apply in reduction of any amount for which the company is obligated under Division 1;

(2) payment of the principal sum shall terminate all obligation of the company under coverage S.

TABLE I

	If applicable principal sum is	If applicable principal sum is
For Loss of	\$5,000.00	\$10,000.00
Both Hands or Both Feet or Sight of Both Eyes	\$5,000.00	\$10,000.00

One Hand and One Foot	\$5,000.00	\$10,000.00
Either Hand or Foot and Sight of One Eye	\$5,000.00	\$10,000.00
Either Hand or Foot	\$2,500.00	\$5,000.00
Sight of One Eye	\$1,750.00	\$3,500.00
Thumb and Index Finger of Either Hand	\$1,250.00	\$2,500.00

"Loss" shall mean with regard to hands and feet, actual severance through or above wrist or ankle joints; with regard to eyes, entire and irrecoverable loss of sight; with regard to thumb and index finger, actual severance through or above metacarpophalangeal joints.

TABLE II

	If applicable principal sum is	If applicable principal sum is
For Fracture of Bones:	\$5,000.00	\$10,000.00
Skull (except bones of face or nose)	\$175.00	\$350.00
Thigh	\$150.00	\$300.00
Arm, between elbow and shoulder	\$150.00	\$300.00
Pelvis (except coccyx)	\$125.00	\$250.00
Vertebra or Vertebrae (except coccyx and vertebral processes)	\$125.00	\$250.00
Shoulder Blade	\$100.00	\$200.00
Leg	\$100.00	\$200.00
Kneecap	\$100.00	\$200.00
Collar Bone	\$75.00	\$150.00
Forearm, between wrist and elbow	\$75.00	\$150.00
Foot (except toes)	\$62.50	\$125.00
Hand (except fingers)	\$62.50	\$125.00
Sternum	\$50.00	\$100.00

Lower Jaw (except alveolar process)	37.50	75.00
One or more ribs, fingers or toes	25.00	50.00
Bones of face or nose	25.00	50.00
Coccyx or Vertebral Processes	25.00	50.00

For Complete Dislocations:		
Hip Joint	\$150.00	\$300.00
Knee Joint (except patella)	75.00	150.00
Bone or Bones of Foot (except toes)	75.00	150.00
Ankle Joint	75.00	150.00
Wrist Joint	62.50	125.00
Elbow Joint	50.00	100.00
Shoulder Joint	37.50	75.00
Bone or Bones of Hand (except fingers)	25.00	50.00
Collar Bone	25.00	50.00
One or more fingers or toes	12.50	25.00

For Loss by Removal:		
Of one or more entire toes	\$100.00	\$200.00
Of one or more fingers (at least one entire phalanx)	75.00	150.00

For a Hospital-confining Injury, except as an Outpatient:	\$25.00	\$50.00
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COVERAGE T — Total Disability — Maximum 200 Weeks. To pay weekly indemnity at the rate stated in the exceptions for the period of continuous total disability of the insured which shall result directly and independently of all other causes from bodily injury caused by accident and sustained by the insured while in or upon or while entering into or alighting from, or through being struck by, an automobile, provided (1) such disability shall commence within twenty days after the date of the accident, and (2) any disability during the period of fifty-two weeks from its commencement shall be deemed total disability only if it shall continuously prevent the insured from performing every duty pertaining to his occupation, and (3) any disability after said fifty-two weeks shall be deemed total disability only if it shall continuously prevent the insured from engaging in any occupation or employment for wage or profit and (4) the weekly indemnity for total disability as provided hereinabove shall in no event extend beyond a period of 200 consecutive weeks from the date of commencement of disability as provided above.

2. Definition of Insured. With respect to coverages S and T, the unqualified word "insured" means the person or

persons so designated for each such coverage in the exceptions.

3. Automobile defined. With respect to this insurance the word "automobile" means a land motor vehicle or trailer not operated on rails or crawler treads, but does not mean: (1) a farm type tractor or other equipment designed for use principally off public roads, except while actually upon public roads, or (2) a land motor vehicle or trailer while located for use as a residence or premises and not as a vehicle.

4. Policy Period, Territory. This insurance applies only to accidents which occur during the policy period within the United States of America, its territories or possessions, or Canada.

EXCLUSIONS. This insurance does not apply:

- (a) to bodily injury or death sustained in the course of his occupation by any person while engaged (1) in duties incident to the operation, loading or unloading of, or as an assistant on, a public or livery conveyance or commercial automobile, or (2) in duties incident to the repair or servicing of automobiles;
- (b) to loss caused by or resulting from disease except pus forming infection which shall occur through bodily injury to which this insurance applies;
- (c) to suicide, sane or insane, or to any attempt thereof;
- (d) to injury or death due to war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing.

CONDITIONS.

1. Policy Provisions. None of the insuring agreements, exclusions or other provisions of Parts I, II and III of the policy or conditions of the policy shall apply to the insurance afforded by this Part IV except the conditions, "Notice", "Action Against Company (Medical Payments)", "Changes", "Assignment", "Cancellation" and "Declarations".

2. Notice of Claim. When loss covered hereunder occurs, written notice thereof shall be given by or on behalf of the insured or the beneficiary to the company or any of its authorized agents as soon as practicable.

3. Proof of Claim; Medical Reports. As soon as practicable, the injured person, or the beneficiary in the event of death, or someone on his behalf, shall give to the company written proof of claim, under oath if required; and shall after each request from the company execute authorization to enable the company to obtain medical reports and copies of records.

Proof of claim shall be made upon forms furnished by the company unless the company shall have failed to

furnish such forms within fifteen days after receiving notice of claim.

The injured person shall submit to physical examination by physicians selected by the company when and as often as the company may reasonably require.

4. Payment of Death Indemnity; Autopsy — Division 1 of Coverage S. If the decedent insured be survived by a spouse who was a resident of the same household at the time of the accident, indemnity for death is payable to such spouse; otherwise, if the decedent insured was a minor, indemnity for death is payable to any parent thereof who was a resident of the same household at the time of the accident; otherwise indemnity for death is payable to the decedent insured's estate.

The company shall have the right and opportunity to make an autopsy where it is not forbidden by law.

5. Payment of Indemnity — Coverage T. Weekly Indemnity for total disability is payable to the insured who is disabled. Subject to proof of claim, accrued

weekly indemnity is payable every four weeks and any balance at termination of the disability period for which the company is liable.

6. Beneficiary — Division 1 of Coverage S. Consent of beneficiary is not requisite to cancellation, assignment, change of beneficiary, or any other change in the policy.

7. Death of Named Insured. If the named insured dies, any insurance afforded under this Part IV with respect to any surviving insured shall be continued while the policy is in effect.

8. Other Insurance. If any insured under this Part IV also is an insured under other coverage of the same kind, issued by the company, any payment for loss under such other coverage shall serve to reduce, to the extent of such payment, the company's obligation under this Part IV as respects any loss to such insured, and the company will return the premium paid for such duplication of the insurance hereunder.

CONDITIONS

Conditions 3, 13 and 15 through 17 apply to all Parts.

Conditions 1, 2, 14 and 4 through 12, apply only to the Parts noted thereunder.

1. Policy Period, Territory (Parts I, II and III). This policy applies only to accidents, occurrences and loss during the policy period while the automobile is within the United States of America, its territories or possessions, or Canada, or is being transported between ports thereof.

2. Premium (Parts I, II and III). If the named insured disposes of, acquires ownership of, or replaces a private passenger, farm or utility automobile or, with respect to Part III, a trailer, any premium adjustment necessary shall be made as of the date of such change in accordance with the manuals in use by the company. The named insured shall, upon request, furnish reasonable proof of the number of such automobiles or trailers and a description thereof.

3. Notice. In the event of an accident, occurrence or loss, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable. In the event of theft the insured shall also promptly notify the police. If claim is made or suit is brought against the insured, he

shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

4. Two or More Automobiles (Parts I, II and III). When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each, but an automobile and a trailer attached thereto shall be held to be one automobile as respects limits of liability under Part I of this policy, and separate automobiles under Part III of this policy, including any deductible provisions applicable thereto.

5. Assistance and Cooperation of the Insured (Parts I and III). The insured shall cooperate with the company and, upon the company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of bodily injury, property damage or loss with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The failure or refusal of the insured to cooperate with or assist the company which prejudices the company's defense of an action for damages arising out of the operation or use of an

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automobile shall constitute non-compliance with the requirements of the policy that the insured shall cooperate with and assist the company. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

6. Action Against Company (Part I). No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. No person or organization shall have any right under this policy to join the company as a party to any action against the insured to determine the insured's liability, nor shall the company be impleaded by the insured or his legal representative. Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.

(Parts II, III and IV). No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy nor, under Part III, until thirty days after proof of loss is filed and the amount of loss is determined as provided in this policy.

7. Medical Reports; Proof and Payment of Claim (Part II). As soon as practicable the injured person or someone on his behalf shall give to the company written proof of claim, under oath if required, and shall, after each request from the company, execute authorization to enable the company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the company when and as often as the company may reasonably require.

The company may pay the injured person or any person or organization rendering the services and such payment shall reduce the amount payable hereunder for such injury. Payment hereunder shall not constitute an admission of liability of any person or, except hereunder, of the company.

8. Insured's Duties in Event of Loss (Part III). In the event of loss the insured shall:

(a) protect the automobile, whether or not the loss is covered by this policy, and any further loss due to the insured's failure to protect shall not be recoverable under this policy; reasonable expenses incurred in affording such protection shall be deemed incurred at the company's request;

(b) file with the company, within 91 days after loss, his sworn proof of loss in such form and including such information as the company may reasonably require and shall, upon the company's request, exhibit the damaged property and submit to examination under oath.

9. Appraisal (Part III). If the insured and the company fail to agree as to the amount of loss, either may, within 60 days after proof of loss is filed, demand an appraisal of the loss. In such event the insured and the company shall each select a competent appraiser, and the appraisers shall select a competent and disinterested umpire. The appraisers shall state separately the actual cash value and the amount of loss and failing to agree shall submit their differences to the umpire. An award in writing of any two shall determine the amount of loss. The insured and the company shall each pay his chosen appraiser and shall bear equally the other expenses of the appraisal and umpire.

The company shall not be held to have waived any of its rights by any act relating to appraisal.

10. Payment of Loss (Part III). The company may pay for the loss in money; or may repair or replace the damaged or stolen property; or may, at any time before the loss is paid or the property is so replaced, at its expense return any stolen property to the named insured; or at its option to the address shown in the declarations, with payment for any resultant damage thereto; or may take all or such part of the property at the agreed or appraised value but there shall be no abandonment to the company. The company may settle any claim for loss either with the insured or the owner of the property.

11. No Benefit to Bailee (Part III). The insurance afforded by this policy shall not inure directly or indirectly to the benefit of any carrier or other bailee for hire liable for loss to the automobile.

12. Subrogation (Parts I and III). In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and

papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

13. Changes. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by an executive officer of the company.

14. Limit of Liability — Coverage II. The company's liability shall not exceed \$25.00 for each disablement.

15. Assignment. Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon; if, however, the insured named as named insured in the declarations, or his spouse if a resident of the same household, shall die, this policy shall cover (1) the survivor as named insured, (2) his legal representative as named insured but only while acting within the scope of his duties as such, (3) any person having proper temporary custody of an owned automobile, as an insured, until the appointment and qualification of such legal representative, and (4) under division I of Part II any person who was a relative at the time of such death.

16. Cancellation. This policy may be canceled by the insured named as named insured in the declarations by mailing to the company written notice stating when thereafter the cancellation shall be effective. This policy may be canceled by the company by mailing to the insured named as named insured in the declarations at the address shown in this policy written notice stating when not less than ten days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by such insured or by the company shall be equivalent to mailing.

If such insured cancels, earned premium shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made either at the time cancellation is effected or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation.

17. Declarations. By acceptance of this policy, the insured named as named insured in the declarations agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

MUTUAL CONDITIONS

1. Mutuals — Membership and Voting Notice. The first insured named in the declarations is notified that by virtue of this policy he is a member of the State Farm Mutual Automobile Insurance Company of Bloomington, Illinois, and while this policy is in force is entitled to vote at all meetings of members and to share in the earnings and savings of the company in accordance with the dividends declared by the Board of Directors on this and like policies.

2. No Contingent Liability. This policy is non-assessable.

3. Annual Meeting. The annual meeting of the members of the company shall be held at its home office at Bloomington, Illinois, on the second Monday of June at the hour of 10:00 A.M., unless the Board of Directors shall elect to change the time and place of such meeting, in which case, but not otherwise, due notice shall be mailed each member at the address disclosed in this policy at least ten (10) days prior thereto.

In Witness Whereof, the State Farm Mutual Automobile Insurance Company has caused this policy to be signed by its President and Secretary at Bloomington, Illinois.

Laura P. Sullivan
SECRETARY

Edward B. Runt Jr.
PRESIDENT

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Note: The following endorsement applies when the endorsement number appears on the declarations page.

6460.2 VIRGINIA AUTOMOBILE INSURANCE PLAN.

It is understood and agreed that in the event of cancellation of this policy by either insured or the company, the earned premium calculated in accordance with the cancellation condition of the policy, shall be subject to a minimum of \$25.00 as provided in Section 18 of the Virginia Automobile Insurance Plan.

Note: The following endorsement applies when the endorsement number appears on the declarations page.

6882AQ PREMIUM AND COVERAGE CHANGES ENDORSEMENT

It is agreed that, subject to all the provisions of the policy except where modified herein, the following provision is added:

PREMIUM AND COVERAGE CHANGES

A. Premium Changes

The premium for this policy is based on information the company has received from the named insured or other sources. The named insured agrees that if any of this information material to the development of the policy premium is incorrect, incomplete or changed, the company may adjust the premium accordingly during the policy period; and to cooperate with the company in determining if this information is correct and complete, and to advise the company of changes in this information.

Any adjustment of the policy's premium will be made using the rules in effect at the time of the change.

Premium adjustment made be made as the result of a change in:

1. automobiles insured by the policy, including changes in use.
2. driver, driver's age or driver's marital status.
3. coverages and coverage limits.
4. rating territory.
5. eligibility for discounts or other premium credits.

B. Coverage Changes

The company may revise the coverages under this policy to provide more protection without additional premium charge. If the company does this and the named insured has the coverage which is changed, this policy will automatically provide the additional coverage as of the date the revision is effective in this state. Otherwise, this policy contains all of the coverage agreements between the named insured and the company. Its terms may not be changed or waived except by an endorsement issued by the company.

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Note: The following endorsement applies when the endorsement number is shown on the declarations page.

6191C DISTRICT OF COLUMBIA EMPLOYEES USING AUTOMOBILES IN GOVERNMENT BUSINESS

It is agreed that the policy does not apply under the Liability Coverages to the following insureds:

1. The District of Columbia or any of its Agencies.
2. Any person, including the named insured, with respect to bodily injury or property damage resulting from the operation of an automobile by such person as an employee of the District of Columbia while acting within the scope of his office or employment, if such person is relieved from liability because of the provisions of Public Law 86-654 (District of Columbia Employee Non-Liability Act), as amended.

Note: The following endorsement applies when the endorsement number is shown on the declarations page.

6256W.1 SOUND RECEIVING AND TRANSMITTING EQUIPMENT EXCLUDED

It is agreed that any Physical Damage Insurance afforded by the policy is subject to the following additional exclusion:

This insurance does not apply to loss of, or damage to any sound receiving or sound receiving and transmitting equipment designed for use as a citizen's band radio, two-way mobile radio or telephone, or scanning monitor receiver, including any accessories and antennas unless permanently installed in the opening of the dash or console of the automobile normally used by the motor vehicle manufacturer for the installation of a radio.

Note: This endorsement replaces any endorsement providing similar coverage. It applies when the endorsement number is shown on the declarations page.

6273H.5 SUPPLEMENTARY UNINSURED MOTORISTS INSURANCE

(Bodily Injury - Property Damage - Limits - Underinsured Motorists)

(Virginia)

It is agreed that, with respect to such insurance as is afforded by the policy for damages because of bodily injury and property damage caused by accident and arising out of the ownership, maintenance or use of an uninsured motor vehicle, subdivision (a) of the definition of "uninsured motor vehicle" is amended to include "underinsured" motor vehicle, subject to the following provisions:

1. If limits of liability for such insurance are stated in the schedule of this endorsement or in the declarations, and subject to 2. below:
 - (a) the split limits so stated as applicable to bodily injury for "each person"/"each accident" and property damage for "each accident" shall apply in lieu of any limits therefor stated elsewhere in the policy, and subject to all the terms of the policy having reference thereto, shall be the total limit of the company's liability for all damages because of bodily injury and property damage as the result of any one accident arising out of the ownership, maintenance or use of uninsured motor vehicles; or
 - (b) the single limit so stated as applicable to bodily injury and property damage for "each accident" shall apply in lieu of any limit therefor stated elsewhere in the policy, and subject to all the terms of the policy having reference thereto, shall be the total limit of the company's liability for all damages as the result of any one accident arising out of the ownership, maintenance or use of uninsured motor vehicles; provided such limit of liability shall first provide the separate limits required by the Virginia Motor Vehicle Safety Responsibility Act as stated in the schedule of this endorsement or in the declarations.
2. When used in reference to this insurance (including this and other endorsements forming a part of the policy):

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A motor vehicle is "underinsured" when, and to the extent that, the total amount of bodily injury and property damage coverage applicable to the operation or use of the motor vehicle and "available for payment" for such bodily injury or property damage, including all bonds or deposits of money or securities made pursuant to Article 6 of Chapter 6 of Title 46.1 of the Code of Virginia (Section 46.1-467 et seq.), is less than the total amount of uninsured motorist coverage afforded any person injured as a result of the operation or use of the vehicle.

"Available for payment" means the amount of liability insurance coverage applicable to the claim of the injured person for bodily injury or property damage reduced by the payment of any other claims arising out of the same occurrence.

If an injured person is entitled to underinsured motorist coverage under more than one policy, the following order of priority of policies applies and any amount available for payment shall be credited against such policies in the following order of priority:

1. The policy covering a motor vehicle occupied by the injured person at the time of the accident;
2. The policy covering a motor vehicle not involved in the accident under which the injured person is a named insured;
3. The policy covering a motor vehicle not involved in the accident under which the injured person is an insured other than a named insured.

Where there is more than one insurer providing coverage under one of the payment priorities set forth, their liability shall be proportioned as to their respective underinsured motorist coverages.

3. The company shall not be obligated to make any payment because of bodily injury or property damage to which this insurance applies and which arises out of the ownership, maintenance or use of an underinsured motor vehicle until after the limits of liability under all bodily injury and property damage liability bonds or insurance policies respectively applicable at the time of the accident to damages because of bodily injury or because of property damage have been exhausted by payment of judgments or settlements.
4. Exclusion (a) in the Uninsured Motorists Insurance endorsement does not apply to the underinsured motorists coverage afforded by this endorsement.
5. The second paragraph of the Other Insurance Condition in the Uninsured Motorists Insurance endorsement does not apply to the underinsured motorists coverage afforded by this endorsement.

SCHEDULE - LIMIT OF LIABILITY

Split Limits see amounts in declarations

Single Limit Bodily Injury and Property Damage \$ see amount in declarations each accident, provided such limit shall first be: Bodily Injury \$25,000 each person, \$50,000 each accident, Property Damage \$10,000 each accident.

Note: This endorsement replaces any similar coverage or endorsement printed in the policy. It applies when the endorsement number is shown on the declarations page.

6520.7 UNINSURED MOTORISTS INSURANCE (Virginia)

In consideration of the payment of premium and subject to all of the provisions of this endorsement and to the applicable provisions of the policy, the company agrees with the named insured as follows:

I. COVERAGE U - UNINSURED MOTORISTS (Damages for Bodily Injury and Property Damage)

The company will pay in accordance with Section 38.2-2206 of the Code of Virginia and all Acts amendatory thereof or supplementary thereto, all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured or property damage, caused by accident and arising out of the

ownership, maintenance or use of such uninsured motor vehicle.

Exclusions

This insurance does not apply:

- (a) to bodily injury or property damage with respect to which the insured or his legal representative shall, without written consent of the company, make any settlement with

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any person or organization who may be legally liable therefor;

(b) to the first two hundred dollars of the total amount of all property damage as the result of any one accident. This exclusion does not apply if the owner or operator of the uninsured motor vehicle causing the damage can be identified;

(c) so as to inure directly or indirectly to the benefit of any insurer of property.

II. PERSONS INSURED

Each of the following is an insured under this insurance to the extent set forth below:

(a) the named insured and, while residents of the same household, the spouse and relatives of either;

(b) any other person while occupying an insured motor vehicle; and

(c) any person, with respect to damage he is entitled to recover because of bodily injury to which this insurance applies sustained by an insured under (a) or (b) above.

The insurance applies separately with respect to each insured, except with respect to the limits of the company's liability.

III. LIMITS OF LIABILITY

Regardless of the number of (1) persons or organizations who are insureds under this insurance, (2) persons or organizations who sustain bodily injury or property damage, (3) claims made or suits brought on account of bodily injury or property damage, or (4) motor vehicles to which this insurance applies,

(a) If the schedule or declarations indicate split limits of liability, the limit of liability for bodily injury stated as applicable to "each person" is the limit of the company's liability for all damages because of bodily injury sustained by one person as the result of any one accident and, subject to the above provision respecting "each person", the limit of liability for bodily injury stated as applicable to "each accident", is the total limit of the company's liability for all damages because of bodily injury sustained by two or more persons as the result of any one accident. The limit of liability for property damage stated as applicable to each accident is the total limit of the company's liability for all damages because of property damage to all property of one or more insureds as the result of any one accident.

(b) If the schedule or declarations indicate a single limit of liability, the limit of liability stated as applicable to "each accident" is the total limit of the company's liability for all damages as the result of any one accident; provided such limit of liability shall first provide the separate limits required by the Virginia Motor Vehicle

Safety Responsibility Act as stated in the schedule or declarations.

(c) If claim is made under this insurance and claim is also made against any person or organization who is an insured under the bodily injury liability or property damage liability coverage of the policy because of bodily injury or property damage sustained in an accident by a person who is an insured under this insurance, any payment made under this insurance to or for any such person shall be applied in reduction of any amount which he may be entitled to recover from any person or organization who is an insured under the bodily injury or property damage liability coverages.

(d) Any amount payable under this insurance because of bodily injury or property damage sustained in an accident by a person who is an insured under this insurance shall be reduced by all sums paid because of such bodily injury or property damage by or on behalf of the owner or operator of an uninsured motor vehicle.

(e) Any amount recoverable as damages because of bodily injury or property damage sustained in an accident by a person who is an insured under this insurance shall be reduced by all sums paid because of such bodily injury or property damage by or on behalf of any person or organization jointly or severally liable together with the owner or operator of an uninsured motor vehicle for such bodily injury or property damage including all sums paid under the bodily injury or property damage coverage of the policy.

IV. POLICY PERIOD: TERRITORY

This insurance applies only to accidents which occur during the policy period and within the United States of America, its territories or possessions, or Canada.

V. DEFINITIONS

When used in reference to this insurance, (including endorsements forming a part of the policy):

bodily injury - means bodily injury, sickness or disease, including death, sustained by a person who is an insured under (a) or (b) of the Persons Insured provision;

hit-and-run vehicle - means a motor vehicle which causes an accident resulting in bodily injury to an insured or property damage, provided;

(a) there cannot be ascertained the identity of either the operator or the owner of such motor vehicle; and

(b) the insured or someone on his behalf shall have reported the accident promptly to either the company, or a law-enforcement officer.

insured motor vehicle - means a motor vehicle registered in Virginia with respect to which the bodily injury and property damage liability coverage of the policy applies but shall not

include a vehicle while being used without the permission of the owner;

motor vehicle - means a land motor vehicle or trailer other than

(a) a farm type tractor or other equipment designed for use principally off public roads, while not upon public roads;

(b) a vehicle operated on rails or crawler-treads, or

(c) a vehicle while located for use as a residence or premises;

named insured - means the person named in the declarations of this policy and includes the spouse if a resident of the same household;

occupying - means in or upon or entering into or alighting from;

property damage - means injury to or destruction of (1) an insured motor vehicle owned by the named insured or his spouse, if a resident of the same household and the contents of such motor vehicle, and (2) any other property (except a motor vehicle) owned by an insured and located in Virginia;

relative - means a person related to the named insured by blood, marriage or adoption who is a resident of the same household;

uninsured motor vehicle - means:

(a) a motor vehicle with respect to the ownership, maintenance or use of which there is, in at least the amounts specified in the Virginia Motor Vehicle Safety Responsibility Act, neither (i) cash or securities on file with the Virginia Commissioner of Motor Vehicles nor (ii) a bodily injury and property damage liability bond or insurance policy, applicable at the time of the accident with respect to any person or organization legally responsible for the use of such vehicle, or with respect to which there is such a bond or insurance policy applicable at the time of the accident but the company writing the same is or becomes insolvent or denies coverage thereunder; or

(b) a hit-and-run vehicle as defined.

VI. CONDITIONS

A. Policy Provisions. None of the Insuring Agreements, Exclusions, Conditions or other provisions of the policy shall apply to the insurance afforded by this endorsement except the Conditions "Notice", "Insured's Duties in the Event of Loss", "Subrogation", "Changes", "Assignment", "Cancellation" and "Declarations".

B. Premium. If during the policy period the number of insured motor vehicles owned by the named insured or spouse and registered in Virginia changes, the named insured shall notify the company during the policy period of any change and the premium shall be adjusted in

accordance with the manuals in use by the company. If the earned premium thus computed exceeds the advance premium paid, the named insured shall pay the excess to the company; if less, the company shall return to the named insured the unearned portion paid by such insured.

C. Proof of Claim; Medical Reports; Proof of Loss. As soon as practicable, the insured or other person making claim shall give to the company written proof of claim, under oath if required, including full particulars of the nature and extent of the injuries, treatment, and other details entering into the determination of the amount payable hereunder. Proof of claim shall be made upon forms furnished by the company unless the company shall have failed to furnish such forms within 15 days after receiving notice of claim.

The injured person shall submit to physical examinations by physicians selected by the company when and as the company may reasonably require and he, or in the event of his incapacity his legal representative, or in the event of his death his legal representative or the persons or persons entitled to sue therefor, shall upon each request from the company execute authorization to enable the company to obtain medical reports and copies of records.

The insured or other person making claim for damage to property shall file proof of loss with the company within sixty days after the occurrence of loss, unless such time is extended in writing by the company, in the form of a sworn statement setting forth the interest of the insured and of all others in the property affected, any encumbrances thereon, the actual cash value thereof at time of loss, the amount, place, time and cause of such loss, and the description and amounts of all other insurance covering such property. Upon the company's request, the insured shall exhibit the damaged property to the company.

With respect to claims alleged to have arisen out of the ownership, maintenance or use of a hit-and-run vehicle if the insured has not obtained a judgment against John Doe, the liability of the uninsured motorist may be established, as between the insured and the company, by filing with the company within a reasonable time after the accident a statement under oath that the insured or his legal representative has a cause or causes of action arising out of such accident, for damages against a person or persons whose identity is unascertainable, setting forth the facts in support thereof, and shall present clear and convincing evidence that there was a hit-and-run vehicle involved in the accident.

D. Notice of Legal Action. If, before the company makes payment of loss hereunder, the insured or his legal representative shall institute any legal action for bodily injury or property damage against any person or organization legally responsible for the use of a motor vehicle involved in the accident, a copy of the summons and complaint or other process served in connection with such legal action shall be forwarded immediately to the company by the insured or his legal representative.

E. Other Insurance. With respect to bodily injury to an insured while occupying a motor vehicle not owned by the named insured, this insurance shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such vehicle as primary insurance.

Except as provided in the foregoing paragraph, if the insured has other similar bodily injury insurance available to him and applicable to the accident, the company shall not be liable for a greater proportion of any loss to which this coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.

With respect to property damage, this insurance shall apply only as excess insurance over any other valid and collectible insurance of any kind applicable to such property damage.

With respect to an accident wherein an employee of a self-insured employer receives a worker's compensation award for injuries resulting from an accident with an uninsured motor vehicle, such award shall be set off against

any judgment for damages awarded for personal injuries resulting from such accident.

F. Payment of Loss by the Company. Any amount due hereunder is payable

(a) to the insured, or

(b) if the insured be a minor to his parent or guardian, or

(c) if the insured be deceased to his surviving spouse, otherwise

(d) to a person authorized by law to receive such payment or to a person legally entitled to recover the damages which the payment represents;

provided, the company may at its option pay any amount due hereunder in accordance with division (d) hereof.

G. This endorsement replaces any other provisions of the policy, including any endorsement forming a part thereof, affording similar insurance with respect to any damages arising out of the ownership, maintenance or use of an uninsured motor vehicle or a hit-and-run vehicle.

SCHEDULE LIMIT OF LIABILITY

Split Limits

Limits of Liability stated in declarations

Single Limit

Limit of Liability stated in declarations provided such limit shall first be:

Bodily Injury	\$25,000 each person
	\$50,000 each accident
Property Damage	\$10,000 each accident

Note: The following endorsement applies when the endorsement number is shown on the declarations page.

6557 FEDERAL EMPLOYEES USING AUTOMOBILES IN GOVERNMENT BUSINESS

It is agreed that the policy does not apply under the Liability Coverages to the following as insureds:

1. The United States of America or any of its agencies;
2. Any person, including the named insured, with respect to bodily injury or property damage resulting from the operation of an automobile by such person as an employee of the United States Government while acting within the scope of his office or employment, if the provisions of Section 2679 of Title 28, United States Code (Federal Tort Claims Act), as amended, require the Attorney General of the United States to defend such person in any civil action or proceeding which may be brought for such bodily injury or property damage, whether or not the incident out of which such bodily injury or property damage arose has been reported by or on behalf of such person to the United States or the Attorney General.

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8466F

Note: If both coverages D and G are provided under Part III endorsement 6259V applies but if only coverage D is provided, endorsement 6259Y applies.

6259V PHYSICAL DAMAGE ENDORSEMENT Part III

It is agreed that

1. With respect to such coverage as is afforded under the Comprehensive coverage, ** shall be deducted from the amount of each loss as to each automobile.
2. With respect to such coverage other than as enumerated in paragraph 1 above, *** shall be deducted from the amount of each loss as to each automobile.
3. The following exclusions are added:

This policy does not apply under Part III:

- (1) to loss to the automobile while being operated in any prearranged or organized racing or speed contest or in practice or preparation for any such contest;
- (2) to any loss to the automobile arising out of or during the use of such automobile for the transportation of any explosive substance, flammable liquid, or similarly hazardous materials, except such transportation as is incidental to ordinary household or farm activities of the named insured;

** See amount with coverage D in declarations.

*** See amount with coverage G in declarations.

6259Y PHYSICAL DAMAGE ENDORSEMENT Part III

It is agreed that

1. With respect to such coverage as is afforded under the Comprehensive coverage, ** shall be deducted from the amount of each loss as to each automobile.
2. The following exclusions are added:

This policy does not apply under Part III:

- (1) to loss to the automobile while being operated in any prearranged or organized racing or speed contest or in practice or preparation for any such contest;
- (2) to any loss to the automobile arising out of or during the use of such automobile for the transportation of any explosive substance, flammable liquid, or similarly hazardous materials, except such transportation as is incidental to ordinary household or farm activities of the named insured;

** See amount with coverage D in declarations.

Note: When Coverage R is shown in the declarations, this endorsement replaces any similar coverage in the policy.

6230.2L LOSS OF USE COVERAGE R

The company agrees to reimburse the named insured for any necessary transportation expense incurred not exceeding \$10 per day or totaling more than \$300, due to the loss of use of an insured motor vehicle because of damage caused by accident to such vehicle.

1. This endorsement does not apply in the event of a theft of such vehicle for which transportation expense reimbursement coverage is provided under the policy.

2. The total payment under this insurance shall not exceed the actual cash value of such vehicle at the time of loss.

3. As used herein insured motor vehicle means the vehicle described in the declarations and for which a specific premium for this coverage is charged.

This endorsement is subject to such exclusions, conditions, and other terms of the policy as are applicable to the Comprehensive, Fire, Windstorm, Theft, Etc., and/or Collision coverages which are not inconsistent herewith.

State Farm Mutual Automobile Insurance Company

July 24, 1989



State Farm Claims Office
111 Candlewood Court
P. O. Box 2089
Lynchburg, Virginia 24501
Phone: 804/237-6900

Miss Anna L. Phelps
c/o Marjorie Phelps
Rt. 2, Box 170
Goode, Va. 24556

Re: Insured - Anna L. Phelps
Policy # - A370 661-46-01
Cl. # - 46-7001-461
Date of Loss - 6-10-89

Dear Miss Phelps:

After a thorough review of the above captioned accident, it is the Company's decision that the vehicle you were driving does not qualify as a non-owned, temporary substitute or newly acquired automobile under your policy, and therefore, we will not be able to extend coverage to you for this loss.

Very truly yours,

A handwritten signature in cursive script, reading "J. William Dinwiddie".

J. William Dinwiddie
CLAIM SUPERINTENDENT
TIDEWATER VIRGINIA DIVISION

JWD:jen

cc: Anna Featherston - 78 Hunting Lane, Goode, Va. 24556
cc: Jenny Trevey - 111 Collington Dr., Lynchburg, Va. 24502
cc: Anna Phelps - 8319 Brookvale Ct., Springfield, Va. 22153

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EXHIBIT "B"

EDMUNDS & WILLIAMS
A PROFESSIONAL CORPORATION

SUITE 400
800 MAIN STREET
P. O. BOX 958

LYNCHBURG, VIRGINIA 24505

TELEPHONE (804) 846-9000
TELECOPIER (804) 846-0337

J. EASLEY EDMUNDS, JR.
(1914-1977)
SAMUEL H. WILLIAMS
(1914-1970)

B. C. BALDWIN, JR.
ROBERT D. RICHARDS
PAUL H. COFFEY, JR.
KENNETH S. WHITE
ROBERT C. WOOD, III
HENRY M. SACKETT, III
RAYNER V. SNEAD, JR.
BERNARD C. BALDWIN, III
WM. TRACEY SHAW
R. EDWIN BURNETTE, JR.
BEVIN R. ALEXANDER, JR.
PATRICIA R. BLACK

WILLIAM E. PHILLIPS
ELEANOR A. PUTNAM DUNN

October 31, 1989

Mrs. Carol Black
Clerk
Circuit Court, Bedford County
Bedford, VA 24523

Re: Anna L. Phelps v. State Farm Mutual Automobile
Insurance Company

Dear Mrs. Black:

I represent the defendant, State Farm Mutual Automobile Insurance Company, in the captioned action and enclose for filing on its behalf its answer to plaintiff's motion for declaratory judgment.

Very truly yours,

EDMUNDS & WILLIAMS, P.C.

By Henry M. Sackett, III
Henry M. Sackett, III

HMSIII: jetc

Enclosure

cc: R. Louis Harrison, Jr., Esquire

Comp

Rec'd
11/1/89
J. Newby

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BEDFORD.

ANNA L. PHELPS,

Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

ANSWER OF THE DEFENDANT,
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

The defendant, State Farm Mutual Automobile Insurance Company, by counsel, for its answer to the plaintiff's motion for declaratory judgment, says:

1. It admits the allegations of paragraphs 1 and 2 of plaintiff's motion for declaratory judgment.

2. It admits that the plaintiff was insured under a policy of automobile insurance issued by State Farm Mutual Automobile Insurance Company as alleged in paragraph 3 of plaintiff's motion for declaratory judgment. It denies that the policy number of said policy was as stated in the motion for declaratory judgment. The correct policy number was A 370-661-46-01. It will require strict proof of the terms and conditions of the policy in question.

FILED IN THE CLERK'S OFFICE

The 24 day of Nov, 1989

TESTE: _____

Clerk

Virginia L. Newby D.C.

3. It admits the allegations of paragraphs 4, 5, 6, 7, 8, 9 and 10 of plaintiff's motion for declaratory judgment.

4. It admits that its policy provides coverage for liability arising out of the use of a "non-owned automobile" as that term is defined in its policy and under the terms and conditions set forth in its policy.

5. It admits the allegations of paragraph 12 of plaintiff's motion for declaratory judgment.

6. It denies the allegations of paragraph 13 of plaintiff's motion for declaratory judgment.

7. It admits the allegations of paragraph 14 of plaintiff's motion for declaratory judgment.

8. It admits the allegations of paragraph 15 of plaintiff's motion for declaratory judgment.

9. It denies the allegations of paragraph 16 of plaintiff's motion for declaratory judgment and affirmatively alleges that the plaintiff, Anna L. Phelps, and Mary C. Phelps were "residents of the same household" as that term is used in State Farm's policy.

10. It denies the allegations of paragraph 17 of plaintiff's motion for declaratory judgment.

11. Plaintiff's motion for declaratory judgment fails to allege that there is any justiciable controversy and State Farm Mutual Automobile Insurance Company denies that there is any justiciable controversy in this case.

12. It denies that the automobile being driven by Anna L. Phelps on June 10, 1989, was covered under the policy issued by State Farm to Anna L. Phelps and further denies that Anna L. Phelps is entitled to any coverage under State Farm's policy for claims arising out of the accident of June 10, 1989.

13. It denies each and every allegation of plaintiff's motion for declaratory judgment except for those specifically admitted herein.

WHEREFORE, State Farm Mutual Automobile Insurance Company respectfully prays that this Court declare that:

(1) The automobile being driven by Anna L. Phelps on June 10, 1989, was not covered under any policy of automobile insurance issued by State Farm Mutual Automobile Insurance Company;

(2) That Anna L. Phelps is not covered under policy of automobile insurance issued by State Farm Mutual Automobile Insurance Company for claims arising out of the accident of June 10, 1989; and

(3) That it be granted such other and further relief as to the Court seems appropriate.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

By Henry M. Sackett, III
Of Counsel

Henry M. Sackett, III
Edmunds & Williams, P. C.
Suite 400, 800 Main Street
P. O. Box 958
Lynchburg, VA 24505

I hereby certify that a copy of the foregoing Answer was mailed to R. Louis Harrison, Esquire, Attorney at Law, P. O. Box 1008, Bedford, VA 24523, counsel for the plaintiff, on this the 31st day of October, 1989.

Henry M. Sackett
Attorney for the defendant,
State Farm Mutual Automobile
Insurance Company

VIRGINIA:

IN THE CIRCUIT COURT OF BEDFORD COUNTY

ANNA L. PHELPS,

Plaintiff,

v.))

MOTION FOR SUMMARY JUDGMENT

STATE FARM MUTUAL INSURANCE COMPANY,

Defendant.

Comes now your plaintiff, Anna L. Phelps, by counsel, and moves for summary judgment against the defendant on the grounds that the terms of the policy, the undisputed depositions of the parties, State Farm's answers to the motion for judgment and stipulations filed herein, there is no issue of material fact in dispute which would disqualify Anna L. Phelps from collision coverage for her accident on June 10, 1989.

Respectfully submitted,

ANNA L. PHELPS

By: RLH
Of Counsel

R. Louis Harrison, Jr., p.q.
RADFORD & WANDREI
P. O. Box 1008
Bedford, Virginia 24523

Certificate

I do hereby certify that a true and exact copy of the foregoing motion for summary judgment was hereby mailed to Henry

1

RADFORD & WANDREI
ATTORNEYS AT LAW
BEDFORD, VIRGINIA
24523

FILED IN THE CLERK'S OFFICE
The 27th day of Feb 1990
TESTE: _____

Kelly G. Creahey

M. Sackett, III, Esquire, counsel for the defendant, at Edmunds & Williams, P.C., P. O. Box 958, Lynchburg, Virginia 24505, this the 27th day of February, 1990.



R. Louis Harrison, Jr.

EDMUNDS & WILLIAMS
A PROFESSIONAL CORPORATION

SUITE 400

800 MAIN STREET

P. O. BOX 958

LYNCHBURG, VIRGINIA 24505

TELEPHONE (804) 846-9000

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WM. TRACEY SHAW
R. EDWIN BURNETTE, JR.
BEVIN R. ALEXANDER, JR.
PATRICIA R. BLACK

WILLIAM E. PHILLIPS
ELEANOR A. PUTNAM DUNN

March 9, 1990

Carol W. Black, Clerk
Bedford County Circuit Court
Main Street
Bedford, Virginia 24523

Re: Anna L. Phelps v. State Farm Mutual Automobile
Insurance Company

Dear Mrs. Black:

I enclose for filing with the papers in the captioned
case, the following:

1. Properly endorsed Stipulation to which is attached
a copy of a State Farm Mutual Automobile Insurance Company policy;
and

2. Motion for Summary Judgment on behalf of State Farm
Mutual Automobile Insurance Company.

Very truly yours,

EDMUNDS & WILLIAMS, P.C.

By Henry M. Sackett, III
Henry M. Sackett, III

HMSIII: jetc

Enclosures

cc R. Louis Harrison, Jr., Esquire
Attorney at Law
P. O. Box 1008
Bedford, VA 24523

FILED IN THE CLERK'S OFFICE
The 12th day of March, 1990
TESTE: _____

Clerk
Henry Creasey D.C.

VIRGINIA:

IN THE CIRCUIT COURT OF BEDFORD COUNTY

ANNA L. PHELPS,

Plaintiff,

v.

)(

STIPULATIONS

STATE FARM MUTUAL INSURANCE COMPANY,


Defendant.

Comes now the parties, by counsel, and files the following stipulations:

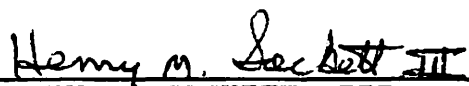
(1) That those depositions dated the 22nd day of January, 1990, of Mary Catherine Phelps and Anna L. Phelps may be used as evidence in a motion for summary judgment proceeding.

(2) That the automobile policy attached hereto as Exhibit "A" is a true and accurate copy of the policy of coverage which State Farm had on Anna L. Phelps at the time of the accident.

We agree to these stipulations.



R. LOUIS HARRISON, JR. (SEAL)



HENRY M. SACKETT, III (SEAL)

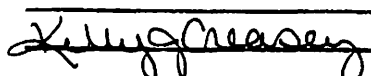
RADFORD & WANDREI
ATTORNEYS AT LAW
BEDFORD, VIRGINIA
24523

1

FILED IN THE CLERK'S OFFICE

The 12th day of March, 1990

TESTE: _____



Clerk
D.C.

FAMILY

Automobile Policy

COMBINATION FORM



State Farm Mutual Automobile Insurance Company

HOME OFFICE/BLOOMINGTON, ILLINOIS

The address of the Regional Office issuing this policy is shown at the bottom of the Declarations Page.

Policy Form 9346F.8

DECLARATIONS

POLICY PERIOD: The policy period shall be as shown in the Declarations under "Policy Period" and for such succeeding periods of twelve months each thereafter as the required renewal premium is paid by the insured on or before the expiration of the current policy period. The policy period shall begin and end at 12:01 A.M., standard time at the address of the named insured as stated herein. The premium shown is for the policy period indicated in the Declarations.

COVERAGES, LIMITS OF LIABILITY, PREMIUMS: The insurance afforded is only with respect to such of the coverages as are indicated in the Declarations by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all terms of the policy having reference thereto.

GARAGED: The owned automobile will be principally garaged in the declared town and state, unless otherwise stated in the exceptions.

LOSS PAYEE: Any loss under Part III is payable as interest may appear to the named insured and the Loss Payee, if any, shown in the Declarations and this insurance as to such additional interest shall not be invalidated by any act or negligence of the mortgagor or owner, nor any change in the title or ownership, nor by any error, or inadvertence in the description of the automobile until after notice of termination of the policy shall be given to the mortgage owner, conditional vendor, mortgagee or assignee stating when not less than 10 days thereafter such termination shall be effective; provided, the lien-holder shall notify the company within 10 days of any change of interest or ownership which shall come to the knowledge of said lien-holder and failure to do so will render this policy null and void.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

BLOOMINGTON, ILLINOIS

A Mutual Insurance Company Herein Called The Company

Agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to all of the terms of this policy:

PART I — LIABILITY

COVERAGE A — Bodily Injury Liability;

COVERAGE B — Property Damage Liability. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of:

A. bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury", sustained by any person;

B. injury to or destruction of property, including loss of use thereof, hereinafter called "property damage";

arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile, and the company shall defend any suit alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent; but the company may make such investigation and settlement of any claim or suit as it deems expedient.

Supplementary Payments. To pay, in addition to the applicable limits of liability:

(a) all expenses incurred by the company, all costs taxed against the insured in any such suit and all interest on the entire amount of any judgment therein which accrues after entry of the judgment and before the company has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the company's liability thereon;

(b) premiums on appeal bonds required in any such suit, premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, and the cost of bail bonds required of the insured because of accident or traffic law violation arising out of the use of an automobile insured hereunder, not to exceed \$100 per bail bond, but without any obligation to apply for or furnish any such bonds;

(c) expenses incurred by the insured for such immediate medical and surgical relief to others as shall be imperative at the time of an accident involving an automobile insured hereunder and not due to war;

(d) all reasonable expenses, other than loss of earnings, incurred by the insured at the company's request.

Persons Insured. The following are insureds under Part I:

(a) with respect to the owned automobile,

(1) the named insured and any resident of the same household,

(2) any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, and

(3) any other person or organization but only with respect to his or its liability because of acts or omissions of an insured under (a)(1) or (2) above;

(b) with respect to a non-owned automobile,

(1) the named insured,

(2) any relative, but only with respect to a private passenger automobile or trailer,

provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission, and

(3) any other person or organization not owning or hiring the automobile, but only with respect to his or its liability because of acts or omissions of an insured under (b)(1) or (2) above.

The insurance afforded under Part I applies separately to each insured against whom claim is made or suit is brought, but the inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

Definitions. Under Part I:

"named insured" means the individual named as named insured in the declarations and also includes his spouse, if a resident of the same household;

"insured" means a person or organization described under "Persons Insured";

"relative" means a relative of the named insured who is a resident of the same household;

"owned automobile" means

(a) a private passenger, farm or utility automobile described in this policy for which a specific premium charge indicates that coverage is afforded;

(b) a trailer owned by the named insured;

(c) a private passenger, farm or utility automobile ownership of which is acquired by the named insured during the policy period, provided

(1) it replaces an owned automobile as defined in (a) above, or

(2) the company insures all private passenger, farm and utility automobiles owned by the named insured on the date of such acquisition and the named insured notifies the company within 30 days after the date of such acquisition of his election to make this and no other policy issued by the company applicable to such automobile, or

(d) a temporary substitute automobile;

"temporary substitute automobile" means any automobile or trailer, not owned by the named insured, while temporarily used with the permission of the owner as a substitute for the owned automobile or trailer when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction;

"non-owned automobile" means an automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile;

"private passenger automobile" means a four wheel private passenger, station wagon or jeep type automobile;

"farm automobile" means an automobile of the truck type with a load capacity of fifteen hundred pounds or less not used for business or commercial purposes other than farming;

"utility automobile" means an automobile, other than a farm automobile, with a load capacity of fifteen hundred pounds or less of the pick-up body, sedan delivery or panel truck type not used for business or commercial purposes;

"trailer" means a trailer designed for use with a private passenger automobile, if not being used for business or commercial purposes with other than a private passenger, farm or utility automobile, or a farm wagon or farm implement while used with a farm automobile;

"automobile business" means the business or occupation of selling, repairing, servicing, storing or parking automobiles;

"use" of an automobile includes the loading and unloading thereof;

"war" means war, whether or not declared, civil war, insurrection, rebellion or revolution, or any act or condition incident to any of the foregoing.

Exclusions. This policy does not apply under Part I:

(a) to any automobile while used as a public or livery conveyance, but this exclusion does not apply to the named insured with respect to bodily injury or property damage which results from the named insured's occupancy of a non-owned automobile other than as the operator thereof;

(b) to bodily injury or property damage caused intentionally by or at the direction of the insured;

(c) to injury, sickness, disease, death or destruction with respect to which an insured under the policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability;

(d) to bodily injury or property damage arising out of the operation of farm machinery;

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

(f) to bodily injury to any fellow employee of the insured injured in the course of his employment if such injury arises out of the use of an automobile in the business of his employer, but this exclusion does not apply to the named insured with respect to injury sustained by any such fellow employee;

(g) to an owned automobile while used by any person while such person is employed or otherwise engaged in the automobile business, but this exclusion does not apply to the named insured, a resident of the same household as the named insured, a partnership in which the named insured or such resident is a partner, or any partner, agent or employee of the named insured; such resident or partnership;

(h) to a non-owned automobile while maintained or used by any person while such person is employed or otherwise engaged in

(1) the automobile business of the insured or of any other person or organization,

(2) any other business or occupation of the insured, but this exclusion (h) (2) does not apply to a private passenger automobile operated or occupied by the

named insured or by his private chauffeur or domestic servant or a trailer used therewith or with an owned automobile;

(i) to injury to or destruction of (1) property owned or transported by the insured or (2) property rented to or in charge of the insured other than a residence or private garage;

(j) to the ownership, maintenance, operation, use, loading or unloading of an automobile ownership of which is acquired by the named insured during the policy period or any temporary substitute automobile therefor, if the named insured has purchased other automobile liability insurance applicable to such automobile for which a specific premium charge has been made.

Financial Responsibility Laws. When this policy is certified as proof of financial responsibility for the future under the provisions of any motor vehicle financial responsibility law, such insurance as is afforded by this policy for bodily injury liability or for property damage liability shall comply with the provisions of such law to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

Limits of Liability. The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury sustained by one person as the result of any one occurrence; the limit of such liability stated in the declarations as applicable to "each occurrence" is, subject to the above provision respecting each person, the total limit of the company's liability for all such damages arising out of bodily injury sustained by two or more persons as the result of any one occurrence.

The limit of property damage liability stated in the declarations as applicable to "each occurrence" is the total limit of the company's liability for all damages arising out of injury to or destruction of all property of one or more persons or organizations, including the loss of use thereof, as the result of any one occurrence.

Other Insurance. If the insured has other insurance against a loss covered by Part I of this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other and collectible insurance.

PART II — EXPENSES FOR MEDICAL SERVICES

Coverage C — Medical Payments. To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services;

Division 1. To or for the named insured and each relative who sustains bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury", caused by accident,

(a) while occupying the owned automobile,

(b) while occupying a non-owned automobile, but only if such person has, or reasonably believe he has, the permission of the owner to use the automobile and the use is within the scope of such permission, or

(c) through being struck by an automobile or by a trailer of any type;

Division 2. To or for any other person who sustains bodily injury, caused by accident, while occupying

(a) the owned automobile, while being used by the named insured, by any resident of the same household or by any other person with the permission of the named insured; or

(b) a non-owned automobile, if the bodily injury results from

(1) its operation or occupancy by the named insured or its operation on his behalf by his private chauffeur or domestic servant, or

(2) its operation or occupancy by a relative, provided it is a private passenger automobile or trailer,

but only if such operator or occupant has, or reasonably believes he has, the permission of the owner to use the automobile and the use is within the scope of such permission.

Definitions. The definitions under Part I apply to Part II, and under Part II:

"occupying" means in or upon on entering into or alighting from.

Exclusions: This policy does not apply under Part II to bodily injury:

(a) sustained while occupying (1) an owned automobile while used as a public or livery conveyance, or (2) any vehicle while located for use as a residence or premises;

(b) sustained by the named insured or a relative while occupying or through being struck by (1) a farm type tractor or other equipment designed for use principally off public roads, while not upon public roads, or (2) a vehicle operated on rails or crawler-treads;

(c) sustained by any person other than the named insured or a relative,

(1) while such person is occupying a non-owned automobile while used as a public or livery conveyance, or

(2) resulting from the maintenance or use of a non-owned automobile by such person while employed or otherwise engaged in the automobile business, or

(3) resulting from the maintenance or use of a non-owned automobile by such person while employed or otherwise engaged in any other business or occupation, unless the bodily injury results from the operation or occupancy of a private passenger

automobile by the named insured or by his private chauffeur or domestic servant, or of a trailer used therewith or with an owned automobile;

(d) sustained by any person while is employed in the automobile business, if the accident arises out of the operation thereof and if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law;

(e) due to war.

Limit of Liability. The limit of liability for medical payments stated in the declarations as applicable to "each person" is the limit of the company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury as the result of any one accident.

Other Insurance. If there is other automobile medical payments insurance against a loss covered by Part II of this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible automobile medical payments insurance; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible automobile medical payments insurance.

PART III - PHYSICAL DAMAGE

COVERAGE D - (1) Comprehensive - Excluding Collision, (2) Personal Effects.

(1) To pay for loss caused other than by collision to the owned automobile or to a non-owned automobile. For the purpose of this coverage, breakage of glass and loss caused by missiles, falling objects, fire, theft or larceny, explosion, earthquake, windstorm, hail, water, flood, malicious mischief or vandalism, riot or civil commotion, or colliding with a bird or animal, shall not be deemed to be loss caused by collision.

(2) To pay for loss caused by fire or lightning to robes, wearing apparel and other personal effects which are the property of the named insured or a relative, while such effects are in or upon the owned automobile.

DEDUCTIBLE COMPREHENSIVE COVERAGE. To pay any loss payable under coverage D but it is agreed that the deductible amount, as shown on the declarations page by the number beside D, shall be deducted from the amount of each loss as to each automobile, other than loss by (a) fire or lightning, (b) smoke or smudge due to a sudden, unusual and faulty operation of any fixed heating equipment servicing the premises in which the automobile is located, or

(c) the stranding, sinking, burning, collision or derailment of any conveyance in or upon which the automobile is being transported.

If the policy affords insurance with respect to the collision coverage, breakage of glass caused by collision may, if the insured so elects, be treated as covered thereunder, subject to the terms thereof, instead of under the comprehensive coverage.

COVERAGE G - Collision. To pay for loss caused by collision to the owned automobile or to a non-owned automobile but only for the amount of each such loss in excess of the deductible amount stated in the declarations as applicable hereto.

COVERAGE H - Towing and Labor Costs. To pay for towing and labor costs necessitated by the disablement of the owned automobile or of any non-owned automobile, provided the labor is performed at the place of disablement.

Supplementary Payments. In addition to the applicable limit of liability:

(a) to reimburse the insured for transportation expenses incurred during the period commencing 48 hours after a

theft covered by this policy of the entire automobile has been reported to the company and the police, and terminating when the automobile is returned to use or the company pays for the loss; provided that the company shall not be obligated to pay aggregate expenses in excess of \$10 per day or totaling more than \$300;

(b) to pay general average and salvage charges for which the insured becomes legally liable, as to the automobile being transported.

Definitions. The definitions of "named insured", "relative", "temporary substitute automobile", "private passenger automobile", "farm automobile", "utility automobile", "automobile business", "war", and "owned automobile" in Part I apply to Part III, but "owned automobile" does not include, under Part III, (1) a trailer owned by the named insured on the effective date of this policy and not described herein, or (2) a trailer ownership of which is acquired during the policy period unless the company insures all private passenger, farm and utility automobiles and trailers owned by the named insured on the date of such acquisition and the named insured notifies the company within 30 days after the date of such acquisition of his election to make this and no other policy issued by the company applicable to such trailer.

"insured" means

(a) with respect to an owned automobile,

(1) the named insured, and

(2) any person or organization (other than a person or organization employed or otherwise engaged in the automobile business or as a carrier or other bailee for hire) maintaining, using or having custody of said automobile with the permission of the named insured and within the scope of such permission;

(b) with respect to a non-owned automobile, the named insured and any relative while using such automobile, provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission;

"non-owned automobile" means a private passenger automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile, while said automobile or trailer is in the possession or custody of the insured or is being operated by him;

"loss" means direct and accidental loss of or damage to (a) the automobile, including its equipment, or (b) other insured property;

"collision" means collision of an automobile covered by this policy with another object or with a vehicle to which it is attached or by upset of such automobile;

"trailer" means a trailer designed for use with a private passenger automobile, if not being used for business or commercial purposes with other than a private passenger, farm or utility automobile, and if not a home, office, store, display or passenger trailer.

Exclusions. This policy does not apply under Part III:

(a) to any automobile while used as a public or livery conveyance;

(b) to loss due to war;

(c) to loss to a non-owned automobile arising out of its use by the insured while he is employed or otherwise engaged in the automobile business;

(d) to loss to a private passenger, farm or utility automobile or trailer owned by the named insured and not described in this policy or to any temporary substitute automobile therefor, if the insured has other valid and collectible insurance against such loss;

(e) to damage which is due and confined to wear and tear, freezing, mechanical or electrical breakdown or failure, unless such damage results from a theft covered by this policy;

(f) to tires, unless damaged by fire, malicious mischief or vandalism, or stolen or unless the loss be coincident with and from the same cause as other loss covered by this policy;

(g) to loss due to radioactive contamination;

(h) under coverage G, to breakage of glass if insurance with respect to such breakage is otherwise afforded;

(i) to loss of or damage to any device or instrument designed for the recording, reproduction, or recording and reproduction of sound unless such device or instrument is permanently installed in the automobile;

(j) to loss of or damage to any tape, wire, record disc or other medium for use with any device or instrument designed for the recording, reproduction, or recording and reproduction of sound.

Limit of Liability. The limit of the company's liability for loss shall not exceed the actual cash value of the property, or if the loss is of a part thereof the actual cash value of such part, at time of loss, nor what it would then cost to repair or replace the property or such part thereof with other of like kind and quality, nor, with respect to an owned automobile described in this policy, the applicable limit of liability stated in the

declarations; provided, however, the limit of the company's liability (a) for loss to personal effects arising out of any one occurrence is \$100, and (b) for loss to any trailer not owned by the named insured is \$500.

Other Insurance. If the insured has other insurance against a loss covered by Part III of this policy, the

company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability of this policy bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible insurance.

PART IV — AUTOMOBILE DEATH INDEMNITY, TOTAL DISABILITY COVERAGE AND SPECIFIC DISABILITY BENEFITS

INSURING AGREEMENTS

1. COVERAGES

Division 1 — Death Indemnity

To pay the principal sum stated in the exceptions in the event of the death of the insured which shall result directly and independently of all other causes from bodily injury caused by accident and sustained by the insured while in or upon, or while entering into or alighting from, or through being struck by, an automobile, provided the death shall occur (1) within ninety days after the date of the accident, or (2) within fifty-two weeks after the date of the accident and during a period of continuous total disability of the insured for which weekly indemnity is payable under the total disability coverage.

Division 2 — (a) Dismemberment and Loss of Sight Benefits

(b) Fractures and Dislocations Benefits

To pay the highest applicable amount stated in the following Tables for loss as enumerated therein, in the event of bodily injury, caused by accident and sustained by the insured while in or upon, or while entering into or alighting from, or through being struck by, an automobile, provided loss under Table I be sustained by the insured within ninety days from such accident.

As respects any insured, (1) any amount for which the company is obligated or has made payment under Division 2 shall apply in reduction of any amount for which the company is obligated under Division 1;

(2) payment of the principal sum shall terminate all obligation of the company under coverage S.

TABLE I

	If applicable principal sum is	If applicable principal sum is
For Loss of	\$5,000.00	\$10,000.00
Both Hands or Both Feet or Sight of Both Eyes	\$5,000.00	\$10,000.00

One Hand and One Foot	5,000.00	10,000.00
Either Hand or Foot and Sight of One Eye	5,000.00	10,000.00
Either Hand or Foot	2,500.00	5,000.00
Sight of One Eye	1,750.00	3,500.00
Thumb and Index Finger of Either Hand	1,250.00	2,500.00

"Loss" shall mean with regard to hands and feet, actual severance through or above wrist or ankle joints; with regard to eyes, entire and irrecoverable loss of sight; with regard to thumb and index finger, actual severance through or above metacarpophalangeal joints.

TABLE II

	If applicable principal sum is	If applicable principal sum is
For Fracture of Bones:	\$5,000.00	\$10,000.00
Skull (except bones of face or nose)	\$175.00	\$350.00
Thigh	150.00	300.00
Arm, between elbow and shoulder	150.00	300.00
Pelvis (except coccyx)	125.00	250.00
Vertebra or Vertebrae (except coccyx and vertebral processes)	125.00	250.00
Shoulder Blade	100.00	200.00
Leg	100.00	200.00
Kneecap	100.00	200.00
Collar Bone	75.00	150.00
Forearm, between wrist and elbow	75.00	150.00
Foot (except toes)	62.50	125.00
Hand (except fingers)	62.50	125.00
Sternum	50.00	100.00

Lower Jaw (except alveolar process)	37.50	75.00
One or more ribs, fingers or toes	25.00	50.00
Bones of face or nose	25.00	50.00
Coccyx or Vertebral Processes	25.00	50.00

For Complete Dislocations:

Hip Joint	\$150.00	\$300.00
Knee Joint (except patella)	75.00	150.00
Bone or Bones of Foot (except toes)	75.00	150.00
Ankle Joint	75.00	150.00
Wrist Joint	62.50	125.00
Elbow Joint	50.00	100.00
Shoulder Joint	37.50	75.00
Bone or Bones of Hand (except fingers)	25.00	50.00
Collar Bone	25.00	50.00
One or more fingers or toes	12.50	25.00

For Loss by Removal:

Of one or more entire toes	\$100.00	\$200.00
Of one or more fingers (at least one entire phalanx)	75.00	150.00

For a Hospital-confining Injury, except as an Outpatient:

	\$25.00	\$50.00
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COVERAGE T — Total Disability — Maximum 200 Weeks. To pay weekly indemnity at the rate stated in the exceptions for the period of continuous total disability of the insured which shall result directly and independently of all other causes from bodily injury caused by accident and sustained by the insured while in or upon or while entering into or alighting from, or through being struck by, an automobile, provided (1) such disability shall commence within twenty days after the date of the accident, and (2) any disability during the period of fifty-two weeks from its commencement shall be deemed total disability only if it shall continuously prevent the insured from performing every duty pertaining to his occupation, and (3) any disability after said fifty-two weeks shall be deemed total disability only if it shall continuously prevent the insured from engaging in any occupation or employment for wage or profit and (4) the weekly indemnity for total disability as provided hereinabove shall in no event extend beyond a period of 200 consecutive weeks from the date of commencement of disability as provided above.

2. Definition of Insured. With respect to coverages S and T, the unqualified word "insured" means the person or

persons so designated for each such coverage in the exceptions.

3. Automobile defined. With respect to this insurance the word "automobile" means a land motor vehicle or trailer not operated on rails or crawler treads, but does not mean: (1) a farm type tractor or other equipment designed for use principally off public roads, except while actually upon public roads, or (2) a land motor vehicle or trailer while located for use as a residence or premises and not as a vehicle.

4. Policy Period, Territory. This insurance applies only to accidents which occur during the policy period within the United States of America, its territories or possessions, or Canada.

EXCLUSIONS. This insurance does not apply:

(a) to bodily injury or death sustained in the course of his occupation by any person while engaged (1) in duties incident to the operation, loading or unloading of, or as an assistant on, a public or delivery conveyance or commercial automobile, or (2) in duties incident to the repair or servicing of automobiles;

(b) to loss caused by or resulting from disease except pus forming infection which shall occur through bodily injury to which this insurance applies;

(c) to suicide, sane or insane, or to any attempt thereof;

(d) to injury or death due to war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing.

CONDITIONS.

1. Policy Provisions. None of the insuring agreements, exclusions or other provisions of Parts I, II and III of the policy or conditions of the policy shall apply to the insurance afforded by this Part IV except the conditions "Notice", "Action Against Company (Medical Payments)", "Changes", "Assignment", "Cancellation" and "Declarations".

2. Notice of Claim. When loss covered hereunder occurs, written notice thereof shall be given by or on behalf of the insured or the beneficiary to the company or any of its authorized agents as soon as practicable.

3. Proof of Claim; Medical Reports. As soon as practicable, the injured person, or the beneficiary in the event of death, or someone on his behalf, shall give to the company written proof of claim, under oath if required; and shall after each request from the company execute authorization to enable the company to obtain medical reports and copies of records.

Proof of claim shall be made upon forms furnished by the company unless the company shall have failed to

furnish such forms within fifteen days after receiving notice of claim.

The injured person shall submit to physical examination by physicians selected by the company when and as often as the company may reasonably require.

4. Payment of Death Indemnity; Autopsy — Division 1 of Coverage S. If the decedent insured be survived by a spouse who was a resident of the same household at the time of the accident, indemnity for death is payable to such spouse; otherwise, if the decedent insured was a minor, indemnity for death is payable to any parent thereof who was a resident of the same household at the time of the accident; otherwise indemnity for death is payable to the decedent insured's estate.

The company shall have the right and opportunity to make an autopsy where it is not forbidden by law.

5. Payment of Indemnity — Coverage T. Weekly Indemnity for total disability is payable to the insured who is disabled. Subject to proof of claim, accrued

weekly indemnity is payable every four weeks and any balance at termination of the disability period for which the company is liable.

6. Beneficiary — Division 1 of Coverage S. Consent of beneficiary is not requisite to cancellation, assignment, change of beneficiary, or any other change in the policy.

7. Death of Named Insured. If the named insured dies, any insurance afforded under this Part IV with respect to any surviving insured shall be continued while the policy is in effect.

8. Other Insurance. If any insured under this Part IV also is an insured under other coverage of the same kind, issued by the company, any payment for loss under such other coverage shall serve to reduce, to the extent of such payment, the company's obligation under this Part IV as respects any loss to such insured, and the company will return the premium paid for such duplication of the insurance hereunder.

CONDITIONS

Conditions 3, 13 and 15 through 17 apply to all Parts.

Conditions 1, 2, 14 and 4 through 12, apply only to the Parts noted thereunder.

1. Policy Period, Territory (Parts I, II and III). This policy applies only to accidents, occurrences and loss during the policy period while the automobile is within the United States of America, its territories or possessions, or Canada, or is being transported between ports thereof.

2. Premium (Parts I, II and III). If the named insured disposes of, acquires ownership of, or replaces a private passenger, farm or utility automobile or, with respect to Part III, a trailer, any premium adjustment necessary shall be made as of the date of such change in accordance with the manuals in use by the company. The named insured shall, upon request, furnish reasonable proof of the number of such automobiles or trailers and a description thereof.

3. Notice. In the event of an accident, occurrence or loss, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable. In the event of theft the insured shall also promptly notify the police. If claim is made or suit is brought against the insured, he

shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

4. Two or More Automobiles (Parts I, II and III). When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each, but an automobile and a trailer attached thereto shall be held to be one automobile as respects limits of liability under Part I of this policy, and separate automobiles under Part III of this policy, including any deductible provisions applicable thereto.

5. Assistance and Cooperation of the Insured (Parts I and III). The insured shall cooperate with the company and, upon the company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of bodily injury, property damage or loss with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The failure or refusal of the insured to cooperate with or assist the company which prejudices the company's defense of an action for damages arising out of the operation or use of an

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automobile shall constitute non-compliance with the requirements of the policy that the insured shall cooperate with and assist the company. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

6. Action Against Company (Part I). No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. No person or organization shall have any right under this policy to join the company as a party to any action against the insured to determine the insured's liability, nor shall the company be impleaded by the insured or his legal representative. Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.

(Parts II, III and IV). No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy nor, under Part III, until thirty days after proof of loss is filed and the amount of loss is determined as provided in this policy.

7. Medical Reports; Proof and Payment of Claim (Part II). As soon as practicable the injured person or someone on his behalf shall give to the company written proof of claim, under oath if required, and shall, after each request from the company, execute authorization to enable the company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the company when and as often as the company may reasonably require.

The company may pay the injured person or any person or organization rendering the services and such payment shall reduce the amount payable hereunder for such injury. Payment hereunder shall not constitute an admission of liability of any person or, except hereunder, of the company.

8. Insured's Duties in Event of Loss (Part III). In the event of loss the insured shall:

(a) protect the automobile, whether or not the loss is covered by this policy, and any further loss due to the insured's failure to protect shall not be recoverable under this policy; reasonable expenses incurred in affording such protection shall be deemed incurred at the company's request;

(b) file with the company, within 91 days after loss, his sworn proof of loss in such form and including such information as the company may reasonably require and shall, upon the company's request, exhibit the damaged property and submit to examination under oath.

9. Appraisal (Part III). If the insured and the company fail to agree as to the amount of loss, either may, within 60 days after proof of loss is filed, demand an appraisal of the loss. In such event the insured and the company shall each select a competent appraiser, and the appraisers shall select a competent and disinterested umpire. The appraisers shall state separately the actual cash value and the amount of loss and failing to agree shall submit their differences to the umpire. An award in writing of any two shall determine the amount of loss. The insured and the company shall each pay his chosen appraiser and shall bear equally the other expenses of the appraisal and umpire.

The company shall not be held to have waived any of its rights by any act relating to appraisal.

10. Payment of Loss (Part III). The company may pay for the loss in money; or may repair or replace the damaged or stolen property; or may, at any time before the loss is paid or the property is so replaced, at its expense return any stolen property to the named insured; or at its option to the address shown in the declarations, with payment for any resultant damage thereto; or may take all or such part of the property at the agreed or appraised value but there shall be no abandonment to the company. The company may settle any claim for loss either with the insured or the owner of the property.

11. No Benefit to Bailee (Part III). The insurance afforded by this policy shall not inure directly or indirectly to the benefit of any carrier or other bailee for hire liable for loss to the automobile.

12. Subrogation (Parts I and III). In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and

papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

13. **Changes.** Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by an executive officer of the company.

14. **Limit of Liability — Coverage H.** The company's liability shall not exceed \$25.00 for each disablement.

15. **Assignment.** Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon; if, however, the insured named as named insured in the declarations, or his spouse if a resident of the same household, shall die, this policy shall cover (1) the survivor as named insured, (2) his legal representative as named insured but only while acting within the scope of his duties as such, (3) any person having proper temporary custody of an owned automobile, as an insured, until the appointment and qualification of such legal representative, and (4) under division I of Part II any person who was a relative at the time of such death.

16. **Cancellation.** This policy may be canceled by the insured named as named insured in the declarations by mailing to the company written notice stating when thereafter the cancellation shall be effective. This policy may be canceled by the company by mailing to the insured named as named insured in the declarations at the address shown in this policy written notice stating when not less than ten days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by such insured or by the company shall be equivalent to mailing.

If such insured cancels, earned premium shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made either at the time cancellation is effected or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation.

17. **Declarations.** By acceptance of this policy, the insured named as named insured in the declarations agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

MUTUAL CONDITIONS

1. **Mutuals — Membership and Voting Notice.** The first insured named in the declarations is notified that by virtue of this policy he is a member of the State Farm Mutual Automobile Insurance Company of Bloomington, Illinois, and while this policy is in force is entitled to vote at all meetings of members and to share in the earnings and savings of the company in accordance with the dividends declared by the Board of Directors on this and like policies.

2. **No Contingent Liability.** This policy is non-assessable.

3. **Annual Meeting.** The annual meeting of the members of the company shall be held at its home office at Bloomington, Illinois, on the second Monday of June at the hour of 10:00 A.M., unless the Board of Directors shall elect to change the time and place of such meeting, in which case, but not otherwise, due notice shall be mailed each member at the address disclosed in this policy at least ten (10) days prior thereto.

In Witness Whereof, the State Farm Mutual Automobile Insurance Company has caused this policy to be signed by its President and Secretary at Bloomington, Illinois.

Laura P. Sullivan
SECRETARY

Edward B. Rust, Jr.
PRESIDENT

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Note: The following endorsement applies when the endorsement number appears on the declarations page.

6460.2 VIRGINIA AUTOMOBILE INSURANCE PLAN.

It is understood and agreed that in the event of cancellation of this policy by either insured or the company, the earned premium calculated in accordance with the cancellation condition of the policy, shall be subject to a minimum of \$25.00 as provided in Section 18 of the Virginia Automobile Insurance Plan.

Note: The following endorsement applies when the endorsement number appears on the declarations page.

6882AQ PREMIUM AND COVERAGE CHANGES ENDORSEMENT

It is agreed that, subject to all the provisions of the policy except where modified herein, the following provision is added:

PREMIUM AND COVERAGE CHANGES

A. Premium Changes

The premium for this policy is based on information the company has received from the named insured or other sources. The named insured agrees that if any of this information material to the development of the policy premium is incorrect, incomplete or changed, the company may adjust the premium accordingly during the policy period; and to cooperate with the company in determining if this information is correct and complete, and to advise the company of changes in this information.

Any adjustment of the policy's premium will be made using the rules in effect at the time of the change.

Premium adjustment made be made as the result of a change in:

1. automobiles insured by the policy, including changes in use.
2. driver, driver's age or driver's marital status;
3. coverages and coverage limits.
4. rating territory.
5. eligibility for discounts or other premium credits.

B. Coverage Changes

The company may revise the coverages under this policy to provide more protection without additional premium charge. If the company does this and the named insured has the coverage which is changed, this policy will automatically provide the additional coverage as of the date the revision is effective in this state. Otherwise, this policy contains all of the coverage agreements between the named insured and the company. Its terms may not be changed or waived except by an endorsement issued by the company.

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Note: The following endorsement applies when the endorsement number is shown on the declarations page.

6191C DISTRICT OF COLUMBIA EMPLOYEES USING AUTOMOBILES IN GOVERNMENT BUSINESS

It is agreed that the policy does not apply under the Liability Coverages to the following insureds:

1. The District of Columbia or any of its Agencies.
2. Any person, including the named insured, with respect to bodily injury or property damage resulting from the operation of an automobile by such person as an employee of the District of Columbia while acting within the scope of his office or employment, if such person is relieved from liability because of the provisions of Public Law 86-654 (District of Columbia Employee Non-Liability Act), as amended.

Note: The following endorsement applies when the endorsement number is shown on the declarations page.

6256W.1 SOUND RECEIVING AND TRANSMITTING EQUIPMENT EXCLUDED

It is agreed that any Physical Damage Insurance afforded by the policy is subject to the following additional exclusion:

This insurance does not apply to loss of, or damage to any sound receiving or sound receiving and transmitting equipment designed for use as a citizen's band radio, two-way mobile radio or telephone, or scanning monitor receiver, including any accessories and antennas unless permanently installed in the opening of the dash or console of the automobile normally used by the motor vehicle manufacturer for the installation of a radio.

Note: This endorsement replaces any endorsement providing similar coverage. It applies when the endorsement number is shown on the declarations page.

6273H.5 SUPPLEMENTARY UNINSURED MOTORISTS INSURANCE (Bodily Injury - Property Damage - Limits - Underinsured Motorists) (Virginia)

It is agreed that, with respect to such insurance as is afforded by the policy for damages because of bodily injury and property damage caused by accident and arising out of the ownership, maintenance or use of an uninsured motor vehicle, subdivision (a) of the definition of "uninsured motor vehicle" is amended to include "underinsured" motor vehicle, subject to the following provisions:

1. If limits of liability for such insurance are stated in the schedule of this endorsement or in the declarations, and subject to 2. below:
 - (a) the split limits so stated as applicable to bodily injury for "each person"/"each accident" and property damage for "each accident" shall apply in lieu of any limits therefor stated elsewhere in the policy, and subject to all the terms of the policy having reference thereto, shall be the total limit of the company's liability for all damages because of bodily injury and property damage as the result of any one accident arising out of the ownership, maintenance or use of uninsured motor vehicles; or
 - (b) the single limit so stated as applicable to bodily injury and property damage for "each accident" shall apply in lieu of any limit therefor stated elsewhere in the policy, and subject to all the terms of the policy having reference thereto, shall be the total limit of the company's liability for all damages as the result of any one accident arising out of the ownership, maintenance or use of uninsured motor vehicles; provided such limit of liability shall first provide the separate limits required by the Virginia Motor Vehicle Safety Responsibility Act as stated in the schedule of this endorsement or in the declarations.
2. When used in reference to this insurance (including this and other endorsements forming a part of the policy):

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A motor vehicle is "underinsured" when, and to the extent that, the total amount of bodily injury and property damage coverage applicable to the operation or use of the motor vehicle and "available for payment" for such bodily injury or property damage, including all bonds or deposits of money or securities made pursuant to Article 6 of Chapter 6 of Title 46.1 of the Code of Virginia (Section 46.1-467 et seq.), is less than the total amount of uninsured motorist coverage afforded any person injured as a result of the operation or use of the vehicle.

"Available for payment" means the amount of liability insurance coverage applicable to the claim of the injured person for bodily injury or property damage reduced by the payment of any other claims arising out of the same occurrence.

If an injured person is entitled to underinsured motorist coverage under more than one policy, the following order of priority of policies applies and any amount available for payment shall be credited against such policies in the following order of priority:

1. The policy covering a motor vehicle occupied by the injured person at the time of the accident;
2. The policy covering a motor vehicle not involved in the accident under which the injured person is a named insured;
3. The policy covering a motor vehicle not involved in the accident under which the injured person is an insured other than a named insured.

Where there is more than one insurer providing coverage under one of the payment priorities set forth, their liability shall be proportioned as to their respective underinsured motorist coverages.

3. The company shall not be obligated to make any payment because of bodily injury or property damage to which this insurance applies and which arises out of the ownership, maintenance or use of an underinsured motor vehicle until after the limits of liability under all bodily injury and property damage liability bonds or insurance policies respectively applicable at the time of the accident to damages because of bodily injury or because of property damage have been exhausted by payment of judgments or settlements.
4. Exclusion (a) in the Uninsured Motorists Insurance endorsement does not apply to the underinsured motorists coverage afforded by this endorsement.
5. The second paragraph of the Other Insurance Condition in the Uninsured Motorists Insurance endorsement does not apply to the underinsured motorists coverage afforded by this endorsement.

SCHEDULE - LIMIT OF LIABILITY

Split Limits see amounts in declarations

Single Limit Bodily Injury and Property Damage \$ see amount in declarations each accident, provided such limit shall first be: Bodily Injury \$25,000 each person, \$50,000 each accident, Property Damage \$10,000 each accident.

Note: This endorsement replaces any similar coverage or endorsement printed in the policy. It applies when the endorsement number is shown on the declarations page.

6520.7 UNINSURED MOTORISTS INSURANCE (Virginia)

In consideration of the payment of premium and subject to all of the provisions of this endorsement and to the applicable provisions of the policy, the company agrees with the named insured as follows:

I. COVERAGE U - UNINSURED MOTORISTS (Damages for Bodily Injury and Property Damage)

The company will pay in accordance with Section 38.2-2206 of the Code of Virginia and all Acts amendatory thereof or supplementary thereto, all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured or property damage, caused by accident and arising out of the

ownership, maintenance or use of such uninsured motor vehicle.

Exclusions

This insurance does not apply:

(a) to bodily injury or property damage with respect to which the insured or his legal representative shall, without written consent of the company, make any settlement with

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any person or organization who may be legally liable therefor.

(b) to the first two hundred dollars of the total amount of all property damage as the result of any one accident. This exclusion does not apply if the owner or operator of the uninsured motor vehicle causing the damage can be identified;

(c) so as to inure directly or indirectly to the benefit of any insurer of property.

II. PERSONS INSURED

Each of the following is an insured under this insurance to the extent set forth below:

(a) the named insured and, while residents of the same household, the spouse and relatives of either;

(b) any other person while occupying an insured motor vehicle; and

(c) any person, with respect to damage he is entitled to recover because of bodily injury to which this insurance applies sustained by an insured under (a) or (b) above.

The insurance applies separately with respect to each insured, except with respect to the limits of the company's liability.

III. LIMITS OF LIABILITY

Regardless of the number of (1) persons or organizations who are insureds under this insurance, (2) persons or organizations who sustain bodily injury or property damage, (3) claims made or suits brought on account of bodily injury or property damage, or (4) motor vehicles to which this insurance applies,

(a) If the schedule or declarations indicate split limits of liability, the limit of liability for bodily injury stated as applicable to "each person" is the limit of the company's liability for all damages because of bodily injury sustained by one person as the result of any one accident and, subject to the above provision respecting "each person", the limit of liability for bodily injury stated as applicable to "each accident", is the total limit of the company's liability for all damages because of bodily injury sustained by two or more persons as the result of any one accident. The limit of liability for property damage stated as applicable to each accident is the total limit of the company's liability for all damages because of property damage to all property of one or more insureds as the result of any one accident.

(b) If the schedule or declarations indicate a single limit of liability, the limit of liability stated as applicable to "each accident" is the total limit of the company's liability for all damages as the result of any one accident; provided such limit of liability shall first provide the separate limits required by the Virginia Motor Vehicle

Safety Responsibility Act as stated in the schedule or declarations.

(c) If claim is made under this insurance and claim is also made against any person or organization who is an insured under the bodily injury liability or property damage liability coverage of the policy because of bodily injury or property damage sustained in an accident by a person who is an insured under this insurance, any payment made under this insurance to or for any such person shall be applied in reduction of any amount which he may be entitled to recover from any person or organization who is an insured under the bodily injury or property damage liability coverages.

(d) Any amount payable under this insurance because of bodily injury or property damage sustained in an accident by a person who is an insured under this insurance shall be reduced by all sums paid because of such bodily injury or property damage by or on behalf of the owner or operator of an uninsured motor vehicle.

(e) Any amount recoverable as damages because of bodily injury or property damage sustained in an accident by a person who is an insured under this insurance shall be reduced by all sums paid because of such bodily injury or property damage by or on behalf of any person or organization jointly or severally liable together with the owner or operator of an uninsured motor vehicle for such bodily injury or property damage including all sums paid under the bodily injury or property damage coverage of the policy.

IV. POLICY PERIOD: TERRITORY

This insurance applies only to accidents which occur during the policy period and within the United States of America, its territories or possessions, or Canada.

V. DEFINITIONS

When used in reference to this insurance (including endorsements forming a part of the policy):

bodily injury - means bodily injury, sickness or disease, including death, sustained by a person who is an insured under (a) or (b) of the Persons Insured provision;

hit-and-run vehicle - means a motor vehicle which causes an accident resulting in bodily injury to an insured or property damage, provided:

(a) there cannot be ascertained the identity of either the operator or the owner of such motor vehicle; and

(b) the insured or someone on his behalf shall have reported the accident promptly to either the company, or a law-enforcement officer.

insured motor vehicle - means a motor vehicle registered in Virginia with respect to which the bodily injury and property damage liability coverage of the policy applies but shall not

include a vehicle while being used without the permission of the owner;

motor vehicle — means a land motor vehicle or trailer other than

(a) a farm type tractor or other equipment designed for use principally off public roads, while not upon public roads,

(b) a vehicle operated on rails or crawler-treads, or

(c) a vehicle while located for use as a residence or premises;

named insured — means the person named in the declarations of this policy and includes the spouse if a resident of the same household;

occupying — means in or upon or entering into or alighting from;

property damage — means injury to or destruction of (1) an insured motor vehicle owned by the named insured or his spouse, if a resident of the same household and the contents of such motor vehicle, and (2) any other property (except a motor vehicle) owned by an insured and located in Virginia;

relative — means a person related to the named insured by blood, marriage or adoption who is a resident of the same household;

uninsured motor vehicle — means:

(a) a motor vehicle with respect to the ownership, maintenance or use of which there is, in at least the amounts specified in the Virginia Motor Vehicle Safety Responsibility Act, neither (i) cash or securities on file with the Virginia Commissioner of Motor Vehicles nor (ii) a bodily injury and property damage liability bond or insurance policy, applicable at the time of the accident with respect to any person or organization legally responsible for the use of such vehicle, or with respect to which there is such a bond or insurance policy applicable at the time of the accident but the company writing the same is or becomes insolvent or denies coverage thereunder; or

(b) a hit-and-run vehicle as defined.

VI. CONDITIONS

A. Policy Provisions. None of the Insuring Agreements, Exclusions, Conditions or other provisions of the policy shall apply to the insurance afforded by this endorsement except the Conditions "Notice", "Insured's Duties in the Event of Loss", "Subrogation", "Changes", "Assignment", "Cancellation" and "Declarations".

B. Premium. If during the policy period the number of insured motor vehicles owned by the named insured or spouse and registered in Virginia changes, the named insured shall notify the company during the policy period of any change and the premium shall be adjusted in

accordance with the manuals in use by the company. If the earned premium thus computed exceeds the advance premium paid, the named insured shall pay the excess to the company; if less, the company shall return to the named insured the unearned portion paid by such insured.

C. Proof of Claim; Medical Reports; Proof of Loss. As soon as practicable, the insured or other person making claim shall give to the company written proof of claim, under oath if required, including full particulars of the nature and extent of the injuries, treatment, and other details entering into the determination of the amount payable hereunder. Proof of claim shall be made upon forms furnished by the company unless the company shall have failed to furnish such forms within 15 days after receiving notice of claim.

The injured person shall submit to physical examinations by physicians selected by the company when and as the company may reasonably require and he, or in the event of his incapacity his legal representative, or in the event of his death his legal representative or the persons or persons entitled to sue therefor, shall upon each request from the company execute authorization to enable the company to obtain medical reports and copies of records.

The insured or other person making claim for damage to property shall file proof of loss with the company within sixty days after the occurrence of loss, unless such time is extended in writing by the company, in the form of a sworn statement setting forth the interest of the insured and of all others in the property affected, any encumbrances thereon, the actual cash value thereof at time of loss, the amount, place, time and cause of such loss, and the description and amounts of all other insurance covering such property. Upon the company's request, the insured shall exhibit the damaged property to the company.

With respect to claims alleged to have arisen out of the ownership, maintenance or use of a hit-and-run vehicle if the insured has not obtained a judgment against John Doe, the liability of the uninsured motorist may be established, as between the insured and the company, by filing with the company within a reasonable time after the accident a statement under oath that the insured or his legal representative has a cause or causes of action arising out of such accident for damages against a person or persons whose identity is unascertainable, setting forth the facts in support thereof, and shall present clear and convincing evidence that there was a hit-and-run vehicle involved in the accident.

D. Notice of Legal Action. If, before the company makes payment of loss hereunder, the insured or his legal representative shall institute any legal action for bodily injury or property damage against any person or organization legally responsible for the use of a motor vehicle involved in the accident, a copy of the summons and complaint or other process served in connection with such legal action shall be forwarded immediately to the company by the insured or his legal representative.

E. Other Insurance. With respect to bodily injury to an insured while occupying a motor vehicle not owned by the named insured, this insurance shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such vehicle as primary insurance.

Except as provided in the foregoing paragraph, if the insured has other similar bodily injury insurance available to him and applicable to the accident, the company shall not be liable for a greater proportion of any loss to which this coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.

With respect to property damage, this insurance shall apply only as excess insurance over any other valid and collectible insurance of any kind applicable to such property damage.

With respect to an accident wherein an employee of a self-insured employer receives a worker's compensation award for injuries resulting from an accident with an uninsured motor vehicle, such award shall be set off against

any judgment for damages awarded for personal injuries resulting from such accident.

F. Payment of Loss by the Company. Any amount due hereunder is payable

- (a) to the insured, or
- (b) if the insured be a minor to his parent or guardian, or
- (c) if the insured be deceased to his surviving spouse, otherwise
- (d) to a person authorized by law to receive such payment or to a person legally entitled to recover the damages which the payment represents;

provided, the company may at its option pay any amount due hereunder in accordance with division (d) hereof.

G. This endorsement replaces any other provisions of the policy, including any endorsement forming a part thereof, affording similar insurance with respect to any damages arising out of the ownership, maintenance or use of an uninsured motor vehicle or a hit-and-run vehicle.

SCHEDULE

LIMIT OF LIABILITY

Split Limits

Limits of Liability stated in declarations

Single Limit

Limit of Liability stated in declarations provided such limit shall first be:

Bodily Injury	\$25,000 each person
	\$50,000 each accident
Property Damage	\$10,000 each accident

Note: The following endorsement applies when the endorsement number is shown on the declarations page.

6557 FEDERAL EMPLOYEES USING AUTOMOBILES IN GOVERNMENT BUSINESS

It is agreed that the policy does not apply under the Liability Coverages to the following as insureds:

1. The United States of America or any of its agencies;
2. Any person, including the named insured, with respect to bodily injury or property damage resulting from the operation of an automobile by such person as an employee of the United States Government while acting within the scope of his office or employment, if the provisions of Section 2679 of Title 28, United States Code (Federal Tort Claims Act), as amended, require the Attorney General of the United States to defend such person in any civil action or proceeding which may be brought for such bodily injury or property damage, whether or not the incident out of which such bodily injury or property damage arose has been reported by or on behalf of such person to the United States or the Attorney General.

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Note: If both coverages D and G are provided under Part III endorsement 6259V applies but if only coverage D is provided, endorsement 6259Y applies.

6259V PHYSICAL DAMAGE ENDORSEMENT Part III

It is agreed that

1. With respect to such coverage as is afforded under the Comprehensive coverage, ** shall be deducted from the amount of each loss as to each automobile.
2. With respect to such coverage other than as enumerated in paragraph 1 above, *** shall be deducted from the amount of each loss as to each automobile.
3. The following exclusions are added:
This policy does not apply under Part III:
 - (1) to loss to the automobile while being operated in any prearranged or organized racing or speed contest or in practice or preparation for any such contest;
 - (2) to any loss to the automobile arising out of or during the use of such automobile for the transportation of any explosive substance, flammable liquid, or similarly hazardous materials, except such transportation as is incidental to ordinary household or farm activities of the named insured;

** See amount with coverage D in declarations.

*** See amount with coverage G in declarations.

6259Y PHYSICAL DAMAGE ENDORSEMENT Part III

It is agreed that

1. With respect to such coverage as is afforded under the Comprehensive coverage, ** shall be deducted from the amount of each loss as to each automobile.
2. The following exclusions are added:
This policy does not apply under Part III:
 - (1) to loss to the automobile while being operated in any prearranged or organized racing or speed contest or in practice or preparation for any such contest;
 - (2) to any loss to the automobile arising out of or during the use of such automobile for the transportation of any explosive substance, flammable liquid, or similarly hazardous materials, except such transportation as is incidental to ordinary household or farm activities of the named insured;

** See amount with coverage D in declarations.

Note: When Coverage R is shown in the declarations, this endorsement replaces any similar coverage in the policy.

6230.2L LOSS OF USE COVERAGE R

The company agrees to reimburse the named insured for any necessary transportation expense incurred not exceeding \$10 per day or totaling more than \$300, due to the loss of use of an insured motor vehicle because of damage caused by accident to such vehicle.

1. This endorsement does not apply in the event of a theft of such vehicle for which transportation expense reimbursement coverage is provided under the policy.

2. The total payment under this insurance shall not exceed the actual cash value of such vehicle at the time of loss.
3. As used herein insured motor vehicle means the vehicle described in the declarations and for which a specific premium for this coverage is charged.

This endorsement is subject to such exclusions, conditions, and other terms of the policy as are applicable to the Comprehensive, Fire, Windstorm, Theft, Etc., and/or Collision coverages which are not inconsistent herewith.

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VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BEDFORD.

ANNA L. PHELPS,

Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

MOTION FOR SUMMARY JUDGMENT
BY STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

The defendant, State Farm Mutual Automobile Insurance Company, by counsel, pursuant to the provisions of Rule 3:18 of the Rules of the Supreme Court of Virginia, hereby moves this Court for the entry of summary judgment on its behalf for the reason that the undisputed facts in this case show that the claim asserted by Anna L. Phelps is not covered under the policy issued by State Farm Mutual Automobile Insurance Company.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

By Henry M. Sackett, III
Of Counsel

Henry M. Sackett, III
Edmunds & Williams, P.C.
P. O. Box 958
Lynchburg, VA 24505

I hereby certify that a copy of the foregoing Motion for Summary Judgment was mailed to R. Louis Harrison, Jr., Esquire, Attorney at Law, P.O. Box 1008, Bedford, VA 24523, counsel for the plaintiff, on this the 9th day of March, 1990.

Henry M. Sackett
Attorney for the defendant, State
Farm Mutual Automobile Insurance
Company

RADFORD & WANDREI

ATTORNEYS AT LAW

P. O. BOX 1008

BEDFORD, VIRGINIA 24523

duVAL RADFORD
ROBERT T. WANDREI
R. LOUIS HARRISON, JR.

AREA CODE 703
PHONE 586-3151

March 12, 1990

Henry M. Sackett, III, Esquire
Edmunds & Williams
P. O. Box 958
Lynchburg, Virginia 24505

In Re: Anna L. Phelps v. State Farm Mutual Insurance Company

Dear Henry:

Enclosed please find a copy of my opening brief in this matter. I would anticipate your filing a reply within a reasonable time (please let me know what your schedule would allow), and then setting the matter before Judge Sweeney for hearing.

I thank you for your attention to this matter.

Very truly yours,

RADFORD & WANDREI


R. Louis Harrison, Jr.

RLHjr/kah

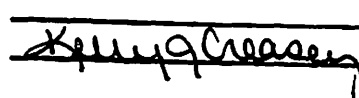
Enc.

cc: Carol Black, Clerk
Circuit Court of Bedford County

FILED IN THE CLERK'S OFFICE

The 13th day of March, 1990

TESTE: _____

 Clerk
D.C.

VIRGINIA:

IN THE CIRCUIT COURT OF BEDFORD COUNTY

ANNA L. PHELPS,

Plaintiff,

v.)(

MEMORANDUM OF LAW

STATE FARM MUTUAL INSURANCE COMPANY,

Defendant.

FACTS

The issues of fact, before this Court, are undisputed and are as follows:

Anna L. Phelps is a nineteen year old student. (ALPdep. p.4.)

On June 10, 1989, Anna was involved in a single car accident in Bedford County, Virginia. (answer ¶1) (ALPdep 12-15). At the time of the accident Anna L. Phelps was covered by a policy of automobile insurance with State Farm Mutual Automobile Insurance Company A 370-661-46-01. (answer ¶2). A copy of the policy is attached to the Stipulation as Exhibit "A". The policy was in good standing on June 10th and Anna L. Phelps followed proper reporting procedures under the policy. (answer ¶3). Nevertheless, by letter dated July 24, 1989, J. William Dinwiddie, Claims Superintendent, of the Tidewater Virginia Division, denied coverage because the vehicle which Ms. Phelps was driving allegedly did not qualify as a "non-owned, temporary substitute or newly acquired automobile under your policy". A copy of that

RADFORD & WANDREI
ATTORNEYS AT LAW
BEDFORD, VIRGINIA
24523

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FILED IN THE CLERK'S OFFICE

The 13th day of March, 1990

TESTE: _____

Clerk
Kenneth C. Cressley D.C.

denial letter is attached to the Motion for Judgment as Exhibit "B". (answer ¶ 6).

The Plaintiffs do not contest that the automobile was not a temporary substitute or newly acquired automobile under the policy but instead assert that it was a non-owned automobile. In particular, part 3 - Physical Damage - Coverage G - Collision, found on page 6 of the policy requires State Farm to "to pay for loss caused by collision to the owned automobile or to a non-owned automobile". A non-owned automobile is defined later in part 3 under the definition section "as a private passenger automobile or trailer, not owned by or furnished for the regular use for either the named insured or any relative, other than a temporary substitute automobile, while said automobile or trailer is in the possession or custody of the insured or is being operated by him." There is no evidence that the automobile was furnished for the regular use of Anna Phelps. In fact, she had driven it only once before and had to obtain special permission to drive the car. (ALPdep. 15)

It is not disputed that Mary L. Phelps owned the 1988 2-door Nissan at the time of the accident and that Mary L. Phelps was the biological sister of Anna L. Phelps. Nevertheless, the definition of relative in the policy is more limited than merely the casual use of the term, instead relative is defined as "a relative of the named insured who is a resident of the same household. (policy p. 4). The Plaintiffs do not dispute that the two girls were

biological sisters and that both resided at 8319 Brookville Court, Springfield, Virginia 22153 at the time of the accident. The key question, for the Court, is whether such arrangements constituted a "household" under the Virginia insurance law. If it does not, then the Plaintiffs are entitled to judgment.

The living arrangements of the two sisters, as set out in their depositions, was that Mary had been living in a town house at 8319 Brookville Court, Springfield, Virginia. She was living there with a roommate named Rob Johnson. (ALPdep. 6) At the time there was a third roommate named Tony Bezacqua, Tony decided he wanted to move out and moved after only two and a half weeks. (MCPdep. 4) Toward the end of January 1989, Anna moved in with her friend Michelle Panzarino, each girl paid one third of the rent and one third of the utilities. (MCPdep. 9-10) Which girl wrote the rent check varied.

The apartment lent itself to multiple occupancy. There were three floors, the basement being a large open room, with a laundry room off to the right and a small half bathroom. The middle floor had a kitchen, small dining room and a small living area all in one great room with the kitchen offset. The upstairs had full bath and two bedrooms. However, it was usually used as three bedrooms because the basement was turned into a bedroom. (MCPdep. 6).

Toward the end of January 1989, Anna moved in with her friend Michelle Panzarino, each girl paid one third of the rent and one

third of the utilities. (MCPdep. 9-10) Which girl wrote the rent check varied.

Each girl was self supporting without significant help from their parents. Both had jobs as waitresses and both were beneficiaries of trust fund while they were students which paid \$200.00 a piece for the rent which went directly to the Landlord. (MCPdep. 10) Each girl bought her own food and they did not eat as a group. They all had different work patterns and eating patterns and in fact rarely ate at home.

Michelle Panzarino eventually moved out and they had two other short term roommates, John Osh and David Vaughn. John Osh left and another girl moved in, Gloria Hartic. (ALPdep. 18019) The largest number of people that was there at any one time was four, the least two. (MCPdep. 10).

ARGUMENT

The Court, in this case, is indeed fortunate to have law of unusual clarity on this subject. The Supreme Court has interpreted the term "relative" in same State Farm Automobile Insurance policy in the same setting as this case. The case was State Farm Mutual v. Smith, 206 Va. 280 (1965). On page 285 in paragraph 6, the Court defines the word "household" as embracing

"a collection of persons as a single group, with one head, living together, a unit of permanent and domestic character, under one roof; a collective body of persons living together within one curtilage, subsisting in common and directs their attentions to a common object, the promotion of their mutual interests and social happiness."

This definition of the term has been embraced by the Virginia

Court in several other and more recent cases. In St. Paul Insurance v. Nationwide Insurance, 209 Va. 18 (1968) the Court made clear that their definition of the word "household" was not mere dicta.

In State Farm Mutual Automobile Insurance Company v. Smith, 206 Va. 280, 285 142 SE 2d 562, 565, 566 (1965), we adopted one of the recognized definitions of the word "household", as used in such insuring provisions, as meaning "a collection of persons, a single group, with one head, living together, a unit of permanent and domestic character, under one roof."

The Court reaffirmed this position again in Allstate Insurance Company v. Patterson, specifically noting an addition to the above language that "residence emphasizes membership in a group rather than an attachment to a building". It also speaks of a "settled or permanent status" as being necessary to find a person a resident of a household. A household is a unit "permanent and domestic character". See 231 Va. 362 and 363. Once again, in Government Employees Insurance v. Allstate, 235 VA. 542 (1988) the Court quotes the language from the previous case:

Whether the term "household" are a "family" is used, the term embraces a collection of persons as a single group, with one head, living together, a unit of permanent and domestic character, living under one roof; a "collective body of persons living together within one curtilage, subsisting in common and directing their attention to a common object, the promotion of their mutual interest and social happiness."

Finally, the language is again reiterated and coincidentally once again defining the same State Farm policy as this case in Furrow v. State Farm Mutual Automobile Insurance, 237 Va. 77 (1989) as follows:

In defining the phrase "resident of the same household" we have said that the term "household" connotes a settled status which is more permanent and settled than would be indicated if the phrase "resident of the same house or apartment." In the present context, the term embraces a collection of persons living together as a single group with one head, under one roof, a unit of permanent and domestic character. (Citations omitted) Furthermore, a persons intent is important is determining whether she qualifies as a residence of a particular household."

Thus a long line of cases, beginning and ending with a case against State Farm, the defendant here, clearly define the term "household".

The facts of this case defy any inclusion of Anna L. Phelps into a household with her sister. First of all the definition requires that there be "one head" of the household. Even a casual reading of the depositions leaves the inescapable conclusion that there was no one in charge. Certainly Marjorie Phelps, the mother of the two girls, had, at one time, been the head of the household but she no longer controlled the actions of her two girls. (Certainly she did not approve of Mary's live-in boyfriend, a subject which Mrs. Phelps will address, in long forceful detail, with remarkably little provocation.) Further Mrs. Phelps, was living hundreds of miles away. The definition requires the head of household to be living with the family. The girls were supporting themselves out of a trust fund money and jobs and were over the age of eighteen.

State Farm may argue that Mary Catherine, as the older sister, was acting as the head of the household. However, the

bills were split evenly and were usually paid by Anna and there was no showing in the record at all Mary attempted to exercise any control over Anna, instead, the record shows that she was trying to establish a relationship with her boyfriend and that Anna was brought in to replace Tony, who moved out shortly after the lease was signed. (See MCPdep. at 627.)

State Farm would indeed be hard pressed to say that Anna was the head of the household. The evidence certainly does not show that Anna exercised any leadership or control over her older sister and live-in boyfriend and to assume such would be ludicrous. Further, there is no showing of any leadership over the other roommates.

The definition also requires that the collection of persons be a single group.....a unit of permanent and domestic character.

The evidence shows that during the short period of the year there was at the house, Mary Catherine Phelps, Anna L. Phelps, Tony Bezacqua, Robert Johnson, Michelle Panzarino, John Osh, Gloria Hartic and David Braun and that all persons were using the residence as a boarding house kind of arrangement. The deposition testimony shows each roommate paid their own rent and seldom ate together and each pursued their own lives separately. There was nothing permanent or domestic about the arrangement. They could hardly be termed a single group. Along the same lines, there is nothing in the evidence to hint that the attention of the group was toward a "common object, promotion of their mutual interests

and social happiness." Instead, the evidence shows that they each pursued their own separate lives.

The Virginia Supreme Court has construed the term household very narrowly in its opinions. In State Farm Mutual v. Smith, 206 Va. 280, the Plaintiff, Elaine R. Smith, had been residing with her sister for eight months before the automobile accident, intending on staying with her married sister until the baby was born. However, while driving the car of her brother-in-law, she was injured in an accident and State Farm refused to pay. The Court found as a matter of law that Ms. Smith was not a resident of her sister's household. In the Smith's case, it was sisters staying together until the baby was born and in this case it was sisters staying together while Anna was in school.

In Allstate Insurance v. Patterson, Patterson had a wreck while he was a member of a motorcycle group which traveled throughout Virginia and other states. He stayed in his parents home when he wasn't visiting one of the groups club houses and spent about ten percent of his time at this parents house. The Supreme Court found on these facts that the trial court erred in giving the matter to the jury and that as a matter of law Patterson could not have been a resident of his fathers household on the date of the accident and therefore reversed and entered a final judgment.

In St. Paul Insurance v. Nationwide the operator of the vehicle was on leave from the Army living with his mother. When

he left for the Army his parents were together, however, during the time that he had been inducted his parents had been separated. The trial court, therefore, held that the operator was not a resident of his fathers household.

In the case of GEICO v. Allstate Insurance the parties were married to each other, however, the Court found that the parties had been separated for approximately four months and therefore the Supreme Court reversed the decision of the trial court and found as a matter of law that the husband was not a member of the same household of his wife at the time of the accident.

Finally, the recent case of Furrow v. State Farm, a daughter, who was living with her boyfriend, moved back into her mothers home during a separation, with her mother, older sister, younger brother and her mother's husband. The daughter stayed at her mothers home during the week and spent weekends with a married boyfriend at a local apartment. The trial court found from this evidence that the daughter was not a resident of her mother's household and the Supreme Court agreed.

In five cases, three of which were within the last four years, the Supreme Court has read the term "household" very narrowly. Judge Barksdale, of the Western District of Virginia, Lynchburg Division, also read the term narrowly, noting that where a son had run away to join the Navy he was not a member of his fathers household. The Court found important the fact the father had no discipline or control over the child. See Allen v.

Maryland Casualty Company 259 Fed. Supp. 505, 512 (1966).

Finally, the Court is familiar with the well understood maxim that the policy provisions of an insurance policy are to be construed in favor of the insured. Thus, one Court went so far as to note that in light of a Virginia automobile policy "one might be held a member of a household within a provision extending coverage, though not for purposes for policy exclusion." See White v. Nationwide Mutual Insurance 245 Fed.Supp. 1, 3 (W.D. Va. 1965).

CONCLUSION

Repeatedly, recently and consistently the Supreme Court has required the term "household" to be a collection of persons as a single group but the evidence shows that the persons living here were of different groups. Also, a household requires "one head", but the evidence shows that no one person was in charge. The Supreme Court requires a household be a unit of permanent and domestic character, the evidence here shows that the living arrangements were a temporary boarding house arrangement. The Supreme Court requires that the collective body of persons be directing their attention to a common object toward the promotion of their mutual interest and social happiness. The evidence here shows that each person was pursuing his/her own life independently and there was no common object. The Supreme Court instructs the Court that it is important to note whether the parties intended to act together as one unit, the evidence in this case shows that

there was no such intent. The Supreme Court has been quick to reverse trial courts who have held against its instruction, and the rules of construction are to resolve ambiguities against the insurer, even to the point of inconsistent results.

The Plaintiffs would therefore suggest to the Court that the undisputed facts here point clearly and irrefutably to the conclusion that Anna L. Phelps was not a member of the same household as her sister and therefore your Plaintiffs pray that this Court declare the vehicle that Anna L. Phelps was driving on June 10, 1989 was a non-owned automobile under the provisions of the applicable State Farm Mutual Automobile Insurance policy.

Respectfully submitted,

ANNA L. PHELPS

By: RLH
Of Counsel

R. Louis Harrison, Jr., p.q.
RADFORD & WANDREI
P. O. Box 1008
Bedford, Virginia 24523

CERTIFICATE

I hereby certify that a true and exact copy of the foregoing memorandum of law was hereby mailed to Henry M. Sackett, III Esquire, counsel for the defendant, at Edmunds & Williams, P.C., P. O. Box 958, Lynchburg, Virginia 24505, this the 12 day of March, 1990.

RLH
R. Louis Harrison, Jr.

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September 6, 1990

R. Louis Harrison, Jr., Esq.
Radford & Wandrei
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Re: Anna L. Phelps v State Farm Mutual Insurance Company

Dear Louis:

Enclosed is a copy of Defendant's Response to Plaintiff's
Memorandum of Law in the above case.

Very truly yours,

EDMUNDS & WILLIAMS, P.C.

By Eleanor A. Putnam Dunn

EAPD:msm

cc Carol Black, Clerk
Circuit Court of Bedford County
Enclosure

FILED IN THE CLERK'S OFFICE

The 11th day of Sept 1990
TESTE: _____

Angela L. Henry

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BEDFORD

ANNA L. PHELPS,

Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

**DEFENDANT'S RESPONSE TO
PLAINTIFF'S MEMORANDUM OF LAW**

The defendant, State Farm Mutual Automobile Insurance Company (hereinafter "State Farm"), by counsel, submits this brief in response to Plaintiff's Memorandum of Law.

STATEMENT OF FACTS

Anna L. Phelps and Mary C. Phelps are sisters who were 19 and 20 years of age, respectively, in June, 1989.¹ They lived with their family at Route 2, Box 170, Goode, Virginia from 1972

¹ 5/17/90 Deposition of Anna Lee Phelps at page 15, lines 24-25; 5/17/90 Deposition of Mary Catherine Phelps at page 3, lines 11-12. FILED IN THE CLERK'S OFFICE

The 14th day of Sept, 1990

TESTE: _____

67 Angela L. Leamy

until they went to college.² Their mother, two younger sisters and, during the winter months, their grandmother still live in the house in Goode.³ In June, 1989, Anna and Mary were students at George Mason University in Fairfax, Virginia and were sharing a townhouse in Springfield, Virginia.⁴

Mary, the older of the two, began attending George Mason before Anna, and moved into the Springfield townhouse in October, 1988⁵. Anna moved in a few months later, in January 1989, when she began attending the University.⁶ Mary's boyfriend at the time, Rob Johnson, lived in the townhouse on a come and go basis, and a friend of Anna's, Michelle Panzarino, moved in at about the same time Anna did and moved out approximately one week after the accident.⁷ However, when Anna moved in, only she and Mary signed

² 5/17/90 Deposition of Marjorie Hunt Phelps at page 3, lines 9-13; 1/22/90 Depo. of ALP at p. 4, lines 4-16; 5/17/90 Depo. of MKP at p. 9, lines 9-11

³ 5/17/90 Depo. ALP p. 8, line 22 - p. 9, lines 1-22. 5/17/90 Depo. Mrs. Phelps p. 3, lines 13-25.

⁴ 1/22/90 Depo. ALP p. 5, line 15 - p. 7, line 25.

⁵ 1/22/90 Depo. MCP p. 4, lines 4-8.

⁶ 1/22/90 Depo. ALP p. 5, lines 7-14 and p. 6, lines 9-12.

⁷ 5/17/90 Depo. MCP p. 14, lines 12-19; 5/17/90 Depo. ALP p. 18, lines 5-20; 1/22/90 Depo. ALP p. 17, line 25 - p. 18, lines 1-5.

the new lease and both of the girls wrote the majority of the rent checks.⁸ The utilities were in Mary's name.⁹

Assisting with the girls' college education and living expenses was a family affair. Mary and Anna's father died in 1979, and their mother could not afford to pay for all of their college expenses.¹⁰ Mrs. Phelps paid some of their school expenses and loaned them money when they were in need.¹¹ Other family members helped out as well. The girls' grandfather established a trust to assist with their educational expenses.¹² Their father's cousin paid for their school books as a graduation present¹³ and their grandmother loaned Mary money to purchase the automobile involved in the accident and bought the girls a kitchen table and Mary a bedroom set.¹⁴ Anna and Mary also obtained jobs to help make ends meet.¹⁵ The trust paid for the girls' college tuition and assisted

⁸ 5/17/90 Depo. MCP p. 4, lines 18-22 and p. 6, line 19 - p. 7, line 20; 5/17/90 Depo ALP p. 10, line 19 - p. 11, line 3; 1/22/90 Depo. ALP p. 21, lines 3-5.

⁹ 5/17/90 Depo. MCP p. 7, lines 21-25.

¹⁰ 5/17/90 Depo. Mrs. Phelps p. 6, lines 12-21.

¹¹ 1/22/90 Depo. ALP p. 22, line 25 - p. 23, lines 1-5; 5/17/90 Depo. MCP p. 12, lines 16-24.

¹² 5/17/90 Depo. Mrs. Phelps p. 4 lines 3-8.

¹³ 5/17/90 Depo. Mrs. Phelps p. 6, lines 7-9.

¹⁴ 5/17/90 Depo. MCP p. 13, lines 12-18 and p. 16, lines 5-8.

¹⁵ 5/17/90 Depo. Mrs. Phelps p. 6, lines 7-15.

with rent.¹⁶ Although their mother had no direct control over the trust fund, she had some input with the trustee regarding how the money was to be spent and told the trustee to pay her daughters' rent out of the trust.¹⁷

Anna and Mary remained an active part of their family while away at school. They would come home to Goode for school vacations and holidays, when their school demands and work schedules would permit it. Mary came home almost every break and Anna would come home every couple of months.¹⁸ Mary still kept some of her possessions at the house.¹⁹ Anna still went to an eye doctor in Goode.²⁰ While at home, they did not have the use of their old bedrooms because their younger sisters and, during the winter months, their grandmother had taken them over.²¹ However, they otherwise resumed their accustomed lifestyle in that home in that they were expected to abide by their mother's general house rules.²² Anna moved back with her mother after the accident

¹⁶ 5/17/90 Depo. Mrs. Phelps p. 4 lines 18-22.

¹⁷ 5/17/90 Depo. Mrs. Phelps p. 12, line 6 - p. 13, line 1.

¹⁸ 5/17/90 Depo. ALP p. 12, lines 21-23; 5/17/90 Depo. MCP p. 12, lines 9-12.

¹⁹ 5/19/90 Depo. MCP p. 11 line 22 - p. 12, line 2.

²⁰ 5/17/90 Depo. Mrs. Phelps p. 21, lines 2-9.

²¹ 5/17/90 Depo. Mrs. Phelps p. 13, lines 2-18.

²² 5/17/90 Depo. Mrs. Phelps p. 18, lines 5-16.

before returning to school and Mary moved back in with her mother in January, 1990 after she dropped out of George Mason.²³

Mrs. Phelps remained involved in the girls' lives in other ways than those already mentioned. She arranged for the preparation of their tax returns and paid their taxes. She claimed Anna and Mary as dependents upon her tax returns up through 1990 and listed them as residing with her 12 months a year.²⁴ Her health and medical insurance covered Anna and Mary in June, 1989.²⁵ She received Mary's grades and all communications regarding Anna's education from George Mason.²⁶ She made her opinion known regarding the girls' behavior when it did not meet with her approval, although, while they were in Springfield there was little she could do to enforce her beliefs.²⁷

On June 10, 1989, Anna and Mary went home to Goode to attend a family wedding that weekend. At the time, Anna owned a Honda CRX, insured by State Farm, which seated only two people and Mary owned a Nissan Sentra XE, insured by Nationwide, which seated

²³ 5/17/90 Depo. MCP p. 17, lines 4-8; 5/17/90 Depo. Mrs. Phelps p. 6, line 22 - p. 7, line 6.

²⁴ 5/17/90 Depo. Mrs. Phelps p. 10, lines 8-25; 5/17/90 Depo. MCP p. 11, lines 11-18.

²⁵ 5/17/90 Depo. Mrs. Phelps p. 15, lines 6-24.

²⁶ 5/17/90 Depo. ALP p. 12, lines 10-13; 5/17/90 Depo. MCP p. 10, lines 12-16.

²⁷ 5/17/90 Depo Mrs. Phelps p. 18, line 17 - p. 19 line 13.

four people.²⁸ Anna intended to go to a party with two friends that night so she borrowed Mary's car, with Mary's permission, because three passengers would not fit in her car.²⁹ Anna and her two companions drove Mary's car to a party at a private home. The private road leading to the home had a tree in the middle of it in a planter. While driving home from the party, Anna drove Mary's car into the planter injuring all three occupants in the vehicle.³⁰

At the time of the accident, Anna was insured by a State Farm Mutual Automobile Insurance Company policy under which she seeks coverage in this case, in excess of that provided by Nationwide on the car she was driving, for any claims against her arising out of the accident. Anna's State Farm policy provided coverage to Anna for "owned" and "non-owned" automobiles. Because the car Anna was driving was owned by Mary, it did not qualify as an "owned" automobile as that term is defined in the policy. A non-owned automobile is defined as one that is "not owned by or furnished for the regular use of either the named insured or any relative...". The policy defines "relative" to mean "a relative of the named insured who is a resident of the same household." State Farm denied coverage to Anna because Anna and Mary were relatives residing in the same household, for which reason the

²⁸ 5/17/90 Depo. MCP p. 14, line 13 - p. 15, line 4.

²⁹ 5/17/90 Depo. ALP p. 13, lines 3-11.

³⁰ 5/17/90 Depo. ALP p. 13, line 19 - p 15, line 4.

vehicle owned by Mary which Anna was driving did not qualify as a "non-owned" automobile under the State Farm policy.

ISSUE

The sole question raised by this case is whether the automobile driven by Anna and belonging to Mary qualifies as a "non-owned vehicle" as that term is defined in Anna's policy with State Farm. If it does not, Anna would have no coverage under it for any claim arising out of her use of that automobile.

ARGUMENT

The State Farm policy excludes coverage for liability arising out of the use of vehicles owned by relatives who reside in the same household. The rationale behind this exclusion is to prevent the policy from covering, in addition to the insured's own automobile, the automobiles of the other members of the household which risk the insurer did not contract to insure and for which it did not receive a premium. See, Napier v. Banks, 19 Ohio App. 2d 152, 250 N.E.2d 417, 419 (1969); Dairyland Ins. Co. v. Beekman, 118 Ariz. 294, 576 P.2d 153, 156 (1978); Shadholt v. Farmers Ins. Exchange, 275 Or. 407, 551 P.2d 478, 481 (1976); Bartholet v. Berkness, 291 Minn. 123, 189 N.W.2d 410, 413 (1971) (dissent); Limpert v. Smith, 56 Wis. 2d 632, 203 N.W.2d 29, 32 (1973). Because of their close relationship, relatives who are members of the same household

"might be expected to use each other's cars without hindrance and with or without permission. Without this

limitation a person could purchase just one policy on only one automobile and thereby secure coverage for all other vehicles he may own or vehicles the members of his family own while residents of the same household. [citations omitted] There is no doubt that a car owner can insure all of the automobiles he owns, but he cannot do so under a policy describing only one such automobile and omitting all others owned by him or by household relatives."

Limpert v. Smith, 56 Wis. 2d 632, 203 N.W.2d 29, 32-33 (1973). The exclusion protects the insurance company from the insured who pays for one policy but seeks to be coverage under that policy for a loss occurring while driving one of his family member's cars. Rodenkirk v. State Farm, 325 Ill. App. 421, 60 N.E.2d 269, 274 (1945).

The Virginia Supreme Court cited the Rodenkirk case for this principle in State Farm v. Smith, 206 Va. 280, 289 (1965). It noted, however, that the rationale did not apply to the facts in Smith because it was not "a case of two automobiles available to members of the same household" Id. at 289. In Smith, the vehicle involved in the accident and for which coverage was sought was the only vehicle available in the household. Therefore, there was no concern about overloading the insurance policy with cars owned by other members of the household. In this case, on the other hand, there were two vehicles available in the same household - Anna's Honda and Mary's Nissan. Therefore, State Farm is being asked to assume in this case the very risk that the policy language involved in the case is designed to avoid.

With this background in mind as to the purpose of the policy language in question in this case, State Farm submits that a close analysis of the applicable Virginia cases will support its position that Anna is not entitled to coverage under its policy. Anna is entitled to coverage under State Farm's policy only if the car she was driving owned by her sister, Mary, qualifies as a "non-owned" automobile under the State Farm policy. If Anna and Mary were residents of the same household, then Mary's car does not qualify as a "non-owned" automobile under the policy that State Farm issued to Anna and State Farm's position should be sustained.

Anna contends that she and Mary are not members of the same "household" because their living arrangements at 8319 Brookville Court in Springfield, Virginia, did not constitute a "household" as that term has been defined in the Virginia cases. However, State Farm does not contend that the apartment in which Anna and Mary lived in Springfield, Virginia, is the "household" of which both Anna and Mary were a member. It is State Farm's position that Anna and Mary were members of the household of their mother, who lives in the Goode community of Bedford County and, therefore, they are in fact "residents of the same household".

Plaintiff cites State Farm v. Smith, 206 Va. 280 (1965) in support of the proposition that the living arrangement that Anna and Mary had in Springfield, Virginia, did not constitute a "household" as that term is defined in Smith. However, State Farm

respectfully submits that when the definitions adopted by the Supreme Court in Smith are analyzed and applied to the facts of this case, Anna and Mary are found to be residents of their mother's household. The issue in Smith was that of "residence". The Supreme Court defined household for the purpose of determining what the insured's residence was. The Court stated at page 285, "[h]ere, we must interpret the meaning of 'resident' when followed by 'of the same household'." In a footnote, the Court then defined household in the language stated in plaintiff's brief. In the following footnote, the Court went on to define the phrase that is significant for this case, "resident of the same household" as follows:

"Since 'household' is usually taken to refer to a group of persons, rather than a building, it appears appropriate to interpret the term, resident of the same household as meaning: resident of the same homestead and member of the same household". State Farm v. Smith, 206 Va. 285, n. 7 (Emphasis added).

The Smith Court held that the State Farm insured was a visitor or sojourner, not a resident, because there was never an intent to become a resident of the household.

In this case, on the other hand, Anna and Mary Phelps had always been members of their mother's household and there is no evidence of an intent to alter that relationship. On the contrary, their intent to remain residents of their mother's household is evidenced by the fact that Anna returned to her mother's home in

Goode, not the apartment in Springfield, to recuperate from injuries received in the subject accident and Mary returned to her mother's home to live when she dropped out of school. The Phelps household in Goode, Virginia, clearly satisfies the Smith definition of a household. Mrs. Phelps provided her daughters with a household of permanent and domestic character in which she was the head and all of the family including the grandmother during the winter and the girls during school breaks, lived together under one roof. While Anna and Mary were away at school, their mother did as much as she could to provide for them financially and emotionally, and while under her roof, she continued to maintain some control and authority over their lives. The girls were also residents of the same homestead: the townhouse that they shared in Springfield, Virginia. Regardless of whether their other roommates came or went, it was their townhouse with a lease in their names for which they assumed primary responsibility for the rent and utilities. Clearly, Anna and Mary were residents of the same homestead and members of their mother's household.

None of the cases cited by the plaintiff in her brief are factually similar to this case and none would dictate a finding that Anna and Mary were not residents of their mother's household. A number of these cases utilized the definition of "household" that was first expressed in Smith, a definition that, we submit, is met in this case. However, most of the cases, including Smith, turn

on the question of intent to establish a residence, rather than on the definition of household. In Furrow v. State Farm, 237 Va. 77 (1989), the Court found that a daughter who had lived away from home for six years and who had moved back into her mother's home only nine days before the automobile accident, after she and her boy friend separated, "never intended to become a member of the mother's 'household'." Id. at 81, and, therefore, was not entitled to coverage under her mother's policy.

In Government Employees Insurance Company v. Allstate Insurance Company, 235 Va. 542 (1988), the Supreme Court held that a husband who had separated from his wife four months before an automobile accident and who was ultimately divorced from the wife without any reconciliation after the accident, was not a resident of the wife's household at the time of the accident and, therefore, was not entitled to coverage under the wife's policy. The Court found that "nothing in the record suggests that James ever intended to reconcile and resume cohabitation with Wilhemina." Id. at 548.

In Allstate Insurance Company v. Patterson, 231 Va. 358 (1986), the Court held that a son who had moved out of his parent's home in 1976 and who thereafter spent only 10% of his time at his parent's home, was not a resident of his parent's household and, therefore, not entitled to coverage under his father's policy. The Court stated "while a person's intention to become a member of a particular household need not be coupled with continuous

residence, the intention must be accompanied by a reasonable degree of regularity in the person's residential contacts with the household; casual, erratic contacts, are not sufficient" Id. at 363.

In St. Paul v. Nationwide, 209 Va. 18 (1968), the Supreme Court held that, where the parents had separated, the father no longer had a household of which the son could be a member. The Court stated:

"[T]he undisputed evidence is that at that time Troy's parents were separated and the former household had been broken up by the father's desertion." Id. at 22

Since there was no household, the son could not have been a resident of his father's household and thus was not entitled to coverage under his father's policy.

Smith, Furrow, GEICO and Allstate each deal with the question of the insured's intent and each finds that there was no intent to be a resident of the household and thus no coverage under the applicable policy. St. Paul finds that there was no household of which the person claiming coverage could be a member and thus no coverage. None of these cases dealt with the question whether a child living away from home while attending college was a member of the parent's household.

However, being a member of a household where one is not living a majority of the time is not a new proposition. There are numerous cases that find people to be members of households where

they are not currently living, especially in the context here: children away at college.

In Montgomery v. Hawkeye Security Ins. Co., 52 Mich. App. 457, 217 N.W. 2d 449 (1974), the insured's 22 year old son was a full-time student and was living away from home in an apartment. The son's education was financed in part by G.I. benefits and in part by his parents. The Court held that the son was a resident of his parents' household even though he was not actually living in or physically occupying the same building as his parents.

In Federated Am. Ins. Co. v. Childers, 45 Or. App. 379, 608 P.2d 584 (1980), the insured's son was living away from home while attending college and moved to a second location away from home during the summer to take a summer job. The court noted that a child may have more than one residence and remain a member of his parents' household.

In American States Ins. Co. v. Walker, 26 Utah 2d 161, 486 P. 2d 1042 (1971), the insured's daughter was living out of state in an apartment and was receiving training at a local hospital to be an X-ray technician. The court defined resident of a household to be a member of a family that lives under one roof, but stated that

"Residence emphasizes membership in a group rather than attachment to a building. It is a matter of intention and choice rather than one of geography

"Ordinarily when a child is away from home attending school, he remains a member of the family household..." Id. at 1044.

Crossett v. St. Louis Fire and Marine Ins. Co., 289 Ala. 598, 269 So.2d 869 (1972) also involved a college student living away from home. Like Anna and Mary, when Crossett was visiting his parents, he abided by their restrictions, but when he was at school, he did as he pleased. The Crossett court cited with approval the same language cited above from American States. Id. at 872.

See also, Goodsell v. State Auto. and Casualty Underwriters, 261 Iowa 135, 153 N.W.2d 458 (Iowa 1967) (Insured's daughter living out of state and training to be a flight attendant. Held: member of insured's household); Travelers Indem. Co. v. Mattox, 345 S.W.2d 290 (Tex. Civ. App. 1961) (Insured's 17 year old son is member of father's household even though he took all of his personal possessions and moved to another town to work in his brother's business.) Manuel v. American Employers Ins. Co., 228 So.2d 321 (La. App. 3d Cir. 1969) (College student may have more than one residence: his parent's home and his actual dwelling place at school.)

State Farm respectfully submits, that all of the definitional requirements of "household" and "resident of the same household" set forth in Smith are met. Mrs. Phelps' household clearly meets the definition of "household". Anna and Mary lived

in the same "homestead" - their apartment in Springfield. As college students living away from home, Anna and Mary remained residents of their mother's household. Therefore, the car Mary owned and which was being driven by Anna at the time of the accident was owned by a relative (Mary) who was a resident of the same household (Mrs. Phelps') and did not qualify as a "non-owned" automobile. Since Mary's car was neither an "owned" nor a "non-owned" vehicle under the State Farm policy, Anna is not entitled to liability coverage under the State Farm policy for liability arising out of her use of Mary's car.

CONCLUSION

Plaintiff's entire argument is based upon the premise that the household in which one lives and the building in which one lives must be the same in order for two people to be a "resident of the same household". However, by defining the term "resident of the same household" as meaning "resident of the same homestead and member of the same household", the Supreme Court in Smith has made it quite clear that this position is incorrect. If plaintiff's position were correct, no child who has gone away to college or has entered the service could remain a resident of the parent's household. We have cited examples of numerous cases from other jurisdictions that clearly hold to the contrary.

This case presents the classic situation to which the policy language under construction was intended to apply. Two family members of the same household who are living together each own an automobile. The purpose of the policy language is to exclude coverage of the vehicle for which State Farm has received no premium. If plaintiff's position is sustained, Mary could own ten uninsured automobiles and Anna would be entitled to coverage under State Farm's policy while driving any of those automobiles. Such a conclusion is not what was intended by the policy, nor would it be fair to State Farm to impose that risk upon it for which it had not been paid a premium.

This is not a case in which Anna has no coverage for liability for claims arising out of the accident in question. The Nationwide policy on the car she was driving provides her with liability coverage. Anna is seeking to obtain excess coverage from State Farm on those claims under a policy for which State Farm has been paid no premium for that risk. If this same accident had occurred before Mary and Anna left home to go to college, there would be no question that Anna would not be entitled to coverage under the State Farm policy. The fact that they were both college students at the time the accident occurred should not change the result. Accordingly, we respectfully request the Court to find that Anna and Mary were "residents of the same household" (their

mother's) at the time the subject accident occurred and that Anna is not entitled to excess coverage under the State Farm policy.

Respectfully submitted,

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

By Henry M. Sackett, III
Of Counsel

Henry M. Sackett, III
Eleanor A. Putnam Dunn
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I hereby certify that a copy of the foregoing Brief was mailed to R. Louis Harrison, Jr., Esquire, Attorney at Law, P. O. Box 1008, Bedford, Virginia 24523-1008, counsel for the plaintiff, on this the 6th day of September, 1990.

Henry M. Sackett, III
Attorney for State Farm Mutual
Automobile Insurance Company

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R. LOUIS HARRISON, JR.
September 11, 1990

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RE: Anna A. Phelps
v.
State Farm Mutual Insurance Company

Dear Henry, Eleanor and Doug:

I have set this case for trial on December 12, 1990 at 9:30 a.m. in the Circuit Court of Bedford County. I hope to conclude our motion for summary judgment before that.

I thank you for your attention in this matter.

Yours very truly,

RADFORD & WANDREI



R. Louis Harrison, Jr.

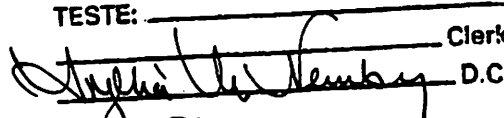
RLHjr/kwl

CC: Carol Black, Clerk
Bedford County Circuit Court

FILED IN THE CLERK'S OFFICE

The 12th day of Sept. 1990

TESTE: _____

 Clerk
D.C.

EDMUNDS & WILLIAMS
A PROFESSIONAL CORPORATION

SUITE 400
800 MAIN STREET
P. O. BOX 958

LYNCHBURG, VIRGINIA 24505

TELEPHONE (804) 846-9000
TELECOPIER (804) 846-0337

J. EASLEY EDMUNDS, JR.
(1914-1977)
SAMUEL H. WILLIAMS
(1914-1970)

B. C. BALDWIN, JR.
ROBERT D. RICHARDS
PAUL H. COFFEY, JR.
KENNETH S. WHITE
ROBERT C. WOOD, III
HENRY M. SACKETT, III
RAYNER V. SNEAD, JR.
BERNARD C. BALDWIN, III
WM. TRACEY SHAW
R. EDWIN BURNETTE, JR.
BEVIN R. ALEXANDER, JR.
PATRICIA R. BLACK
WILLIAM E. PHILLIPS

ELEANOR A. PUTNAM DUNN
KEVIN L. CASH

December 4, 1990

Carol W. Black, Clerk
Bedford County Circuit Court
Main Street
Bedford, Virginia 24523

Re: Anna L. Phelps v. State Farm Mutual Automobile
Insurance Company

Dear Mrs. Black:

I represent the defendant in the captioned case which is set for trial in the Circuit Court of Bedford county on December 12, 1990. Please issue and deliver to the proper Sheriff for service a summons for each of the following individuals to testify on behalf of the defendant:

1. Mary Catherine Phelps
Route 2, Box 170
Goode, VA; and
2. Marjorie Hunt Phelps
Route 2, Box 170
Goode, VA.

I enclose the following check in the amount of \$10.00, payable to the Sheriff of Bedford County, VA, to cover the cost of service.

Very truly yours,

EDMUNDS & WILLIAMS, P.C.

By Henry M. Sackett, III
Henry M. Sackett, III

HMSIII: jets

Enclosure

*Proven
waived
12-6-90*

FILED IN THE CLERK'S OFFICE

The 4th day of December, 1990

TESTE: Ellen G. Creasey Clerk
D.C.

11/90 14:16
VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BEDFORD.

ANNA L. PHELPS,

Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

Defendant.

MOTION TO DISMISS

The defendant, State Farm Mutual Automobile Insurance Company, by counsel, hereby moves this Court to dismiss this action for lack of subject matter jurisdiction and in support thereof states the following:

1. Under the holding of the Virginia Supreme Court in Erie Ins. Group v. Hughes, 6 VLR 2698 (June 8, 1990), there is no justiciable controversy where all of the potentially adverse parties are not before the Court. In the absence of such a justiciable controversy the Court lacks subject matter jurisdiction.

2. A number of necessary parties are not before the Court in this action, including Anna Featherstone and Jennifer Trevey, the potential claimants against Anna L. Phelps, and United

Services Automobile Association, the underinsured motorist carrier for Jennifer Trevey.

3. In the absence of these necessary, adverse parties, there is no justiciable controversy and, therefore, no subject matter jurisdiction.

WHEREFORE, the defendant, State Farm Mutual Automobile Insurance Company, by counsel, hereby moves this Court to dismiss this action for lack of subject matter jurisdiction.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

By Henry M. Sackett, III
Of Counsel

Henry M. Sackett, III
Edmunds & Williams, P.C.
P. O. Box 958
Lynchburg, VA 24505

I hereby certify that a copy of the foregoing Motion to Dismiss was transmitted to R. Louis Harrison, Jr., Esquire, Attorney for the plaintiff, by FAX MAIL (703) 586-1649, on this the 11th day of December, 1990.

Henry M. Sackett, III
Attorney for the defendant,
State Farm Mutual Automobile
Insurance Company

Group v. Hughes, 6 VLR 288
 SUPREME COURT

Present: Carrico, C.J., Compton, Stephenson, Russell, Whiting, Lacy,
 JJ., and Poff, Senior Justice

ERIE INSURANCE GROUP

v. Record No. 891377 OPINION BY SENIOR JUSTICE RICHARD E. POFF
 June 8, 1990
 NETTIE JANE HUGHES, ET AL.

FROM THE CIRCUIT COURT OF ALBEMARLE COUNTY
 David F. Berry, Judge-Designate

This is an appeal by an automobile liability insurance carrier from a declaratory judgment rejecting its denial of coverage of a claim for personal injuries sustained in a two-car collision. One of the vehicles was a Buick sedan registered to Nettie Hughes and operated by John Crizsar. The other was a Plymouth registered to R. Viar and operated by Robert Joe Kendrick, Jr. One of the passengers in the Buick was killed in the collision; Hughes and four other passengers were injured.

Erie Insurance Group had issued Viar a liability insurance policy providing bodily injury liability limits of \$250,000 per person and \$500,000 per accident. Allstate Insurance Company had issued Hughes a policy providing uninsured motorist limits of \$50,000 per person and \$100,000 per accident. Hughes notified both insurance companies of her claim. Both denied coverage. Naming Erie and Allstate as parties, Kendrick filed a motion for judgment against Erie and Allstate praying for "a judgment declaring and adjudicating the prospective rights and duties of plaintiff and the defendants under the provisions of their respective insurance policies concerning coverage of each policy". Neither Viar, the owner of the Plymouth, nor Kendrick, the driver, was named as a party to this action.

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 The trial
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 By judgment
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[A] Editor's note: When the official reporter publishes this opinion, the next issue of 6 VLR will cite to the Citation Cross-Reference Table. For VLR Headnotes—See Summaries and Headnote sections.

Counsel of Record: Jay T. Sweet (Laura C. Rublee; Dawn B. Mathew; McGuire, Woods, Battle & Booche, on briefs), for appellant. L. B. Chandler, Jr. (Chandler, Franklin & O'Bryen, on briefs), for appellee Nettie Jane Hughes. Richard H. Milner (John W. Zunker; Taylor & Zunker, on briefs), for appellee Allstate Insurance Company.

Eric and Allstate filed answers denying liability. As affirmative defenses, Erie denied coverage on both the Plymouth and its driver, alleging (1) that the car was not an "owned automobile" insured under Viar's policy and (2) that Kendrick operated the Plymouth without permission of the named insured.

The trial court, sitting without a jury, heard evidence ore tenus. The record shows that Viar had acquired the Plymouth as a replacement for a disabled car she had loaned to her stepfather, Sandy Gibson. Although Viar testified that she had notified Erie to that effect, the Plymouth was not listed as an insured automobile on the policy Erie renewed and delivered to Viar shortly before the collision with the Buick.

Viar said that she had authorized Gibson to drive the Plymouth but had forbidden him expressly to allow Kendrick to do so because she knew that Kendrick was an irresponsible driver. Gibson acknowledged that he had permitted Kendrick, a grandson he had reared, to use the Plymouth to run short errands, but Viar testified that she had never seen him drive the car.

In the spring of 1987, however, Viar learned that Kendrick had driven the Plymouth to the local market. Viar instructed Gibson to remove the license tags from the car. Gibson promised he would "never let [Kendrick] do it again" if she would "leave the tags on the car". The tags remained on the Plymouth and, so far as the record reveals, Kendrick did not drive it again until August 15, 1987 when he became involved in a head-on collision with the Buick.

By judgment entered April 26, 1989, the trial court declared that Viar has "impliedly consented to . . . Kendrick's use of the 1975

Plymouth sedan", that "the 1975 Plymouth sedan was an 'owned automobile' under the terms of [Erie's] Policy", and that coverage under that policy "applies in this case". Erie filed a motion to set aside the judgment for lack of subject-matter jurisdiction. The court vacated the judgment pending consideration of that motion. By final judgment entered August 11, 1989, the court reinstated the original judgment, and we awarded Erie an appeal.¹

On appeal, Erie renews its challenge to the subject-matter jurisdiction of the trial court.² In response, Hughes and Allstate rely principally upon our decision in Reisen v. Aetna Life and Casualty Co., 225 Va. 327, 302 S.E.2d 529 (1983). There, a tortfeasor's liability insurer, faced with a personal injury claim, filed a motion for declaratory judgment declaring no coverage. The insurer named as defendants its insured, the injured person, and the latter's uninsured motorist insurance carrier. Confirming the jury's finding that the tort was intentional as alleged, the trial court entered judgment declaring no coverage. Rejecting the appellant's argument on appeal, we held that "there was a justiciable controversy ripe for adjudication within the meaning of our declaratory judgment

statutes, and exercising jurisdiction. S.E.2d at 532.

We based Price, 206 Va. claimant in a damages claim insurer had to of compromise. Reisen, 225 Va. from and in an and indemnify claimant's off faith conduct, in excess of p. That duty and made the offer dispute under, for adjudication statutes". Id.

Relying upon statutory mandate interpreted and serviceable to the statutory re economy and cost that she "used t

¹ Trial of the tort actions, filed following entry of the declaratory judgment by the decedent's representative and the several persons injured in the accident, have been suspended pending this appeal.

² Erie also contends that the trial court erred in finding that the Plymouth was an "owned automobile" and "in concluding that Kendrick had implied permission . . . because Viar . . . specifically prohibited Kendrick from driving the car." We need not consider these questions.

Erie Ins. Group v. Hughes, 6 VLR 298
SUPREME COURT

2701

statutes, and that the trial court did not abuse its discretion in exercising jurisdiction over the coverage matter." Id. at 334, 302 S.E.2d at 532.

We based our holding upon the common-law rule applied in Aetna v. Price, 206 Va. 749, 761, 146 S.E.2d 220, 228 (1956). Because the tort claimant in Reisen had made an offer to settle for a sum less than the damages claimed and within the limits of the insurance policy, "the insurer had the duty to exercise good faith in dealing with the offer of compromise, keeping in mind the insured's interests and its own." Reisen, 225 Va. at 335, 302 S.E.2d at 533. Said differently, apart from and in addition to the insurer's contractual obligation to defend and indemnify its insured, the insurer, faced as it was with the claimant's offer, had a common-law duty, one measured in terms of good faith conduct, to protect its insured against the threat of a judgment in excess of policy limits. The insured had a corresponding right. That duty and that right came into conflict when the tort claimant made the offer and the insurer denied coverage. Clearly, the coverage dispute underlying that conflict was "a justiciable controversy ripe for adjudication within the meaning of our declaratory judgment statutes". Id. at 334, 302 S.E.2d at 532.

Relying upon its reading of Reisen, Allstate invokes the statutory mandate that the declaratory judgment statutes "be liberally interpreted and administered with a view to making the courts more serviceable to the people." Code § 8.01-191. Allstate contends that the statutory remedy is justified "in the interests of judicial economy and common sense". Joining in that argument, Hughes explains that she "used the mechanism of declaratory judgment to reduce the

burden upon the judicial system and to seek a clear and binding adjudication of the rights and liabilities of Erie Insurance Company and Allstate Insurance Company to plaintiffs."

Obviously, use of the procedure in Reisen served the cause of judicial economy. This was because in that case, all potentially adverse parties were before the court at trial and on appeal. But in this case, as Erie points out, Viar and Kendrick were never made parties to the declaratory judgment proceeding and, consequently, are not parties to this appeal. And, as Hughes' argument implicitly recognizes, the trial court's adjudication was "clear and binding" only on Erie and Allstate.

If we were to uphold the trial court's judgment on the jurisdictional question but should reverse its declaration on the question of coverage, neither Viar nor Kendrick would be bound, either by the judgment below or by our decision. Hence, as a defendant in several tort actions, each would have standing to file a declaratory judgment suit or an action ex contractu against Erie claiming coverage.

Such a claim could demand all of the rights of coverage, including the right to a defense, the right to Erie's good faith dealing with respect to any compromise within policy limits offered any claimant, and the right to indemnity on account of any judgment within policy limits entered in favor of any of the several plaintiffs in the tort actions. In such event, an application of the declaratory judgment statutes would not make "the courts more serviceable to the people" but, instead, would tend to defeat rather than to promote

cause of judicial economy in Reisen, we hold

As provided in Code § 8.01, "whether or not claimed". Code § 8.01 only "[i]n cases of assertion and denial

Erie acknowledges court's jurisdiction declaratory judgment. See Aetna Life Insur. Co. v. City of S.E.2d 773, 775-76 (1973) statutes did not vest opinions, decide moot inquiries." Reisen, (omitted). To the contrary, the uncertainty and its rights". Code § 8.01.

Courts cannot afford all parties to the declaratory judgment, the judgment defendant, the judgment defendant, Declaratory be a real and substantial

cause of judicial economy. While reaffirming the principles applied in Reisen, we hold that the decision there is not controlling here.

As provided in Article 18 of Code Title 8.01, circuit courts are empowered to make certain "binding adjudications of right" and to do so "whether or not consequential relief is, or at the time could be, claimed". Code § 8.01-184. Courts may exercise such power, however, only "[i]n cases of actual controversy" involving "actual antagonistic assertion and denial of right." Id.

Erie acknowledges that the motion for judgment invoking the trial court's jurisdiction alleged a controversy over coverage. But declaratory judgment does not lie just because the parties disagree. See Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 240-41 (1937). To vest the court with jurisdiction, the controversy must be justiciable. City of Fairfax v. Shanklin, 205 Va. 227, 229-30, 135 S.E.2d 773, 775-76 (1964). "Enactment of the declaratory judgment statutes did not vest the courts with authority to render advisory opinions, decide moot questions, or answer merely speculative inquiries." Reisen, 225 Va. at 331, 302 S.E.2d at 531 (citation omitted). To the contrary, their purpose is "to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights". Code § 8.01-191.

Courts cannot afford such "relief" when they lack the power to bind all parties to the controversy. "Actions or opinions are denominated 'advisory' . . . where, by reason of inadequacy of parties defendant, the judgment could not be sufficiently conclusive." E. Borchard, Declaratory Judgments 35 (2d ed. 1941). The dispute "must be a real and substantial controversy admitting of specific relief

Erie Ind. Group v. Hughes, 6 VLR 2898
SUPREME COURT

(Cumulative for 6)

through a decree of a conclusive character". Haworth, 300 U.S. at 241. Without Kendrick and Viar as parties defendant, this action cannot be sufficiently conclusive.

Finding no justiciable controversy within the definition of our declaratory judgment statutes, we will sustain Erie's jurisdictional challenge, vacate the judgment below, and dismiss the action for declaratory judgment.

Vacated and dismissed.

Abandonment . . .
- Child, abandonment of . . . See Child at neglect; Child custody
- Legal right, abandonment of . . . See Wa
- Property . . . See Property
ABC laws . . . 1224.01*A
Abduction . . .
- Generally . . . 1249.02*A; 1249.03*A; 1249.05*A; 1681.01*A; 1249.05*A; 1253.01*S; 1253.03*S; 1253.05*S
- Murder-abduction . . . Capital offense . . . S
- Parental abduction . . . See Familial abdu
- Venue . . . 1253.03*S
Abuse of children . . . See Child abuse
Abuse of process . . . See Discovery & production; Frivolousness; unreasonableness
Abuse of spouse . . . See Spousal abuse
Abusive language & fighting words . . .
- Breadth - Constitutional issues . . . 1649.01
- Free speech issues . . . 1649.01*A
- Yelling "F" cops" . . . 1649.01*A
- Yelling "I hate f" cops, and he's an too" . . . 1649.01*A
Acceleration . . . See Credit & debt; Debt trust
Acceptance . . . See Contracts; Gifts
Accessories . . . See Principals in crime
Accord & satisfaction . . . See Resolution disputes
Accountants . . . See Bookkeeping & records
Accountings . . .
- Fiduciary issues . . . See Agency
- Trusts . . . See Wills & estates
Account . . . Generally . . . 1234.01*A; 1447.01
1765.03*S; 12173.02*S
- See also . . . Credit & debt; Limitations actions; Rights of action/Cas actions; Verbal & substantive
Accusations . . . See also Character & reputation; Confrontation rig
Set offenses
1135.01*A; 1135.02*A; 1234.01*A; 1804.1804.03*S; 1804.04*S
Acquiescence . . . See Conceding; State of Terminology
Actions . . .
- Causes of action . . . See Rights of action/C of action
- Rights of action . . . See Rights of action/C of action
Admiral & statistical evidence . . . 1125.01
1416.06*S; 11399.08*S
Adopted . . .
- Term continued . . . See Terminology
Administrative law . . .
- Adjudicatory functions . . . 1512.02*S
- Administrative precedents . . . See Judicial & administrative precedent
- Administrative Process Act . . . 1863.01*A; 1863.02*A
- Adoption of regulations . . . See Promulgation
- Approved parties . . . See Litigants & parties
- Appeals . . . 12131.01*S
- Arbitration . . . See Arbitrariness & capriciousness
- Authority . . . See Powers & authority
- Basic law governing regulated market

TO: File
 Anna Phelps v. State Farm Mut. Auto. Ins. Co.
DATE: December 11, 1990

In a telephone conference call on December 11, 1990, counsel of record and the Judge agreed that Mr. Sackett's motion to dismiss should be granted. The case will not be dismissed on the merits, however. Mr. Harrison will draw the necessary decree and the case will be set for trial at the January 1991 term if requested.

RECORDS SECTION - CIVIL DIVISION
U.S. DISTRICT COURT
DISTRICT OF COLUMBIA
WASHINGTON, D.C.

DATE OF SERVICE

12/29/99

IN RE: RANDOLPH CIRCHIT - CIVIL - DECEASED - 119

FILE NO 019014-1-1277-99
DATE OF FILING 01
SERVICE DATE 12/29/99

ANNA L. PHILIPS

VS. LIFE FARM CO. AUTO INS CO

PERSONAL NOTICE TO DECEASED

DATE OF DEATH 1990

DATE OF BIRTH 1936

TYPE OF SERVICE PLATINUM WITNESS 12/29/99

DATE OF DEATH 12/29/99
DATE OF BIRTH 12/29/99

FILED IN THE CLERK'S OFFICE

On 11th day of Dec, 1999

WITNESS:

Elizabeth O. Wright Clerk
D.C.

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF BEDFORD

TO THE SHERIFF OF THE COUNTY OF BEDFORD,

OR ANY OTHER AUTHORIZED OFFICER:

You are commanded to summon

Mary Catherine Phelps
Route 2 Box 170
Goode, VA 24556

to appear in the Circuit Court of the County of Bedford, at its Courthouse
in Bedford, Virginia, on Wednesday, the 12th day of December,
1990, at 9:30 o'clock, a. m., to testify in the case of
Anna L. Phelps vs State Farm Mutual Insurance Ins. Co

This subpoena is issued on application of Henry M. Sackett III
in the above styled case.

WITNESS, Carol W. Black, Clerk of our said Court, at the Courthouse,
the 6th day of December, 1990, and in the 215th year of
the Commonwealth.

Carol W. Black, Clerk.

By: Kelly J. Cleary, Deputy Clerk

FILED IN THE CLERK'S OFFICE

The 11th day of Dec, 1990

TESTE: _____

Wazel C. Wright Clerk
D.C.

VIRGINIA:

IN THE CIRCUIT COURT OF BEDFORD COUNTY, January 2, 1991

ANNA L. PHELPS,

Plaintiff,

v.) (

ORDER GRANTING MOTION TO
DISMISS

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Chancery File No. 89015473

Defendant.

Came this day the parties upon the defendant's motion to dismiss for lack of subject matter jurisdiction and was argued by counsel. After a review of the motion and argument of counsel, the court found that the holding of the Virginia Supreme Court in Erie Insurance Group v. Hughes 6 VLR 2698 (June 8, 1990), is applicable and the proper parties are not before this court and therefore this court lacks subject matter jurisdiction.

Upon which holding, the plaintiff moved to continue the case until proper parties are added. This motion being without objection,

It is therefore ORDERED that this case shall be continued and no further proceedings shall be had until the plaintiff joins the necessary claimants, to-wit, Anna Featherstone and Jennifer Trevey and their respective insurance carriers as parties to this action and leave is hereby granted to the plaintiff to do so.

A copy of this order shall be mailed to both attorneys of record and this case shall continue on the docket.

RADFORD & WANDREI
ATTORNEYS AT LAW
BEDFORD, VIRGINIA
.24323

1

1991 January 2nd
FILED IN CHANCERY
ORDER BOOK.
No. 58 Page 643

ENTERED this the 2 day of

1991
1990.

[Signature]
Judge

I ask for this:

Henry M. Sackett III
Henry M. Sackett, III

Seen and Agreed to:

[Signature]
R. Louis Harrison, Jr.

1-3-91
cc Sackett
Harrison

RADFORD & WANDREI
ATTORNEYS AT LAW
BEDFORD, VIRGINIA
24523

VIRGINIA:

IN THE CIRCUIT COURT OF BEDFORD COUNTY

ANNA L. PHELPS,
GOVERNMENT EMPLOYEES INSURANCE COMPANY and
ANNA FEATHERSTONE,

Plaintiffs,

v.) (

AMENDED MOTION FOR
DECLARATORY JUDGMENT

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

JENNIFER TREVEY, and
UNITED STATES AUTOMOBILE ASSOCIATION
NATIONWIDE MUTUAL INSURANCE COMPANY

Defendants.

Comes now your plaintiffs and move for a declaratory judgment against the defendant, State Farm Mutual Automobile Insurance company, on the grounds as follows:

(1) Anna L. Phelps is an individual who was involved in an automobile accident in Bedford County, Virginia, on June 10, 1989.

(2) State Farm Mutual Automobile Insurance Company is an insurance company licensed and doing business in the State of Virginia.

(3) That Anna L. Phelps, the plaintiff, contracted for a policy of automobile insurance with State Farm Mutual Automobile

1

FILED IN THE CLERK'S OFFICE

The 9th day of Jan, 1991
TESTE: _____

Kelly J. Cleary Clerk
S.C.

RADFORD & WANDREI
ATTORNEYS AT LAW
BEDFORD, VIRGINIA
24323

Insurance company and Policy No. A370-661-46-01 was issued to her. A copy of which is attached hereto as Exhibit "A".

(4) That the policy was in good standing on June 10, 1989.

(5) That after June 10, 1989, Anna L. Phelps properly reported her accident to the defendant, State Farm.

(6) That by letter dated July 24, 1989, J. William Dinwiddie, Claims Superintendent of the Tidewater, Virginia, Division for State Farm, denied coverage because the vehicle Ms. Phelps was driving did not qualify as a "non-owned, temporary substitute or newly acquired automobile under your policy . . .". A copy of the denial letter is attached hereto as Exhibit "B".

(7) At the time of the accident, your plaintiff was driving a 1988 2-door Nissan owned by Mary c. Phelps, her sister.

(8) That at the time of the accident, Anna L. Phelps resided at 8319 Brookvale court, Springfield, Virginia 22153.

(9) That at the time of the accident, Mary L. Phelps resided at 8319 Brookvale Court, Springfield, Virginia 22153.

(10) That a non-owned vehicle pursuant to the State Farm insurance policy means "an automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile".

(11) That the State Farm automobile insurance policy provides coverage to non-owned automobiles as set out in Coverage

B of Part 1, Liability, of that policy.

(12) That Anna L. Phelps did not own the automobile involved in the accident.

(13) That the automobile involved in the accident was not furnished for the regular use of Anna L. Phelps.

(14) That a relative, under the terms of the policy, means "a relative of the insured who is a resident of the same household".

(15) That Anna L. Phelps is a biological relative, i.e., sister, of Mary C. Phelps.

(16) That Anna L. Phelps and Mary C. Phelps were not "residents of the same household" within the meaning of that term.

(17) That, therefore, the 1988 2-door Nissan was a non-owned automobile under the terms of the State Farm policy.

(18) That the plaintiff, Government Employees Insurance Company, is the liability and underinsured motorist carrier for Anna Featherstone, a possible claimant against Anna Phelps.

(19) That the defendant, United Services Automobile Association is the liability and underinsured carrier for Jennifer Trevey, a possible claimant against Anna Phelps.

(20) Nationwide Mutual Insurance Company is the liability carrier for Mary Phelps and may have an interest in the outcome

of this litigation.

(21) That there is a justiciable controversy between the parties concerning coverage on the State Farm Automobile Insurance police.

WHEREFORE, your plaintiffs pray that this Court declare that the vehicle Anna L. Phelps was driving on June 10, 1989, was a non-owned automobile under the provisions of State Farm Mutual Automobile Insurance Policy No. A30-661-46-01, and for such other and further relief as the nature of this case may require.

Respectfully submitted,

ANNA L. PHELPS

By: 

Of Counsel

R. Louis Harrison, Jr., p.q.
RADFORD & WANDREI
P.O. Box 1008
Bedford, Virginia 24523

CERTIFICATE

I hereby certify that a true and exact copy of the foregoing Amended Motion for Declaratory Judgment was hereby mailed to Henry M. Sackett, III, Esquire, Edmunds & Williams, P.C., P. O. Box 958, Lynchburg, Virginia 24505, this the 7 day of January, 1991.


R. Louis Harrison, Jr.

FAMILY
Automobile Policy
COMBINATION FORM



State Farm Mutual Automobile Insurance Company
HOME OFFICE/BLOOMINGTON, ILLINOIS

The address of the Regional Office issuing this policy is shown at the bottom of the Declarations Page.

Policy Form 9346F.8

Plaintiff's Exhibit

A

DECLARATIONS

POLICY PERIOD: The policy period shall be as shown in the Declarations under "Policy Period" and for such succeeding periods of twelve months each thereafter as the required renewal premium is paid by the insured on or before the expiration of the current policy period. The policy period shall begin and end at 12:01 A.M., standard time at the address of the named insured as stated herein. The premium shown is for the policy period indicated in the Declarations.

COVERAGES, LIMITS OF LIABILITY, PREMIUMS: The insurance afforded is only with respect to such of the coverages as are indicated in the Declarations by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all terms of the policy having reference thereto.

GARAGED: The owned automobile will be principally garaged in the declared town and state, unless otherwise stated in the exceptions.

LOSS PAYEE: Any loss under Part III is payable as interest may appear to the named insured and the Loss Payee, if any, shown in the Declarations and this insurance as to such additional interest shall not be invalidated by any act or negligence of the mortgagor or owner, nor any change in the title or ownership, nor by any error, or inadvertence in the description of the automobile until after notice of termination of the policy shall be given to the mortgage owner, conditional vendor, mortgagee or assignee stating when not less than 10 days thereafter such termination shall be effective; provided, the lien-holder shall notify the company within 10 days of any change of interest or ownership which shall come to the knowledge of said lien-holder and failure to do so will render this policy null and void.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

BLOOMINGTON, ILLINOIS.

A Mutual Insurance Company Herein Called The Company

Agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to all of the terms of this policy:

PART I — LIABILITY

COVERAGE A — Bodily Injury Liability;

COVERAGE B — Property Damage Liability. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of:

A. bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury", sustained by any person;

B. injury to or destruction of property, including loss of use thereof, hereinafter called "property damage";

arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile, and the company shall defend any suit alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent; but the company may make such investigation and settlement of any claim or suit as it deems expedient.

Supplementary Payments. To pay, in addition to the applicable limits of liability:

(a) all expenses incurred by the company, all costs taxed against the insured in any such suit and all interest on the entire amount of any judgment therein which accrues after entry of the judgment and before the company has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the company's liability thereon;

(b) premiums on appeal bonds required in any such suit, premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, and the cost of bail bonds required of the insured because of accident or traffic law violation arising out of the use of an automobile insured hereunder, not to exceed \$100 per bail bond, but without any obligation to apply for or furnish any such bonds;

(c) expenses incurred by the insured for such immediate medical and surgical relief to others as shall be imperative at the time of an accident involving an automobile insured hereunder and not due to war;

(d) all reasonable expenses, other than loss of earnings, incurred by the insured at the company's request.

Persons Insured. The following are insureds under Part I:

(a) with respect to the owned automobile,

(1) the named insured and any resident of the same household,

(2) any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, and

(3) any other person or organization but only with respect to his or its liability because of acts or omissions of an insured under (a)(1) or (2) above;

(b) with respect to a non-owned automobile,

(1) the named insured,

(2) any relative, but only with respect to a private passenger automobile or trailer,

provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission, and

(3) any other person or organization not owning or hiring the automobile, but only with respect to his or its liability because of acts or omissions of an insured under (b)(1) or (2) above.

The insurance afforded under Part I applies separately to each insured against whom claim is made or suit is brought, but the inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

Definitions. Under Part I:

"named insured" means the individual named as named insured in the declarations and also includes his spouse, if a resident of the same household;

"insured" means a person or organization described under "Persons Insured";

"relative" means a relative of the named insured who is a resident of the same household;

"owned automobile" means

(a) a private passenger, farm or utility automobile described in this policy for which a specific premium charge indicates that coverage is afforded;

(b) a trailer owned by the named insured;

(c) a private passenger, farm or utility automobile ownership of which is acquired by the named insured during the policy period, provided

(1) it replaces an owned automobile as defined in (a) above, or

(2) the company insures all private passenger, farm and utility automobiles owned by the named insured on the date of such acquisition and the named insured notifies the company within 30 days after the date of such acquisition of his election to make this and no other policy issued by the company applicable to such automobile, or

(d) a temporary substitute automobile;

"temporary substitute automobile" means any automobile or trailer, not owned by the named insured, while temporarily used with the permission of the owner as a substitute for the owned automobile or trailer when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction;

"non-owned automobile" means an automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile;

"private passenger automobile" means a four wheel private passenger, station wagon or jeep type automobile;

"farm automobile" means an automobile of the truck type with a load capacity of fifteen hundred pounds or less not used for business or commercial purposes other than farming;

"utility automobile" means an automobile, other than a farm automobile, with a load capacity of fifteen hundred pounds or less of the pick-up body, sedan delivery or panel truck type not used for business or commercial purposes;

"trailer" means a trailer designed for use with a private passenger automobile, if not being used for business or commercial purposes with other than a private passenger, farm or utility automobile, or a farm wagon or farm implement while used with a farm automobile;

"automobile business" means the business or occupation of selling, repairing, servicing, storing or parking automobiles;

"use" of an automobile includes the loading and unloading thereof;

"war" means war, whether or not declared, civil war, insurrection, rebellion or revolution, or any act or condition incident to any of the foregoing.

Exclusions. This policy does not apply under Part I:

(a) to any automobile while used as a public or livery conveyance, but this exclusion does not apply to the named insured with respect to bodily injury or property damage which results from the named insured's occupancy of a non-owned automobile other than as the operator thereof;

(b) to bodily injury or property damage caused intentionally by or at the direction of the insured;

(c) to injury, sickness, disease, death or destruction with respect to which an insured under the policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability;

(d) to bodily injury or property damage arising out of the operation of farm machinery;

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

(f) to bodily injury to any fellow employee of the insured injured in the course of his employment if such injury arises out of the use of an automobile in the business of his employer, but this exclusion does not apply to the named insured with respect to injury sustained by any such fellow employee;

(g) to an owned automobile while used by any person while such person is employed or otherwise engaged in the automobile business, but this exclusion does not apply to the named insured, a resident of the same household as the named insured, a partnership in which the named insured or such resident is a partner, or any partner, agent or employee of the named insured, such resident or partnership;

(h) to a non-owned automobile while maintained or used by any person while such person is employed or otherwise engaged in

(1) the automobile business of the insured or of any other person or organization,

(2) any other business or occupation of the insured, but this exclusion (h) (2) does not apply to a private passenger automobile operated or occupied by the

named insured or by his private chauffeur or domestic servant or a trailer used therewith or with an owned automobile;

(i) to injury to or destruction of (1) property owned or transported by the insured or (2) property rented to or in charge of the insured other than a residence or private garage;

(j) to the ownership, maintenance, operation, use, loading or unloading of an automobile ownership of which is acquired by the named insured during the policy period or any temporary substitute automobile therefor, if the named insured has purchased other automobile liability insurance applicable to such automobile for which a specific premium charge has been made.

Financial Responsibility Laws. When this policy is certified as proof of financial responsibility for the future under the provisions of any motor vehicle financial responsibility law, such insurance as is afforded by this policy for bodily injury liability or for property damage liability shall comply with the provisions of such law to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

Limits of Liability. The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury sustained by one person as the result of any one occurrence; the limit of such liability stated in the declarations as applicable to "each occurrence" is, subject to the above provision respecting each person, the total limit of the company's liability for all such damages arising out of bodily injury sustained by two or more persons as the result of any one occurrence.

The limit of property damage liability stated in the declarations as applicable to "each occurrence" is the total limit of the company's liability for all damages arising out of injury to or destruction of all property of one or more persons or organizations, including the loss of use thereof, as the result of any one occurrence.

Other Insurance. If the insured has other insurance against a loss covered by Part I of this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other and collectible insurance.

PART II — EXPENSES FOR MEDICAL SERVICES

Coverage C — Medical Payments. To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services;

Division 1. To or for the named insured and each relative who sustains bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury", caused by accident,

- (a) while occupying the owned automobile,
- (b) while occupying a non-owned automobile, but only if such person has, or reasonably believe he has, the permission of the owner to use the automobile and the use is within the scope of such permission, or
- (c) through being struck by an automobile or by a trailer of any type;

Division 2. To or for any other person who sustains bodily injury, caused by accident, while occupying

(a) the owned automobile, while being used by the named insured, by any resident of the same household or by any other person with the permission of the named insured; or

(b) a non-owned automobile, if the bodily injury results from

(1) its operation or occupancy by the named insured or its operation on his behalf by his private chauffeur or domestic servant, or

(2) its operation or occupancy by a relative, provided it is a private passenger automobile or trailer,

but only if such operator or occupant has, or reasonably believes he has, the permission of the owner to use the automobile and the use is within the scope of such permission.

Definitions. The definitions under Part I apply to Part II, and under Part II:

"occupying" means in or upon on entering into or alighting from.

Exclusions. This policy does not apply under Part II to bodily injury:

(a) sustained while occupying (1) an owned automobile while used as a public or livery conveyance, or (2) any vehicle while located for use as a residence or premises;

(b) sustained by the named insured or a relative while occupying or through being struck by (1) a farm type tractor or other equipment designed for use principally off public roads, while not upon public roads, or (2) a vehicle operated on rails or crawler-treads;

(c) sustained by any person other than the named insured or a relative,

(1) while such person is occupying a non-owned automobile while used as a public or livery conveyance, or

(2) resulting from the maintenance or use of a non-owned automobile by such person while employed or otherwise engaged in the automobile business, or

(3) resulting from the maintenance or use of a non-owned automobile by such person while employed or otherwise engaged in any other business or occupation, unless the bodily injury results from the operation or occupancy of a private passenger

automobile by the named insured or by his private chauffeur or domestic servant, or of a trailer used therewith or with an owned automobile;

(d) sustained by any person while is employed in the automobile business, if the accident arises out of the operation thereof and if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law;

(e) due to war.

Limit of Liability. The limit of liability for medical payments stated in the declarations as applicable to "each person" is the limit of the company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury as the result of any one accident.

Other Insurance. If there is other automobile medical payments insurance against a loss covered by Part II of this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible automobile medical payments insurance; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible automobile medical payments insurance.

PART III - PHYSICAL DAMAGE

COVERAGE D - (1) Comprehensive - Excluding Collision, (2) Personal Effects.

(1) To pay for loss caused other than by collision to the owned automobile or to a non-owned automobile. For the purpose of this coverage, breakage of glass and loss caused by missiles, falling objects, fire, theft or larceny, explosion, earthquake, windstorm, hail, water, flood, malicious mischief or vandalism, riot or civil commotion, or colliding with a bird or animal, shall not be deemed to be loss caused by collision.

(2) To pay for loss caused by fire or lightning to robes, wearing apparel and other personal effects which are the property of the named insured or a relative, while such effects are in or upon the owned automobile.

DEDUCTIBLE COMPREHENSIVE COVERAGE. To pay any loss payable under coverage D but it is agreed that the deductible amount, as shown on the declarations page by the number beside D, shall be deducted from the amount of each loss as to each automobile, other than loss by (a) fire or lightning, (b) smoke or smudge due to a sudden, unusual and faulty operation of any fixed heating equipment servicing the premises in which the automobile is located, or

(c) the stranding, sinking, burning, collision or derailment of any conveyance in or upon which the automobile is being transported.

If the policy affords insurance with respect to the collision coverage, breakage of glass caused by collision may, if the insured so elects, be treated as covered thereunder, subject to the terms thereof, instead of under the comprehensive coverage.

COVERAGE G - Collision. To pay for loss caused by collision to the owned automobile or to a non-owned automobile but only for the amount of each such loss in excess of the deductible amount stated in the declarations as applicable hereto.

COVERAGE H - Towing and Labor Costs. To pay for towing and labor costs necessitated by the disablement of the owned automobile or of any non-owned automobile, provided the labor is performed at the place of disablement.

Supplementary Payments. In addition to the applicable limit of liability:

(a) to reimburse the insured for transportation expenses incurred during the period commencing 48 hours after a

theft covered by this policy of the entire automobile has been reported to the company and the police, and terminating when the automobile is returned to use or the company pays for the loss; provided that the company shall not be obligated to pay aggregate expenses in excess of \$10 per day or totaling more than \$300.

(b) to pay general average and salvage charges for which the insured becomes legally liable, as to the automobile being transported.

Definitions. The definitions of "named insured", "relative", "temporary substitute automobile", "private passenger automobile", "farm automobile", "utility automobile", "automobile business", "war", and "owned automobile" in Part I apply to Part III, but "owned automobile" does not include, under Part III, (1) a trailer owned by the named insured on the effective date of this policy and not described herein, or (2) a trailer ownership of which is acquired during the policy period unless the company insures all private passenger, farm and utility automobiles and trailers owned by the named insured on the date of such acquisition and the named insured notifies the company within 30 days after the date of such acquisition of his election to make this and no other policy issued by the company applicable to such trailer.

"insured" means

(a) with respect to an owned automobile,

(1) the named insured, and

(2) any person or organization (other than a person or organization employed or otherwise engaged in the automobile business or as a carrier or other bailee for hire) maintaining, using or having custody of said automobile with the permission of the named insured and within the scope of such permission;

(b) with respect to a non-owned automobile, the named insured and any relative while using such automobile, provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission;

"non-owned automobile" means a private passenger automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile, while said automobile or trailer is in the possession or custody of the insured or is being operated by him;

"loss" means direct and accidental loss of or damage to (a) the automobile, including its equipment, or (b) other insured property;

"collision" means collision of an automobile covered by this policy with another object or with a vehicle to which it is attached or by upset of such automobile;

"trailer" means a trailer designed for use with a private passenger automobile, if not being used for business or commercial purposes with other than a private passenger, farm or utility automobile, and if not a home, office, store, display or passenger trailer.

Exclusions. This policy does not apply under Part III:

(a) to any automobile while used as a public or livery conveyance;

(b) to loss due to war;

(c) to loss to a non-owned automobile arising out of its use by the insured while he is employed or otherwise engaged in the automobile business;

(d) to loss to a private passenger, farm or utility automobile or trailer owned by the named insured and not described in this policy or to any temporary substitute automobile therefor, if the insured has other valid and collectible insurance against such loss;

(e) to damage which is due and confined to wear and tear, freezing, mechanical or electrical breakdown or failure, unless such damage results from a theft covered by this policy;

(f) to tires, unless damaged by fire, malicious mischief or vandalism, or stolen or unless the loss be coincident with and from the same cause as other loss covered by this policy;

(g) to loss due to radioactive contamination;

(h) under coverage G, to breakage of glass if insurance with respect to such breakage is otherwise afforded;

(i) to loss of or damage to any device or instrument designed for the recording, reproduction, or recording and reproduction of sound unless such device or instrument is permanently installed in the automobile;

(j) to loss of or damage to any tape, wire, record disc or other medium for use with any device or instrument designed for the recording, reproduction, or recording and reproduction of sound.

Limit of Liability. The limit of the company's liability for loss shall not exceed the actual cash value of the property, or if the loss is of a part thereof the actual cash value of such part, at time of loss, nor what it would then cost to repair or replace the property or such part thereof with other of like kind and quality, nor, with respect to an owned automobile described in this policy, the applicable limit of liability stated in the

declarations; provided, however, the limit of the company's liability (a) for loss to personal effects arising out of any one occurrence is \$100, and (b) for loss to any trailer not owned by the named insured is \$500.

Other Insurance. If the insured has other insurance against a loss covered by Part III of this policy, the

company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability of this policy bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible insurance.

PART IV — AUTOMOBILE DEATH INDEMNITY, TOTAL DISABILITY COVERAGE AND SPECIFIC DISABILITY BENEFITS

INSURING AGREEMENTS

I. COVERAGES

Division 1 — Death Indemnity

To pay the principal sum stated in the exceptions in the event of the death of the insured which shall result directly and independently of all other causes from bodily injury caused by accident and sustained by the insured while in or upon, or while entering into or alighting from, or through being struck by, an automobile, provided the death shall occur (1) within ninety days after the date of the accident, or (2) within fifty-two weeks after the date of the accident and during a period of continuous total disability of the insured for which weekly indemnity is payable under the total disability coverage.

Division 2 — (a) Dismemberment and Loss of Sight Benefits

(b) Fractures and Dislocations Benefits

To pay the highest applicable amount stated in the following Tables for loss as enumerated therein, in the event of bodily injury, caused by accident and sustained by the insured while in or upon, or while entering into or alighting from, or through being struck by, an automobile, provided loss under Table I be sustained by the insured within ninety days from such accident.

As respects any insured, (1) any amount for which the company is obligated or has made payment under Division 2 shall apply in reduction of any amount for which the company is obligated under Division 1;

(2) payment of the principal sum shall terminate all obligation of the company under coverage S.

TABLE I

	If applicable principal sum is	If applicable principal sum is
For Loss of	\$5,000.00	\$10,000.00
Both Hands or Both Feet or Sight of Both Eyes	\$5,000.00	\$10,000.00

One Hand and One Foot	5,000.00	10,000.00
Either Hand or Foot and Sight of One Eye	5,000.00	10,000.00
Either Hand or Foot	2,500.00	5,000.00
Sight of One Eye	1,750.00	3,500.00
Thumb and Index Finger of Either Hand	1,250.00	2,500.00

"Loss" shall mean with regard to hands and feet, actual severance through or above wrist or ankle joints; with regard to eyes, entire and irrecoverable loss of sight; with regard to thumb and index finger, actual severance through or above metacarpophalangeal joints.

TABLE II

	If applicable principal sum is	If applicable principal sum is
For Fracture of Bones:	\$5,000.00	\$10,000.00
Skull (except bones of face or nose)	\$175.00	\$350.00
Thigh	150.00	300.00
Arm, between elbow and shoulder	150.00	300.00
Pelvis (except coccyx)	125.00	250.00
Vertebra or Vertebrae (except coccyx and vertebral processes)	125.00	250.00
Shoulder Blade	100.00	200.00
Leg	100.00	200.00
Kneecap	100.00	200.00
Collar Bone	75.00	150.00
Forearm, between wrist and elbow	75.00	150.00
Foot (except toes)	62.50	125.00
Hand (except fingers)	62.50	125.00
Sternum	50.00	100.00

Lower Jaw (except alveolar process)	37.50	75.00
One or more ribs, fingers or toes	25.00	50.00
Bones of face or nose	25.00	50.00
Coccyx or Vertebral Processes	25.00	50.00
For Complete Dislocations:		
Hip Joint	\$150.00	\$300.00
Knee Joint (except patella)	75.00	150.00
Bone or Bones of Foot (except toes)	75.00	150.00
Ankle Joint	75.00	150.00
Wrist Joint	62.50	125.00
Elbow Joint	50.00	100.00
Shoulder Joint	37.50	75.00
Bone or Bones of Hand (except fingers)	25.00	50.00
Collar Bone	25.00	50.00
One or more fingers or toes	12.50	25.00
For Loss by Removal:		
Of one or more entire toes	\$100.00	\$200.00
Of one or more fingers (at least one entire phalanx)	75.00	150.00
For a Hospital-confining Injury, except as an Outpatient:	\$25.00	\$50.00

COVERAGE T — Total Disability — Maximum 200 Weeks. To pay weekly indemnity at the rate stated in the exceptions for the period of continuous total disability of the insured which shall result directly and independently of all other causes from bodily injury caused by accident and sustained by the insured while in or upon or while entering into or alighting from, or through being struck by, an automobile, provided (1) such disability shall commence within twenty days after the date of the accident, and (2) any disability during the period of fifty-two weeks from its commencement shall be deemed total disability only if it shall continuously prevent the insured from performing every duty pertaining to his occupation, and (3) any disability after said fifty-two weeks shall be deemed total disability only if it shall continuously prevent the insured from engaging in any occupation or employment for wage or profit and (4) the weekly indemnity for total disability as provided hereinabove shall in no event extend beyond a period of 200 consecutive weeks from the date of commencement of disability as provided above.

2. Definition of Insured. With respect to coverages S and T, the unqualified word "insured" means the person or

persons so designated for each such coverage in the exceptions.

3. Automobile defined. With respect to this insurance the word "automobile" means a land motor vehicle or trailer not operated on rails or crawler treads, but does not mean: (1) a farm type tractor or other equipment designed for use principally off public roads, except while actually upon public roads, or (2) a land motor vehicle or trailer while located for use as a residence or premises and not as a vehicle.

4. Policy Period, Territory. This insurance applies only to accidents which occur during the policy period within the United States of America, its territories or possessions, or Canada.

EXCLUSIONS. This insurance does not apply:

(a) to bodily injury or death sustained in the course of his occupation by any person while engaged (1) in duties incident to the operation, loading or unloading of, or as an assistant on, a public or livery conveyance or commercial automobile, or (2) in duties incident to the repair or servicing of automobiles;

(b) to loss caused by or resulting from disease except pus forming infection which shall occur through bodily injury to which this insurance applies;

(c) to suicide, sane or insane, or to any attempt thereof;

(d) to injury or death due to war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing.

CONDITIONS.

1. Policy Provisions. None of the insuring agreements, exclusions or other provisions of Parts I, II and III of the policy or conditions of the policy shall apply to the insurance afforded by this Part IV except the conditions "Notice", "Action Against Company (Medical Payments)", "Changes", "Assignment", "Cancellation" and "Declarations".

2. Notice of Claim. When loss covered hereunder occurs, written notice thereof shall be given by or on behalf of the insured or the beneficiary to the company or any of its authorized agents as soon as practicable.

3. Proof of Claim; Medical Reports. As soon as practicable, the injured person, or the beneficiary in the event of death, or someone on his behalf, shall give to the company written proof of claim, under oath if required; and shall after each request from the company execute authorization to enable the company to obtain medical reports and copies of records.

Proof of claim shall be made upon forms furnished by the company unless the company shall have failed to

furnish such forms within fifteen days after receiving notice of claim.

The injured person shall submit to physical examination by physicians selected by the company when and as often as the company may reasonably require.

4. Payment of Death Indemnity; Autopsy — Division 1 of Coverage S. If the decedent insured be survived by a spouse who was a resident of the same household at the time of the accident, indemnity for death is payable to such spouse; otherwise, if the decedent insured was a minor, indemnity for death is payable to any parent thereof who was a resident of the same household at the time of the accident; otherwise indemnity for death is payable to the decedent insured's estate.

The company shall have the right and opportunity to make an autopsy where it is not forbidden by law.

5. Payment of Indemnity — Coverage T. Weekly Indemnity for total disability is payable to the insured who is disabled. Subject to proof of claim, accrued

weekly indemnity is payable every four weeks and any balance at termination of the disability period for which the company is liable.

6. Beneficiary — Division 1 of Coverage S. Consent of beneficiary is not requisite to cancelation, assignment, change of beneficiary, or any other change in the policy.

7. Death of Named Insured. If the named insured dies, any insurance afforded under this Part IV with respect to any surviving insured shall be continued while the policy is in effect.

8. Other Insurance. If any insured under this Part IV also is an insured under other coverage of the same kind, issued by the company, any payment for loss under such other coverage shall serve to reduce, to the extent of such payment, the company's obligation under this Part IV as respects any loss to such insured, and the company will return the premium paid for such duplication of the insurance hereunder.

CONDITIONS

Conditions 3, 13 and 15 through 17 apply to all Parts.

Conditions 1, 2, 14 and 4 through 12, apply only to the Parts noted thereunder.

1. Policy Period, Territory (Parts I, II and III). This policy applies only to accidents, occurrences and loss during the policy period while the automobile is within the United States of America, its territories or possessions, or Canada, or is being transported between ports thereof.

2. Premium (Parts I, II and III). If the named insured disposes of, acquires ownership of, or replaces a private passenger, farm or utility automobile or, with respect to Part III, a trailer, any premium adjustment necessary shall be made as of the date of such change in accordance with the manuals in use by the company. The named insured shall, upon request, furnish reasonable proof of the number of such automobiles or trailers and a description thereof.

3. Notice. In the event of an accident, occurrence or loss, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable. In the event of theft the insured shall also promptly notify the police. If claim is made or suit is brought against the insured, he

shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

4. Two or More Automobiles (Parts I, II and III). When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each, but an automobile and a trailer attached thereto shall be held to be one automobile as respects limits of liability under Part I of this policy, and separate automobiles under Part III of this policy, including any deductible provisions applicable thereto.

5. Assistance and Cooperation of the Insured (Parts I and III). The insured shall cooperate with the company and, upon the company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of bodily injury, property damage or loss with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The failure or refusal of the insured to cooperate with or assist the company which prejudices the company's defense of an action for damages arising out of the operation or use of an

automobile shall constitute non-compliance with the requirements of the policy that the insured shall cooperate with and assist the company. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

6. Action Against Company (Part I). No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. No person or organization shall have any right under this policy to join the company as a party to any action against the insured to determine the insured's liability, nor shall the company be impleaded by the insured or his legal representative. Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.

(Parts II, III and IV). No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy nor, under Part III, until thirty days after proof of loss is filed and the amount of loss is determined as provided in this policy.

7. Medical Reports; Proof and Payment of Claim (Part II). As soon as practicable the injured person or someone on his behalf shall give to the company written proof of claim, under oath if required, and shall, after each request from the company, execute authorization to enable the company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the company when and as often as the company may reasonably require.

The company may pay the injured person or any person or organization rendering the services and such payment shall reduce the amount payable hereunder for such injury. Payment hereunder shall not constitute an admission of liability of any person or, except hereunder, of the company.

8. Insured's Duties in Event of Loss (Part III). In the event of loss the insured shall:

(a) protect the automobile, whether or not the loss is covered by this policy, and any further loss due to the insured's failure to protect shall not be recoverable under this policy; reasonable expenses incurred in affording such protection shall be deemed incurred at the company's request;

(b) file with the company, within 91 days after loss, his sworn proof of loss in such form and including such information as the company may reasonably require and shall, upon the company's request, exhibit the damaged property and submit to examination under oath.

9. Appraisal (Part III). If the insured and the company fail to agree as to the amount of loss, either may, within 60 days after proof of loss is filed, demand an appraisal of the loss. In such event the insured and the company shall each select a competent appraiser, and the appraisers shall select a competent and disinterested umpire. The appraisers shall state separately the actual cash value and the amount of loss and failing to agree shall submit their differences to the umpire. An award in writing of any two shall determine the amount of loss. The insured and the company shall each pay his chosen appraiser and shall bear equally the other expenses of the appraisal and umpire.

The company shall not be held to have waived any of its rights by any act relating to appraisal.

10. Payment of Loss (Part III). The company may pay for the loss in money; or may repair or replace the damaged or stolen property; or may, at any time before the loss is paid or the property is so replaced, at its expense return any stolen property to the named insured, or at its option to the address shown in the declarations, with payment for any resultant damage thereto; or may take all or such part of the property at the agreed or appraised value but there shall be no abandonment to the company. The company may settle any claim for loss either with the insured or the owner of the property.

11. No Benefit to Bailee (Part III). The insurance afforded by this policy shall not inure directly or indirectly to the benefit of any carrier or other bailee for hire liable for loss to the automobile.

12. Subrogation (Parts I and III). In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and

papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

13. Changes. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by an executive officer of the company.

14. Limit of Liability — Coverage H. The company's liability shall not exceed \$25.00 for each disablement.

15. Assignment. Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon; if, however, the insured named as named insured in the declarations, or his spouse if a resident of the same household, shall die, this policy shall cover (1) the survivor as named insured, (2) his legal representative as named insured but only while acting within the scope of his duties as such, (3) any person having proper temporary custody of an owned automobile, as an insured, until the appointment and qualification of such legal representative, and (4) under division 1 of Part II any person who was a relative at the time of such death.

16. Cancellation. This policy may be canceled by the insured named as named insured in the declarations by mailing to the company written notice stating when thereafter the cancellation shall be effective. This policy may be canceled by the company by mailing to the insured named as named insured in the declarations at the address shown in this policy written notice stating when not less than ten days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by such insured or by the company shall be equivalent to mailing.

If such insured cancels, earned premium shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made either at the time cancellation is effected or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation.

17. Declarations. By acceptance of this policy, the insured named as named insured in the declarations agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

MUTUAL CONDITIONS

1. Mutuals — Membership and Voting Notice. The first insured named in the declarations is notified that by virtue of this policy he is a member of the State Farm Mutual Automobile Insurance Company of Bloomington, Illinois, and while this policy is in force is entitled to vote at all meetings of members and to share in the earnings and savings of the company in accordance with the dividends declared by the Board of Directors on this and like policies.

2. No Contingent Liability. This policy is non-assessable.

3. Annual Meeting. The annual meeting of the members of the company shall be held at its home office at Bloomington, Illinois, on the second Monday of June at the hour of 10:00 A.M., unless the Board of Directors shall elect to change the time and place of such meeting, in which case, but not otherwise, due notice shall be mailed each member at the address disclosed in this policy at least ten (10) days prior thereto.

In Witness Whereof, the State Farm Mutual Automobile Insurance Company has caused this policy to be signed by its President and Secretary at Bloomington, Illinois.

Laura P. Sullivan
SECRETARY

Edward B. Rust Jr.
PRESIDENT

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Note: The following endorsement applies when the endorsement number appears on the declarations page.

6460.2 VIRGINIA AUTOMOBILE INSURANCE PLAN

It is understood and agreed that in the event of cancellation of this policy by either insured or the company, the earned premium calculated in accordance with the cancellation condition of the policy, shall be subject to a minimum of \$25.00 as provided in Section 18 of the Virginia Automobile Insurance Plan.

Note: The following endorsement applies when the endorsement number appears on the declarations page.

6882AQ PREMIUM AND COVERAGE CHANGES ENDORSEMENT

It is agreed that, subject to all the provisions of the policy except where modified herein, the following provision is added:

PREMIUM AND COVERAGE CHANGES

A. Premium Changes

The premium for this policy is based on information the company has received from the named insured or other sources. The named insured agrees that if any of this information material to the development of the policy premium is incorrect, incomplete or changed, the company may adjust the premium accordingly during the policy period; and to cooperate with the company in determining if this information is correct and complete, and to advise the company of changes in this information.

Any adjustment of the policy's premium will be made using the rules in effect at the time of the change.

Premium adjustment made be made as the result of a change in:

1. automobiles insured by the policy, including changes in use.
2. driver, driver's age or driver's marital status.
3. coverages and coverage limits.
4. rating territory.
5. eligibility for discounts or other premium credits.

B. Coverage Changes

The company may revise the coverages under this policy to provide more protection without additional premium charge. If the company does this and the named insured has the coverage which is changed, this policy will automatically provide the additional coverage as of the date the revision is effective in this state. Otherwise, this policy contains all of the coverage agreements between the named insured and the company. Its terms may not be changed or waived except by an endorsement issued by the company.

Note: The following endorsement applies when the endorsement number is shown on the declarations page.

6191C DISTRICT OF COLUMBIA EMPLOYEES USING AUTOMOBILES IN GOVERNMENT BUSINESS

It is agreed that the policy does not apply under the Liability Coverages to the following insureds:

1. The District of Columbia or any of its Agencies.
2. Any person, including the named insured, with respect to bodily injury or property damage resulting from the operation of an automobile by such person as an employee of the District of Columbia while acting within the scope of his office or employment, if such person is relieved from liability because of the provisions of Public Law 86-654 (District of Columbia Employee Non-Liability Act), as amended.

Note: The following endorsement applies when the endorsement number is shown on the declarations page.

6256W.1 SOUND RECEIVING AND TRANSMITTING EQUIPMENT EXCLUDED

It is agreed that any Physical Damage Insurance afforded by the policy is subject to the following additional exclusion:

This insurance does not apply to loss of, or damage to any sound receiving or sound receiving and transmitting equipment designed for use as a citizen's band radio, two-way mobile radio or telephone, or scanning monitor receiver, including any accessories and antennas unless permanently installed in the opening of the dash or console of the automobile normally used by the motor vehicle manufacturer for the installation of a radio.

Note: This endorsement replaces any endorsement providing similar coverage. It applies when the endorsement number is shown on the declarations page.

6273HL5 SUPPLEMENTARY UNINSURED MOTORISTS INSURANCE (Bodily Injury - Property Damage - Limits - Underinsured Motorists) (Virginia)

It is agreed that, with respect to such insurance as is afforded by the policy for damages because of bodily injury and property damage caused by accident and arising out of the ownership, maintenance or use of an uninsured motor vehicle, subdivision (a) of the definition of "uninsured motor vehicle" is amended to include "underinsured" motor vehicle, subject to the following provisions:

1. If limits of liability for such insurance are stated in the schedule of this endorsement or in the declarations, and subject to 2. below:
 - (a) the split limits so stated as applicable to bodily injury for "each person"/"each accident" and property damage for "each accident" shall apply in lieu of any limits therefor stated elsewhere in the policy, and subject to all the terms of the policy having reference thereto, shall be the total limit of the company's liability for all damages because of bodily injury and property damage as the result of any one accident arising out of the ownership, maintenance or use of uninsured motor vehicles; or
 - (b) the single limit so stated as applicable to bodily injury and property damage for "each accident" shall apply in lieu of any limit therefor stated elsewhere in the policy, and subject to all the terms of the policy having reference thereto, shall be the total limit of the company's liability for all damages as the result of any one accident arising out of the ownership, maintenance or use of uninsured motor vehicles; provided such limit of liability shall first provide the separate limits required by the Virginia Motor Vehicle Safety Responsibility Act as stated in the schedule of this endorsement or in the declarations.
2. When used in reference to this insurance (including this and other endorsements forming a part of the policy):

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A motor vehicle is "underinsured" when, and to the extent that, the total amount of bodily injury and property damage coverage applicable to the operation or use of the motor vehicle and "available for payment" for such bodily injury or property damage, including all bonds or deposits of money or securities made pursuant to Article 6 of Chapter 6 of Title 46.1 of the Code of Virginia (Section 46.1-467 et seq.), is less than the total amount of uninsured motorist coverage afforded any person injured as a result of the operation or use of the vehicle.

"Available for payment" means the amount of liability insurance coverage applicable to the claim of the injured person for bodily injury or property damage reduced by the payment of any other claims arising out of the same occurrence.

If an injured person is entitled to underinsured motorist coverage under more than one policy, the following order of priority of policies applies and any amount available for payment shall be credited against such policies in the following order of priority:

1. The policy covering a motor vehicle occupied by the injured person at the time of the accident;
2. The policy covering a motor vehicle not involved in the accident under which the injured person is a named insured;
3. The policy covering a motor vehicle not involved in the accident under which the injured person is an insured other than a named insured.

Where there is more than one insurer providing coverage under one of the payment priorities set forth, their liability shall be proportioned as to their respective underinsured motorist coverages.

3. The company shall not be obligated to make any payment because of bodily injury or property damage to which this insurance applies and which arises out of the ownership, maintenance or use of an underinsured motor vehicle until after the limits of liability under all bodily injury and property damage liability bonds or insurance policies respectively applicable at the time of the accident to damages because of bodily injury or because of property damage have been exhausted by payment of judgments or settlements.
4. Exclusion (a) in the Uninsured Motorists Insurance endorsement does not apply to the underinsured motorists coverage afforded by this endorsement.
5. The second paragraph of the Other Insurance Condition in the Uninsured Motorists Insurance endorsement does not apply to the underinsured motorists coverage afforded by this endorsement.

SCHEDULE - LIMIT OF LIABILITY

Split Limits see amounts in declarations

Single Limit Bodily Injury and Property Damage \$ see amount in declarations each accident, provided such limit shall first be: Bodily Injury \$25,000 each person, \$50,000 each accident, Property Damage \$10,000 each accident.

Note: This endorsement replaces any similar coverage or endorsement printed in the policy. It applies when the endorsement number is shown on the declarations page.

6520.7 UNINSURED MOTORISTS INSURANCE (Virginia)

In consideration of the payment of premium and subject to all of the provisions of this endorsement and to the applicable provisions of the policy, the company agrees with the named insured as follows:

I. COVERAGE U - UNINSURED MOTORISTS (Damages for Bodily Injury and Property Damage)

The company will pay in accordance with Section 38.2-2206 of the Code of Virginia and all Acts amendatory thereof or supplementary thereto, all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured or property damage, caused by accident and arising out of the

ownership, maintenance or use of such uninsured motor vehicle.

Exclusions

This insurance does not apply:

(a) to bodily injury or property damage with respect to which the insured or his legal representative shall, without written consent of the company, make any settlement with

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any person or organization who may be legally liable therefor.

(b) to the first two hundred dollars of the total amount of all property damage as the result of any one accident. This exclusion does not apply if the owner or operator of the uninsured motor vehicle causing the damage can be identified;

(c) so as to inure directly or indirectly to the benefit of any insurer of property.

II. PERSONS INSURED

Each of the following is an insured under this insurance to the extent set forth below:

(a) the named insured and, while residents of the same household, the spouse and relatives of either;

(b) any other person while occupying an insured motor vehicle; and

(c) any person, with respect to damage he is entitled to recover because of bodily injury to which this insurance applies sustained by an insured under (a) or (b) above.

The insurance applies separately with respect to each insured, except with respect to the limits of the company's liability.

III. LIMITS OF LIABILITY

Regardless of the number of (1) persons or organizations who are insureds under this insurance, (2) persons or organizations who sustain bodily injury or property damage, (3) claims made or suits brought on account of bodily injury or property damage, or (4) motor vehicles to which this insurance applies,

(a) If the schedule or declarations indicate split limits of liability, the limit of liability for bodily injury stated as applicable to "each person" is the limit of the company's liability for all damages because of bodily injury sustained by one person as the result of any one accident and, subject to the above provision respecting "each person", the limit of liability for bodily injury stated as applicable to "each accident", is the total limit of the company's liability for all damages because of bodily injury sustained by two or more persons as the result of any one accident. The limit of liability for property damage stated as applicable to each accident is the total limit of the company's liability for all damages because of property damage to all property of one or more insureds as the result of any one accident.

(b) If the schedule or declarations indicate a single limit of liability, the limit of liability stated as applicable to "each accident" is the total limit of the company's liability for all damages as the result of any one accident; provided such limit of liability shall first provide the separate limits required by the Virginia Motor Vehicle

Safety Responsibility Act as stated in the schedule or declarations.

(c) If claim is made under this insurance and claim is also made against any person or organization who is an insured under the bodily injury liability or property damage liability coverage of the policy because of bodily injury or property damage sustained in an accident by a person who is an insured under this insurance, any payment made under this insurance to or for any such person shall be applied in reduction of any amount which he may be entitled to recover from any person or organization who is an insured under the bodily injury or property damage liability coverages.

(d) Any amount payable under this insurance because of bodily injury or property damage sustained in an accident by a person who is an insured under this insurance shall be reduced by all sums paid because of such bodily injury or property damage by or on behalf of the owner or operator of an uninsured motor vehicle.

(e) Any amount recoverable as damages because of bodily injury or property damage sustained in an accident by a person who is an insured under this insurance shall be reduced by all sums paid because of such bodily injury or property damage by or on behalf of any person or organization jointly or severally liable together with the owner or operator of an uninsured motor vehicle for such bodily injury or property damage including all sums paid under the bodily injury or property damage coverage of the policy.

IV. POLICY PERIOD: TERRITORY

This insurance applies only to accidents which occur during the policy period and within the United States of America, its territories or possessions, or Canada.

V. DEFINITIONS

When used in reference to this insurance (including endorsements forming a part of the policy):

bodily injury — means bodily injury, sickness or disease, including death, sustained by a person who is an insured under (a) or (b) of the Persons Insured provision;

hit-and-run vehicle — means a motor vehicle which causes an accident resulting in bodily injury to an insured or property damage, provided;

(a) there cannot be ascertained the identity of either the operator or the owner of such motor vehicle; and

(b) the insured or someone on his behalf shall have reported the accident promptly to either the company, or a law-enforcement officer.

insured motor vehicle — means a motor vehicle registered in Virginia with respect to which the bodily injury and property damage liability coverage of the policy applies but shall not

include a vehicle while being used without the permission of the owner;

motor vehicle — means a land motor vehicle or trailer other than

(a) a farm type tractor or other equipment designed for use principally off public roads, while not upon public roads,

(b) a vehicle operated on rails or crawler-treads, or

(c) a vehicle while located for use as a residence or premises;

named insured — means the person named in the declarations of this policy and includes the spouse if a resident of the same household;

occupying — means in or upon or entering into or alighting from;

property damage — means injury to or destruction of (1) an insured motor vehicle owned by the named insured or his spouse, if a resident of the same household and the contents of such motor vehicle, and (2) any other property (except a motor vehicle) owned by an insured and located in Virginia;

relative — means a person related to the named insured by blood, marriage or adoption who is a resident of the same household;

uninsured motor vehicle — means:

(a) a motor vehicle with respect to the ownership, maintenance or use of which there is, in at least the amounts specified in the Virginia Motor Vehicle Safety Responsibility Act, neither (i) cash or securities on file with the Virginia Commissioner of Motor Vehicles nor (ii) a bodily injury and property damage liability bond or insurance policy, applicable at the time of the accident with respect to any person or organization legally responsible for the use of such vehicle, or with respect to which there is such a bond or insurance policy applicable at the time of the accident but the company writing the same is or becomes insolvent or denies coverage thereunder; or

(b) a hit-and-run vehicle as defined.

VI. CONDITIONS

A. Policy Provisions. None of the Insuring Agreements, Exclusions, Conditions or other provisions of the policy shall apply to the insurance afforded by this endorsement except the Conditions "Notice", "Insured's Duties in the Event of Loss", "Subrogation", "Changes", "Assignment", "Cancellation" and "Declarations".

B. Premium. If during the policy period the number of insured motor vehicles owned by the named insured or spouse and registered in Virginia changes, the named insured shall notify the company during the policy period of any change and the premium shall be adjusted in

accordance with the manuals in use by the company. If the earned premium thus computed exceeds the advance premium paid, the named insured shall pay the excess to the company; if less, the company shall return to the named insured the unearned portion paid by such insured.

C. Proof of Claim; Medical Reports; Proof of Loss. As soon as practicable, the insured or other person making claim shall give to the company written proof of claim, under oath if required, including full particulars of the nature and extent of the injuries, treatment, and other details entering into the determination of the amount payable hereunder. Proof of claim shall be made upon forms furnished by the company unless the company shall have failed to furnish such forms within 15 days after receiving notice of claim.

The injured person shall submit to physical examinations by physicians selected by the company when and as the company may reasonably require and he, or in the event of his incapacity his legal representative, or in the event of his death his legal representative or the persons or persons entitled to sue therefor, shall upon each request from the company execute authorization to enable the company to obtain medical reports and copies of records.

The insured or other person making claim for damage to property shall file proof of loss with the company within sixty days after the occurrence of loss, unless such time is extended in writing by the company, in the form of a sworn statement setting forth the interest of the insured and of all others in the property affected, any encumbrances thereon, the actual cash value thereof at time of loss, the amount, place, time and cause of such loss, and the description and amounts of all other insurance covering such property. Upon the company's request, the insured shall exhibit the damaged property to the company.

With respect to claims alleged to have arisen out of the ownership, maintenance or use of a hit-and-run vehicle if the insured has not obtained a judgment against John Doe, the liability of the uninsured motorist may be established, as between the insured and the company, by filing with the company within a reasonable time after the accident a statement under oath that the insured or his legal representative has a cause or causes of action arising out of such accident for damages against a person or persons whose identity is unascertainable, setting forth the facts in support thereof, and shall present clear and convincing evidence that there was a hit-and-run vehicle involved in the accident.

D. Notice of Legal Action. If, before the company makes payment of loss hereunder, the insured or his legal representative shall institute any legal action for bodily injury or property damage against any person or organization legally responsible for the use of a motor vehicle involved in the accident, a copy of the summons and complaint or other process served in connection with such legal action shall be forwarded immediately to the company by the insured or his legal representative.

E. Other Insurance. With respect to bodily injury to an insured while occupying a motor vehicle not owned by the named insured, this insurance shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such vehicle as primary insurance.

Except as provided in the foregoing paragraph, if the insured has other similar bodily injury insurance available to him and applicable to the accident, the company shall not be liable for a greater proportion of any loss to which this coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.

With respect to property damage, this insurance shall apply only as excess insurance over any other valid and collectible insurance of any kind applicable to such property damage.

With respect to an accident wherein an employee of a self-insured employer receives a worker's compensation award for injuries resulting from an accident with an uninsured motor vehicle, such award shall be set off against

any judgment for damages awarded for personal injuries resulting from such accident.

F. Payment of Loss by the Company. Any amount due hereunder is payable

- (a) to the insured, or
- (b) if the insured be a minor to his parent or guardian, or
- (c) if the insured be deceased to his surviving spouse, otherwise
- (d) to a person authorized by law to receive such payment or to a person legally entitled to recover the damages which the payment represents;

provided, the company may at its option pay any amount due hereunder in accordance with division (d) hereof.

G. This endorsement replaces any other provisions of the policy, including any endorsement forming a part thereof, affording similar insurance with respect to any damages arising out of the ownership, maintenance or use of an uninsured motor vehicle or a hit-and-run vehicle.

SCHEDULE

LIMIT OF LIABILITY

Split Limits

Limits of Liability stated in declarations

Single Limit

Limit of Liability stated in declarations provided such limit shall first be:

Bodily Injury	\$25,000 each person
	\$50,000 each accident
Property Damage	\$10,000 each accident

Note: The following endorsement applies when the endorsement number is shown on the declarations page.

6557 FEDERAL EMPLOYEES USING AUTOMOBILES IN GOVERNMENT BUSINESS

It is agreed that the policy does not apply under the Liability Coverages to the following as insureds:

1. The United States of America or any of its agencies;
2. Any person, including the named insured, with respect to bodily injury or property damage resulting from the operation of an automobile by such person as an employee of the United States Government while acting within the scope of his office or employment, if the provisions of Section 2679 of Title 28, United States Code (Federal Tort Claims Act), as amended, require the Attorney General of the United States to defend such person in any civil action or proceeding which may be brought for such bodily injury or property damage, whether or not the incident out of which such bodily injury or property damage arose has been reported by or on behalf of such person to the United States or the Attorney General.

Note: If both coverages D and G are provided under Part III endorsement 6259V applies but if only coverage D is provided, endorsement 6259Y applies.

6259V PHYSICAL DAMAGE ENDORSEMENT Part III

It is agreed that

1. With respect to such coverage as is afforded under the Comprehensive coverage, ** shall be deducted from the amount of each loss as to each automobile.
2. With respect to such coverage other than as enumerated in paragraph 1 above, *** shall be deducted from the amount of each loss as to each automobile.
3. The following exclusions are added:
This policy does not apply under Part III:
 - (1) to loss to the automobile while being operated in any prearranged or organized racing or speed contest or in practice or preparation for any such contest;
 - (2) to any loss to the automobile arising out of or during the use of such automobile for the transportation of any explosive substance, flammable liquid, or similarly hazardous materials, except such transportation as is incidental to ordinary household or farm activities of the named insured;

** See amount with coverage D in declarations.

*** See amount with coverage G in declarations.

6259Y PHYSICAL DAMAGE ENDORSEMENT Part III

It is agreed that

1. With respect to such coverage as is afforded under the Comprehensive coverage, ** shall be deducted from the amount of each loss as to each automobile.
2. The following exclusions are added:
This policy does not apply under Part III:
 - (1) to loss to the automobile while being operated in any prearranged or organized racing or speed contest or in practice or preparation for any such contest;
 - (2) to any loss to the automobile arising out of or during the use of such automobile for the transportation of any explosive substance, flammable liquid, or similarly hazardous materials, except such transportation as is incidental to ordinary household or farm activities of the named insured;

** See amount with coverage D in declarations.

Note: When Coverage R is shown in the declarations, this endorsement replaces any similar coverage in the policy.

6230.2L LOSS OF USE COVERAGE R

The company agrees to reimburse the named insured for any necessary transportation expense incurred not exceeding \$10 per day or totaling more than \$300, due to the loss of use of an insured motor vehicle because of damage caused by accident to such vehicle.

1. This endorsement does not apply in the event of a theft of such vehicle for which transportation expense reimbursement coverage is provided under the policy.

2. The total payment under this insurance shall not exceed the actual cash value of such vehicle at the time of loss.
3. As used herein insured motor vehicle means the vehicle described in the declarations and for which a specific premium for this coverage is charged.

This endorsement is subject to such exclusions, conditions, and other terms of the policy as are applicable to the Comprehensive, Fire, Windstorm, Theft, Etc., and/or Collision coverages which are not inconsistent herewith.

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State Farm Mutual Automobile Insurance Company

July 24, 1989



State Farm Claims Office
111 Candlewood Court
P. O. Box 2089
Lynchburg, Virginia 24501
Phone: 804/237-6900

Miss Anna L. Phelps
c/o Marjorie Phelps
Rt. 2, Box 170
Goode, Va. 24556

Re: Insured - Anna L. Phelps
Policy # - A370 661-46-01
Cl. # - 46-7001-461
Date of Loss - 6-10-89

Dear Miss Phelps:

After a thorough review of the above captioned accident, it is the Company's decision that the vehicle you were driving does not qualify as a non-owned, temporary substitute or newly acquired automobile under your policy, and therefore, we will not be able to extend coverage to you for this loss.

Very truly yours,

A handwritten signature in cursive script that reads "J. William Dinwiddie".

J. William Dinwiddie
CLAIM SUPERINTENDENT
TIDEWATER VIRGINIA DIVISION

JWD:jen

cc: Anna Featherston - 78 Hunting Lane, Goode, Va. 24556
cc: Jenny Trevey - 111 Collington Dr., Lynchburg, Va. 24502
cc: Anna Phelps - 8319 Brookvale Ct., Springfield, Va. 22153

Plaintiff's Exhibit

B

GENTRY LOCKE
RAKES & MOORE

Attorneys at Law

703-982-8000

Telecopier 703-982-8524

10 Franklin Road, S.E.

Post Office Box 1018

Roanoke, Virginia 24005

February 5, 1991

Carol W. Black, Clerk
Bedford County Circuit Court
P.O. Box 235
Bedford, Virginia 24523

Re: Anna L. Phelps, Government Employees Insurance
Company and Anna Featherstone
v.
State Farm Mutual Automobile Insurance Company,
Jennifer Trevey, United States Automobile Association
and Nationwide Mutual Insurance Company

Dear Ms. Black:

Please find enclosed for filing the Answer of United States
Automobile Association to the Amended Motion for Declaratory
Judgment of Anna L. Phelps.

By copy of this letter, I serve a copy of same upon all counsel
of record.

Thank you for your assistance in this matter.

Sincerely,

GENTRY LOCKE RAKES & MOORE


Phillip V. Anderson

PVA:lj

Enclosure

cc: R. Louis Harrison, Jr., Esquire
Henry M. Sackett, III, Esquire
Doug Henson, Esquire
Jonathan S. Kurtain, Esquire
100/04634-096/002.ltr

FILED IN THE CLERK'S OFFICE

The 6th day of February 1991

TESTE: _____

Clerk
Kenny A. Creason D.C.

IN THE CIRCUIT COURT FOR THE COUNTY OF BEDFORD

Plaintiffs

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,
JENNIFER TREVEY,
UNITED STATES AUTOMOBILE ASSOCIATION,
and
NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendants.

**ANSWER OF UNITED
STATES AUTOMOBILE
ASSOCIATION**

COMES NOW United States Automobile Association (hereinafter referred to as "USAA"), by counsel, and files this its Answer to the Amended Motion for Declaratory Judgment of Anna L. Phelps, et al and states as follows:

1. That upon information and belief USAA admits the allegations in paragraphs 1, 2, 3, and 4 inclusive of the Amended Motion for Declaratory Judgment.

2. That USAA is without sufficient information or knowledge to either admit or deny the allegations in paragraph 5 of the plaintiff's Amended Motion for Declaratory Judgment.

3. That upon information and belief, USAA admits the allegations in paragraphs 6, 7, 8, 9, 10, 11 and 12 of the Amended Motion for Declaratory Judgment.

4. That USAA is without sufficient information or knowledge to either admit or deny the allegations in paragraph 13 of the Amended Motion for Declaratory Judgment.

Testimony taken in the Clerk's Office
The 6th day of February, 1991
TESTE: _____

Clerk

~~Kelly Creasey~~ D. 12.

5. That upon information and belief USAA admits the allegations in paragraphs 14, 15, 16 and 17 of the Amended Motion for Declaratory Judgment.

6. That USAA is without sufficient information or knowledge to either admit or deny the allegations in paragraph 18 of the plaintiff's Amended Motion for Declaratory Judgment.

7. That USAA admits the allegations in paragraph 19 of the plaintiff's Amended Motion for Declaratory Judgment.

8. That USAA is without sufficient information or knowledge to either admit or deny the allegations in paragraph 20 of the Amended Motion for Declaratory Judgment.

9. That USAA admits the allegations in paragraph 21 of the Amended Motion for Declaratory Judgment.

Respectfully submitted,

UNITED STATES AUTOMOBILE ASSOCIATION

By: 

Of Counsel

Phillip V. Anderson
GENTRY LOCKE RAKES & MOORE
P.O. Box 1018
Roanoke, Virginia

CERTIFICATE OF SERVICE

I certify that on the 5th day of February, 1991, I mailed a copy of the foregoing document to R. Louis Harrison, Jr., Esquire, Radford & Wandrei, P.O. Box 1008, Bedford, Virginia 24523, counsel for plaintiff; Henry M. Sackett, III, Esquire, Edmunds & Williams, P.O. Box 958,

Lynchburg, Virginia 24505, counsel for State Farm Insurance Company; Doug Henson, Esquire, Woods, Rogers & Hazelgrove, P.O. Box 720, Roanoke, Virginia 24004-0720, counsel for Government Employees Insurance Company; Jonathan S. Kurtain, Esquire, Lutins & Shapiro, P.O. Box 180, Roanoke, Virginia 24002, counsel for Jennifer Trevey.


Of Counsel

GENTRY LOCKE
RAKES & MOORE

Attorneys at Law

703-982-8000

Telecopier 703-982-8524

10 Franklin Road, S.E.

Post Office Box 1018

Roanoke, Virginia 24005

March 13, 1991

Carol W. Black, Clerk
Bedford County Circuit Court
P.O. Box 235
Bedford, Virginia 24523

Re: Anna L. Phelps, Government Employees Insurance
Company and Anna Featherstone
v.
State Farm Mutual Automobile Insurance Company,
Jennifer Trevey, United States Automobile Association
and Nationwide Mutual Insurance Company

Dear Ms. Black:

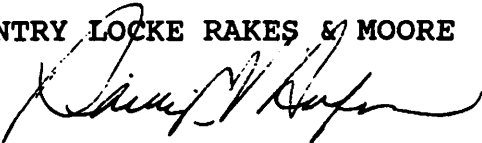
Please find enclosed Answer of United States Automobile
Association to Second Amended Motion for Judgment to be filed
with the papers in the above-styled case.

By copy of this letter, I send a copy of same to all counsel of
record.

Thank you for your assistance in this regard.

Sincerely,

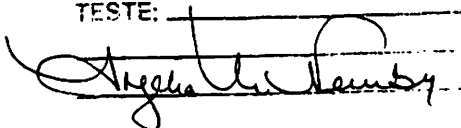
GENTRY LOCKE RAKES & MOORE


Phillip V. Anderson

PVA:lj

Enclosure

cc: R. Louis Harrison, Jr., Esquire
Henry M. Sackett, III, Esquire
Diane Baun, Esquire
Jonathan S. Kurtain, Esquire

Comp.
FILED IN THE CLERK'S OFFICE
The 14th day of Mar., 1991
TESTE: 

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BEDFORD

ANNA L. PHELPS,
GOVERNMENT EMPLOYEES INSURANCE
COMPANY

and
ANNA FEATHERSTONE,

Plaintiffs

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,
JENNIFER TREVEY,
UNITED STATES AUTOMOBILE ASSOCIATION,
and
NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendants.

ANSWER OF UNITED
STATES AUTOMOBILE
ASSOCIATION TO
SECOND AMENDED
MOTION FOR JUDGMENT

COMES NOW United States Automobile Association
(hereinafter referred to as "USAA"), by counsel, and files
this its Answer to the Second Amended Motion for Declaratory
Judgment of Anna L. Phelps, et al and states as follows:

1. That upon information and belief USAA admits the
allegations in paragraphs 1, 2, 3, and 4 inclusive of the
Second Amended Motion for Declaratory Judgment.

2. That USAA is without sufficient information or
knowledge to either admit or deny the allegations in paragraph
5 of the plaintiff's Second Amended Motion for Declaratory
Judgment.

3. That upon information and belief, USAA admits the
allegations in paragraphs 6, 7, 8, 9, 10, 11 and 12 of the
Second Amended Motion for Declaratory Judgment.

4. That USAA is without sufficient information or

FILED IN THE CLERK'S OFFICE

The 11 day of Mar. 1991

TESTE: _____

Clerk

130

Angela L. Newby D.C.

130

)
knowledge to either admit or deny the allegations in paragraph 13 of the Second Amended Motion for Declaratory Judgment.

5. That upon information and belief USAA admits the allegations in paragraphs 14, 15, 16 and 17 of the Second Amended Motion for Declaratory Judgment.

6. That USAA is without sufficient information or knowledge to either admit or deny the allegations in paragraph 18 of the plaintiff's Second Amended Motion for Declaratory Judgment.

7. That USAA admits the allegations in paragraph 19 of the plaintiff's Second Amended Motion for Declaratory Judgment.

8. That USAA is without sufficient information or knowledge to either admit or deny the allegations in paragraph 21 of the Second Amended Motion for Declaratory Judgment.

9. That upon information and belief USAA admits the allegations in paragraphs 20 and 22 of the Second Amended Motion for Judgment.

Respectfully submitted,

UNITED STATES AUTOMOBILE ASSOCIATION

By: 

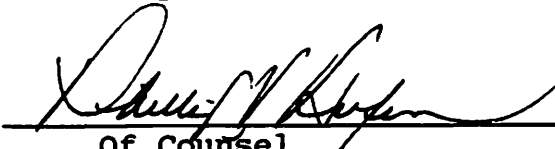
Of Counsel

Phillip V. Anderson
GENTRY LOCKE RAKES & MOORE
P.O. Box 1018
Roanoke, Virginia

)

CERTIFICATE OF SERVICE

I certify that on the 13th day of March, 1991, I mailed a copy of the foregoing document to R. Louis Harrison, Jr., Esquire, Radford & Wandrei, P.O. Box 1008, Bedford, Virginia 24523, counsel for plaintiff; Henry M. Sackett, III, Esquire, Edmunds & Williams, P.O. Box 958, Lynchburg, Virginia 24505, counsel for State Farm Insurance Company; Diane Baun, Esquire, Woods, Rogers & Hazelgrove, P.O. Box 720, Roanoke, Virginia 24004-0720, counsel for Government Employees Insurance Company; Jonathan S. Kurtain, Esquire, Lutins & Shapiro, P.O. Box 180, Roanoke, Virginia 24002, counsel for Jennifer Trevey.



Of Counsel

MAR 14 1991

MAR 14 1991

BOOK 59 PAGE 382

VIRGINIA:

IN THE CIRCUIT COURT OF BEDFORD COUNTY , May 6, 1991

ANNA L. PHELPS,
GOVERNMENT EMPLOYEES INSURANCE COMPANY,
ANNA FEATHERSTONE,
JENNIFER TREVEY and
MARY C. PHELPS,

Chancery File No. 89015473

Plaintiffs,

v.) (

ORDER ALLOWING AMENDED MOTION
FOR DECLARATORY JUDGMENT

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
UNITED STATES AUTOMOBILE ASSOCIATION and
NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendants.

Came this day the plaintiffs and moved to amend their motion for Declaratory Judgment against the defendant, State Farm Mutual Automobile Insurance Company, and others, and the Court seeing no objection to the same and believing an amendment to be proper.

Doth hereby ORDER that the plaintiff be allowed to amend their motion for Declaratory Judgment for the second time.

ENTERED this the 6 day of May, 1991

[Signature]
Judge

I ask for this:

[Signature]
R. Louis Harrison, Jr.

1

RADFORD & WANDREI

ATTORNEYS AT LAW
BEDFORD, VIRGINIA

24523


1991, May 6th
ENTERED IN CHANCERY
ORDER BOOK.

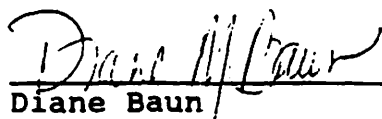
No. 59 Page 389

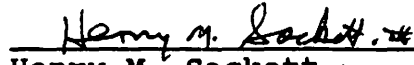
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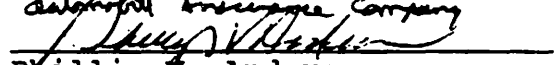
Seen and agreed:


Jonathan Kurtin


Diane Baun


Henry M. Sackett, Jr.

attorney for State Farm Mutual
Automobile Insurance Company


Phillip W. Anderson

Counsel for USAA

VIRGINIA:

IN THE CIRCUIT COURT OF BEDFORD COUNTY

ANNA L. PHELPS,
GOVERNMENT EMPLOYEES INSURANCE COMPANY,
ANNA FEATHERSTONE,
JENNIFER TREVEY and
MARY C. PHELPS,

Plaintiffs,

v.) (SECOND AMENDED MOTION FOR
DECLARATORY JUDGMENT

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
UNITED STATES AUTOMOBILE ASSOCIATION and
NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendants.

Comes now your plaintiffs to move for a declaratory judgment against the defendants, State Farm Mutual Automobile Insurance Company and others, on the grounds as follows:

(1) Anna L. Phelps is an individual who was involved in an automobile accident in Bedford County, Virginia, on June 10, 1989.

(2) State Farm Mutual Automobile Insurance Company is an insurance company licensed and doing business in the State of Virginia.

(3) That Anna L. Phelps, the plaintiff, contracted for a policy of automobile insurance with State Farm Mutual Automobile

RADFORD & WANDREI
ATTORNEYS AT LAW
BEDFORD, VIRGINIA
24523

FILED IN THE CLERK'S OFFICE
The 6th day of May 1991
TESTE: _____

Mary Kay Schaefer 135

Insurance company and Policy No. A370-661-46-01 was issued to her. A copy of which is attached hereto as Exhibit "A".

(4) That the policy was in good standing on June 10, 1989.

(5) That after June 10, 1989, Anna L. Phelps properly reported her accident to the defendant, State Farm.

(6) That by letter dated July 24, 1989, J. William Dinwiddie, Claims Superintendent of the Tidewater, Virginia, Division for State Farm, denied coverage because the vehicle Ms. Phelps was driving did not qualify as a "non-owned, temporary substitute or newly acquired automobile under your policy . . .". A copy of the denial letter is attached hereto as Exhibit "B".

(7) At the time of the accident, your plaintiff was driving a 1988 2-door Nissan owned by Mary C. Phelps, her sister.

(8) That at the time of the accident, Anna L. Phelps resided at 8319 Brookvale court, Springfield, Virginia 22153.

(9) That at the time of the accident, Mary C. Phelps resided at 8319 Brookvale Court, Springfield, Virginia 22153.

(10) That a non-owned vehicle pursuant to the State Farm insurance policy means "an automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile".

(11) That the State Farm automobile insurance policy provides coverage to non-owned automobiles as set out in Coverage B of Part 1, Liability, of that policy.

(12) That Anna L. Phelps did not own the automobile involved in the accident.

(13) That the automobile involved in the accident was not furnished for the regular use of Anna L. Phelps.

(14) That a relative, under the terms of the policy, means "a relative of the insured who is a resident of the same household".

(15) That Anna L. Phelps is a biological relative, i.e., sister, of Mary C. Phelps.

(16) That Anna L. Phelps and Mary C. Phelps were not "residents of the same household" within the meaning of that term.

(17) That, therefore, the 1988 2-door Nissan was a non-owned automobile under the terms of the State Farm policy.

(18) That the plaintiff, Government Employees Insurance Company, is the liability and underinsured motorist carrier for Anna Featherstone, a possible claimant against Anna Phelps.

(19) That the defendant, United Services Automobile Association is the liability and underinsured carrier for Jennifer Trevey, a possible claimant against Anna Phelps.

(20) Anna L. Phelps was the driver of the vehicle involved in an automobile accident in Bedford County, Virginia, on June 10, 1989. Jennifer Trevey and Anna Featherstone were passengers in the said motor vehicle at the date and time aforesaid. Anna

Featherstone and Jennifer Trevey have alleged that they each suffered injuries as a result of the negligence of Anna L. Phelps and are seeking a recovery, each of them having filed an action at law naming Anna L. Phelps as the defendant.


(21) Nationwide Mutual Insurance Company is the liability carrier for Mary Phelps and may have an interest in the outcome of this litigation.

(22) That there is a justiciable controversy between the parties concerning coverage on the State Farm Automobile Insurance police.

WHEREFORE, your plaintiffs pray that this Court declare that the vehicle Anna L. Phelps was driving on June 10, 1989, was a non-owned automobile under the provisions of State Farm Mutual Automobile Insurance Policy No. A30-661-46-01, and for such other and further relief as the nature of this case may require.

Respectfully submitted,

ANNA L. PHELPS
MARY C. PHELPS

By: 
Of Counsel

R. Louis Harrison, Jr., p.q.
RADFORD & WANDREI
P.O. Box 1008
Bedford, Virginia 24523

ANNA FEATHERSTONE
JENNIFER TREVEY

By: 
Of Counsel

Jonathan S. Kurtin
Lutins & Shapiro
P. O. Box 180
Roanoke, Virginia 24002-0180

GOVERNMENT EMPLOYEES INSURANCE COMPANY

By: 
Of Counsel

Diane Baun
Woods, Rogers & Hazlegrove
P. O. Box 720
Roanoke, Virginia 24004-0720

CERTIFICATE

I hereby certify that a true and exact copy of the foregoing Amended Motion for Declaratory Judgment was hereby mailed to Henry M. Sackett, III, Esquire, Edmunds & Williams, P.C., P. O. Box 958, Lynchburg, Virginia 24505, and Phillip V. Anderson, Esquire, Gentry, Locke, Rakes & Moore, P. O. Box 1018, Roanoke, Virginia 24005, this the ____ day of _____, 1991.

R. Louis Harrison, Jr.

EDMUNDS & WILLIAMS

A PROFESSIONAL CORPORATION

SUITE 400

800 MAIN STREET

P. O. BOX 938

LYNCHBURG, VIRGINIA 24505

TELEPHONE (804) 846-9000

TELECOPIER (804) 846-0337

J. EASLEY EDMUNDS, JR.

(1914-1977)

SAMUEL H. WILLIAMS

(1914-1970)

B. C. BALDWIN, JR.
ROBERT D. RICHARDS
PAUL H. COFFEY, JR.
KENNETH S. WHITE
ROBERT C. WOOD, III
HENRY M. SACKETT, III
RAYNER V. SNEAD, JR.
BERNARD C. BALDWIN, III
WM. TRACEY SHAW
R. EDWIN BURNETTE, JR.
BEVIN R. ALEXANDER, JR.
PATRICIA R. BLACK
WILLIAM E. PHILLIPS

ELEANOR A. PUTNAM DUNN
KEVIN L. CASH

May 16, 1991

Carol W. Black, Clerk
Bedford County Circuit Court
P. O. Box 235
Bedford, Virginia 24523

Re: Anna L. Phelps, et al v. State Farm Mutual
Automobile Insurance Company, et al

Dear Mrs. Black:

I enclose for filing with the papers in the captioned case the answer of State Farm Mutual Automobile Insurance Company to plaintiffs' second amended motion for declaratory judgment.

Very truly yours,

EDMUNDS & WILLIAMS, P.C.

By Henry M. Sackett III
Henry M. Sackett, III

HMSIII: jetc

cc: R. Louis Harrison, Jr., Esquire
Jonathan S. Kurtin, Esquire
Diane Baun, Esquire
Phillips V. Anderson, Esquire

VIRGINIA:

IN THE CIRCUIT COURT OF THE BEDFORD COUNTY.

ANNA L. PHELPS,
GOVERNMENT EMPLOYEES INSURANCE COMPANY,
ANNA FEATHERSTONE,
JENNIFER TREVEY
and
MARY C. PHELPS,

Plaintiffs,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY,
UNITED STATES AUTOMOBILE ASSOCIATION
and
NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendants.

ANSWER OF THE DEFENDANT,
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
TO SECOND AMENDED MOTION FOR DECLARATORY JUDGMENT
Case No. CH89-015473

The defendant State Farm Mutual Automobile Insurance Company, by counsel, for its answer to plaintiffs' second amended motion for judgment, says:

1. It admits the allegations of paragraphs 1 and 2 of plaintiffs' second amended motion for declaratory judgment.

2. It admits that the plaintiff was insured under a policy of automobile insurance issued by State Farm Mutual

FILED IN THE CLERK'S OFFICE
The 22nd day of May, 1991
TESTE: _____

Hazel B. Knight, Clerk
C.C.

Automobile Insurance Company, as alleged in paragraph 3 of plaintiffs' second amended motion for declaratory judgment. It will require strict proof of the terms and conditions of the policy in question.

3. It admits the allegations of paragraphs 4, 5, 6, 7, 8, 9 and 10 of plaintiffs' second amended motion for declaratory judgment.

4. It admits that its policy provides coverage for liability arising out of the use of a "non-owned automobile" as that term is defined in its policy and under the terms and conditions set forth in its policy. To the extent that the allegations of paragraph 11 of plaintiffs' second amended motion for declaratory judgment are inconsistent with the foregoing admission, those allegations are denied.

5. It admits the allegations of paragraph 12 of plaintiffs' second amended motion for declaratory judgment.

6. It denies the allegations of paragraph 13 of plaintiffs' second amended motion for declaratory judgment.

7. It admits the allegations of paragraph 14 of plaintiffs' second amended motion for declaratory judgment.

8. It admits the allegations of paragraph 15 of plaintiffs' second amended motion for declaratory judgment.

9. It denies the allegations of paragraph 16 of plaintiffs' second amended motion for declaratory judgment and affirmatively alleges that the plaintiff, Anna L. Phelps and Mary

C. Phelps were "residents of the same household" as that term is used in State Farm's policy.

10. It denies the allegations of paragraph 17 of plaintiffs' second amended motion for declaratory judgment.

11. It has no knowledge of the allegations of paragraphs 18 and 19 of plaintiffs' second amended motion for declaratory judgment and will require strict proof thereof.

12. It admits that Jennifer Trevey and Anna Featherstone were passengers in a motor vehicle operated by Anna L. Phelps, as alleged in paragraph 20 of plaintiffs' second amended motion for declaratory judgment. It has no knowledge of the remaining allegations of paragraph 20 of plaintiffs' second amended motion for declaratory judgment and will require strict proof thereof.

13. It has no knowledge of the allegations of paragraph 21 of plaintiffs' second amended motion for declaratory judgment and will require strict proof thereof.

14. It denies the allegations of paragraph 22 of plaintiffs' second amended motion for declaratory judgment.

15. It denies that the automobile being driven by Anna L. Phelps on June 10, 1989, was covered under the policy issued by State Farm to Anna L. Phelps and further denies that Anna L. Phelps is entitled to any coverage under State Farm's policy for claims arising out of the accident of June 10, 1989.

16. It denies each and every allegation of the plaintiffs' second amended motion for declaratory judgment except for those specifically admitted herein.

WHEREFORE, State Farm Mutual Automobile Insurance Company respectfully prays that this Court declare that:

1. The automobile being driven by Anna L. Phelps on June 10, 1989, was not covered under any policy of automobile liability insurance issued by State Farm Mutual Automobile Insurance Company;

2. That Anna L. Phelps is not covered under the policy of automobile liability insurance issued by State Farm Mutual Automobile Insurance Company for claims arising out of the accident of June 10, 1989; and

3. That it be granted such other and further relief as to the Court seems appropriate.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

By Henry M. Sackett III
Of Counsel

Henry M. Sackett, III
Edmunds & Williams, P.C.
P. O. Box 958
Lynchburg, VA 24505


I hereby certify that a copy of the foregoing Answer to Plaintiffs' Second Amended Motion for Declaratory Judgment was mailed to the following counsel of record on this the 17th day of May, 1991:

R. Louis Harrison, Jr., Esquire
Attorney at Law
P. O. Box 1008
Bedford, VA 24523
Counsel for Anna L. Phelps and Mary C. Phelps;

Jonathan S. Kurtin, Esquire
Attorney at Law
P. O. Box 180
Roanoke, VA 24002-0180
Counsel for Anna Featherstone and Jennifer Trevey;

Diane Baun, Esquire
Attorney at Law
P. O. Box 720
Roanoke, VA 24004-0720
Counsel for Government Employees Insurance Company;
and

Phillip V. Anderson, Esquire
Attorney at Law
P. O. Box 1018
Roanoke, VA 24005
Counsel for United Services Automobile Association.



Attorney for State Farm
Mutual Automobile Insurance
Company

RADFORD & WANDREI

ATTORNEYS AT LAW

P. O. BOX 1008

BEDFORD, VIRGINIA 24523

duVAL RADFORD
ROBERT T. WANDREI

R. LOUIS HARRISON, JR.

AREA CODE 703
PHONE 586-3151

May 29, 1991

Ms. Donna Sensabaugh
Judge Sweeney's Office
Bedford County Circuit Court
Bedford, Virginia 24523

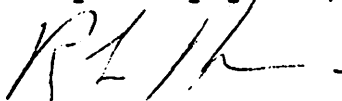
Re: Anna L. Phelps - Government Employees Insurance Company
Anna Featherstone, Jennifer Trevey and Mary C. Phelps
v.
State Farm Mutual Automobile Insurance Company,
United States Automobile Association and
Nationwide Mutual Insurance Company

Dear Donna:

This is to confirm that the hearing for the second amended
motion for declaratory judgement in the above matter has been set
on September 10, 1991 at 2:00 p.m.

Thank you.

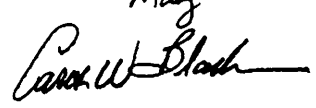
Very truly yours,



R. Louis Harrison, Jr.

RLHjr/kag

cc: Anna L. Phelps
Jonathan S. Kurtin, Esquire
Diane Baun, Esquire
Henry M. Sackett, III, Esquire
Philip V. Anderson, Esquire
Thomas M. Whiteman, Esquire

30th May 91


EDMUNDS & WILLIAMS
A PROFESSIONAL CORPORATION

SUITE 400
800 MAIN STREET
P. O. BOX 958

LYNCHBURG, VIRGINIA 24505

TELEPHONE (804) 846-9000
TELECOPIER (804) 846-0337

J. EASLEY EDMUNDS, JR.
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ROBERT D. RICHARDS
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KENNETH S. WHITE
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HENRY M. SACKETT, III
RAYNER V. SNEAD, JR.
BERNARD C. BALDWIN, III
WM. TRACEY SHAW
R. EDWIN BURNETTE, JR.
BEVIN R. ALEXANDER, JR.
PATRICIA R. BLACK
WILLIAM E. PHILLIPS
ELEANOR A. PUTNAM DUNN
KEVIN L. CASH

September 3, 1991

Carol W. Black, Clerk
Bedford County Circuit Court
Main Street
Bedford, Virginia 24523

Re: Anna L. Phelps v. State Farm Mutual Automobile
Insurance Company

Dear Mrs. Black:

I represent the defendant in the captioned case which is set for trial in the Circuit Court of Bedford County on September 10, 1991. Please issue and deliver to the proper Sheriff for service a summons for each of the following individuals to testify on behalf of the defendant:

1. Mary Catherine Phelps
Route 2, Box 170
Goode, VA; and
2. Marjorie Hunt Phelps
Route 2, Box 170
Goode, VA.

I enclose the following check in the amount of \$10.00, payable to the Sheriff of Bedford County, VA, to cover the cost of service.

Very truly yours,

EDMUNDS & WILLIAMS, P.C.

By

Henry M. Sackett, III
Henry M. Sackett, III

HMSIII: jetc

Enclosure

*Process issued
9/14/91 - HWT*

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF BEDFORD
TO THE SHERIFF OF THE COUNTY OF BEDFORD,
OR ANY OTHER AUTHORIZED OFFICER:

You are commanded to summon

Mary Catherine Phelps
Rt 2, Box 170
Goode, VA

Marjorie Hunt Phelps
Rt 2, Box 170
Goode, VA

to appear in the Circuit Court of the County of Bedford, at
its Courthouse in Bedford, Virginia, on Tuesday, the 10th
day of Sept., 1991, at 9:30 o'clock, a.m., to testify in the
case of Anna L. Phelps vs State Farm Mut. Auto. Ins. Co.

This subpoena is issued on application of Henry M.
Sackett, III in the above styled case.

WITNESS, Carol W. Black, Clerk of our said Court, at
the Courthouse, the 4th day of Sept., 1991, and in the 216th
year of the Commonwealth.

Carol W. Black, Clerk

By: *Angela W. Newby*
Deputy Clerk

FILED IN THE CLERK'S OFFICE

The 9th day of September, 1991

TESTE: _____

Jonathan E. Craft Clerk
D.C.

OATH OF COURT REPORTER

(Required by Rule 1:10)

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF BEDFORD

Anna Phelps

VS:

State Farm Mutual Ins. Co.

I, Brenda B. Alger, a Court Reporter,

do solemnly swear that I will to the best of my ability, faithfully and accurately take down and transcribe the proceedings in the above styled case, and be subject to the control and discipline of the Court. So help me God.

Brenda B. Alger

Subscribed and sworn to before me this 10th day of

September, 1991.

Carol W. Haskins
Clerk - Deputy Clerk:

Date: 9-18-91

Style of Case:

Anna L. Phillips

vs.

State Farm Mutual Auto Ins

Attorney for Complainant: Louis Harrison - also upo Mary Phillips

Attorney for Respondent: Henry Sathell

Court's Rulings:

- Tax Returns*
1. *Deane Bond - BEICO ins Co - Anna Featherston (Passenger in Car)*
2. *Philip Anderson-Rhe USSA - Jennifer Trevey*
3. *1988 Marjorie*
4. *1989 Marjorie*
5. *1988 - Mary Phillips*
6. *Add Memos must be filed by 9-24-91*
7. *Responses one add wh to response*
8. *I who from today to submit add cases*
9. *in college students away from home*
10. *After 14 days Ct will rule by*
11. *written opinion - Rule after 9-24-91*
12. *10-1-91*

150

Attorney to Prepare Decree: _____

150

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF BEDFORD

ANNA L. PHELPS, et al,

Appellant,

v.) (

Case No. CH89-015473

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, et al,

Appellee.

ANNA L. PHELPS
Supplemental Memorandum in Support of
Motion for Declaratory judgment

In State Farm's brief, they cite several cases as supportive of their effort to find that Anna L. Phelps was a resident of her parents home. The first was Montgomery v. Hawkeye Security Insurance Company, 52 Mich. App. 457, 217 N.W. 2d 449 (1974). In that action, the insureds twenty-two year old son was a full time student living in an apartment at school. The lower court had written a "well reasoned opinion subsequent to a full trial before the Court which found that the son was a resident of his father's household." The lower court noted that the son lived at home with his parents, except when he was at school, that his education was being financed in part from his parents and that his parents paid the rent on the sons apartment at school. Based on these facts, the Appellant Court noted that the Trial Court has considered the evidence in light of all the surrounding circumstances, and its decision, not being clearly erroneous,

RADFORD & WANDREI
ATTORNEYS AT LAW
BEDFORD, VIRGINIA
24523

1

FILED IN THE CLERK'S OFFICE

The 15th day of Oct, 1991

TESTE:

Clerk
D.C.

151

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will not be overturned." It should also be noted that in this case, the Court was interpreting resident so as to find coverage.

The next case cited was Federated American Insurance Company v. Childers, 45 Or. App. 379, 608 P2d 585 (1980). In that case, the insureds son resided with his father and brother in the family home at Grant's Pass, Oregon. When the son turned nineteen he decided to enroll in Layne Community College in Eugene, Oregon, where he hoped to gain a position on the College basketball team. However, he arrived too late to begin the fall term and returned back to his father's house and discussed the possibility with his father of living in an apartment in Eugene in order to avoid out of district tuition for the winter term. Consequently, he moved to Eugene and occupied his time during the fall by practicing with the College basketball team. His father sent him money to help with his living expenses. He then registered for classes at Layne and continued in school to the end of the term. At the end of the term he did not stay in Eugene. He would have returned to Grant's Pass only because he was unable to find a summer job there and instead he went to Wallowa, Oregon to take a job. The son considered his father's home as his residence and left his possessions there. He returned often to the home for holidays and a bedroom was kept available to his use. It should be noted that even though the Court was interpreting the policy in such a way as to allow coverage, the Court was sharply divided 5 to 4.

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In American States Insurance Company v. Walker, 26 Utah 2d 261, 46 P. 2d 1042 (1971), the insured daughter was living out of state in an apartment and receiving training at a local hospital to be an x-ray technician. The trial court found that the daughter considered herself a resident of her father's household all during her education and returned to his home in Idaho at the end of each school year. She maintained a joint bank account with her father and her parents augmented her income by giving her money for clothing and food when she would return home for visits. At all times she had kept furniture, books and clothing at her father's home. She considered herself a resident of Idaho and voted in the general election there. She had a drivers license issued in Idaho but none in the state where she was going to school. The insurance company pointed out that her tax return showed her as being a resident of Utah. Nevertheless, the trial found that she was a resident of her parents household again interpreting the policy in such a way as to allow coverage. The Appellant Court made it clear that it was upholding the trial courts decision because it was not clearly erroneous and not because it would have made the same decision, noting:

The trial court heard the evidence and made a finding that at the time of the collision Dixie Ann Walker was still and resident of her father's household. Whether we would have made this same ruling had we tried the case is immaterial, and on appeal we are not justified in substituting judgment for his since the evidence was such as to sustain his judgment.

Again this case presents a much stronger case for finding residency and was interpreted such as to find coverage.

The next case cited by State Farm was Crossett v. St. Louis Fire and Marine Insurance Company, 289 Ala.598, 269 So. 2d 869 (1972), which involved a college student who was attending university 116 miles away from home. However, unlike our case, the son had very close ties to the family. The son was an only child and came home every weekend except when his school was playing football at home. He kept all of his personal belongings at his parents home with the exception of those clothes he needed at school, his radio, books and personal necessities. The father paid for all of the tuition, automobile expenses, board and provided him with money for incidental expenses. The listed his parents address on his drivers license and registered for the draft near his parents home. He was at his family home during all holiday periods and when he was at his parents home they put restrictions on him, requiring him to be in at a reasonable hour and he obeyed those restrictions. He Court noted that when he was at school he did as he pleased and he went to school all four quarters, but when there were breaks between quarters he was at his father's home. The Court noted that the clause "residence of his household" is ambiguous and is due to be construed to extend coverage to the person seeking to become an additional insured if he can qualify in any ordinary sense. The Court then adopted a construction favorable to the insured and found that the son was

a resident of his father's household. The Court distinguished the case of State Farm Mutual Insurance Company v. Hanna, 277 Ala. 32 166 So. 2d 872(1964), which found that a college student was not a resident of his father's home for the reason that, in Hanna, the exclusion cause of the automobile policy was involved and it was obvious that the Court in Hanna was construing resident so as to omit coverage. Despite the fact the two were quite similar factually.

In Goodsell v. State Farm Auto and Casualty Underwriters, 261 Iowa 135, 135 NW 2d 458 (1967), the insured's twenty-four year old daughter had begun a training course with Northwest Airlines in Minneapolis, Minnesota. Evidence was introduced to show that when she went to Detroit her plans were uncertain and it was well known that the course was temporary. She had resided with her father and mother before the course. In wrestling with the problem, the Court noted that the "rule of construction in an insurance cases requires any ambiguity to be construed strictly against the insurer and liberally in favor of the insured. The rule is peculiarly applicable here." Using this the Court construed residence so as to find coverage. It should be noted that two justices assented from the opinion.

State Farm also cites Travelers Indemnity Company v. Mattox, 345 S.W. 2d 290 (Tex. Civ.App. 1961) which did not involve a college student and again interpreted residence to define coverage.

The final case quoted by State Farm was Manuel v. American Employers Insurance Company, 228 So. 2d 321 (La. App. 3d Cir. 1969), where the son was attending college only forty miles from his father's home. He rented an apartment there and lived at the apartment for the four months of the semester in question, however, he kept most of his possessions and clothes in his father's home to which he returned every weekend and on vacation. His permanent mailing address was at his father's home and he received his bills and governmental allotment checks there. When he returned he had his own room at his father's house and several people testified that he considered his father's home as his residence. Once again the term resident was construed so as to define coverage.

Note that none of the cases quoted by State Farm involved a situation where a child was living with a member of the opposite sex, in a husband and wife type of relationship, such as that presented by Mary. None involved full time employment. It should be noted that while both of the girls were college students, as Anna testified at trial, she did not receive enough credit to complete her freshman semester because she was not taking a full load. On the other hand she was a full time employee. State Farm is wanting to classify the girls as college students and put blinders on to the court to the fact that they were also self supporting members of the work force. None of the cases cited by State Farm showed a case where a child had

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evidenced an intent not to return to the same household and most importantly each of the cases involved situations where the Court was construing the term resident in favor of coverage. As noted in Annotation, 93 ALR 3d 420, "Who is a Resident or Member of the Same Household or Family as Named Insured within Liability Insurance Provision Deeming Additional Insureds" §2(B), points out that as recognized by numerous Courts "such terms are ambiguous and should therefore be construed, in accordance with general principals of insurance law in such a manner as to favor policy coverage." Certainly this is the case in Virginia as the Federal Courts in Virginia have recognized that, "policy provisions are to be construed in favor of the insured, one might be held a member of the household extending coverage, though not for the purpose of a policy exclusion." White v. Nationwide, 245 F Supp. 1 (W.D. Va. 1965).

The Plaintiff would point the Court to, State Farm v. Hanna, 277 Ala. 32, 166 So. 872 (1964), where the Court held that a college student was not a resident of his father's household even though Mr. Hanna lived in a temporary housing, (ie College dormitory) whose tuition was paid in part by his parents. The son returned home during summer vacation each year and also returned there for Thanksgiving, Christmas and Spring holidays. He would also return for weekend visits from time to time. He registered for the draft in his parents county and gave his parents address as his address. He had a room in the family,

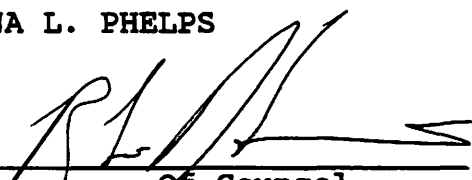
which was known as his room, which had been his room while he was in high school. He was an only child and his possessions remained in that room. He maintained a charge account in a drug store at his house and listed his address as his family home. His drivers license showed his address as being the family home and his insurance policy and other papers remained at his family home. Despite this powerful evidence, the Appeals Court opted to adapt a construction which would be favorable to the insured and held that the son was not residing in the same household as his father at the time of the accident.

In summary, the courts have consistently construed this ambiguity against the insurer and in favor of coverage, exactly the result requested here.

Respectfully submitted,

ANNA L. PHELPS

BY



of Counsel

CERTIFICATE

I do hereby certify that a true and exact copy of the foregoing Supplemental Memorandum was mailed to Phillip V. Anderson, Esquire, Gentry, Locke, Rakes & Moore, P. O. Box 1018, Roanoke, Virginia, Diane Baun, Esquire, Woods, Rogers & Hazlegrove, 105 Franklin Road, Roanoke, Virginia, and Henry M. Sackett, Esquire, Edmunds & Williams, P. O. Box 958, Lynchburg, Virginia 24505, this the 1 day of October, 1991.



R. Louis Harrison, Jr.

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PAGE 1

Citation
166 So.2d 872
(Cite as: 277 Ala. 32, 166 So.2d 872)

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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

v.

Phillip HANNA et al.

5 Div. 772.

Supreme Court of Alabama.

March 26, 1964.

Rehearing Denied Aug. 27, 1964.

Bill in equity by automobile liability insurer which claimed that it was not obligated to defend personal injury suit. The Circuit Court, Tallapoosa County, Albert Hooton, J., entered a decree adverse to the insurer which appealed. The Supreme Court, Harwood, J., held that insured who was student at college in another town and who returned to family home for vacations and occasional weekends was not 'residing in the same household' when his father was injured in automobile accident while insured was home for weekend, and accident was not excluded under automobile policy which excluded coverage for injury to insured or to any member of family of insured residing in the same household as the insured.

Affirmed.

[1]

135K2

DOMICILE

K. Domicile distinguished from residence.

Ala. 1964

Word 'residing' indicates some intent of permanency of occupation as distinguished from boarding or lodging, but does not require intent of permanency to degree required in 'domicile.'

STATE FARM MUTUAL AUTOMOBILE INS. CO. v. HANNA

166 So.2d 872, 277 Ala. 32

See publication Words and Phrases for other judicial constructions and definitions.

[2]

135K2

DOMICILE

K. Domicile distinguished from residence.

Ala. 1964

While residence is necessary component of domicile, residence is not always domicile, and one may have legal domicile with family, and reside actually and personally away from his family.

STATE FARM MUTUAL AUTOMOBILE INS. CO. v. HANNA

166 So.2d 872, 277 Ala. 32

[3]

157K5(2)

EVIDENCE

K. Particular facts.

Ala. 1964

It is common knowledge that usually a student in a college or university must be in residence at college or university for academic year preceding the award of his degree.

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PAGE 2

(Cite as: 277 Ala. 32, 166 So.2d 872)

STATE FARM MUTUAL AUTOMOBILE INS. CO. v. HANNA

166 So.2d 872, 277 Ala. 32

[4]

217K146.7(1)

INSURANCE

K. In general.

Ala. 1964

Where policy provisions are susceptible of plural constructions, consistent with object of obligation, that construction will be adopted which is favorable to insured.

STATE FARM MUTUAL AUTOMOBILE INS. CO. v. HANNA

166 So.2d 872, 277 Ala. 32

[5]

217K435.18(2)

INSURANCE

K. Named insured or member of family.

Ala. 1964

Insured who was student at college in another town and who returned to family home for vacations and occasional weekends was not 'residing in the same household' when his father was injured in automobile accident while insured was home for weekend, and accident was not excluded from automobile policy which excluded coverage for injury to insured or any member of family of insured residing in the same household as the insured.

STATE FARM MUTUAL AUTOMOBILE INS. CO. v. HANNA

166 So.2d 872, 277 Ala. 32

See publication Words and Phrases for other judicial constructions and definitions.

[6]

217K514.18(1)

INSURANCE

K. In general.

Ala. 1964

Action of insured in picking up suit papers at office of attorney for injured party and taking them to office of circuit clerk, where insured was served with summons and complaint did not violate automobile liability policy provision requiring insured's cooperation.

STATE FARM MUTUAL AUTOMOBILE INS. CO. v. HANNA

166 So.2d 872, 277 Ala. 32

[7]

217K514.18(1)

INSURANCE

K. In general.

Ala. 1964

Cooperation of insured implies assistance, and failure to cooperate cannot be implied where no assistance has been requested.

STATE FARM MUTUAL AUTOMOBILE INS. CO. v. HANNA

166 So.2d 872, 277 Ala. 32

[8]

217K514.21(1)

INSURANCE

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166 So.2d 872

PAGE 3

(Cite as: 277 Ala. 32, 166 So.2d 872)

K. Presumptions and burden of proof.

Ala. 1964

Lack of cooperation was an affirmative defense which insurer had burden to establish.

STATE FARM MUTUAL AUTOMOBILE INS. CO. v. HANNA

166 So.2d 872, 277 Ala. 32

[9]

217K514.22

INSURANCE

K. Questions for jury.

Ala. 1964

What constitutes failure of cooperation by an insured is usually a question of fact.

STATE FARM MUTUAL AUTOMOBILE INS. CO. v. HANNA

166 So.2d 872, 277 Ala. 32

[10]

157K151(1)

EVIDENCE

K. In general.

Ala. 1964

Unobjected to testimony by insured to the effect that he intended to make certain town his place of residence was not admissible under so-called Rule of Exclusion relating to uncommunicated intentions. Code 1940, Tit. 7, s 372(1).

STATE FARM MUTUAL AUTOMOBILE INS. CO. v. HANNA

166 So.2d 872, 277 Ala. 32

[11]

30K837(11)

APPEAL AND ERROR

K. Consideration of incompetent evidence.

Ala. 1964

In equity cases, reviewing court will consider only such evidence as is legal, material, and competent.

STATE FARM MUTUAL AUTOMOBILE INS. CO. v. HANNA

166 So.2d 872, 277 Ala. 32

*33 **873 Sam W. Oliver, Dadeville, Rives, Peterson, Pettus & Conway, Birmingham, for appellant.

*34 Chas. R. Adair, Jr., and Ruth S. Sullivan, Dadeville, Wm. I. Byrd, Alexander City, for appellees.

HARWOOD, Justice.

This is an appeal from a decree entered in a declaratory judgment action. The bill prayed for a determination of the rights of the parties under an automobile insurance policy.

It alleged that a damage suit for personal injuries had been filed by Jimmie Hanna against his son Phillip, who was the insured. It further alleged that the injury to Jimmie Hanna, on 4 November 1961, resulted from the negligence of Phillip in the operation of an automobile.

The insurer, State Farm, had been called upon to defend the suit under a liability insurance policy issued by it to Phillip. State Farm thereupon filed

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(Cite as: 277 Ala. 32, *34, 166 So.2d 872, **873)

the bill below and asserted that it was not obligated to defend the suit nor to pay any judgment rendered thereon on grounds that, (1) the alleged accident was not covered by the **874 policy because of a family exclusion provision and, (2) the respondent, Phillip Hanna, had breached the cooperation clause of the policy, a condition precedent to liability by State Farm under the policy.

The family exclusion provision in the policy excludes coverage to:

'Bodily injury to the insured or any member of the family of the insured residing in the same household as the insured.'

The assistance and cooperation of the insured provision in the policy reads:

'The insured shall cooperate with the company.'

In their separate answers the respondents denied that Jimmie Hanna was a member of the family of the insured, Phillip Hanna, residing in the same household, and further denied that the insured had failed to cooperate with State Farm as required by the policy.

After a hearing, the court rendered a decree adverse to State Farm, and in favor of the respondents, holding that State Farm was obligated to defend the action at law instituted by Jimmie Hanna against his son Phillip Hanna, the insured, and was obligated to pay any judgment that might be rendered therein. The court further found that non-cooperation on the part of the insured that would prejudice the complainant was not sufficiently established.

*35 From this decree State Farm has perfected its appeal.

The appellant has argued three points: (1) that the court erred in decreeing that State Farm was obligated to defend the insured, Phillip Hanna, in the suit brought by his father, and to pay any judgment rendered thereon against Phillip Hanna, (2) that the court erred in finding that the coverage, if any, was not voided by the insured's breach of the cooperation clause, and (3) in considering evidence which was illegal, immaterial, and irrelevant in reaching its conclusions and its decree.

The evidence presented by the complainant shows that at the time of the accident on 4 November 1961, the insured, Phillip Hanna, was 20 years of age, and was in his third year as a student in Howard College in Birmingham, Alabama. At the college he lived in a dormitory room with a roommate, with the usual furnishings of a dormitory room.

It cost Phillip approximately \$800.00 per college year to attend college, his tuition being reduced by half because he was a ministerial student. These expenses were paid in part by Phillip and in part by his parents who were domiciled in East Tallassee, Alabama. Prior to entering college Phillip had accumulated \$1,000 to \$1,500 which was deposited in a savings account in a bank in Tallassee. During the summer vacations he had earned \$300 to \$500 in summer jobs, and while in college he had preached six or eight times a year and had been paid about \$15 each time. He drew upon his monies from time to time while in college, and part of his expenses were paid by his parents. Upon registering for the draft in Tallapoosa County, he gave his address as that of his parents in East Tallassee. Subsequent notices of classification by the draft board have been sent to that address, the last such notice being dated 12 January 1961. He never changed his address with the draft board.

During the summer vacation each year, Phillip returned to the home of his parents in East Tallassee, and also returned there for the Thanksgiving, Christmas, and Spring holidays. He also would return for weekend visits from time to time.

(Cite as: 277 Ala. 32, *35, 166 So.2d 872, **874)

Phillip had a room in the family home in East Tallassee which was known as his room, and which had been his room while in high school. He was an only child and he and his parents were the only people who had lived in the home. While away at college some of his possessions remained in this room.

Just before Christmas of 1960, he applied for the policy of insurance involved in this **875 case. At that time he was a student at Howard College. The license tags for the automobile purchased in late 1961 were bought in Tallapoosa County and Phillip gave his address as East Tallassee, Alabama.

Phillip did not pay room rent or board when he went to the family home on weekends, but from time to time during the summer vacations he would buy and contribute groceries. He maintains a charge account in a drug store in East Tallassee where his address is listed as the family home. His drivers' license shows his address as being at the family home. The present insurance policy and other papers belonging to Phillip remain in the family home. On the other hand, his college library card listed his address as Room 213, Howard College. When he purchased the insurance policy here involved, he told Mr. Thompson, the State Farm agent, he had been living in Birmingham at school.

Mr. Thompson testified that he had told Mr. Jimmie Hanna that the two conditions to issuing the policy to Phillip were that a State Farm policy must be in force in his immediate household insuring a car owned by a member of the household and secondly, that the minor owner of a car had to be a resident or member of the household. When the policy was actually applied for on 26 December 1960, he again discussed these conditions in the presence of both Mr. Hanna and Phillip. He told Phillip he was qualified under both conditions, *36 though Mr. Thompson at that time knew that Phillip was a student in Birmingham and would take the car to Birmingham when he returned to school. Notwithstanding, Mr. Thompson considered Phillip a member of the household in Tallassee.

The accident in which Mr. Hanna was injured occurred on 4 November 1961, while Phillip had his automobile in the yard of his parent's home, he being on a weekend visit to them.

On 10 February 1962, Mrs. Hanna, at the request of Mr. Hanna's attorney, got in touch with Phillip at Howard College and requested him to pick up papers pertaining to a suit filed by his father against him, and to take such papers to Dadeville for filing. Phillip did as he was requested, picking up the papers at the office of his father's attorney, and called his mother from Dadeville telling her that he had been served, and that she should notify Mr. Thompson. This, of course, was after he had taken the suit papers from the attorney's office in Alexander City to Dadeville, Alabama, where he handed them to the clerk of the Circuit Court. He also filed a paper for the appointment of a guardian ad litem to represent him in the suit. In Dadeville a copy of the suit papers was handed to the deputy sheriff by an employee in the circuit clerk's office, who in turn served the copy on Phillip. He then returned to school and did nothing with respect to the papers until his mother called him about two and a half weeks later and told him that Mr. Thompson, the State Farm agent, needed the papers. Phillip mailed them to his mother.

Phillip testified that he in no wise discussed the suit with Mr. Hanna's attorney, but merely picked up the papers and took them to Dadeville as instructed.

Mr. Thompson testified he received these papers on 6 March. He further

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(Cite as: 277 Ala. 32, *36, 166 So.2d 872, **875)

testified that he visited Jimmie Hanna with a claims adjuster some time after 5 November 1961, and prior to 10 February 1962, but he could not recall what was said or done on that occasion regarding the injury to Mr. Hanna.

Mr. Charles Funderbuck testified that Phillip had worked in his drug store in the afternoons while in school, and full time during the summers. Phillip terminated this employment after telling Mr. Funderbuck that he was going to college in Birmingham.

Miss Jenny Ruth Gann, clerk of the East Tallassee Baptist Church, testified in substance that Phillip Hanna moved his church membership back and forth between East Tallassee and Birmingham depending on **876 whether he was in school or at home for the summer. A copy of the 'Church Covenant' was received in evidence and it showed that members of the church agreed that 'when we remove from this place we will as soon as possible unite with some other church where we can carry out the spirit of the Covenant.'

The first point to be determined is, were Jimmie Hanna and Phillip residing in the same household at the time of the accident?

In brief counsel for appellant argue that the provision excluding coverage for 'bodily injury to the insured or any member of the family of the insured residing in the same household as the insured' is plain, unambiguous, and susceptible of only one reasonable construction, and does not permit of a construction favorable to the insured. Counsel further asserts that the doctrines of *Holloway v. State Farm Mutual Automobile Ins. Co.*, 275 Ala. 41, 151 So.2d 774, and *Home Ins. Co. v. Pettit*, 225 Ala. 487, 143 So. 839, are decisive of the point now being considered. We do not agree with either premise.

Holloway, supra, concerned the concept to be accorded the word 'family' as it appears in the provision now under consideration.

Pettit, supra, dealt with the meaning of the word 'household' in an exclusionary clause then being considered.

*37 Neither case was concerned with the interpretation of the phrase 'residing in the same household.'

[1][2] The word 'residing' is an ambiguous, elastic, or relative term, and includes a very temporary, as well as a permanent, abode. *Phillips v. South Carolina Tax Comm.*, 195 S.C. 472, 12 S.E.2d 13. It means a dwelling place for the time being, as distinguished from a mere temporary locality of existence. *Drew v. Drew*, 37 Me. 389. It indicates some intent of permanency of occupation as distinguished from boarding or lodging, but does not require the intent of permanency to the degree required in domicile. 2 Kent's Comm. (10th Ed.) 576. While residence is a necessary component of domicile, residence is not always domicile. One may have a legal domicile with his family, and reside actually and personally away from his family. In such event the word 'reside' may correctly denote either the technical domicile, or the actual personal residence. The word 'reside' is often used to express a different meaning according to the subject matter. In *re Seidel*, 204 Minn. 357, 283 N.W. 742.

[3] We think it common knowledge that usually a student in a college or university must be 'in residence' at the college or university for the academic year preceding the award of his degree. Often the statement is found that a student, or a faculty member is 'in residence' at a college or university during a particular time. Phillip Hanna was living in a college dormitory at Howard College, and taking his meals at the college dining hall. Thus in this

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sense, Phillip Hanna was 'in residence,' or residing at Howard College at the time of the accident.

Nor was such residence abrogated by casual visits over the weekend to the home of his parents. Such visits were nothing more than mere temporary interruptions of his more permanent residence at Howard College. The same would apply to the Christmas and Spring vacation periods. We doubt that such rule should apply to the long summer vacation period of several months where a student resumes living with his parents, nor should such rules apply where a student attends a college or university in the same town or city as his home while he continues to reside in his family home.

[4] The rule is too well settled by our decisions to require citation of authority that where provisions of an insurance policy are susceptible of plural constructions, consistent with the object of the obligation, that construction will be adopted which is favorable to the insured.

**877 [5] We hold that the court did not err in concluding that Phillip Hanna was not residing in the same household as Jimmie Hanna at the time of the accident.

Appellant's assignment of error No. 9, asserts error because the court, in its decree stated: 'I do not see any element of non-cooperation to any extent that would prejudice the insurer.'

The clauses of the policy pertinent to this aspect of the case read:

* * *

'2. Action Against Company. No action shall lie against the company: (a) Unless as a condition precedent thereto there shall have been full compliance with all terms of this policy.

* * *

'3. Assistance and Cooperation of the Insured. The insured shall cooperate with the company and upon its request, attend hearings and trials, assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of any legal proceedings in connection with the subject of this insurance.'

Counsel for appellant relies upon American Fire and Cas. Co. v. Tankersley, 270 *38 Ala. 126, 116 So.2d 579. This case concerned the failure of the insured to give the insurer notice of an accident, or receipt of any demand, summons, or other process, and held that such failure will release the insurer from obligation under the insurance contract, although no prejudice resulted, where such notices are specifically made a condition precedent to any action against the insurer.

[6] The evidence below as to non-cooperation was merely to the effect that Phillip, at his mother's direction, had picked up certain suit papers at the office of his father's attorney and taken them to Dadeville where he filed them in the office of the circuit clerk, and was there served by a deputy sheriff with the summons and complaint. Phillip testified he did not discuss the suit in any wise with the attorney. Insofar as disclosed, his act in conveying the papers was that of a messenger or courier. The fact that he was served with the papers in no wise affected the substantial rights of the insurer, since serving could easily have been perfected by other methods.

There was no evidence tending to show that Phillip had ever been requested by the insurer to do any of the things set forth in the cooperation clause.

[7] Cooperation implies assistance, and failure to cooperate cannot be

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(Cite as: 277 Ala. 32, *38, 166 So.2d 872, **877)

implied where no assistance has been requested. American Surety Co. v. Sutherland, D.C., 35 F.Supp. 353.

[8][9] Lack of cooperation being an affirmative defense, the burden was upon the insurer to establish such defense. United States Fidelity and Guaranty Co. v. Remond, 221 Ala. 349, 129 So. 15. What constitutes a failure of cooperation by an insured is usually a question of fact. Metropolitan Cas. Ins. Co. of New York v. Blue, 219 Ala. 37, 121 So. 25. The trial court, as trier of fact, and after hearing the witnesses, found no substantial lack of cooperation on the part of Phillip, the insured. What constituted a cooperation, or a material failure in that regard was a question of fact passed upon by him. We find no justifiable basis for disturbing his conclusion in this regard.

[10] Counsel for appellant also argues, under appropriate assignment, that the decree is erroneous in that, because of certain statements there, it must be concluded that the court considered illegal, immaterial, and irrelevant testimony. These statements related to testimony by Phillip as to his intent to make Birmingham his place of residence. No objections were interposed to this evidence. See Section 372(1), Title 7, Code of Alabama 1940. Such evidence is not admissible under our decisions because of the so-called Rule of Exclusion prevailing in this State. See Conrad v. Conrad, **878 275 Ala. 202, 153 So.2d 635, and cases cited in concurring opinion.

However, there is legal, material, and relevant evidence fully supporting the judgment and decree below.

[11] In equity cases, this court, in its review, will consider only such evidence as is legal, material and competent. Section 372(1), supra; Mink v. Whitfield, 218 Ala. 334, 118 So. 559. After full consideration, we are clear to the conclusion that the decree is supported by such type of evidence.

Affirmed.

LIVINGSTON, C. J., and SIMPSON and MERRILL, JJ., concur.
END OF DOCUMENT

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FEDERAL SUPPLEMENT

VOLUME 245



Rita S. WHITE, Plaintiff,
v.
NATIONWIDE MUTUAL INSURANCE
COMPANY, Original Defendant and
Third-Party Plaintiff,
v.
ALLSTATE INSURANCE COMPANY,
Third-Party Defendant.
Civ. A. Nos. 65-C-5-A, 65-C-11-A.

United States District Court
W. D. Virginia,
Abingdon Division.
July 20, 1965.

Actions brought against insurer of father of plaintiff injured in collision and against insurer of motorist whose automobile collided with automobile in which plaintiff was a passenger and who did not pay judgment obtained against him by plaintiff. Cases were removed to federal court, consolidated for trial and father's insurer was permitted to file third-party complaint against other insurer. The District Court, Dalton, Chief Judge, held that where coverage specified in father's policy, under which plaintiff was an insured, was \$15,000 per person and limits of liability of policy of other motorist was \$10,000 per person, motorist's vehicle came under section of Virginia Code defining uninsured motor vehicle and plaintiff who obtained judgments in amount of \$22,000 against motorist was entitled to recover \$12,000 from her father's insurer.

Order accordingly.

245 F.Supp.—1

1. Insurance ⇨146.7(1)

Policy provisions are to be construed in favor of insured.

2. Insurance ⇨169(3)

One might be held a member of household within provision extending coverage, though not for purposes of policy exclusion.

3. Insurance ⇨169(3)

Daughter who went to stay with her parents in August 1963, who remained with them until her husband rejoined her in June 1964 and who during that time ate, slept, and lived at home of her parents was a member of her father's household so as to come under coverage of father's automobile liability policy containing uninsured motorist endorsement and defining insured to mean named insured and, while residents of same household, his spouse and relatives. Code Va.1950, § 38.1-381.

4. Insurance ⇨612(2)

Timely notice is condition precedent to right of recovery under uninsured motorist provision of automobile liability policy calling for notice as soon as practicable.

5. Insurance ⇨562.3(1)

Burden of showing notice as soon as practicable as required by uninsured motorist provision of automobile liability policy is on insured.

6. Insurance ⇨537.1

For compliance with automobile liability policy requiring that insurer be notified of claim it is not always necessary that notice come directly from the insured.

7. Insurance \S 539.3

"As soon as practicable" within uninsured motorist provision of automobile liability policy requiring notice of claim as soon as practicable must be broadly construed and it is not necessary that notice be given immediately after accident especially where prejudice to insurer is lacking.

See publication Words and Phrases for other judicial constructions and definitions.

8. Insurance \S 539.8

Inasmuch as insurer received actual notice of injuries sustained by plaintiff who subsequently made claim against insurer under uninsured motorist provision of policy, there was no prejudice on ground that insurer had not received adequate notice of claim.

9. Insurance \S 539.1

Where, despite reasonable diligence, no discovery was made that limits of automobile liability policy covering motorist were less than required by Virginia law until one month after motion for judgment against motorist was filed and, within 10 days of learning that fact, registered agent of insurer of plaintiff's father was notified that plaintiff was relying on uninsured motorist provision of father's policy and father's insurer had four months to investigate and prepare defense, plaintiff was not precluded from recovering under uninsured motorist provision of father's policy on basis of mere lapse of time in insurer's receiving notice. Code Va.1950, $\S\S$ 38.1-381, 46.1-1(8), 46.1-451.

10. Insurance \S 388(5)

Main purpose of Virginia financial responsibility form is to inform Division of Motor Vehicles so they may act accordingly in revoking driving privileges and it is not meant to be relied on by insurance carriers. Code Va.1950, \S 46.1-451.

11. Estoppel \S 87

Estoppel arises when false representation is made by one to another who reasonably relies thereon to his detriment.

12. Insurance \S 388(5)

Inasmuch as one automobile liability insurer should at least have been put on inquiry by apparent conflict between financial responsibility form filed by insurer of motorist and notice it received from its insured as to coverage, insurer's reliance on form indicating that motorist's coverage was equal to that required by Virginia Financial Responsibility Law was not reasonable and motorist's insurer was not estopped from asserting that its coverage did not equal that required by Financial Responsibility Law when it was sued as third-party defendant. Code Va.1950, $\S\S$ 38.1-381, 46.1-1(8), 46.1-451.

13. Insurance \S 452.4, 523.5

Where plaintiff was an insured under her father's automobile liability policy limiting recovery to \$15,000 per person and limits of liability of policy of motorist whose negligence injured plaintiff was \$10,000 per person, motorist's vehicle was an "uninsured motor vehicle" under Virginia Financial Responsibility Act and plaintiff who obtained judgment in amount of \$22,000 against motorist was entitled to recover \$12,000 from her father's insurer. Code Va.1950, $\S\S$ 38.1-381, 46.1-1(8), 46.1-451.

14. Insurance \S 606(4)

Insurer after payment to insured under uninsured motorist provision of policy maintains all his rights against uninsured motorist. Code Va.1950, \S 38.1-381.

Leslie M. Mullins, and William J. Sturgill, Greear, Bowen, Mullins, Winston, Pippin & Sturgill, Norton, Va., for plaintiff.

William B. Poff, Woods, Rogers, Muse & Walker, Roanoke, Va., for Nationwide Mut. Ins. Co.

Francis W. Flannagan, Flannagan & Flannagan, Bristol, Va., and Frank Winston, Curtin, Hayes & Winston, Bristol, Tenn., for Allstate Ins. Co.

DALTON, Chief Judge.

Plaintiff, Rita S. White, instituted this action to recover damages for injuries which she sustained as a result of an automobile accident. The controversy centers around Virginia's Uninsured Motorist Statute. (Va.Code Ann. § 38.1-381 (Supp.1964)). The pertinent facts are not in dispute.

On November 17, 1963, the plaintiff, Rita S. White, was a passenger in an automobile which was owned and operated by one Daisy P. Long. The accident occurred in Scott County, Virginia, when Miss Long's vehicle was struck and forced from the road by another vehicle operated by Jack L. Morrison of Blountville, Tennessee.

The vehicle driven by Morrison was covered by a policy of automobile liability insurance issued in Tennessee by Allstate Insurance Company, hereinafter referred to as Allstate. The limits of that policy were \$10,000 per person and \$40,000 per accident. On December 11, 1963, a proof of insurance form (SR-21) was filed by Allstate with the Virginia Commissioner of Motor Vehicles in an effort to comply with Va.Code Ann. § 46.1-451. The form indicated Morrison had limits of liability insurance at least equal to those required by the Virginia Financial Responsibility law (\$15,000 per person, \$30,000 per accident).

Miss Long after the accident notified her insurer, Nationwide Mutual Insurance Company, hereinafter referred to as Nationwide. An investigation ensued and certain medical expenses of plaintiff were paid under Miss Long's policy.

The facts show that plaintiff was at the time of the accident residing at the home of her father, Add D. Sizemore in Dickenson County, Virginia. The facts also show that Nationwide had issued an automobile liability insurance policy to Mr. Sizemore which was in effect at the time of the accident. It was under the uninsured motorist endorsement of this policy which plaintiff was to later make claim.

On May 5, 1964 plaintiff, alleging serious and permanent injuries, filed a motion for judgment in the Circuit Court of Dickenson County, Virginia, against Morrison as tortfeasor. Learning later that the liability insurance on Morrison's vehicle was not equal to that required by Virginia law, plaintiff on June 18, 1964 sent Nationwide an affidavit that she was relying on the uninsured motorist provision of her father's policy. A copy of the notice of motion for judgment was served on Nationwide June 25, 1964.

Trial of the case of White v. Morrison was begun on October 20, 1964. A judgment was recovered by plaintiff on October 21, 1964 in an amount of \$22,000 with interest at the rate of six per cent per annum to run from the date of judgment, with costs in an amount of \$121.50.

When Miss White was unable to collect on her judgment against Morrison, she brought two actions in the Circuit Court of Dickenson County on January 1, 1965. One action was instituted against Allstate to recover \$22,121.50 plus interest from the date of judgment and another was brought against Nationwide to recover \$15,121.50 with interest.

After removal by Nationwide and Allstate to this Court, the cases were consolidated for trial. Nationwide was permitted by leave of Court to file a third-party complaint against Allstate.

Allstate then paid into Court \$10,215.60 claiming payment in full to the plaintiff under its policy covering Morrison, the limit of that policy being \$10,000 per person. This Court ordered that amount paid to plaintiff, without prejudice, on February 16, 1965.

[1-3] The Court first considers whether plaintiff was a member of her father's household so as to come under the coverage of the policy issued her father. The policy issued Sizemore by Nationwide defines "insured" thusly:

"The unqualified word 'Insured' means (1) the Named Insured and, while residents of the same household, his spouse, and the relatives of either;"

Plaintiff went to stay with her parents on August 15, 1963, and she remained with them until her husband, who had matriculated at East Tennessee State University, rejoined her in June of 1964. During that time plaintiff ate, slept, and lived at the home of her parents. Her relationship to her family was, she observed in testimony, the same as before she was married. She dwelled under their roof and was a member of their family. See *Johnson v. State Farm Mut. Auto. Ins. Co.*, 252 F.2d 158 (8th Cir. 1958); *Rathbun v. Aetna Cas. & Sur. Co.*, 144 Conn. 165, 128 A.2d 327 (1956); *Lontkowski v. Ignorski*, 6 Wis.2d 561, 95 N.W.2d 230 (1959). In light of the maxim that policy provisions are to be construed in favor of the insured, one might be held a member of a household within a provision extending coverage, though not for purposes of policy exclusion. See Annot., 50 A.L.R.2d 120 n. 1 (1956). The purpose of the policy provision in the case at bar was one of inclusion; the evidence is strongly in support of the conclusion that plaintiff was a member of the household of her father, and this Court so finds.

[4-6] The next question presented is whether adequate or timely notice was given by plaintiff to Nationwide of her intent to rely on the uninsured motorist provision of her father's policy so as not to violate the terms of that policy calling for notice "as soon as practicable". Timely notice is a condition precedent to the right of recovery and the burden of showing such notice is on the insured. *Temple v. Virginia Auto. Mut. Ins. Co.*, 181 Va. 561, 25 S.E.2d 268 (1943). On the other hand it is not always necessary that notice come directly from the insured, nor must it be given immediately after an accident, for the words "as soon as practicable" are broadly construed and time limits have been extended considerably in many instances. *Home Indemnity Co. v. Ware*, 183 F.Supp. 367 (D.Del.1960). This is especially true where prejudice to the insurer is lacking.

The purpose of the policy provision calling for prompt and timely notice is twofold: (1) It is to afford the insurer

opportunity to make reasonable investigation and (2) to enable the insurer to adequately prepare a defense, if that be necessary.

[7] The facts show that one day following the accident, Miss Long, the driver of the vehicle in which plaintiff was a passenger, notified her insurance company, Nationwide, of the accident and of the injuries sustained by plaintiff. An investigation was made by Nationwide at that time. Since, Nationwide received actual notice there was no prejudice in that regard.

[8] Motion for judgment against defendant, Morrison, was filed on May 5, 1964. Despite reasonable diligence by counsel for plaintiff, no discovery that the limits of liability insurance of Allstate were less than required by the Virginia Financial law was made until approximately one month later. (Va.Code Ann. § 46.1-1(8)).

Within 10 days of learning this fact counsel for plaintiff notified the registered agent of Nationwide that he was relying on the uninsured motorist provision of Sizemore's policy and Nationwide received an affidavit to this effect on June 18, 1964. A copy of process was served on the registered agent of Nationwide on June 25, 1964 in the manner set forth by Va.Code Ann. § 38.1-381(e) (I). In fact, Nationwide had approximately four months in which to investigate and to prepare a defense. The case was not tried until October 20, 1964. The purpose of the policy provision was satisfied.

In the instant case, it does not appear that Nationwide was materially prejudiced, and it appears that the plaintiff acted with reasonable diligence. All the surrounding circumstances must be looked to, not the mere time lapse alone. 13 Couch on Insurance, Second Edition § 49:120. Failure to give prompt notice to vitiate a contract must be material. In this case prejudice was neither material nor substantial.

[9] A determination must be made as to whether the filing of the SR-21 form

WHITE v. NATIONWIDE MUTUAL INSURANCE COMPANY

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Cite as 245 F.Supp. 1 (1965)

pursuant to Va.Code Ann. § 46.1-451 by Allstate estops Allstate from asserting that its policy insured Morrison only to the extent of \$10,000.

We regard to the purpose of the form, Carrico, V., stated in Virginia Farm Bureau Mut. Ins. Co. v. Saccio, 204 Va. 769, at 781, 782, 133 S.E.2d 268, 276 (1963).

"Thus, if there is a policy applicable to the liability, if any, of an operator involved in an accident, the SR-21 form serves the purpose of so advising the Division of Motor Vehicles so that such operator will not be required to furnish security or suffer the suspension of his license and registration. On the other hand, if there is a policy, but it does not afford coverage in the manner and to the extent required by Code, § 46.1-450, then the carrier, by the SR-21 form, advises the Division of Motor Vehicles that this policy is not applicable to liability, if any, and the Division is free to invoke the provisions of Code, § 46.1-449.

We are of opinion that the legislature had no other intention with re-

spect to the purpose to be served by the SR-21 form. Had there been an intention to make absolute the liability of a carrier to its insured when loss or damage covered by the policy occurs and the SR-21 form is filed, the legislature would surely have so stated. As has been previously noted, the legislature has clearly expressed such an intention with respect to certified policies issued pursuant to the Safety Responsibility Act. If, following certification of a policy issued under the Act, loss or damage covered thereby occurs, the liability of the carrier to the insured is absolute. Code, § 46.1-511. But in language just as clear the legislature has said that this provision shall not apply to any policy except one so certified. Code, § 46.1-509. We cannot read into the statute requiring the filing of the SR-21 form the language of the statute fixing absolute liability under a certified policy."

The (SR-21) Proof of Insurance Form.

(Copy)

AAMVA UNIFORM FINANCIAL RESPONSIBILITY FORM

Official Use Only

18801499

11/17/63

Place of Accident Gate City, Va.

Description of Vehicle Involved in Accident (Not required if Operator's Policy)				
Year of Model	Trade Name	Model	Body Type	Identification No.
55	Chevrolet			C555011077

OWNER Arch Morrison, Jr. Blountville, Tenn
Last Name First Middle Address

OPERATOR Jack Morrison, Sr.
Last Name First Middle Address

The company signatory hereto gives notice that its policy numbered 35-795-259

issued to XXXXXXXXXXXX Owner Address

is an automobile liability policy providing limits of liability at least equal to the limits required by the financial responsibility laws of this state, which policy was in effect on the date of the above described accident.

Does this policy apply to the above owner? Yes ☒ No ☐ Above operator? Yes ☒ No ☐

Va. SR-21 FINANCIAL RESPONSIBILITY NOTICE OF POLICY
(State)

By Allstate Insurance Company

Signature of Authorized Representative

Date 11/27/63

U 2790 PRINTED IN U.S.A. (This copy will be returned to the address shown above.)

[10] Thus, it seems to be the view of the Virginia Court that the main purpose of the SR-21 form is for the information of the Division of Motor Vehicles so that they may act accordingly in revoking driving privileged. It is not meant to be relied on by insurance carriers. Although the language in the Saccio case limits it to that particular set of facts, the principle is not so limited. For a case which follows Saccio, see *Insurance Co. of North America v. Atlantic Nat. Insurance Co.*, 329 F.2d 769 (4th Cir. 1964). In view of the aforementioned cases, namely, Saccio and *Insurance Co. of North America v. Atlantic Nat. Ins. Co.*, the Court is unable to regard Nationwide's reliance on the SR-21 form vital.

[11-13] Estoppel arises when a false representation is made by one to another on which the latter reasonably relies to his detriment. See *Knapp v. Independence Life & Acc. Ins. Co.*, 146 W.Va. 163, 118 S.E.2d 631 (W.Va.1961); 16 Appleman, *Insurance Law and Practice*, § 9088; 6 Couch on *Insurance*, Second Edition, § 32:270; 32:271; 32:272; Vance on *Insurance*, Third Edition, Chapter 9, § 88. Reasonable reliance in estoppel is important. Nationwide may have been privileged to rely on the form for company reasons, but it was certainly not entitled to with respect to the rights of third parties. It may well be economically advantageous and practical for insurance companies to rely on the SR-21 form, for they cannot investigate all uninsured motorist claims. In the instant case, however, Nationwide's reliance was not reasonable under the circumstances. Nationwide, at the least, should have been put on inquiry by the apparent conflict between the SR-21 form and the notice it received from plaintiff as to coverage.

Next under consideration by the Court is the amount of plaintiff's recovery. Va. Code Ann. § 38.1-381(c) defines an uninsured motor vehicle as:

" * * * a motor vehicle as to which there is no (i) bodily injury liability insurance and property damage liability insurance both in the

amounts specified by § 46.1-1(8), as amended from time to time * * *."

The "amount specified" was \$15,000 per person and \$30,000 per accident. Since the limit of Morrison's liability insurance was \$10,000 per person, his vehicle did by statutory definition come under that section of the Code defining the uninsured motor vehicle. Hence recovery was sought by plaintiff under her father's policy. This policy was controlled by Va. Code Ann. § 38.1-381(b) which provides that the insurer must undertake " * * to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle * * *" within the policy limits (i. e. \$15,000 per person). The statute expressly says that "all sums" shall so be paid.

It should be noted that the insurer's liability under the uninsured motorist provision is contractual in nature. Moreover, the Court is mindful that the purpose of the uninsured motorist law was to benefit injured parties, and liberal construction has been accorded that law with a view to the stated purpose. See *Storm v. Nationwide Mut. Ins. Co.*, 199 Va. 130, 97 S.E.2d 759, 69 A.L.R.2d 849 (1957).

Plaintiff already having collected \$10,215.60 from Allstate now seeks recovery of the unpaid part of its judgment, \$12,000 plus interest and costs, from Nationwide. Nationwide argues that it, at most, should be liable only for \$5,000, the difference between Allstate's policy with the defendant and the limits of its own policy.

The recent case of *Bryant v. State Farm Mutual Auto. Ins. Co.*, 205 Va. 897, 140 S.E.2d 817 (1965) seems controlling despite Nationwide's argument to the contrary. In that case the Court at page 901, 140 S.E.2d at page 820 said:

"The limit of the recovery of the plaintiff under any or all insurance policies carrying the uninsured motorist provision required by § 38.1-381(b) would be the amount of the insured's judgment against the uninsured motorist."

HARDRIDGE v. CELEBREZZE

Cite as 245 F.Supp. 7 (1965)

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The Court is of the opinion that in the instant case the full limits of Nationwide's policy are available to satisfy the unpaid part of the judgment.

[14] Virginia Code Annotated § 38.1-381(f) as amended provides:

"Any insurer paying a claim under the endorsement or provisions required by paragraph (b) of this section shall be subrogated to the rights of the insured to whom such claim was paid *against the person causing such injury*, death or damage to the extent that payment was made; * * *." (Emphasis Supplied)

The rights of subrogation are against the tortfeasor not against another insurance company. The insurer, after payment to the insured, maintains all his rights against the uninsured motorist. Nationwide's rights will arise after payment is made. It can then determine the extent of the tortfeasor's assets and proceed accordingly. Nationwide's rights of subrogation against Morrison will not be damaged in toto as it claims.

For the foregoing reasons the Court is of the opinion that Morrison was an uninsured motorist under statute, that timely notice was given Nationwide Mutual Insurance Company, and that Nationwide is liable in an amount of \$12,000 plus interest and costs to plaintiff, Rita S. White.

An order will be entered to this effect.



James D. HARDRIDGE, Plaintiff,

v.

Anthony J. CELEBREZZE, Secretary of
Health, Education and Welfare,
Defendant.

Civ. No. 5650.

United States District Court
N. D. Oklahoma.

Aug. 25, 1965.

Action to review administrative denial of social security disability benefits.

The District Court, Daugherty, J., held that vocational witness' testimony as to job opportunities available to disability benefits claimant supported secretary's finding that claimant was able to perform some kind of substantial gainful activity and that he was not entitled to period of disability or disability benefits.

Judgment accordingly.

1. Social Security and Public Welfare

§ 143

Disability benefits claimant must establish that there is medically determinable physical or mental impairment which can be expected to result in death or be of long-continued and indefinite duration, that there is inability to engage in any substantial gainful activity and that inability is by reason of impairment. Social Security Act, § 216(i) (1) as amended 42 U.S.C.A. § 416(i) (1).

2. Social Security and Public Welfare

§ 143

Once disability benefits claimant has proved existence of requisite impairment and has shown that he is unable to continue previous employment or to engage in any employment in which he may have engaged in past, he has made prima facie case. Social Security Act, § 216(i) (1) as amended 42 U.S.C.A. § 416(i) (1).

3. Social Security and Public Welfare

§ 143

Vocational witness' testimony as to job opportunities available to disability benefits claimant supported secretary's finding that claimant was able to perform some kind of substantial gainful activity and that he was not entitled to period of disability or disability benefits. Social Security Act, § 216(i) (1) as amended 42 U.S.C.A. § 416(i) (1).

Pat Malloy and N. E. McNeill, Jr., Tulsa, Okl., for plaintiff.

John M. Imel, U. S. Atty., Tulsa, Okl., for defendant.

ALLEN v. MARYLAND CASUALTY COMPANY

Cite as 259 F.Supp. 505 (1966)

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voluntarily made with an understanding of its consequences before the Court accepted the plea. The record reflects that if anything, the Criminal Court was zealous in its protection of Petitioner's constitutional rights.

Thereupon, it is,

Ordered and adjudged that the Petition be and the same is hereby denied without hearing.



Jacob Edward ALLEN, Plaintiff,

v.

MARYLAND CASUALTY COMPANY

and

State Farm Mutual Automobile Insurance Company, Defendants.

No. 66-C-3-L.

United States District Court

W. D. Virginia,

Lynchburg Division.

Sept. 22, 1966.

Action by judgment creditor against his automobile liability insurer and against insurer of judgment debtor's father. Judgment creditor's insurer sought to avoid liability on theory that judgment debtor was insured under father's policy. Father's insurer denied liability. The District Court, Barksdale, J., held that where neither named insured, his son nor anyone on their behalf gave any notice of collision to insurer "as soon as practicable" as required under automobile liability policy, insurer was justified in disclaiming coverage by reason of failure to give required notice.

Judgment accordingly.

1. Insurance ⇨125(2)

Illinois law governed construction of contract of insurance entered into in Illinois.

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2. Insurance ⇨539.8

Where neither named insured, his son who drove automobile, nor anyone on their behalf gave any notice of collision to insurer "as soon as practicable" as required under automobile liability policy, insurer was justified in disclaiming coverage by reason of failure to give required notice, though son admitted fault and it was doubtful whether earlier investigation by insurer would have produced evidence preventing judgment against son.

3. Courts ⇨370

Where Illinois law governed construction of automobile liability policy and there were no Illinois cases in point construing clause, District Court would give phrase "resident of the same household" a fair, common-sense construction.

See publication Words and Phrases for other judicial constructions and definitions.

4. Domicile ⇨4(1)

Judgment debtor's domicile of origin continued to be his domicile until and unless he changed it by acquisition of domicile of choice.

5. Domicile ⇨4(1)

Enlistment in Navy did not effect change in domicile of origin by acquisition of domicile of choice.

6. Domicile ⇨4(2)

To acquire domicile of choice, one must reside at some place other than his domicile of origin with intention of making it his permanent home.

7. Insurance ⇨435.8(4)

Judgment debtor who had run away from home to voluntarily join Navy and who visited home only on brief leaves of absence was not a "resident of the same household" as father who was named insured under automobile liability policy so as to be within policy's coverage, notwithstanding that domicile continued to be in father's home.

Shuler A. Kizer, Kizer, Hess & Robey, Buena Vista, Va., for plaintiff Allen.

William Rosenberger, Jr., Lynchburg, Va., for Maryland Casualty Co.

Henry M. Sackett, Jr., Williams, Robertson & Sackett, Lynchburg, Va., for State Farm Mut. Auto. Ins. Co.

FINDINGS OF FACT and CONCLUSIONS OF LAW.

BARKSDALE, District Judge.

This action having been tried upon the facts, without a jury, the court doth hereby find the facts specially, and states separately its conclusions of law thereon, pursuant to Rule 52(a) F.R.Civ.P., as follows:

FINDINGS OF FACT.

On September 17, 1963, in Amherst County, Virginia, a Ford truck owned and operated by plaintiff, Jacob Edward Allen, was in collision with a Buick automobile owned by George Nutes Ivey and operated by Billy Don Bowden. Thereafter, on January 19, 1965, Allen instituted his action for damages against Ivey and Bowden in the Circuit Court of Amherst County. Shortly afterwards, this action was removed to this Court, and the trial on December 8, 1965, resulted in a judgment in the sum of \$11,000.00 for plaintiff Allen against both defendants. It does not appear that George Nutes Ivey had any insurance coverage on his Buick Sedan. There was in force at the time of the accident a policy issued by defendant, Maryland Casualty Company, to plaintiff Allen, which included the Uninsured Motorist endorsement required by Virginia law (Section 38.1-381, of the Code of Virginia). Alleging that the Ivey automobile was an uninsured vehicle, plaintiff Allen instituted this action to recover of Maryland Casualty Company the amount of his judgment, which was within the Uninsured Motorist endorsement's policy limit.

Maryland Casualty Company admitted the fact of its coverage of Allen's automobile for damages which he might recover from injuries by an uninsured vehicle, but denied that the Ivey vehicle was an uninsured vehicle by reason of

its allegation that Billy Don Bowden was covered by an insurance policy issued to his father, Heartsel V. Bowden, by State Farm Mutual Automobile Insurance Company. Whereupon, State Farm was impleaded as a party hereto. State Farm has answered, admitting that it had issued its policy to Heartsel Bowden, in force at the time of the accident, which provided amongst other things "such insurance as is afforded by the policy under the coverages A and B * * * with respect to the owned automobile, applies to the use of a non-owned automobile by the named insured or a relative * * *", with the further provision:

"Insured—Under coverages A and B * * *—The unqualified word 'insured' includes (1) the named insured and also includes (2) his relatives. * * *"

"Relative—means a relative of the named insured who is a resident of the same household."

However, State Farm denied liability, alleging that Billy Don Bowden, although a son of its insured, Heartsel V. Bowden, was not a resident of his household and thus was not an Insured within the meaning of the policy; and upon the further ground that neither Ivey nor Bowden, nor any one on their behalf, had complied with the provisions of its policy relating to notice of accidents or notice of claim or suit. By its amended answer, State Farm has alleged that its policy was invalid and insufficient in law to afford coverage to Billy Don Bowden by reason of the misrepresentations and declarations made by Heartsel V. Bowden that there was no operator of the insured vehicle under twenty five years of age a resident of his household.

In the insurance policy issued to Heartsel Bowden by State Farm, the following Policy Conditions appear:

"In the event of an accident, occurrence or loss, written notice shall be given by or on behalf of the Insured to the Company, or any of its duly authorized agents, as soon as practicable. * * *"

"The insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative."

The policy further provides that:

"No action shall lie against the Company (a) unless, as a condition precedent thereto, there shall have been full compliance with the terms of this policy."

Heartsel Bowden was promptly notified of the accident by letter from the Navy authorities dated September 17, 1963, and he confirmed this information by a telephone call to his son, Billy Don, at his Naval Station in Norfolk. On January 25, 1965, a registered letter, enclosing a summons and copy of the motion for judgment in the Allen suit, from the Virginia Division of Motor Vehicles, addressed to Billy Don in care of his father, was received by Heartsel Bowden at his home in Coal City, Ill., and delivered the same day by Heartsel to Billy Don, who then lived in Joliet, Ill. Heartsel Bowden did not think that his policy afforded any coverage for Billy Don. Neither Billy Don, nor the named insured, Heartsel Bowden, ever gave any notice to State Farm that the accident had occurred or that suit had been brought. No report of the accident, or the institution of the damage suit, or notice of any kind, was received by State Farm until more than 18 months after the accident when Maryland Casualty Company on March 24, 1965, wrote to State Farm's agent in Coal City, Ill., informing him of the accident and the institution of the suit. Shortly thereafter, State Farm took non-waiver agreements from the Bowdens, undertook to investigate the accident, and by letter of June 3, 1965, denied coverage.

I find as facts that neither Heartsel Bowden, Billy Don Bowden, nor anyone on their behalf, gave any notice to State Farm "as soon as practicable", and that this failure to give notice resulted in prejudice to State Farm. It is true that Billy Don Bowden promptly admitted that he was at fault in causing the accident, and it is doubtful that prompt in-

vestigation by State Farm would have discovered witnesses whose testimony would have prevented a judgment against Billy Don Bowden. It does not appear when Allen retained counsel, but his suit was not instituted until January 19, 1965, 16 months after the date of the accident. Consequently, it appears that State Farm, having received no notice of the accident, was deprived of its opportunity of prompt investigation and also the opportunity to negotiate for a settlement before the institution of the damage suit, and in all likelihood, before Allen had employed counsel.

Billy Don resided with his father and mother until he was 17 years old, at which time the family resided in Coal City, Ill. On March 8, 1961, Billy Don ran away from home because he wanted to quit school and get out on his own for a little while, although his parents wanted him to continue his schooling. There was friction between Billy Don and his father on that account. He first went to live with an aunt in Kankakee, Ill., about 35 miles away. He wrote his parents where he was and visited them occasionally on week ends, but stayed away until about the middle of August. At that time, his father and a Baptist minister, a family adviser, urged him to come home, and he agreed. His parents wanted him to go back to school, but Billy Don wanted to get a job. He tried to find a job, but after his efforts had been unsuccessful for 2½ to 3 weeks, he decided that he wanted to go into the Navy. Consequently, a little over a month after his return home, Billy Don voluntarily joined the Navy on September 25, 1961. He served in the Navy for more than two years, and was, of course, entirely independent of his parents during this time. When he enlisted, he left his clothes and personal effects at his parents' home and gave as his home address his parents' home in Coal City. He spent two leaves of absence with his parents. In mid-September of 1963, he went AWOL. Instead of going home, he came to Lynchburg, where he had friends, and spent twelve days or more

in this vicinity, working a part of the time in apple orchards. Finally, he hitch-hiked from Lynchburg to his parents' home, where he spent one day, and his father took him to Chicago and gave him enough money to travel by rail to his station in Norfolk. Instead, he hitch-hiked until he became involved in the accident on September 17, 1963, which is the basis of this litigation. In December, 1963, he was discharged by the Navy as being unsuitable for Naval service. After being discharged, he returned to Lynchburg, where he stayed a week or more before returning to his father's home in Coal City. He remained in his father's home for less than a month, leaving about January 10, 1965.

The matter of Billy Don's residence in his father's home may be briefly summarized by the following questions and answers on cross-examination in Billy Don's deposition:

- "Q. From March, 1961 until you returned home in mid-August of 1961 you were living away from home.
- A. Yes, sir.
- Q. Then you returned home briefly and went in the Navy.
- A. Yes, sir.
- Q. Then when discharged from the Navy you were home briefly and you left and have had many different addresses since that time.
- A. Yes, sir.
- Q. So the only times you were home were just brief periods during the times that I am speaking of—that is, March '61 to August of '61 and from December 1963 when you were discharged from the Navy until right now—the only times you have been home during any of those periods were just brief periods but basically or essentially you were seeking jobs elsewhere and living elsewhere. Is that correct?
- A. Just about. I don't think I have lived at home more than two

months at a stretch since I left home in '61."

I find as a fact that on September 17, 1963, the date of the accident, Billy Don Bowden was not a resident of his father's household.

CONCLUSIONS OF LAW.

[1] Upon the facts found, my conclusions of law are as follows. Since the contract of insurance was entered into in the State of Illinois, it seems obvious that under *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, Illinois law controls as to the construction to be given the provisions of the policy. Considering first the legal effect of the failure of the insured to give notice of the accident to State Farm as required by the conditions of the policy, I find the following Illinois authorities quite pertinent:

In the case of *Simmon v. Iowa Mutual Casualty Co.*, (1954), 3 Ill.2d 318, 121 N.E.2d 509, an accident occurred on June 30, 1948, and no notice was given by the insured to her insurance company until September 9, 1948. However, the attorney for the injured person, before the institution of a suit, notified the insurance company on August 7, 1948, 38 days after the accident. The issue of whether the insurance company was given reasonable notice was presented to the court, sitting without a jury, who found from the evidence that defendant had been given reasonable notice. On appeal, the insurance company contended that the policy required notice to be given by or on behalf of the insured, and that the giving of the notice by counsel for the injured party was not sufficient. The court held that giving of notice by the injured person was sufficient, and that under the circumstances, the finding of the trial court should not be overruled.

In *Hawkeye-Security Insurance Company v. Myers*, (7 Cir., Ill.1954), 210 F.2d 890, notice of an accident which occurred on March 31, 1951, was received

Cite as 259 F.Supp. 505 (1966)

on May 5, 1951, 35 days after the accident. The court said (p. 893):

"The District Court, trying the case without a jury, found that the plaintiff first learned of the accident of March 31, 1951, in which the defendant Willis was injured, on May 5, 1951, thirty-five days after the accident, at which time the insurer received the accident report signed by Myers; that no report of the accident was given by or on behalf of Myers prior to this notice; that the policy in question provided, as the first condition of the insurance agreement, that notice of an accident should be given 'as soon as practicable'; and that such notice was not given as soon as practicable.

* * *

"The provision that the assured shall give timely notice of an accident is a reasonable requirement which is ordinarily inserted in insurance policies covering public liability. Such a notice, if promptly given, enables the insurer to make an investigation of the accident while the circumstances are still fresh in the minds of the parties involved and of the witnesses. *The insurer may thus advise itself as to whether it should settle any claim arising therefrom or whether it should prepare to defend any action which might be brought to recover damages for any injury caused by the accident.* The failure to comply with such a provision, where compliance has not been waived by the insurer, relieves the insurer of liabilities arising out of that accident. *Clements v. Preferred Accident Insurance Co., 8 Cir., 41 F.2d 470, 472, 76 A.L.R. 17.*" (Italics mine.)

The more recent case of *Allstate Insurance Co. v. Hoffman*, (1959), 21 Ill. App.2d 314, 158 N.E.2d 428, seems particularly analogous to the situation here. While it is a decision of the intermediate appellate court, it does not appear that any appeal was taken from it to the Illinois Supreme Court, so it would seem that it is an authoritative declaration of Illinois law.

Defendant Hoffman had a public liability policy issued by Allstate, which, under certain circumstances, covered his operations of vehicles other than his own. He had an accident while driving a National Guard vehicle while he was on active duty as a member of the Guard. He immediately notified the National Guard investigating officer. When he was sued by the injured parties, he promptly notified National Guard officers, and the Attorney General appeared for him in that suit. In response to an inquiry, Hoffman told the military authorities that he had no insurance, because he did not think his policy covered his liability for this accident. Neither Hoffman, nor anyone for him, reported the accident to Allstate until 23 months after the accident when the Attorney General notified the Company. It was held that the failure of Hoffman to give the notice required by his policy as soon as practicable, justified Allstate's disclaimer of liability. The court said (pp. 432, 433):

"The remaining contention is whether, if Hoffman had had a right to coverage, it was forfeited by breach of the condition requiring written notice of the accident to be given by or for him to plaintiff as soon as practicable. The contention of the Attorney General seems to be that because Hoffman was of the opinion that the policy did not cover his liability for the accident—an opinion concurred in by his superior officer—his supposed mistake as to coverage was an excusable one for the reason that Hoffman's construction of the policy was identical with plaintiff's. We regard this contention as fallacious; but on the basis of this position the Attorney General urges that it 'was not "practicable" for the defendant to give notice to the plaintiff under a policy that the plaintiff itself reads as not covering the accident.' The requirements of the policy as to notice and the question as to whether the policy affords coverage are separate and distinct matters. Failure of the insured to comply with

provisions with respect to notice justifies a disclaimer of liability on the part of the insurer, even though the insured would have been entitled to the protection had he complied with the notice provisions. It is admitted that plaintiff had no notice of the accident until some twenty-three months had elapsed. There is no evidence that during that period plaintiff had any knowledge of the accident or gave any consideration to the matter of coverage until it had disclaimed because of failure on the part of insured to comply with the policy condition as to notice. We think that the Attorney General is therefore not in a position to urge plaintiff's conclusion that he had no coverage as an excuse for the long delay in giving notice. Hoffman was fully cognizant of the fact of the accident, reported it to the investigating officer of the convoy, and again to his superior officer on arriving at the home armory in Chicago the evening of the day it occurred. He was served with a summons in the Grochowski case the following December and turned it over to his headquarters commander, but at no time did he report the accident to plaintiff. The obvious conclusion justified by the record is that it would have been practicable for Hoffman to give notice on the day following the accident.

"The Attorney General contends that the delay in receiving notice was not prejudicial; he argues that officers of the National Guard, as well as his own office, investigated the occurrence, and he has put himself on record as being willing to turn over to the plaintiff the results of these investigations. In our opinion, this offer does not operate as a substitute for timely notice. Plaintiff has a right to make its own investigation to determine the question of liability, the nature and extent of the injuries sustained by the Grochowskis, the location of the witnesses who might have had first-hand knowledge of the facts and other matters bearing on the defense of the claim. It

is common knowledge that insurance companies have a staff of skilled investigators, and without timely notice of the accident the insurer is irreparably handicapped in making its investigation."

See also *International Harvester Co. v. Continental Casualty Co.*, 33 Ill.App. 2d 467, 179 N.E.2d 833, which is generally in accord, although the factual situation was quite different.

[2] Having found as a fact that neither Heartsel Bowden, Billy Don Bowden, nor anyone on their behalf, gave any notice of the accident to State Farm "as soon as practicable", I conclude, as a matter of law, that State Farm is justified in disclaiming coverage by reason of the failure of the insured to give the required notice.

Since I have concluded that State Farm has been relieved of coverage, if any there existed, by reason of the failure of the insured to give notice of the accident as soon as practicable, it is not necessary to a decision of this case to make a conclusion of law on the question of whether or not Billy Don Bowden was a resident of the same household as his father, the named insured. However, the issue has been raised, and it seems not inappropriate that I pass on it. No Illinois decisions on this question have been cited to me by counsel, nor do I find any. Nor do I find any decisive Virginia authority on the question. However, I find a number of cases from other jurisdictions wherein the facts were quite analogous.

In *Island v. Fireman's Fund, etc.*, (1947), 30 Cal.2d 541, 184 P.2d 153, it was held that a minor son serving in the Armed Services was *not* a member of the insured's household, this holding being necessary to afford coverage. The court said (p. 156):

"As contended by the insurer, the domicile or legal residence of a person is in no way affected by his enlistment in the Armed Forces in the absence of a contrary intent (citing cases), but these decisions are not

decisive upon the question as to whether military service excludes the enlistee from being a 'member of the household' within the meaning of that term as used in the insurance policy.

"One of the definitions of the word 'household' given in Webster's New International Dictionary is 'those who dwell under the same roof and compose a family; a domestic establishment.' The courts have noted that the term may have different meanings under different circumstances. (citing cases) * * * A federal court declared: Whether the term 'household' or 'family' is used, the term embraces a collection of persons as a single group, with one head, living together, a unit of permanent and domestic character, under one roof, a 'collective body of persons living together within one curtilage, subsisting in common and directing their attention to a common object, the promotion of their mutual interests and social happiness.' In that case, it was held that when two families came together temporarily, 'each family retained its own organization under its own head and did not merge to make one family or one household in any such way as the word is used in the policy.' *Lumbermen's Mutual Casualty Co. v. Pulsifer*, supra, D.C., 41 F.Supp. 249 at pp. 251, 252.

"A cardinal rule of interpretation is that, where a provision of an insurance policy is susceptible of two constructions, it should be construed most strongly in favor of the policy holder. (citing cases). This rule requires the conclusion that Cave, Jr., was not a member of his father's household at the time of the happening of the accident to Island. If the insurer intended to restrict its coverage to the extent of its definition in the present case, it should have used language clearly stating that purpose."

In *Cal.-Farm Insurance Co. v. Boiseranc et al.* (1957), 151 Cal.App.2d 775, 312 P.2d 401, the insured's child inflicted injury upon another child. The child

was within coverage of his father's insurance if he was a resident of insured's household. The child's parents were separated, and he had been living with his father, the insured, but a few days before the accident, he had gone to live a short while with his mother. It was held the child was a resident of his father's household, which resulted in coverage under the father's policy. The court said (p. 405):

"While the cases do not all appear consistent, it can generally be stated that insofar as the cases involve insurance policies, they can be roughly divided into cases involving policies excluding from coverage of the policies members of the insured's household, and those extending coverage to such persons. Both attempt to apply the rules of construction above discussed. As a result, in the extension cases the questioned terms are broadly interpreted, while in the exclusion cases the same terms are given a much more restricted interpretation. This is necessary, because in both situations the courts favor an interpretation in favor of coverage."

In *Shapiro v. Republic Indemnity Co.* (1959), 52 Cal.2d 437, 341 P.2d 289, after recovering a judgment against John and Pauline Campbell and their son for personal injuries, plaintiff herein, Mrs. Shapiro, instituted this action against the Campbells' insurer. It appeared that, if the son who was driving his parents' car at the time of the accident had been held to be a resident of his parents' household, there would have been no coverage by reason of the endorsement on the policy that "there is no operator of the automobile under twenty five (25) years of age resident in Named Insured's household. * * *" The Court held that, since the son was a member of the Armed Services at the time, he was *not* a resident of the Insured's household within the meaning of the endorsement.

In *American Universal Insurance Co. v. Thompson*, (1963), 62 Wash.2d 595, 384 P.2d 367, it was held that a minor

son who had an accident while driving a non-owned automobile during the period of his Army service and residence at an Army Post was a "resident of same household" as his parents, so that he was within the coverage of his parents' policy.

Referring to two cases involving young men in military service, one holding that the son was a member of his father's household, and the other holding that he was not, the Court said:

"The common denominator in the two cases is that in both, the court upheld the rule that the language should be interpreted more strongly against the insurance company so as to hold that the policy covered the persons involved * * *

"These cases illustrate that the interpretation of the terms involved is not fixed, but varies according to the circumstances of the case. They also demonstrate that most courts will interpret the terms so as to extend the coverage, if this can be done under any reasonable interpretation of the facts."

The same result is reached in the following cases construing extension clauses: *Allstate v. Jahrling*, 229 N.Y.S. 707, and *Detroit Auto., etc., Co. v. Feys*, D.C., 205 F.Supp. 42.

[3] Here the situation is unusual. Admittedly, plaintiff Allen is entitled to a judgment against one of the two defendants, the controversy really being between the two insurance companies. It is not necessary for me to give the phrase, "resident of the same household", a broad construction in order to fix liability upon an insurer, nor does it behoove me to give the phrase a narrow construction in order to avoid relief from coverage by reason of an exclusionary clause. It would seem that I should give the phrase a fair, common-sense construction.

[4-6] Undoubtedly, the domicile of Billy Don was his father's home. That was his domicile of origin, and by operation of law continued to be his domi-

cile until and unless he changed it by the acquisition of a domicile of choice. While in the service of the Navy, he never changed his domicile of origin by acquiring a domicile of choice. To acquire a domicile of choice, a man must reside at some place other than his domicile of origin with the intention of making it his permanent home. While Billy Don resided at different Naval stations, there is nothing to indicate that he intended to make any of them his permanent home.

But *residence* and *domicile* are quite different. A man, while in public service may *reside* in the District of Columbia for many years, but as was said in *District of Columbia v. Murphy*, 314 U.S. 441, 62 S.Ct. 303, 86 L.Ed. 329:

"A man does not acquire a domicile in the District simply by coming here to live for an indefinite period of time while in the Government service.
* * *"

Under the circumstances existing here, it simply does not make sense to me to conclude that, on September 17, 1963, Billy Don Bowden was a resident of his father's household. Prior to his enlistment in the Navy, he had run away from home because of friction with his father. When he came home his father wanted him to go to school. He wanted to get a job. Failing in his search for a job, he *voluntarily* joined the Navy, serving at different Naval stations for more than two years before September 17, 1963. During this two year period, he only visited his father's home on brief leaves of absence. He was not a member of his father's household. He was in no way under the discipline and control of his father. In fact, when the accident occurred, he was disobeying his father in hitch-hiking, when his father had given him money to enable him to return to Norfolk by rail.

[7] I have found as a fact that, on September 17, 1963, Billy Don was not a resident of his father's household, so I conclude as a matter of law that, not being a resident of his father's household

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Cite as 259 F.Supp. 513 (1966)

at the time of the accident, Billy Don was not within the coverage of his father's liability insurance policy issued to him by State Farm.

Since I have held that Billy Don was not a resident of his father's household, I do not reach the question raised by State Farm's amended answer.

It is my final conclusion that defendant, Maryland Casualty Company, is liable to the plaintiff, Allen, for the amount sued for, and the defendant, State Farm, is not liable to the plaintiff in any amount.



E. F. HUTTON & COMPANY Inc., a Delaware corporation, Plaintiff,

v.

MANUFACTURERS NATIONAL BANK OF DETROIT, a national banking corporation, and V.G.A. Co. (formerly Vernors, Inc.), a Michigan corporation, Defendants.

No. 28780.

United States District Court
E. D. Michigan, S. D.
Sept. 16, 1966.

Action by stockbroker which had mistakenly forwarded customers' stock warrants to issuer's liquidating agent for payment of first installment of liquidation dividends pursuant to liquidation plan to compel issuer and its liquidation agent to return the warrants. A temporary restraining order was issued. On the broker's motion for preliminary injunction and the issuer's and its liquidation agent's motion to dismiss, the District Court, Freeman, J., held that under Michigan law, stockbroker which had mistakenly forwarded customers' stock warrants to issuer's liquidating agent for payment of first installment of liquidation dividend was entitled to

preliminary injunction forbidding liquidating agent from releasing warrants from its custody or cancelling them where issuer was not bona fide purchaser and stockbroker had acted under mistake of fact in forwarding warrants.

Motion to dismiss denied and petition for preliminary injunction granted.

1. Corporations \S 111½

Under Michigan law, stock warrants attached to corporate debentures were "investment security" within statute governing rights of parties to transactions involving investment securities. Comp. Laws Mich.1948, §§ 440.8104-440.8106, Pub.Acts 1962, No. 174.

See publication Words and Phrases for other judicial constructions and definitions.

2. Corporations \S 111½

Under Michigan law, where stock warrants were within definition of "investment security", statutes governing investment securities and not statutes governing commercial paper would determine rights of parties to transaction involving warrants. Comp.Laws Mich. 1948, §§ 440.3101 et seq., 440.8101 et seq., 440.8201, Pub.Acts 1962, No. 174.

3. Corporations \S 111½

Under Michigan law, where particular question regarding investment security cannot be resolved on basis of Uniform Commercial Code provisions governing investment securities, court would look to Uniform Commercial Code article dealing with negotiable instruments for guidance. Comp.Laws Mich.1948, §§ 440.3101 et seq., 440.8101 et seq., 440.8201, Pub.Acts 1962, No. 174.

4. Corporations \S 149

Under Michigan statute providing that upon delivery of security, bona fide purchaser acquires rights in security which transferor had or had actual authority to convey and acquires security free of adverse claim, purchaser would acquire the security free of claims of even parties to transaction. Comp.Laws Mich.1948, §§ 440.1201, 440.8301, Pub. Acts 1962, No. 174.

VIRGINIA:

IN THE CIRCUIT COURT OF BEDFORD COUNTY

ANNA L. PHELPS, et al.,)

Appellant,)

v.)

Case No. CH89-015473

STATE FARM MUTUAL AUTOMOBILE)
INSURANCE COMPANY, et al.,)

Appellee.)

USAA, GEICO, ANNA L. PHELPS AND MARY C. PHELPS
Joint Memorandum in Support of
Motion for Declaratory Judgment

STATEMENT OF THE CASE

This declaratory judgment action is before this Court to determine whether State Farm Mutual Automobile Insurance Company (State Farm), provides excess liability and collision coverage to its named insured Anna L. Phelps for claims arising out of a single vehicle accident on June 10, 1989 when Anna Phelps was operating her sister, Mary Catherine Phelps', car. While USAA is named as a party defendant, its interests are more closely aligned to those of the plaintiffs and adverse to those of State Farm. Therefore, USAA joins in this Memorandum as well. These issues have previously been briefed by Anna Phelps and State Farm. A hearing was held on September 10, 1991 at which time evidence was presented ore tenuis. Anna L. Phelps, Mary Catherine Phelps, USAA and Geico file this Joint Memorandum in Support of a declaration that State Farm does provide both collision and excess liability

FILED IN THE CLERK'S OFFICE
The 1st day of Oct., 1991

TESTE:

Clerk

LAW OFFICES
CENTRY LOCKE
RAKES & MOORE
ROANOKE, VIRGINIA

coverage for all claims arising out of the accident of June 10, 1989.

STATEMENT OF FACTS

Most of the pertinent facts have been stated in the Briefs previously filed with the Court. In addition, the testimony presented at the hearing on September 10, 1991, addressed the relevant facts. This Brief will not seek to restate all of the pertinent facts, but briefly summarize those most pertinent to the positions of the parties.

On June 10, 1989, Anna Phelps was involved in a single vehicle accident in Bedford County while she was driving a 1988 Nissan owned by her sister Mary Catherine Phelps. The 1988 Nissan was insured by Nationwide with Mary Catherine Phelps as the named insured. At the time of the accident, Anna Phelps, the driver, was also insured with a liability policy through State Farm listing her as a named insured and providing coverage on a Honda CRX. Two passengers were in the Nissan with Anna Phelps on the night of the accident. They were Jennifer Trevey and Anna Featherstone. Ms. Trevey is insured for underinsured motorist purposes under a policy issued by USAA. Ms. Featherstone is potentially covered by an underinsured motorist policy issued through GEICO.

A tort action has been filed by Ms. Trevey against Anna Phelps in the Bedford County Circuit Court seeking damages for injuries caused in the accident of June 10, 1989. Nationwide,

the insurer for the vehicle which Ms. Phelps was driving at the time of the accident, is providing Ms. Phelps with a defense and providing the primary liability coverage of \$25,000. The question is whether State Farm, Anna Phelps's own carrier, provides excess liability coverage for the use of a non-owned vehicle. If this Court determines that State Farm does not have excess liability coverage for the claims arising out of the accident of June 10, 1989, the possibility exists that USAA and GEICO would both have underinsured motorist exposures to their respective insureds. In the event that judgments were returned against Anna Phelps in excess of the primary limits of Nationwide, both USAA and GEICO would have to pay those judgments and would be subrogated against Anna Phelps for any amounts paid.

QUESTION PRESENTED

DOES STATE FARM PROVIDE EXCESS LIABILITY AND COLLISION COVERAGE FOR ANNA PHELPS, ITS NAMED INSURED, FOR CLAIMS ARISING OUT OF THE ACCIDENT WHICH OCCURRED ON JUNE 10, 1989, WHEN ANNA PHELPS OPERATED A VEHICLE OWNED BY HER SISTER MARY CATHERINE PHELPS?

DISCUSSION OF AUTHORITY

It is undisputed that at the time of this accident, Anna Phelps had purchased through an insurance agent in Northern Virginia an automobile liability policy issued by State Farm listing Anna Phelps as the named insured. It is this policy which is the subject of this action. It is likewise

undisputed, that at the time of the purchase of the insurance, Anna Phelps was living in Northern Virginia in a townhouse with her sister, Mary Catherine. Anna Phelps testified that she had been instructed by her mother to purchase this insurance because her mother had removed Anna Phelps from her liability policy when Anna turned 18. Moreover, it is undisputed that at the time of the accident, Anna Phelps was operating a vehicle which she did not own, but which was owned by her sister Mary Catherine Phelps.

The insuring clause of Anna Phelps' State Farm policy provides coverage for claims arising out of the use of a nonowned vehicle.¹ The question is whether the car driven by Anna Phelps at the time of the accident which was owned by her sister Mary Catherine Phelps, was a "nonowned" vehicle as defined by the State Farm policy.

The policy defines a nonowned automobile as follows:

A nonowned automobile means an automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile.

¹ Part I Liability

Coverage A Bodily Injury Liability: ...To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of:

A. Bodily injuries,
sickness or disease,...

arising out of the ownership, maintenance or use of the owned automobile or any nonowned automobile,...[emphasis added].

It is clear that Mary Catherine Phelps, the owner of the vehicle, is the biological sister of Anna Phelps. In the vernacular, she is a relative of Anna Phelps. The question, however, is whether she is a relative as defined by the State Farm policy. State Farm defines a relative as follows:

Relative means a relative of the named insured who is a resident of the same household.

Thus, in order to be a relative as defined by State Farm, an individual must not only be a relative of the named insured, Anna Phelps, she must also be a resident of the same household as Anna Phelps. If Mary Catherine Phelps is deemed to be a relative of Anna Phelps as defined by the policy, there would be no coverage under Anna Phelps' State Farm policy. If Mary Catherine Phelps is not deemed to be a resident of the same household as Anna Phelps, then it would be concluded that Anna Phelps was driving a nonowned vehicle at the time of the accident and excess liability and collision coverage would be provided under State Farm's policy to its named insured.

Thus, the single issue before this Court is whether Anna Phelps and Mary Phelps were residents of the same household at the time of the accident. State Farm has conceded in its Brief and in Argument at the hearing on September 10, 1991 that Anna Phelps and Mary Catherine Phelps were not residents of the same household in Northern Virginia where they were living at the time of the accident. Rather, State Farm contends that both Anna Phelps and Mary Catherine Phelps were still residents of their mother's household in Goode,

Virginia. It is important to recognize that in order for State Farm to successfully avoid coverage to Anna Phelps, its named insured, it must be established that both sisters were residents of the same household (their mother's) at the time of the accident. If only one of the sisters was a resident of their mother's household, the other sister would not be deemed to be a relative as defined by the policy. The definition of a nonowned vehicle would apply and coverage would be provided.

The definition of "household" has been exhaustively addressed in the other Briefs and does not need to be rehashed here. There is little question that the residence of Marjorie Hunt Phelps in Goode, Virginia would constitute a household. The question, however, is whether, under the evidence as presented, both Mary Catherine and Anna were residents of their mother's household in June, 1989.

The facts as established at the hearing indicate that Mary Catherine Phelps owned the vehicle which Anna Phelps was driving at the time of the accident. At the time of the accident, Mary Catherine Phelps was 20 years old and had left home in the fall of 1987, approximately 18 months before this accident. Mary Catherine had left nothing of importance in Goode and had bought furniture for the townhome she had leased in her own name in Northern Virginia. Mary Catherine had removed her name from her mother's liability policy and had purchased her own liability coverage through Nationwide. She was living with a boyfriend at the time of the accident, a

relationship of which her mother did not approve. In fact, because her relationship with her mother was not very good, Mary Catherine did not go home very much. Mary Catherine Phelps testified that from the fall of 1987 through June 10, 1989, she and her sister, Anna Phelps, were only at their mother's home in Goode at the same time for, at the most, 3 or 4 days at a given time and that this occurred only once or twice in that 18 month period. On the rare occasion when they were both present, they did not have bedrooms and had to sleep on sofas.

Anna Phelps testified that she also had left nothing of importance at home when she moved out and went to school in the Fall of 1988. She also purchased furniture for a townhome and signed a lease with her sister for the townhome. Both sisters testified that the mother never saw nor approved the lease. They received no financial assistance from their mother. Anna Phelps testified that her mother advised her that when she turned 18 she was on her own and that she was taken off of her mother's liability policy. Accordingly, Anna secured the State Farm policy which is the subject of this lawsuit, through an agent in Northern Virginia, and paid the premium herself. Anna had no intention of moving back home.

Marjorie Hunt Phelps, the mother, confirmed that once the girls reached 18 they were "on their own" and that she had no indication whatsoever that either one of them had any intention of coming back to her house as of the date of the

accident June 10, 1989. The mother testified that after the Fall of 1987 Mary Catherine's visits to Goode, Virginia were casual and erratic at best. Mary Catherine did not come home during the summer months after school but remained in Northern Virginia to work. She also testified that the amount of time that both Anna and Mary Catherine Phelps were in Goode at the same time was very rare.

State Farm, on the contrary, has tried to portray this as the typical college case wherein students often leave home and return home following the school year for their summer break. They have tried to raise the straw man argument that typically when students leave home and go to college they still remain residents of their parents' household. They argue to hold otherwise would result in a ludicrous result that students cease to be residents of their parents' homes when they go to school. They have cited a number of cases from jurisdictions other than Virginia for this proposition. It is interesting to note, however, that most of the cases cited by State Farm are either homeowner or uninsured motorist cases and do not address the nonowned automobile liability question which is at issue here. More importantly, however, in all of the cases, the student who has left home is seeking to be determined a resident of their parent's household in order to secure coverage as an insured under their parent's policy. The posture of those cases is diametrically opposed to the facts of this case. It is quite interesting that in each of the

cases the Courts reached their conclusions which afford coverage. State Farm seeks to analyze this residency requirement in a vacuum without any consideration to the consequences. As the Courts have noted "policy provisions are to be construed in favor of the insured, one might be a member of the household extending coverage, though not for the purpose of a policy exclusion." White v. Nationwide, 245 F. Supp. 1 (W.D. Va. 1965).

State Farm is not contending that Anna Phelps is a resident of her mother's household in order that she might be afforded liability coverage under her mother's policy. State Farm is contending that Anna Phelps is a resident of her mother's household in order to avoid providing excess liability and collision coverage to its own named insured from whom they have received a premium and agreed to insure. In order to do this, State Farm has presented the circuitous argument that both she and her sister were residents of their mother's household so as to avoid the definition of a nonowned vehicle under State Farm's policy. The evidence, however, demonstrates a very different situation.

This is not the typical college situation as portrayed by State Farm, and the facts of the college cases which have been cited by State Farm cannot be relied upon for authority in this context. While we certainly do not argue that every person who leaves home to go to college ceases to be a resident of their parents' household, the converse is likewise

not always true. Every person who goes to college does not continue to be a resident of their parents' household. These young women left their mother's home to go to college and to start out on their own. They rented their own townhouse without any prior approval or review by their mother. They signed their own lease. They were removed as insureds from their mother's liability policy. They purchased their own vehicles. They purchased their own liability policies in their own names, from their own agents and paid their own premiums. They got their own jobs to assist in their support. They received very little, if anything, in the way of financial support from their mother. Perhaps most importantly, both Anna and Mary Catherine, and especially Mary Catherine, came home very seldomly. Mary Catherine testified that from the Fall of 1987 until June of 1989, almost two years, she seldom came home and when she did she did not have a bedroom available. She slept on the sofa and usually stayed at most several days. These girls, and especially Mary Catherine, had ceased to be residents of their mother's household. This is not, contrary to what is argued by State Farm, the typical college situation.

State Farm has not cited a single case in which an insurance company has successfully denied coverage to its own insured from whom they have received a premium on the grounds that they were residents of their parent's household and deemed not be operating a nonowned automobile at the time of

the accident. As best as can be determined, this is a case of first impression.

State Farm has presented very little evidence at the trial of this case which would indicate that these students were residents of their mother's household. The only evidence presented was that the mother continued to insure both daughters on her health insurance contract. As was established on cross-examination, Ms. Phelps was insured under a group health insurance plan through her employer which agreed to provide coverage, at no extra charge, for any children until age of 22 regardless of their residence. This cannot be accepted as evidence of these young women's residency, as that term is defined by the policy language. The only other evidence presented by State Farm dealt with Ms. Phelps' tax returns wherein she claimed both Anna and Mary Catherine as dependents. Ms. Phelps testified that the tax returns were prepared by someone else and that she had no knowledge or expertise in tax matters. No evidence was presented to demonstrate that Ms. Phelps' deduction was legal or correct. The testimony actually indicates that the deduction was improper. Therefore, to ignore all of the other evidence in this case and hold that these two young women were continuing to be residents of their mother's household despite the fact that in their own minds, and their mother's mind, they had severed that relationship, and to make this

determination solely on the basis of the income tax returns would be inappropriate.

Much has been written and argued in this case about the resident of the household definition. What is critical, however, is the Supreme Court of Virginia's acknowledgement that an important and critical factor in analyzing these questions is the individuals intent.

[A] persons intent is important in determining whether he qualifies as a resident of a particular household... Hence, while a person's intention to become a member of a particular household need not be coupled with continuous residence, the intention must be accompanied by a reasonable degree of regularity in the person's residential context with the household; casual and erratic contacts are not sufficient. 231 Va. 358, 363 (1986) (emphasis added). See also Furrow v. State Farm Mutual Automobile Insurance, 237 Va. 77 (1989).

The evidence which has been presented to this Court by both deposition testimony and live testimony indicates clearly the intentions of these young women was to be out on their own and to sever their ties with their mother's household. Regardless of how others may have viewed them, the intentions of these girls were to no longer be residents of their mother's household. Their intentions are reflected in their visits to home which at best are characterized as casual and erratic. To reach a contrary conclusion merely on the grounds that they were both college students at the time, not only would be contrary to the evidence presented to this Court with regard to their intent, but would result in a gross injustice.

State Farm has received from Anna Phelps a premium for

liability protection to insure her whether she is driving an owned or nonowned vehicle. At the time of this accident, she was driving a vehicle which she did not own. Yet State Farm is attempting to avoid coverage by arguing that this Court should conclude that both Anna Phelps and Mary Catherine Phelps were residents not of the same household in Northern Virginia where they lived but of their mother's household in Bedford County. To reach that conclusion not only would result in State Farm not having to provide excess liability coverage to its own named insured from whom a premium had been received but would also expose Anna Phelps personally to potential subrogation claims by the underinsured motorist carriers in these cases who could conceivably have to pay judgments in excess of the primary limits of Nationwide in the underlying cases. This result should not be permitted based upon the paucity of the evidence and tenuous positions asserted by State Farm in this case. Just as the out of state cases cited by State Farm and the residency of the same household construed the policies in favor of coverage, so should this Court construe these facts and this policy language in favor of coverage and reject State Farm's position.

Accordingly, these parties, Anna Phelps, Mary Catherine Phelps, USAA and Geico respectfully submit that this Court should conclude that Anna Phelps and Mary Catherine Phelps were not residents of their mother's household as of June 10,

LAW OFFICES

GENTRY LOCKE
RAKES & MOORE
ROANOKE, VIRGINIA

1989 and that State Farm should provide both excess liability coverage and collision coverage for its insured, Anna Phelps, for the claims arising from the June 10, 1989 accident.

Respectfully submitted,

USAA

By: 

Of Counsel

Phillip V. Anderson, Esquire
GENTRY, LOCKE, RAKES & MOORE
800 Crestar Plaza
P. O. Box 1018
Roanoke, Virginia

GEICO

By: 

Of Counsel

Diane Baun
WOODS, ROGERS & HAZLEGROVE
105 Franklin Road
Roanoke, Virginia

ANNA PHELPS and MARY CATHERINE PHELPS

By: 

Of Counsel

R. Louis Harrison, Jr., Esquire
RADFORD & WANDREI
P.O. Box 1008
Bedford, Virginia 24523

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of _____,
19__, I served the foregoing Memorandum in Support of Joint
Motion for Declaratory Judgment upon Henry M. Sackett,
Esquire, Edmunds & Williams, P.O. Box 958, Lynchburg, Virginia
24505 counsel of record for State Farm Mutual Automobile
Insurance Company.

Of Counsel

LAW OFFICES

GENTRY LOCKE
RAKES & MOORE
ROANOKE, VIRGINIA

research/463496.001

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1
TWENTY-FOURTH JUDICIAL CIRCUIT
OF VIRGINIA

WILLIAM W. SWEENEY, JUDGE
BEDFORD COUNTY CIRCUIT COURT
P.O. BOX 235
BEDFORD, VA 24523
(703) 586-7685



CAROL W. BLACK, CLERK
BEDFORD COUNTY CIRCUIT COURT
P.O. BOX 235
BEDFORD, VA 24523
(703) 586-7632

COMMONWEALTH OF VIRGINIA
CITIES OF LYNCHBURG AND BEDFORD
COUNTIES OF AMHERST, BEDFORD, CAMPBELL AND NELSON

October 15, 1991

Henry M. Sackett, III, Esq.
Edmunds & Williams
P. O. Box 958
Lynchburg, VA 24505

R. Louis Harrison, Jr., Esq.
Radford, Wandrei & Harrison
P. O. Box 1008
Bedford, VA 24523

Re: Anna L. Phelps v. State Farm Mutual Automobile Ins. Co.

Gentlemen:

The facts in the captioned declaratory judgment action are not in dispute except as to whether, for automobile insurance purposes, Anna L. Phelps and Mary C. Phelps, her sister, were "residents of the same household" as their mother at the time of the accident, of June 10, 1989. At that time, the mother was living in the family home at Goode, Virginia, and the daughters were attending college full time in Northern Virginia. The accident occurred when both sisters were at home in Goode, Virginia (Bedford County) for a family wedding. Anna was driving Mary's car when the accident occurred. Anna was then 18 years of age and Mary was either 19 or 20.

If Anna and Mary were residents of their mother's household on June 10, 1989, Anna would not be entitled to excess coverage under the State Farm policy. Otherwise, State Farm would have to provide excess coverage under its policy. Otherwise stated, whether the 1988 Nissan automobile involved in the accident was a non-owned automobile under the policy terms depends on the household status of the Phelps family. Other insurance interests are also involved, but a ruling on the "household" issue will be dispositive as to coverage.

There were disputes in the depositions and at the evidentiary hearing on the "household" issue. For instance, the mother's testimony was to the effect that the two daughters were pretty much on their own, but tax returns filed by her for 1988 and 1989 showed that she continued to list Anna and Mary as dependents for whom she

Henry M. Sackett, III, Esq.
R. Louis Harrison, Jr., Esq.
October 15, 1991
Page 2

provided a majority of support while they were away at college. She claimed statutory exemptions for the children and showed as their home address on the returns "Goode, Virginia."

While the mother's and daughters' testimony generally favored the plaintiff's position, they have an interest in the outcome of this case and their credibility must be tested by their objectivity.

Any ambiguity in the insurance policy must be construed against State Farm; however, I find no ambiguity in the language, which is standard in all such policies. The only difficulty is with court interpretation of such language. In my opinion, the phrase "residents of the same household" should be given an ordinary, generally accepted meaning. It is a collection of persons living as a collective unit, with one head. Usually such persons would reside in the same building, but this is not necessarily true as, for instance, children away at college and dependent on a parent or parents for their education. As the Court said in American States Ins. Co. v. Walker, 26 Utah 2d 161, 486 P.2d 1042 (1971):

"Residence emphasizes membership in a group rather than attachment to a building. It is a matter of intention and choice rather than one of geography. Ordinarily, where a child is away from home attending school, he remains a member of the family household." 486 P.2d 1042 at 1044. (Emphasis added)

In Montgomery v. Hawkeye Security Ins. Co., 52 Mich. App. 457, 217 N.W.2d 449, a 22 year-old son was held to be a resident of his parents' household for automobile insurance purposes where he was a full-time college student, living away from home, and his college expenses were paid in part by his parents. For similar holding, see, Federated American Ins. Co. v. Childers, 45 Or. App. 379, 608 P.2d 584 (1980).

The cases relied on by plaintiff are all factually distinguishable. E.g., State Farm v. Smith, 206 Va. 285 (1965); Allstate v. Patterson, 231 Va. 358 (1986); Govt. Employees Ins. Co. v. Allstate, 235 Va. 542 (1988); Furrow v. State Farm, 237 Va. 77 (1989). In all these cases, there was a clear intent not to be a resident of the household with conduct supporting intent, and thus there was no insurance coverage. None of those cases involve children attending college away from home. (See list of cases on pages 14, 15 of State Farm's responsive brief where children attending school away from home were held to be residents of the same household.)

Henry M. Sackett, III, Esq.
R. Louis Harrison, Jr., Esq.
October 15, 1991
Page 3

In response to a question by the Court at the hearing, counsel for plaintiff stated that he doubted that children living away from home at college could be residents of the same household as their parents for insurance purposes. I disagree. I feel that each case must be decided on its facts, and that intent must be determined not only by the parties' words, but by their acts as well.

As I said at the hearing, this is a close case on the facts. However, I think it is a matter of fact, not of law. There are factors which favor both sides. The ultimate burden of proof, however, is on the plaintiff. I do not think that burden was carried.

The children were living in Springfield, Virginia, only because they were going to school there. They were supported by a family trust without which they could not have attended college. Their report cards were sent home to Goode on some occasions. They were at home when the accident happened. Neither had married or set up a separate household. Anna testified that she went home about once a month and two weeks at Christmas. Mary said she went home about once every two months. While students, both Anna and Mary remained covered under their mother's health insurance.

I am not unaware of other factors supporting the plaintiff's position, such as the stated intent not to return home after finishing college, family disagreements, certain aspects of the mother's testimony as to the status of the children, the part-time employment, and the fact that Anna had a Honda automobile in her own name and paid premiums on it.

For reasons stated, I rule that Anna and Mary Phelps, at the time of the accident, were residents of the same household as their mother; that the vehicle in question does not qualify as a "non-owned automobile" under the State Farm policy; and that Anna is not entitled to excess coverage under the terms of the State Farm automobile policy.

Counsel for State Farm will prepare and submit an order.

Yours very truly,


William W. Sweeney, Judge

WWS/dss

cc: Jonathan S. Kurtin, Esq.
Diane Baun, Esq.
Phillip V. Anderson, Esq.

OCT. 15 1991

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ELEANOR A. PUTNAM DUNN
KEVIN L. CASH

October 10, 1991

Honorable William W. Sweeney
Bedford County Circuit Court
P.O. Box 235
Bedford, VA 24523

Re: Anna Phelps, et al v. State Farm Mutual Automobile
Insurance Company, et al

Dear Judge Sweeney:

I enclose State Farm's Reply brief in the captioned case. It is my understanding that with the submission of this Brief all parties have now concluded the briefing of the case and the case is now in the hands of the Court for decision.

After the evidentiary hearing in this case, you indicated that you did not at that time want to have the evidence transcribed by the Court Reporter. If you now decide that you would like to have a transcript of the evidence, please let me know and I will have one prepared as promptly as possible.

Very truly yours,

EDMUNDS & WILLIAMS, P.C.

By Henry M. Sackett, III
Henry M. Sackett, III

HMSIII: jetc

Enclosure

cc: R. Louis Harrison, Jr., Esquire
Diane Baun, Esquire
Phillip V. Anderson, Esquire

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BEDFORD.

ANNA L. PHELPS, et al,

Plaintiffs,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, et al,

Defendants.

FILED IN THE CLERK'S OFFICE
The 5th day of October, 1991
TESTE: [Signature] Clerk
D.C.

**REPLY BRIEF OF STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY**

ARGUMENT

As all of the parties have agreed, the sole legal issue before the Court in this case is whether Anna L. Phelps and Mary C. Phelps were residents of the household of their mother, Majorie Phelps, in Goode, Virginia, at the time the accident occurred out of which this claim arises. If they were residents of their mother's household, Anna Phelps meets the definition of a relative, the vehicle she was driving at the time of the accident does not qualify as a "non-owned automobile" under the State Farm policy and State Farm's policy provides no coverage. If, on the other hand, either Anna Phelps or Mary Catherine Phelps was not a resident of their mother's household at the time the accident occurred, Anna

Phelps does not meet the policy definition of a relative, the vehicle she was driving was a "non-owned automobile" under the State Farm policy and there is coverage under the State Farm policy.

The factual issue that provides the answer to the legal issue posed above is whether as college students living away from home, Anna Phelps and Mary Catherine Phelps remained residents of their mother's household. The parties opposing State Farm's position have argued at length that the facts do not support the conclusion that Anna Phelps and Mary Catherine Phelps remained residents of their mother's household. Much reliance is placed upon the self-serving testimony of Marjorie Phelps, Anna Phelps and Mary Catherine Phelps that when the girl's left home for college they no longer intended to be residents of their mother's household. It is quite clear that this testimony is nothing more than a self-serving attempt to create coverage. We respectfully submit that if it was necessary for Anna Phelps and Mary Catherine Phelps to be residents of their mother's household in order to create coverage, the testimony would have been substantially different.

The actions of Marjorie Phelps, Anna Phelps and Mary Catherine Phelps speak much more loudly than their words on the question whether Anna and Mary Catherine remained residents of their mother's household. The tax returns filed by Marjorie Phelps for the years in question claimed both Anna Phelps and Mary

Catherine Phelps as dependents and listed them as full-time residents of the household. The tax returns filed by Anna Phelps and Mary Catherine Phelps for the years in question listed their addresses as their mother's address. While recuperating from the injuries received in the accident out of which this claim arises, Anna Phelps returned to her mother's home and remained there for several weeks, rather than going back to the townhouse in northern Virginia that she shared with her sister and others. When Mary Catherine Phelps dropped out of school several months after the accident in question, she returned to her mother's home and lived there for over a year before moving out into an apartment in Lynchburg.

These actions on the part of Marjorie Phelps, Anna Phelps and Mary Catherine Phelps reflect their true intention, that being that Anna Phelps and Mary Catherine Phelps would remain residents of their mother's household. At the time this accident occurred, both Anna Phelps and Mary Catherine Phelps were full-time college students, who were not emancipated and were not self-supporting. They both received rent and tuition from the trust fund established by their grandfather and both received incidental aid from their mother and other family members. They both had jobs in order to provide the additional money that was necessary to enable them to attend college. Neither had a job that would have made them fully self-supporting had they not also been students receiving aid from other sources.

The joint brief submitted by the parties opposing State Farm's position argues that the Court should pay no attention to the cases cited by State Farm in which college students were found to be residents of their parents' households because those were cases in which such a finding resulted in a finding of coverage, rather than a finding of no coverage. We respectfully submit that no such distinction is warranted. The factual issue in this case is whether Anna Phelps and Mary Catherine Phelps, both full-time college students at the time this accident occurred, remained residents of their mother's household. The determination of that factual issue should be made without reference to how that determination affects the coverage question. The two girls were either residents of their mother's household at the time of the accident in question or they were not. The coverage determination then flows naturally from the resolution of that issue.

A very important factor in this case that has not been addressed by the parties opposing State Farm's position is that the plaintiffs in this case have the burden of proof. That specific question was addressed to Mr. Harrison in oral argument and he conceded that the burden of proof in this case was upon the plaintiffs. Therefore, if there is a lack of evidence on the issue before the Court in this case, as has been suggested in the brief filed by the opposing parties, any uncertainty created by that lack of evidence should be resolved against the plaintiff who has the burden of proof. The plaintiff's burden of proof in this case is

to prove by a preponderance of the evidence that Anna Phelps and Mary Catherine Phelps were not residents of their mother's household at the time the accident occurred out of which this claim arises. We respectfully submit that the evidence presented by the plaintiffs in this case is insufficient to meet that burden of proof and that if the facts of this case remain in equipoise in the mind of the Court, the case should be decided in favor of State Farm.

Finally, it is argued by the parties opposing State Farm's position that because Anna Phelps paid a premium to State Farm for liability coverage, such coverage should be extended to her for this claim. We respectfully submit that this is a specious argument. Anna Phelps paid to State Farm a premium for the coverage provided in her policy. She did not pay a premium for a policy that would provide coverage to her in all circumstances. The exclusions contained in Anna Phelps' policy and upon which State Farm relies in this case were included in the policy to exclude coverage for the very type of claim that is presented in this case. If this accident had occurred while Anna Phelps and Mary Catherine Phelps were both still students in high school living in their mother's home, there would no question about the fact that there was no coverage under Anna Phelps' policy even though she had paid a premium for that policy. Likewise, there would be no question that if both Anna Phelps and Mary Catherine Phelps were students at a local college and continuing to live in

their mother's home at the time this accident occurred, there would be no coverage under the policy despite the fact that a premium was paid for that policy. The fact that both girls were attending college in northern Virginia that required them to live away from home and required them to work to be able to attend college should not lead to a different result.

CONCLUSION

The simple facts in this case are that at the time of the accident out of which this case arises Anna Phelps and Mary Catherine Phelps were both full-time college students living together in northern Virginia and working to enable themselves to attend college. They were no different than any other students living away from home while attending college. The Virginia Supreme Court cases that have analyzed the policy language at issue have looked at the actions of the parties and the total context of the situation in determining whether they were residents of the same household. The cases from other jurisdictions that have addressed the question whether a college student remains a resident of his parents' household have almost uniformly found that the college student does remain a resident of his parents' household. The parties opposing State Farm's position have not cited to the Court one case in which a college student living away from home was found not to be a resident of the parents' household. The argument that has been made in this case is essentially that when Anna Phelps and Mary Catherine Phelps graduated from high school and

left home to attend college they became self-supporting, emancipated individuals and ceased to be residents of their mother's household. However, their actions have demonstrated that their intent was quite to the contrary. They quite clearly continued to act in a parent/child relationship and we respectfully submit that their actions bring them within the definition of residents of the same household as that term has been used by the Virginia Supreme Court.

Accordingly, we respectfully submit that the Court's conclusion in this case should either be a finding of fact that Anna Phelps and Mary Catherine Phelps remained residents of their mother's household at the time the subject accident occurred or that the plaintiff has failed to carry her burden of proving that she and Mary Catherine Phelps were not residents of her mother's household at the time the subject accident occurred. In either event, we respectfully submit that the Court should conclude that the policy issued by State Farm to Anna Phelps provides no coverage to Anna Phelps for the claims that have been asserted or may be asserted against her as a result of the accident out of which this action arises.

RESPECTFULLY SUBMITTED,

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

By Henry M. Sackett
Of Counsel

Henry M. Sackett, III
Edmunds & Williams, P.C.
P. O. Box 958
Lynchburg, VA 24505

I hereby certify that a copy of the foregoing Reply Brief was mailed to R. Louis Harrison, Jr., Esquire, Attorney at Law, P. O. Box 1008, Bedford, VA 24523, counsel for Anna L. Phelps; Philip V. Anderson, Esquire, Attorney at Law, P. O. Box 1018, Roanoke, VA 24005, counsel for USAA; and Diane Baun, Esquire, Attorney at Law, P. O. Box 720, Roanoke, VA 24002, counsel for GEICO, on this the 14th day of October, 1991.

Henry M. Sackett, III
Attorney for State Farm
Mutual Automobile Insurance
Company

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OCT. 18 1991

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October 17, 1991

Honorable William W. Sweeney
Bedford County Circuit Court
P.O. Box 235
Bedford, VA 24523

Conf. File

Re: Anna Phelps v. State farm Mutual Automobile
Insurance Company

Dear Judge Sweeney:

Mr. Sackett is out of the office on vacation until
October 28th. Upon his return to the office, he will prepare and
submit to you an order reflecting your ruling in the captioned
case.

Very truly yours,

Joanne T. Clarkson
(Mrs.) Joanne T. Clarkson,
Secretary to Henry M. Sackett, III

jetc

cc: R. Louis Harrison, Jr., Esquire
Diane Baun, Esquire
Phillip V. Anderson, Esquire

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WILLIAM E. PHILLIPS
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JAMES O. WATTS, IV

December 23, 1991

Honorable William W. Sweeney
Bedford County Circuit Court
P.O. Box 235
Bedford, VA 24523

Re: Anna L. Phelps, et al v. State Farm Mutual
Automobile Insurance Company, et al

Dear Judge Sweeney:

I enclose a properly endorsed order that reflects your decision in the captioned case. I apologize for the delay in getting this order to you, but it took quite some time for the order to make the rounds of all counsel who needed to endorse it. You will note that counsel for USAA and GEICO have noted specific objections with their endorsement.

If the order meets with your approval in this form, I would appreciate it if you would enter it and have your secretary forward it to the Clerk for filing.

By copy of this letter to Mrs. Black, I am mailing her a copy of the order and requesting that when the original is received and filed by her, she certify the copy and return it to me.

Very truly yours,

EDMUNDS & WILLIAMS, P.C.

By Henry M. Sackett, III
Henry M. Sackett, III

HMSIII: jetc
Enclosure
cc:

R. Louis Harrison, Jr., Esquire
Diane M. Baun, Esquire
Phillip V. Anderson, Esquire
Jonathan S. Kurtin, Esquire
Carol W. Black, Clerk

24 December 91
Monica M. Sheelock

))

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December 23, 1991

Honorable William W. Sweeney
Bedford County Circuit Court
P.O. Box 235
Bedford, VA 24523

Re: Anna L. Phelps, et al v. State Farm Mutual
Automobile Insurance Company, et al

Dear Judge Sweeney:

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Very truly yours,

EDMUNDS & WILLIAMS, P.C.

By Henry M. Sackett, III
Henry M. Sackett, III

HMSIII: jetc
Enclosure

cc: R. Louis Harrison, Jr., Esquire
Diane M. Baun, Esquire
Phillip V. Anderson, Esquire
Jonathan S. Kurtin, Esquire
Carol W. Black, Clerk

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BEDFORD. December 24, 1991

ANNA L. PHELPS, et al,

Plaintiffs,

Chancery File No. 89015473

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, et al,

Defendants.

O R D E R

The Court having heard the evidence in this case ore
tenus on September 10, 1991, having considered the depositions
submitted to the Court by the parties and having reviewed the
briefs submitted to the Court by the parties finds as follows:

1. That Anna L. Phelps and Mary Catherine Phelps, who
are biological sisters, are relatives as that term is commonly
understood;

2. That on June 10, 1989, the date of the accident out
of which this claim arises, Anna L. Phelps and Mary Catherine
Phelps were both residents of the household of their mother,
Marjorie Phelps, in Goode, Virginia;

3. That on June 10, 1989, Anna L. Phelps and Mary Catherine Phelps were "relatives" as that term is used in the State Farm policy;

4. That the automobile being operated by Anna L. Phelps on June 10, 1989, does not qualify as a "non-owned automobile" as that term is used in the State Farm policy;

5. That there is no ambiguity in the applicable language of the State Farm policy; and

6. That the plaintiff, on whom the ultimate burden of proof rests in this case, has failed to carry her burden of proof.

The Court, therefore, rules, for the reasons more specifically stated in the Court's opinion letter to counsel of October 15, 1991, a copy of which is hereto attached and incorporated herein by reference, that the automobile being operated by Anna L. Phelps at the time of the accident of June 10, 1989, did not qualify for coverage (liability, collision or otherwise) under the policy issued by State Farm to Anna L. Phelps. It is, therefore, ORDERED by the Court that State Farm Mutual Automobile Insurance Company is not required to provide any coverage to, or a defense for, Anna L. Phelps for any of the claims against her arising out of the automobile accident of June 10, 1989, nor is it obligated to provide to her any collision coverage for the damage to the automobile that she was operating at the time of the accident of June 10, 1989, to which action of the Court, the

plaintiff, Government Employees Insurance Company and United Services Automobile Association, by counsel, respectfully object.

The objects of this suit having been accomplished it is ordered STRICKEN from the docket of this Court.

I ASK FOR THIS:

ENTER: 12 / 24 / 91

Henry M. Sackett
Attorney for State Farm
Mutual Automobile Insurance
Company

Leslie B. Leary
Judge

SEEN AND OBJECTED TO:

RL Phelps
Attorney for Anna L. Phelps
and Mary C. Phelps

SEEN AND OBJECTED TO FOR THE ATTACHED REASONS:

Attorney for Government
Employees Insurance Company

SEEN AND OBJECTED TO FOR THE FOLLOWING REASONS:

Attorney for United Services
Automobile Association

SEEN:

Attorney for Anna Featherstone
and Jennifer Trevey

USAA specifically objects to paragraphs 2-6 inclusive of the Order. USAA further objects on the grounds that the Court has incorrectly found the facts in this matter holding the plaintiff Anna Phelps to be a resident of the same household as her sister, Mary Catherine Phelps. USAA objects on the grounds that the Court has incorrectly applied the law to the facts in question by holding that Anna Phelps was not entitled to liability for the permissive use of a non-owned vehicle.

3

GENTRY LOCKE RAKES & MOORE

By: Phillip V. Rakes

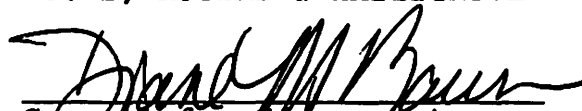
Counsel for USAA

216

216

Government Employees Insurance Company specifically objects to paragraphs 2, 3, 4, 5, and 6 inclusive of this order. Geico further objects on the grounds that the court has incorrectly found the facts in this matter holding the plaintiff, Anna Phelps, to be a resident of the same household as her sister, Mary Catherine Phelps. Geico objects on the grounds that the court has incorrectly applied the law to the facts in question by holding that Anna Phelps was not entitled to liability coverage for the permissive use of a non-owned vehicle.

WOODS, ROGERS & HAZLEGROVE


Counsel for Government
Employees Insurance Company

WOODS, ROGERS & HAZLEGROVE
Roanoke Office

Dominion Tower • Suite 1400
10 South Jefferson Street • P.O. Box 14125
Roanoke, Virginia 24038-4125
Telephone 703-983-7600
Facsimile 703-983-7711

Danville Office
530 Main Street • P.O. Box 560
Danville, Virginia 24543-0560
Telephone 804-791-1350
Facsimile 804-799-3527

WRITER'S DIRECT DIAL TELEPHONE

(703) 983-7707

January 10, 1992

Ms. Brenda B. Alger
Court Reporter
P.O. Box 956
Lynchburg, Virginia 24505

Re: Order Transcript

Dear Ms. Alger:

My law firm represents GEICO in the lawsuit of Anna L. Phelps, Government Employees Insurance Co., Anna Featherston, Geneva Trevey and Mary C. Phelps v. State Farm Mutual Automobile Insurance Co., United States Automobile Association, and Nationwide Mutual Insurance Co..

Please forward to me a copy of the transcript of the September 10, 1991 hearing in Bedford County Circuit Court before the Honorable William W. Sweeney.

Thank you for your prompt attention to this matter.

Very truly yours,

WOODS, ROGERS & HAZLEGROVE

Diane M. Baun
Diane M. Baun

DMB:rdt

cc: Carol W. Black, Clerk
Henry M. Sackett, III, Esquire
Phillip V. Anderson, Esquire
R. Louis Harrison, Jr., Esquire
Jonathan S. Kurtin, Esquire

FILED IN THE CLERK'S OFFICE
The 13 day of Jan, 1992
TESTE: [Signature] Clerk
[Signature]

M#87379

WOODS, ROGERS & HAZLEGROVE
Roanoke Office

Dominion Tower • Suite 1400
10 South Jefferson Street • P.O. Box 14125
Roanoke, Virginia 24038-4125
Telephone 703-983-7600
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Danville Office
530 Main Street • P.O. Box 560
Danville, Virginia 24543-0560
Telephone 804-791-1350
Facsimile 804-799-3527

(703) 983-7707

January 10, 1992

Carol W. Black, Clerk
Bedford County Circuit Court
Bedford County Courthouse
Bedford, VA 24523

Re: GEICO v. State Farm

Dear Ms. Black:

Enclosed please find for filing the plaintiff's notice of appeal in this matter. By copy of this letter, I certify that a copy of the transcript has been ordered from the court reporter who reported the case.

Very truly yours,

WOODS, ROGERS & HAZLEGROVE


Diane M. Baun

DMB:rdt

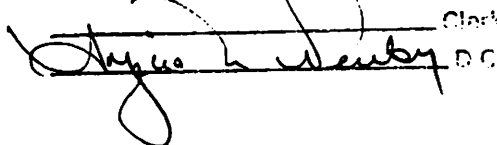
Enclosure

cc: Henry M. Sackett, III, Esquire
Phillip V. Anderson, Esquire
R. Louis Harrison, Jr., Esquire
Jonathan S. Kurtin, Esquire

FILED IN THE CLERK'S OFFICE

The 13th day of Jan., 1992

WITNESSES:

 Clerk

M#87380

VIRGINIA:

IN THE CIRCUIT COURT OF BEDFORD COUNTY

Government Employees)
Insurance Company,)
et al,)
Plaintiffs,)
v.)
State Farm Mutual)
Automobile Insurance)
Company, et al,)
Defendants.)

NOTICE OF APPEAL

The plaintiff, Government Employees Insurance Company ["Geico"], hereby gives notice of appeal from the judgment order of this Court entered December 24, 1991, and further gives notice that a trial transcript covering the testimony and other incidents of trial has been ordered from the court reporter who reported the case and will be filed in the Office of the Clerk of the Circuit Court of Bedford County, all in compliance with the Rules of the Supreme Court of Virginia.

Government Employees Insurance Company

By: Diane M. Baun

Michael A. Cleary
Diane M. Baun
WOODS, ROGERS & HAZLEGROVE
Dominion Tower, Suite 1400
10 South Jefferson Street
P.O. Box 14125
Roanoke, VA 24038-4125

Counsel for Plaintiff, GEICO

M#87377

LAW OFFICES
WOODS, ROGERS
& HAZLEGROVE
ROANOKE, VA.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Appeal was mailed, first-class mail, postage prepaid, to Henry M. Sackett, III, Esquire, Edmunds & Williams, P. O. Box 958, Lynchburg, VA 24505, counsel for State Farm; Phillip V. Anderson, Esq., Gentry, Locke, Rakes & Moore, P. O. Box 1018, Roanoke, VA 24005, counsel for U.S.A.A.; R. Louis Harrison, Jr., Esquire, P. O. Box 1008, Bedford, VA 24523, counsel for Anna Phelps and Mary Phelps; and Jonathan S. Kurtin, Esquire, Lutins & Shaprio, 347 Highland Avenue, S.W., P. O. Box 180, Roanoke, VA 24002-0180, counsel for Jennifer Trevey and Anna Featherston, this 10th day of January, 1992.



WOODS, ROGERS & HAZLEGROVE

Roanoke Office

Dominion Tower • Suite 1400
10 South Jefferson Street • P.O. Box 14125
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Telephone 703-983-7600
Facsimile 703-983-7711

Danville Office
530 Main Street • P.O. Box 560
Danville, Virginia 24543-0560
Telephone 804-791-1350
Facsimile 804-799-3527

WRITER'S DIRECT DIAL TELEPHONE

(703) 983-7707

January 15, 1992

HAND DELIVERED

Carol W. Black, Clerk
Bedford County Circuit Court
Bedford County Courthouse
Bedford, VA 24523


Re: Geico v. State Farm

Dear Ms. Black:

Enclosed please find the transcript of the hearing held in this matter on September 10, 1991 for filing as required by Rule 5:11(a). By copy of this letter, I am forwarding a copy of the enclosed Notice of Filing of Transcript as required by Rule 5:11(b).

Very truly yours,

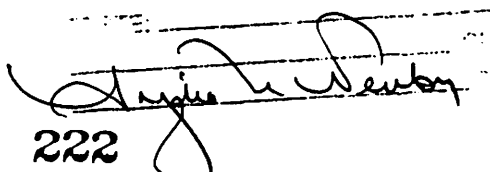
WOODS, ROGERS & HAZLEGROVE


Diane M. Baun

DMB:rdt

cc: Henry M. Sackett, III, Esquire
Phillip V. Anderson, Esquire
R. Louis Harrison, Jr., Esquire
Jonathan S. Kurtin, Esquire

M#88255


222

222

VIRGINIA:

IN THE CIRCUIT COURT OF BEDFORD COUNTY

Government Employees
Insurance Company,
et al,

Appellant,

v.

State Farm Mutual
Automobile Insurance
Company, et al,

Appellees.

NOTICE OF FILING
OF TRANSCRIPT

To: Henry M. Sackett, III, Esquire
Edmunds & Williams
P. O. Box 958
Lynchburg, VA 24505

To: Phillip V. Anderson, Esquire
Gentry, Locke, Rakes & Moore
P. O. Box 1018
Roanoke, VA 24005

To: R. Louis Harrison, Jr., Esquire
P. O. Box 1008
Bedford, VA 24523

To: Jonathan S. Kurtin, Esquire
Lutins & Shapiro
347 Highland Avenue, S.W.
P. O. Box 180
Roanoke, VA 24002-0180

Please take notice that the transcript for the appeal in the above-styled case has this day been filed by counsel for the appellant, Government Employees Insurance Company, in the Office of the Clerk of the Circuit Court of Bedford County on the 16th day of January, 1992.

FILED
16 Jan 92
223
223

Given under my hand this 16th day of January, 1992.

GOVERNMENT EMPLOYEES INSURANCE
COMPANY

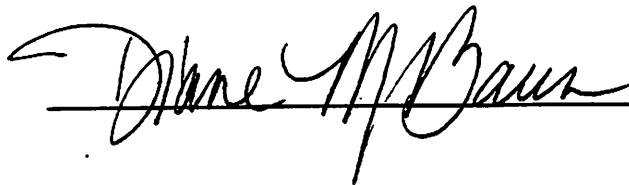
BY: 

Michael A. Cleary
Diane M. Baun
Woods, Rogers & Hazlegrove
Dominion Tower, Suite 1400
10 S. Jefferson Street
Roanoke, VA 24011

Counsel for Geico

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Filing of Transcript was mailed, first-class mail, postage prepaid, to Henry M. Sackett, III, Esquire, Edmunds & Williams, P. O. Box 958, Lynchburg, VA 24505, counsel for State Farm; Phillip V. Anderson, Esquire, Gentry, Locke, Rakes & Moore, P. O. Box 1018, Roanoke, VA 24005, counsel for U.S.A.A.; R. Louis Harrison, Jr., Esquire, P. O. Box 1008, Bedford, VA 24523, counsel for Anna Phelps and Mary Phelps; and Jonathan S. Kurtin, Esquire, Lutins & Shapiro, 347 Highland Avenue, S.W., P. O. Box 180, Roanoke, VA 24002-0180, counsel for Jennifer Trevey and Anna Featherston, this 16th day of January, 1992.



RADFORD, WANDREI & HARRISON

ATTORNEYS AT LAW
112 S. BRIDGE STREET
P. O. BOX 1008

BEDFORD, VIRGINIA 24523-1008

TELEPHONE 703-586-3151
TELECOPIER 703-586-1646

ROBERT T. WANDREI
R. LOUIS HARRISON, JR.

OF COUNSEL
DUVAL RADFORD

January 15, 1992

Carol W. Black, Clerk
Bedford County Circuit Court
Bedford County Courthouse
Bedford, Virginia 24523

In Re: Anna L. Phelps v. State Farm Insurance

Dear Ms. Black:

Enclosed please find for filing the plaintiff's notice of appeal in this matter.

Very truly yours,



R. Louis Harrison, Jr.

RLHjr/mbm

Enclosure

cc: Henry M. Sackett, III, Esquire
Phillip V. Anderson, Esquire
Diane M. Baun, Esquire
Jonathan S. Kurtin, Esquire

VIRGINIA:

IN THE CIRCUIT COURT OF BEDFORD COUNTY

Anna L. Phelps, et al,

Plaintiff,

v.)(

NOTICE OF APPEAL

State Farm Mutual
Automobile Insurance
Company, et al,

Defendant.

The plaintiff, Anna L. Phelps, hereby gives notice of appeal from the judgment order of this Court entered December 24, 1991, and further gives notice that a trial transcript covering the testimony and other incidents of trial has been ordered from the court reporter who reported the case and will be filed in the Office of the Clerk of the Circuit Court of Bedford County, all in compliance with the Rules of the Supreme Court of Virginia.

Anna L. Phelps

By: 

Of Counsel

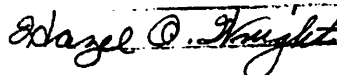
R. Louis Harrison, Jr.
RADFORD, WANDREI & HARRISON
P. O. Box 1008
Bedford, Virginia 24523

Counsel for Plaintiff, Anna L. Phelps

RADFORD & WANDREI
ATTORNEYS AT LAW
BEDFORD, VIRGINIA
24523

The 21st / Jan

92



CERTIFICATE

I hereby certify that a true and exact copy of the foregoing Notice of Appeal was hereby mailed, first-class mail, postage prepaid, to Henry M. Sackett, III, Esquire, Edmunds & Williams, P.O. Box 958, Lynchburg, VA 24505, counsel for State Farm; Phillip V. Anderson, Esq., Gentry, Locke, Rakes & Moore, P.O. Box 1018, Roanoke, VA 24005, counsel for U.S.A.A.; Michael A. Cleary and Diane M. Baun, Esquires, Woods, Rogers & Hazlegrove, Dominion Tower, Suite 1400, 10 South Jefferson Street, P.O. Box 14125, Roanoke, VA 24038-4125, counsel for Geico; and Jonathan S. Kurtin, Esquire, Lutins & Shaprio, 347 Highland Avenue, S.W., P.O. Box 180, Roanoke, VA 24002-0180, counsel for Jennifer Trevey and Anna Featherston, I further certify that a copy of the transcript has been ordered this 16 day of January, 1992.



R. Louis Harrison, Jr.

request therefor must be made within fourteen days of the date of the notice.⁴

Plaintiff timely made such request. Accompanying the request was a letter signed by plaintiff's counsel in effect objecting to the legal sufficiency of the grounds upon which the hearing was based. Several adjournments took place. Meanwhile plaintiff started his action in the circuit court alleging that plaintiff's arrest was unlawful because the offense charged was a misdemeanor, and the claimed misdemeanor, i. e., the act of driving, was not committed in the presence of the arresting officer. This, argues plaintiff, was in plain violation of plaintiff's rights and exceeded the officer's powers of arrest without a warrant as defined in M.C.L.A. § 764.15; M.S.A. § 28.874. There is no gainsaying the fact that literally the statute says "Any peace officer may, without a warrant, arrest a person [f]or the commission of any . . . misdemeanor committed in his presence."

On the basis of the foregoing provision plaintiff argued the alleged misdemeanor was not committed in the officer's presence, ergo the arrest was unlawful. Since the arrest was unlawful the plaintiff could not be held under the statute.

Whatever the merits of this argument may or may not be we are constrained to hold that the learned circuit judge acted prematurely by injunctively stopping all proceedings under the statute. This for the reason that there was no final determination by the license appeal board from which an appeal could be taken by plaintiff to the circuit court in the manner provided by the act.⁵ For this reason we are compelled to vacate the injunction as it applied to the proceedings before the board.

Defendant below and appellant here then took another tack. He ordered plaintiff in

for a hearing under the statute⁶ which authorizes an inquiry into the fitness of a driver who has been involved in three accidents within a 24-month period resulting in personal injury or damage to property in each accident in excess of \$200 and in which the official police report indicates a moving violation on the part of the involved driver.

On petition for "clarification" of the injunctive order the trial judge held that his injunctive order applied to any action of defendant-appellant which would result in suspension or revocation of plaintiff's driving privileges. Again we must disagree with the trial judge and hold his action to have been premature and, as he interpreted it, overbroad. Majestic as are the powers of the chancellor they do not extend to emasculating legislative enactments which themselves provide for judicial review of administrative action by appeal from the administrative determination. Thus we must vacate the injunction against appellant doing exactly what the statute clearly permits him to do.

We have not, as we said, burdened this opinion with statutory excerpts. Nor have we recited litany of authority holding very simply and basically that courts cannot act in restraining administrative proceedings until the remedies thereunder have been exhausted. Such is the settled law.

As to the merits of plaintiff's claims we express no opinion. Were we to do so we would in effect be rendering before-the-fact advisory opinions. Such is not our function. Whether all of the proceedings complained of and the statutes upon which they are based are constitutionally infirm is not before us. We are a court of review on records made in all but few exceptional cases.

4. See M.C.L.A. § 257.625; M.S.A. § 9.2325 (5); M.C.L.A. § 257.626; M.S.A. § 9.2325 (6).

5. For the pertinent provisions in the Vehicle Code governing appeals to circuit court, see generally M.C.L.A. § 257.323; M.S.A. §

9.2023; M.C.L.A. § 257.323a; M.S.A. § 9.2023(1); M.C.L.A. § 257.323; M.S.A. § 9.2023(3); M.C.L.A. § 257.625; M.S.A. § 9.2325 (6).

6. M.C.L.A. § 257.320; M.S.A. § 9.2020.

Cite as 217 N.W.2d 449

On this record we vacate and hold for naught the injunction. We vacate the declaratory judgment. We direct the dismissal of the action in the circuit court as prematurely brought and of at least questionable jurisdiction to entertain.

All of the foregoing are without prejudice to plaintiff raising whatever defenses he chooses including any challenge to constitutionality before the administrative agencies and if such determinations be adverse to reassert them on appeal to the circuit court in the manner provided by law.

Reversed.



52 Mich.App. 457

Larry Doyle MONTGOMERY et al.,
Plaintiffs-Appellees,

v.

HAWKEYE SECURITY INSURANCE
COMPANY, a foreign corporation,
Defendant-Appellant.

Docket No. 16550.

Court of Appeals of Michigan,
Div. 3.

March 29, 1974.

Released for Publication May 8, 1974.
Leave to Appeal Denied July 3, 1974.

Action by insureds and their son against homeowner's insurer for declaratory relief to determine whether the insureds' son was an "insured" and whether the insurer had duty to defend and pay in a civil action for assault and battery brought against the son. The Circuit Court, Mecosta County, Harold Van-Domelen, J., entered judgment that the son was insured and that the insurer had a duty to defend. The insurer appealed. The Court of Appeals held that insureds' 22-year-old son who was full-time student at university and who lived at home with his parents except when in the service or

away at school and whose education was financed in part by his parents was "resident of his household" within meaning of homeowner's policy, and the son was an "insured". The Court further held that where the homeowner's policy stated that the insurer would defend any suit against the insured seeking damages which are payable under the terms of the policy, even if any of the allegations of the suit are groundless, false or fraudulent and there was a question of fact as to whether the son's actions were negligent, intentional or not actionable at all, the insurer had duty to defend the assault and battery claim.

Affirmed.

1. Insurance — 435.34, 514.9(1)

Insureds' 22-year-old son who was full-time student at university and who lived at home with his parents except when in the service or away at school and whose education was financed in part by his parents was "resident of his household" within meaning of homeowner's policy, the son was "insured" and insurer had duty to defend insureds' son in a civil action for assault and battery.

2. Insurance — 437.1(2)

In action for declaratory judgment as to homeowner's insurer's duty to defend insureds' son in civil action for assault and battery, trial court's admission of various evidentiary items, although not directly concerned with the date of the assault and battery and the residence of the insureds' son on that date, was not improper where the language in homeowner's policy, "resident of his household," had legal meaning only within the context of numerous factual settings possible.

3. Insurance — 514.10(2)

Where there was fact issue as to whether actions of insureds' son toward third party were negligent, intentional or not actionable at all, homeowner's insurer had the duty, under policy provision that

the insurer would defend any suit against the insured seeking damages which are payable under the terms of the policy, even if any of the allegations of the suit are groundless, false or fraudulent, to defend the insured's son, himself an insured under the policy, against third party's claim for assault and battery.

Dale M. Strain, Phelps, Linsey, Strain & Worsfold, Grand Rapids, for defendant-appellant.

Kenneth P. Walz, Big Rapids, for plaintiffs-appellees.

Before R. B. BURNS, P. J., and BRONSON and VanVALKENBURG,* JJ.

PER CURIAM.

On October 18, 1969, plaintiff Larry Doyle Montgomery was involved in an incident which resulted in a civil action for assault and battery being filed against him in a district court. Larry, claiming coverage under a homeowner's policy issued in the name of his parents, the other plaintiffs herein, requested the insurer, defendant Hawkeye Security Insurance Company, to defend. Hawkeye refused, claiming that Larry was not an "insured" within the policy coverage for "residents of his [the named insureds'] household" and that they were not liable to either defend or pay for "bodily injury or property damage caused intentionally by or at the direction of the insured".

The instant action is one for declaratory relief brought to determine whether Larry was an insured and whether the insurer had a duty to defend and pay. In a well-reasoned opinion subsequent to a full trial before the court, the trial judge found that Larry was an insured and that the insurer had a duty to defend. Hawkeye appeals of right.

* WADE VanVALKENBURG, former Circuit Court Judge sitting on the Court of Appeals

At the time of the incident Larry was 22 and a full-time student at Ferris State in Big Rapids, Michigan. Larry had lived at home with his parents in Flint except when in the service or, in this case, away at school. Larry's education at Ferris was being financed by G.I. benefits and support from his parents. His parents paid the rent for his apartment at school.

The insurer Hawkeye would have us interpret the policy phrase "residents of his household" to mean only those actually dwelling in or occupying the physical premises named in the policy. Further, if one lived in two separate "households" during any given period appellant would then base the result on the amount of time spent at each. See: Wilkins v. Ann Arbor City Clerk, 385 Mich. 670, 674, 189 N.W.2d 423 (1971), and compare M.C.L.A. § 168-11; M.S.A. § 6.1011. We find this mechanical determination inappropriate as a general rule for the many and varied fact situations which may develop.

In Stadelmann v. Glen Falls Ins. Co., 5 Mich.App. 536, 541-542, 147 N.W.2d 460, 462-463 (1967), the phrase "residents of his household" was construed. The Court discussed the meaning of "resident" and "household" as follows:

"Resident" is defined in Webster's New International Dictionary (2d ed.) as:

"Dwelling, or having an abode, for a continued length of time; * * * one who resides in a place; one who dwells in a place for a period of more or less duration. Residence usually implies more or less permanence of abode, but is often distinguished from inhabitant as not implying as great fixity or permanency of abode."

"Resident" is defined in Black's Law Dictionary (4th ed.), p. 1473 as follows: "One who has his residence in a place."

by assignment pursuant to Conn.1963, art. 6, § 23 as amended in 1968.

Cite as 217 N.W.2d 449

"Household" is defined in the same authority on p. 873 as: "A family living together. Schurler v. Industrial Commission, 86 Utah 284, 43 P.2d 696, 699, 101 A.L.R. 1085. Those who dwell under the same roof and compose a family." Stadelmann, *supra*, 5 Mich.App. at 540, 147 N.W.2d at 462.

In Stadelmann the facts were undisputed and the Court ruled as a matter of law that the relative who was part of another household and a resident of a foreign country was not an insured within the policy's meaning. In the instant case the facts are different and disputed.

In Ortman v. Miller, 33 Mich.App. 451, 454-455, 190 N.W.2d 242, 244 (1971), now Justice Levin discussed the meaning of the term "resident" and quoted with approval from Corpus Juris Secundum as follows:

"The terms 'residence' and 'resident' have no fixed meaning in the law. They have variable meanings depending on the context in which the words are used and the subject matter;

"'Resident' has no technical meaning, and no fixed meaning applicable to all cases, but rather it has many meanings, and is used in different and various senses, and it has received various interpretations by the courts. Generally the construction or signification of the term is governed by the connection in which it is used, and depends on the context, the subject matter, and the object, purpose, or result designed to be accomplished by its use, and its meaning is to be determined from the facts and circumstances taken together in each particular case.'" (Citing 77 C.J.S. Resident pp. 305-306.)

[1] We think that this more flexible approach is preferable. The trier of fact, in this case the court, has considered the evidence in light of all the surrounding circumstances, and his decision, not being clearly erroneous, will not be overturned.

[2] Having thus determined that the phrase "resident of his household" has legal meaning only within the context of the numerous factual settings possible, the admission of various evidentiary items by the trial court, although not directly concerned with the date of the incident and residence on that date, was not improper. The question was one of weight, not admissibility. The admission of this evidence was not clearly erroneous.

[3] We turn to the insurer's duty to defend the civil action for assault and battery. In testimony taken in this action the complainant in the civil case claimed that plaintiff kicked her. Plaintiff asserts that he only pushed her away after she grabbed him by the seat of the pants to evict him from a bar. The complainant conceded that the complained-of bruise on her arm was caused when she got her arm caught in the door slamming behind the plaintiff. The complainant also testified that plaintiff was not looking at her when he left the bar and slammed the door behind him. This is a classic confrontation of disputed facts. Depending on the outcome of the fact finder's determination, these acts could be either negligent, intentional, or not actionable at all within the meaning of the policy. See and compare: Morrill v. Gallagher, 370 Mich. 578, 122 N.W.2d 687 (1963); Putman v. Zeluff, 372 Mich. 553, 127 N.W.2d 374 (1964); and Hawkeye Security Ins. Co. v. Shields, 31 Mich.App. 649, 187 N.W.2d 894 (1971).

The policy language concerning the duty to defend reads:

"1. Coverage E—Personal Liability:

"(a) Liability: To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury or property damage, and the Company shall defend any suit against the Insured alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy.

even if any of the allegations of the suit are groundless, false or fraudulent; but the Company may make such investigation and settlement of any claim or suit as it deems expedient." (Emphasis supplied.)

We think that the insurer using this broad language is required to defend. The question of whether they are required to defend should not rest solely on the form of pleading of a non-insured plaintiff. Whether the intentional acts exclusion will ultimately preclude payment is a mixed question of fact and law which, upon proper instruction and special questions, the jury or trier of fact in the assault and battery action can answer.

Affirmed. Costs to appellees.



52 Mich.App. 437

PEOPLE of the State of Michigan,
Plaintiff-Appellee,

v.

David Patrick LAKIN, Defendant-
Appellant.

Docket No. 17138-9.

Court of Appeals of Michigan,
Div. 1.

March 29, 1974.

Released for Publication May 8, 1974.

Defendant was convicted in the Circuit Court, Wayne County, George T. Martin, J., of larceny from a person on guilty plea to one charge and acceptance of plea of nolo contendere as to another charge and he appealed and the appeals were consolidated. The Court of Appeals, O'Hara, J., held that where trial judge conducted searching inquiry into every possible phase of defendant's rights, he elicited necessary information to establish

factual basis for commission of offense of armed robbery and subsequently he accepted a negotiated plea of nolo contendere to lesser included offense of larceny from a person arising out of original charge and there was no record support for claimed reliance of trial judge on facts adduced at preliminary examination, acceptance of nolo contendere plea was not improper, and that defendant failed to show that his plea of nolo contendere had been involuntary.

Affirmed.

1. Criminal Law § 275

Where trial judge conducted searching inquiry into every possible phase of defendant's rights, he elicited necessary information to establish factual basis for commission of offense of armed robbery and subsequently he accepted a negotiated plea of nolo contendere to lesser included offense of larceny from a person arising out of original charge and there was no record support for claimed reliance of trial judge on facts adduced at preliminary examination, acceptance of nolo contendere plea was not improper. M.C.L.A. § 750-357; GCR 1963, 785.1 et seq.

2. Criminal Law § 264

Even if accused had had a degree of drug addiction, that did not require trial court to inquire into possible defense of intoxication in prosecution for armed robbery.

3. Criminal Law § 275

Defendant failed to show that his plea of nolo contendere had been involuntary.

4. Criminal Law § 275

Nolo contendere plea is a plea of grace, not of right.

5. Criminal Law § 275

Plea of nolo contendere was not infirm because trial judge did not advise defendant of minimum sentence which would be imposed.

James R. Neuhard, State Appellate Defender, Detroit, for defendant-appellant.

Frank J. Kelley, Atty. Gen., Robert A. Derengoski, Sol. Gen., William L. Cahalan, Pros. Atty., Dominick R. Carnovale, Chief, Appellate Div., Arthur N. Bishop, Asst. Pros. Atty., for plaintiff-appellee.

Before MCGREGOR, P. J., and J. H. GILLIS and O'HARA,* JJ.

O'HARA, Judge.

The first and most salient point to be recognized and emphasized in this opinion is that the pleas and their acceptances occurred before the amendments to GCR 1963, 785 adopted March 16, 1973, effective June 1, 1973. Thus we consider this appeal under court rule and case law which is unaffected by the rule change above specified.

Defendant was charged with two separate armed robberies. Pleas to the lesser included offense of larceny from a person were negotiated in both cases.¹ As to one, the defendant entered a plea of guilty. As to the other, he proffered a plea of nolo contendere, which was accepted. He is in this Court by grant of leave to appeal as to both pleas. The cases have been consolidated in this Court.

Four claims of error are asserted:

- (1) Improper acceptance of a nolo contendere plea;
- (2) Error by the trial court in not inquiring into a possible defense of intoxication;
- (3) Infirmary in acceptance of the nolo plea by reason of its claimed involuntary nature;
- (4) Claimed failure of the trial judge in not informing the defendant of his

actual minimum sentence before finally accepting the proffered plea.

[1] On January 10, 1973, the trial judge conducted a searching inquiry into every possible phase of defendant's rights, constitutional and otherwise. He elicited the necessary information to establish the factual basis for the commission of the offense. All in all it covered 11 transcript pages. On January 16, 1973, the same trial judge accepted a negotiated plea of nolo contendere to the lesser included offense of larceny from a person which also arose out of an original armed robbery charge. Both the prosecution and defense counsel made specific reference to the proceedings the week before. Defendant was again questioned as fully as possible, this time for ten transcript pages. There is no basis for disturbing either plea for lack of completeness. The claimed reliance of the trial judge on the facts adduced at the preliminary examination is without merit. The court said nothing about it. Defense counsel in justification of the bargained plea simply made a passing reference to the preliminary examination. There is no off-record support for the claim that the court in part relied on anything remotely connected with the preliminary examination. The same can be said of the so-called stipulation between the prosecutor and defense counsel that the transcript of the examination become a part of the record in the case. It is anyway. There is no way the case could get to the circuit court without either a hindover on examination or a waiver thereof. The proscription is of the trial court's reliance on the preliminary examination to establish the factual basis required before acceptance of the plea. There is no suggestion of such reliance in the case at bar.

[2] There was nothing in the plea proceedings that would require the trial court

*MICHAEL D. O'HARA, former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const. 1963, art. 6, § 23 as amended in 1968.

1. M.C.L.A. § 750.357; M.S.A. § 28.589.

Robert C. Cannon, Asst. Atty. Gen., Salem, argued the cause for respondent. With him on the brief were James A. Redden, Atty. Gen., and Walter L. Barrie, Sol. Gen., Salem.

Before SCHWAB, C. J., and RICHARDSON and GILLETTE,* JJ.

PER CURIAM.

This is a companion case to *State v. Meyer, Jr.*, 45 Or.App. 375, 608 P.2d 582, decided today, and it involves Meyer's co-defendant.

Reversed and remanded for new trial. *State v. Meyer, Jr.*, 45 Or.App. 375, 608 P.2d 582 (1980).



45 Or.App. 379

FEDERATED AMERICAN INSURANCE COMPANY, a Washington Corporation, Appellant,
v.

Lon Gray CHILDERS and Thomas Mark Ryder, Respondents.

No. L 11,317; CA 12858.

Court of Appeals of Oregon,
In Banc.

Argued and submitted Oct. 15, 1979, before TANZER, P. J., and THORNTON and CAMPBELL, JJ.

Resubmitted in banc March 13, 1980, before SCHWAB, C. J., and THORNTON, TANZER, RICHARDSON, BUTTLER, JOSEPH, GILLETTE, ROBERTS and CAMPBELL, JJ.

Decided March 24, 1980.

Insurer brought declaratory judgment action concerning whether automobile liability policy provided coverage with respect

to accident which occurred while nonowned automobile was being driven by named insured's son. The Circuit Court, Umatilla County, William W. Wells, J., determined that named insured's son was covered under policy, and insurer appealed. The Court of Appeals, Thornton, J., held that evidence was sufficient to support finding that named insured's son was resident of named insured's household for purposes of policy.

Affirmed.

Tanzer, J., filed a dissenting opinion in which Schwab, C. J., Buttler and Gillette, JJ., joined.

Insurance — 437.1(4)

In view of evidence that named insured's son was temporarily living away from home in order to go to school, that the son considered named insured's home as his residence and left his possessions there, that he often returned for holidays, that bedroom was kept available for his use, and that he had lived with named insured prior to going away to college and was receiving financial support, evidence was sufficient to support trial court's finding that named insured's son was resident of named insured's household for purposes of automobile liability policy provisions providing coverage with respect to a nonowned automobile to any relative of a named insured who was a permanent resident of the same household.

William G. Wheatley, Eugene, argued the cause for appellant. With him on the briefs was Jaqua & Wheatley, Eugene.

John J. Haugh, Portland, argued the cause and filed the brief for respondent Lon Gray Childers.

James H. Gidley and Cosgrave, Kester, Crowe, Gidley & Lagesen, Portland, waived appearance for respondent Thomas Mark Ryder.

* GILLETTE, J., vice LEE, J., deceased.

Cite as, Or.App., 608 P.2d 584

THORNTON, Judge.

This action at law, brought by plaintiff insurer for declaratory relief, was tried to the court. Plaintiff appeals from the judgment determining that defendant Ryder was covered under his father's automobile liability insurance policy.

The sole issue on this appeal is whether the trial court erred in finding that Ryder was a "relative . . . who is a permanent resident of the same household" as his father, and thus entitled to coverage under the non-owned automobile provision of his father's "Family Automobile Policy."¹

Prior to graduating from high school, Ryder resided with his father and brother in the family home in Grants Pass. In the summer of 1975, Ryder, age 19, decided to enroll at Lane Community College in Eugene, where he hoped to gain a position on the college baseball team. Arriving in Eugene too late to begin the fall term, he returned to Grants Pass and discussed with his father the possibility of living in an apartment in Eugene in order to avoid out-of-district tuition for the winter term. Consequently, he moved to Eugene and occupied his time during the fall by practicing with the college baseball team. His father sent him money to help with his living expenses. In January he registered for classes at Lane and continued in school until the end of the term. Unable to find a summer job in Grants Pass, Ryder went to Wallowa, Oregon, to take a job. He intended to return to college at the end of the summer. He considered his father's home as his residence and left his possessions there. He often returned to Grants Pass for holidays, and a bedroom was kept available for his use. In applying for the insurance policy in issue, defendant Ryder's fa-

ther listed himself as the only driver of the automobile, and listed as members of his household only his unlicensed daughter, age 16, to be excluded.

On June 18, 1976, an accident occurred in which defendant Childers was seriously injured. The automobile involved in the accident was owned by Childers, but was being driven with his permission by Ryder.

The question of whether a person is a resident of the household of a named insured has continued to be treated by our Supreme Court as a fact issue to be resolved by the trier of fact. *Waller v. Rocky Mtn. Fire & Casualty*, 272 Or. 69, 71-72, 585 P.2d 530, 531-32 (1975); *Schehen v. North-West Insurance*, 258 Or. 559, 484 P.2d 836 (1971). However, the court has required that there be sufficient evidence that the person seeking coverage and the insured "dwell or live together" as members of a household, in order to survive a motion for directed verdict. *Schehen v. North-West Insurance*, supra at 561-62, 484 P.2d 836. In *Schehen*, a dentist moved from Eugene to Klamath Falls, where he purchased a home and practiced dentistry for four years. By so doing, he established residence in Klamath Falls. His adult daughter and her teenage children, who theretofore had lived with him, remained in his prior home in Eugene. The Supreme Court held that although Dr. Schehen visited his daughter and her teenage children and gave them financial support, this was not sufficient evidence to submit to a jury that he "lived, dwelled, or resided" with them in Eugene. 258 Or. at 562-63, 484 P.2d 836.

Because there is evidence to support the finding below, we need not decide whether, under *Schehen*, a child who is temporarily

I. That policy provides in pertinent part:

"Persons Insured: The following are insureds under Part I:

"(b) with respect to a non-owned automobile.

"(2) any relative . . .

"Definitions: Under Part I:

"Relative" means a relative of the named insured who is a permanent resident of the same household;

"Non-Owned Automobile" means an automobile or trailer not owned by or furnished for the regular or frequent use of either the named insured or any relative, other than a temporary substitute automobile; but does not include any automobile or trailer used without the permission of the owner."

away from home for camp, school, college, summer employment, or the like, loses protection under a "relative resident" clause of a family automobile policy the moment he ceases to physically "dwell or live" with his family.² Yet, we note that decisions from many jurisdictions conclude that such a clause can include a child who is away from home for school, for temporary employment, or for service in the armed forces. These decisions are collected in Annotation, 93 A.L.R.3d 420 (1979).³

It has been held that a child may be temporarily absent from the household, or indeed may have more than one residence, without necessarily losing the protection afforded to a "resident of the household" under an insurance policy. See *Aetna Casualty & Surety Co. v. Means*, 382 F.2d 26, 28 (10th Cir. 1967); *Detroit Auto. Inter-Insurance Exchange v. Feys*, 205 F.Supp. 42 (N.D.Cal.1962); *Travelers Indem. Co. v. Mattox*, 345 S.W.2d 290, 292 (Tex.Civ.App. 1961); Annotation, 93 A.L.R.3d 420 (1979). For example, in *Aetna Casualty & Surety Co. v. Means*, *supra*, the court, applying Oklahoma law, held that despite the fact that insured's son was married and had his own automobile insurance policy, and despite testimony by both the insured and his son that the son was not a resident of the insured's household at the time of the accident, evidence that the son was a minor, lived away at college, had a room and kept clothing in the insured's house, used the insured's address as his own on important papers, and received financial assistance from the insured, was sufficient to support the jury's determination that the son was a resident of the insured's household and was therefore covered under his automobile policy. In *Beck v. Pennsylvania National Mut. Cas. Ins. Co.*, 429 F.2d 813 (5th Cir. 1970), the court, applying Pennsylvania law, held

2. We note that in *Schehen v. North-West Insurance*, 258 Or. 559, 484 P.2d 836 (1971), the insured moved away from his daughter and established residence in a distant city, while in this case the insured's son was temporarily away from home for college and was found not to have established a permanent residence elsewhere.

that a son, who kept his personal belongings at his parents' home and returned there on every leave, was a resident of the household and therefore covered under the non-owned automobile clause of the insured's liability policy, despite the fact that the son was in the service and stationed away from home, and despite testimony that the insured desired to lower his premium by excluding his son from coverage.

The approach taken by our Supreme Court in *Waller v. Rocky Mtn. Fire & Casualty*, *supra*, is applicable in this case. There, a 24-year old son left home for service in the Navy. Upon his discharge he returned to his parents' home for about a year. He then moved out-of-state and took a full-time job, but left many of his belongings at his parents' home and visited frequently. The trial court found that the son was no longer a resident of his parents' household entitled to coverage under a "relative resident" clause of their automobile insurance policy. The Supreme Court upheld the finding on the basis that evidence that the son was an adult, lived in another state, worked full time, and did not intend to return to his parents' home, plus the reasonable inferences to be drawn from that evidence, supported the further inference that he did not "dwell or live" with his parents. 272 Or. at 75, 535 P.2d 530.

In this case, there was conflicting evidence. On his insurance application form the insured did not list Ryder as a resident of his household, because Ryder had been living away at school during the year and because the insured believed that listing Ryder would increase his premium. Ryder in fact was temporarily living away from home in order to go to school. However, Ryder considered his father's home as his residence and left his possessions there. Further, he often returned for holidays, and

3. Examination of the cases discussed in this annotation reveals that while some jurisdictions treat "relative resident" questions as fact issues and others treat them as a mixed question of fact and law, all agree that such a clause can (and often does) include a child away from home

a bedroom was kept available for his use. Ryder lived with his father prior to going away to college, and his father was giving him financial support. In the face of this evidence we cannot hold, as a matter of law, that there is no evidence to support the trial court's finding that Ryder was a resident of his father's household.

As the Supreme Court did in *Waller*, we uphold the trial court's factual determination regarding residency within the meaning of a "relative resident" clause, because there is evidence and reasonable inferences to be drawn therefrom which support that finding. *Hassan v. Guyer*, 271 Or. 349, 352, 532 P.2d 227 (1975); *White v. Bello*, 276 Or. 931, 933, 556 P.2d 1362 (1976).

Affirmed.

TANZER, Judge, dissenting.

The majority errs in treating the issue solely as a matter of fact. It is elementary that before we can review the sufficiency of any finding, we must first determine what legal issue the facts must be sufficient to establish. This case presents a preliminary legal issue of what is meant by the phrase "relative . . . who is a permanent resident of the same household [as the insured]." Only after determining as a matter of law the definitional requirements of the term is it proper to proceed to the factual issue of whether the finding is supported by the evidence. That is essentially what the Supreme Court did in *Schehen v. North-West Insurance*, 258 Or. 559, 484 P.2d 836 (1971).

The fallacy of the majority is that it treats the "permanent resident" clause as having a fixed legal meaning which is the same in all situations, contexts and jurisdictions as a matter of law and then holds that we cannot say there was no evidence to support a finding because other states have so held. Were that so, we would be bound by analogy to reverse the trial court based on the authority of *Garrow v. Pennsylv. Gen. Ins. Co.*, 288 Or. 215, 603 P.2d 1175 (1979). There, the Supreme Court construed the term "members of [the insured's] family residing in the same household" in ORS

743.800 (which governs personal injury protection coverage) to not include persons not actually residing in the home of the insured. The term in this case is not only analogous, but somewhat narrower because it requires permanence.

The term "permanent resident" is material in this case because it is used in an insurance contract, not in a statute. Accordingly, it should be construed under the well-established principles of contract law applicable to insurance policies. Those principles are well summarized in *Shadbolt v. Farmers Insur. Exch.*, 275 Or. 407, 410-11, 551 P.2d 478, 480 (1976):

"We have said, however, that when words or terms of a general nature are used in an insurance policy, such words or terms may be ambiguous, in the legal sense, when they could reasonably be given a broader or a narrower meaning, depending upon the intention of the parties in the context in which such words are used by them.

"We have also said that an insurance policy should be construed 'according to its character and its beneficial purposes, and in the sense that the insured had reason to suppose that it was understood.'

"Finally, we have said many times that if there is an ambiguity in the terms of an insurance policy, any reasonable doubt as to the intended meaning of such terms will be resolved against the insurance company and in favor of extending coverage to the insured." (Footnotes omitted.)

The intention of the parties and the sense in which the insured must have understood the term is demonstrated beyond serious question by the father's conscious decision not to insure his son. On the order for insurance, he listed himself as the only driver. Where asked to list "Ages of children residing in household," the father left the "Males" blank empty and, after "Females," named his 16-year-old daughter to be excluded as a nondriver. The father testified forthrightly regarding his intention and understanding: (1) that his children had always been required to insure themselves or pay the cost increment on his policy as

the price they paid for driving; (2) that he had not listed his son as a resident because the son had been away from the home for almost a year and because he did not consider his son a resident of his household ("If I did, I would have included him here, also."); and (3) he did not desire or intend that his son be covered because he wanted the lower premium based on coverage of himself only and that had he listed his son, the premium would have been higher. It is clear from the testimony of the father that neither the insured nor the insurer regarded the son as a permanent resident of the household of the insured.

Applying the principles of *Shadbolt*, there is no reason for us to construe the contract differently than the parties did. Under the legal meaning of the term which was understood and intended by the parties to the contract, the facts in this case are insufficient to support a finding of coverage.

SCHWAB, C. J., and BUTTLER and GILLETTE, JJ., join in this dissent.



45 Or.App. 389

STATE of Oregon ex rel. ADULT AND FAMILY SERVICES DIVISION,
Appellant,

v.

William J. LESTER, Respondent,
and

Nancy J. Whipps, Mother.
No. 54465; CA 14606.

Court of Appeals of Oregon.

Argued and Submitted Oct. 12, 1979.

Decided March 24, 1980.

Adult and family services division brought action for support on behalf of State, as assignee of mother, seeking order

requiring father to make child support payments to Department of Human Resources. The Circuit Court, Linn County, Wendell H. Tompkins, J., denied petition, and division appealed. The Court of Appeals, Tanzer, P. J., held that where previous dissolution decree had awarded custody of child to the father and no support payments were required by the decree, where child subsequently resided with mother, who, as a prerequisite to receipt of public assistance, had assigned her support rights to Department of Human Resources, and where adult and family services division therefore had the statutory right to petition for modification of dissolution decree but did not do so, petition for support brought on behalf of State by adult and family services division as assignee of mother was properly denied.

Affirmed.

1. Assignments — 71

An assignee stands in the shoes of his assignor.

2. Social Security and Public Welfare — 11

Adult and family services division, as assignee of mother's support rights, could acquire no greater interest in those rights than she possessed. ORS 23.789(2), 418.042(1).

3. Social Security and Public Welfare — 11

Where previous dissolution decree had awarded custody of child to the father and no support payments were required by the decree, where child subsequently resided with mother, who, as a prerequisite to receipt of public assistance, had assigned her support rights to Department of Human Resources, and where adult and family services division therefore had the statutory right to petition for modification of dissolution decree but did not do so, petition for support brought on behalf of State by adult and family services division as assignee of mother was properly denied. ORS 23.789(2), 418.042(1).

Ches. Or.App., 606 P.2d 680

James C. Rhodes, Asst. Atty. Gen., Salem, argued the cause for appellant. With him on the brief were James A. Redden, Atty. Gen., and Walter L. Barrie, Sol. Gen., Salem.

Richard L. King, Portland, argued the cause and filed the brief for respondent.

Before TANZER, P. J., and THORNTON and CAMPBELL, JJ.

TANZER, Presiding Judge.

This is an action for support under ORS 23.789(2),¹ brought on behalf of the state by the Adult and Family Services Division (AFSD) as assignee of the mother against respondent, the father of a minor child. AFSD seeks to require respondent to make child support payments to the Department of Human Resources. The trial court denied AFSD's petition and it appeals.

A previous decree of dissolution awarded custody of the child to the father. No child support payments were required by the decree. For reasons not material here, the child, age 16, now resides with her mother, who receives public assistance from the State of Oregon on her behalf.

Public assistance was provided for the child while she was living with her mother. As a prerequisite to the receipt of such assistance, the mother was required by ORS 418.042(1)² to assign her support rights to the Department of Human Resources.³ In

Gibson v. Johnson, 35 Or.App. 493, 499-500, 582 P.2d 452, 456, rev. den. (1978), this court explained the statutes relating to such an assignment of support rights:

" . . . The general statutory plan is that the recipient must assign support rights to the state, and the state, with the required cooperation of the recipient-assignor, collects the support from the obligor. The support is collected on behalf of the state as assignee and not on behalf of the recipient. See *Warlick v. Pub. Wel. Div.*, 29 Or.App. 21, 562 P.2d 223, rev. den. (1977); *Whallon and Whallon*, 23 Or.App. 307, 42 P.2d 155 (1975). The essence of this statutorily created relationship is that of assignor-assignee. . . . The contact between the recipient and the SED [Support Enforcement Division] attorneys is for the benefit of the state in recouping some of the funds paid out for aid to dependent children. . . ."

[1, 2] An assignee stands in the shoes of his assignor. Plaintiff, as assignee of the mother's support rights, could acquire no greater interest in those rights than she possessed. *Weyerhaeuser Co. v. First Nat. Bank*, 150 Or. 172, 38 P.2d 48, 49 P.2d 1078 (1935); *Hill v. Wood*, 142 Or. 143, 19 P.2d 89 (1938).

[3] The only means the mother has to collect child support from the father is to seek modification of the dissolution decree to provide for payment of child support.

as the applicant or recipient refuses to assign to the Department of Human Resources any rights to support from any other person such applicant may have in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and which have accrued at any time such assignment is executed, or refuses to cooperate with the Department of Human Resources in establishing the paternity of a child born out of wedlock and in obtaining support or other payments of property due the applicant or the child."

2. AFSD's petition for support avers that "Petitioner is, pursuant to ORS 418.042 and Mother's assignment thereunder, the duly constituted assignee of Mother's child support rights." The assignment is not in the record, but no question has been raised with respect to its execution or validity.

1. ORS 23.789(2):

"In any case involving a child or custodial parent or other dependent person who is a recipient of public assistance or care, support or services, the Support Enforcement Division of the Department of Justice shall represent such child or children, caretaker parent, other dependent person or the Department of Human Resources for the purpose of seeking modification, or enforcement through contempt proceedings, garnishment, an order for assignment of wages under ORS 23.777 or 23.783 or the Uniform Reciprocal Enforcement of Support Act, of any order or decree entered under ORS chapter 107, 108, 109, 110, or 419. The Support Enforcement Division shall also move to initiate proceedings for orders of support under those chapters."

2. ORS 418.042(1):

"Aid, as defined in subsection (2) of ORS 418.035, shall not be granted to, or on behalf of, any applicant, or recipient and for as long

venture. The parties having stipulated that the court in lieu of a new trial could make a decision based upon the records of the two prior trials did not preserve that finding and it is clear that the court was not bound thereby. Pursuant to the agreement of the parties, the court was entitled to make its own independent decision and dispose of the issues.

We have carefully considered the other assignments of error and we conclude that they are without merit. The findings and conclusions of the court below are amply supported by the evidence and we discern no error which would justify a reversal. The judgment of the court below is affirmed. Respondents are entitled to costs.

CALLISTER, C. J., and ELLETT,
HENRIOD, and CROCKETT, JJ., concur.



26 Utah 2d 161

AMERICAN STATES INSURANCE COMPANY,
WESTERN PACIFIC DIVISION, Plaintiff and Appellant,

v.

Marvin J. WALKER et al., Defendants
and Respondents.

Robert W. CLUBB, Plaintiff,

v.

Dixie Ann WALKER, Defendant.
No. 12320.

Supreme Court of Utah.
July 7, 1971.

Action by insurer for declaratory judgment determining its liability to daughter of named insured under automobile policy and rider of motorcycle who was injured in collision with automobile. The Third District Court, Salt Lake County, Stewart M. Hanson, J., entered judgment adverse to insurer and insurer appealed. The case was consolidated with

garnishment action. The Supreme Court, Ellett, J., held that evidence supporting finding that insured's daughter who had some furniture, books and clothing in insured's home and who had Idaho driver's license but who listed her residence in Utah on her income tax return as being in Utah was sufficient to establish that she was a resident of insured's household in Utah within meaning of automobile policy at time of collision.

Affirmed.

Henriod, J., concurred in the result.

1. Insurance §-435.8(4)

A "resident of a household", for purpose of determining coverage under automobile policy, is one who is a member of family that lives under the same roof.

See publication Words and Phrases for other judicial constructions and definitions.

2. Insurance §-437.1(4)

Evidence supported finding that insured's daughter who had gone to Utah to attend college and who listed residence on income tax return as being in Utah, who kept some furniture, books and clothing in her father's home in Idaho, was a resident of her father's household at time of automobile collision and covered by automobile policy.

3. Insurance §-602.2(1)

Before award of attorney fees could be made in declaratory judgment action by insurer seeking determination of its liability under policy, it must appear that the insurer acted in bad faith or fraudulently or was stubbornly litigious.

4. Insurance §-602.2(3), 602.5

Where automobile liability insurer could have obtained determination of its liability by answering writ of garnishment and insurer by bringing declaratory judgment action compelled defendants to seek counsel in order to avoid a default judgment, trial court acted within its powers in awarding attorney fees on ground that insurer was acting in bad faith and was stubbornly litigious.

AMERICAN STATES INS. CO., WESTERN PAC. DIV. v. WALKER Utah 1048

Cite as 486 P.2d 1042

D. Gary Christian, of Kipp & Christian,
Salt Lake City, for plaintiff-appellant.

William S. Richards, of Richards & Richards,
Salt Lake City, for Walkers.

Lee W. Hobbs, Salt Lake City, for
Clubb.

The following are insureds under Part 1:

(b) with respect to a non-owned automobile, (1) the named insured, (2) any relative, but only with respect to a private passenger automobile or trailer,

"relative" means a relative of the named insured who is a resident of the same household.

Dixie Ann went away to college during the school years 1965-66 and 1966-67, where she was studying to go into the field of education. She considered herself a resident of her father's household all during this time and returned to his home in Idaho Falls, Idaho, at the end of each school year. After two years of college study, she decided to become an X-ray technician and came here to Salt Lake City, Utah, to receive her training in a local hospital.

She lived at the hospital for approximately four months until she had to move to make room for some student nurses, and thereafter she lived in an apartment with some other girls. She opened a joint bank account here with her father and had a telephone listed in her own name. She was born July 23, 1947, and was just under 21 years of age on May 30, 1968, the date when the accident in question happened. While in training as an X-ray technician she was paid a salary of approximately \$140 per month take-home pay. Her parents augmented her income by giving her small amounts of money, clothing, and food when she would return home on visits. At all times prior to the date of the accident she kept some furniture, her books, and her clothing in her father's home. She considered herself a resident of Idaho and voted in the general election there in November 1968. She had a driver's license issued by the State of Idaho but none by Utah. As opposed to the foregoing, the insurance company points out that when she filed her 1968 income tax return, she listed her residence for the year as being in Utah.

ELLETT, Justice:

Dixie Ann Walker was involved in an automobile-motorcycle collision and was sued by Robert W. Clubb, the rider of the motorcycle. She claims to be covered by a policy of insurance written by American States Insurance Company wherein her father, Marvin J. Walker, is the named insured.

The insurance company denied coverage to Dixie Ann on the ground that she was not an insured under her father's policy. She retained her own attorney and settled the case on a stipulated judgment in favor of Mr. Clubb. A garnishment was issued by Clubb, who traversed the answer of the insurance company. Upon trial thereof, the lower court held the insurance company to be indebted to Dixie Ann Walker and gave judgment against it for the use and benefit of Mr. Clubb.

Subsequent to the service of the writ of garnishment, the insurance company filed a declaratory judgment action seeking to have a determination of whether it is liable to Dixie Ann and Clubb under the policy. The trial court held that Dixie Ann was an insured under the policy and awarded her an attorney's fee for defending the declaratory judgment action.

The two cases were consolidated on this appeal.

There are two matters for our determination:

1. Was Dixie Ann Walker a resident of her father's household at the time of the collision? and
2. Is she entitled to an attorney's fee for defending the declaratory judgment action?

The policy in question contained the following provisions:

With this evidence before him, the trial court held on May 30, 1968, Dixie Ann Walker was a resident of her father's household. It is our duty to affirm him if there is any substantial evidence to sustain that ruling.¹

[1] A resident of a household is one who is a member of a family who live under the same roof. Residence emphasizes membership in a group rather than an attachment to a building. It is a matter of intention and choice rather than one of geography.

Ordinarily when a child is away from home attending school, he remains a member of the family household, and the question of when he ceases to be such is one which must be determined from all of the facts and circumstances as revealed by the evidence.

[2] The trial court heard the evidence and made a finding that at the time of the collision Dixie Ann Walker was still a resident of her father's household. Whether we would have made the same ruling had we tried the case is immaterial, and on appeal we are not justified in substituting our judgment for his, since the evidence was such as to sustain his judgment.

The ruling made is further buttressed by the testimony to the effect that Dixie Ann and her father went to the agent of the insurance company for advice as to whether an additional insurance policy should be taken out to cover her when she left Idaho for training in Utah. The agent told them that she would be covered by her father's policy. The inquiry was made because the father's policy contained this provision:

YOUR AGENT

Information regarding your insurance policy or additional coverage may be obtained from your agent whose name is noted in this policy.

1. Charlton v. Hackett, 11 Utah 2d 389, 390 P.2d 176 (1961).

[3,4] Before an award of attorney's fee could be made in the declaratory judgment action, it must appear that the insurance company acted in bad faith or was stubbornly litigious.² In our practice an attorney's fee is not allowed in the ordinary lawsuit unless provided for by statute or by contract, its policy the insurance company refused to pay all sums which the insured was legally obligated to pay as a result of injury sustained by any person, failing to defend the action against Ann Walker, it caused her to sustain expenses which resulted because of the collision. It does not dispute its liability for this fee. It does question the award in declaratory judgment action. The Walker and Mr. Clubb contend that the company acted in bad faith and was stubbornly litigious in bringing and maintaining the action. The record shows that the garnishment was served on the insurance company June 30, 1970, and the declaratory judgment action was commenced. The company could have quashed the writ and appealed from any judgment rendered against it and have raised all points which it asserted in the action it filed. We can see no reason for the bringing of this new action to compel the defendants therein to seek counsel in order to avoid a default judgment. The trial court without making a specific finding to that effect apparently thought the company was acting in bad faith and was stubbornly litigious, and made an award of an attorney's fee in this matter. We think he acted within his prerogative in doing so.

The judgment is affirmed, with costs of appeal awarded to the respondents.

CALLISTER, C. J., and TUCKETT, CROCKETT, JJ., concur.

HENRIOD, J., concurs in the result.

2. Maryland Casualty Co. v. Sams, 323 Ga.App. 323, 11 S.E.2d 89 (1960).

28 Utah 2d 105

Richard L. GILLMAN, by and through his Guardian ad Litem, Norman Gillman, Plaintiff and Respondent,

v.

Blanche W. HANSEN, Defendant and Appellant.

No. 12299.

Supreme Court of Utah.

June 28, 1971.

Action arising from intersectional collision. The Third District Court, Salt Lake County, Marcellus K. Snow, J., refused to allow defendant to amend her answer by way of a counterclaim, and defendant appealed. The Supreme Court, Ellett, J., held that refusal to allow lawyer, selected by insurer to defend insured in action arising from intersectional collision, to amend insured's answer by way of a counterclaim for personal injuries and property damage was not in furtherance of justice, even though plaintiff might be required to take a further deposition of insured, where neither party had made any effort to set case for trial, nor had a pretrial conference been requested, and where refusal to permit amendment would forever bar insured from having her day in court when failure to assert claim earlier was no fault of hers.

Reversed and remanded with directions.

1. Pleading \S 236(1)

Ordinarily, allowance of an amendment by leave of court is a matter which lies within sound discretion of trial court, but such discretion is to be exercised in furtherance of justice and must not be exercised so as to defeat justice. Rules of Civil Procedure, rule 15(a).

2. Pleading \S 262

Refusal to allow lawyer, selected by insurer to defend insured in action arising from intersectional collision, to amend insured's answer by way of a counterclaim

for personal injuries and property damage was not in furtherance of justice, even though plaintiff might be required to take a further deposition of insured, where neither party had made any effort to set case for trial, nor had a pretrial conference been requested, and where refusal to permit amendment would forever bar insured from having her day in court when failure to assert claim earlier was no fault of hers. Rules of Civil Procedure, rules 13(a), 15(a).

Harold G. Christensen, of Worsley, Snow & Christensen, Salt Lake City, for defendant and appellant.

James R. Amschler, and Clifford L. Ashton, of Van Cott, Bagley, Cornwall & McCarthy, Salt Lake City, for plaintiff and respondent.

ELLETT, Justice:

Blanche W. Hansen was involved in an automobile accident in an intersection controlled by semaphore lights and was sued by the driver of the other car. Her insurance carrier undertook the defense of the case and filed an answer in her behalf. Each party served interrogatories on the other. Certain motions were made, and the deposition of the defendant was taken.

Since the attorneys for the defendant were selected by the insurance company, they had not met the defendant until just prior to the taking of her deposition. At this meeting she told them that she herself had been injured in the collision and that the plaintiff was the one who ran the red light.

Immediately after the deposition was finished, her counsel informed the insurance company of the possible counterclaim which defendant was asserting. The company instructed the lawyers to include the claim by way of an amendment to the answer.

Since the defendant's claim arose out of the same transaction as did that of the plaintiff, it would be forever barred unless

With this evidence before him, the trial court held on May 30, 1968, Dixie Ann Walker was a resident of her father's household. It is our duty to affirm him if there is any substantial evidence to sustain that ruling.¹

[1] A resident of a household is one who is a member of a family who live under the same roof. Residence emphasizes membership in a group rather than an attachment to a building. It is a matter of intention and choice rather than one of geography.

Ordinarily when a child is away from home attending school, he remains a member of the family household, and the question of when he ceases to be such is one which must be determined from all of the facts and circumstances as revealed by the evidence.

[2] The trial court heard the evidence and made a finding that at the time of the collision Dixie Ann Walker was still a resident of her father's household. Whether we would have made the same ruling had we tried the case is immaterial, and on appeal we are not justified in substituting our judgment for his, since the evidence was such as to sustain his judgment.

The ruling made is further buttressed by the testimony to the effect that Dixie Ann and her father went to the agent of the insurance company for advice as to whether an additional insurance policy should be taken out to cover her when she left Idaho for training in Utah. The agent told them that she would be covered by her father's policy. The inquiry was made because the father's policy contained this provision:

YOUR AGENT

Information regarding your insurance policy or additional coverage may be obtained from your agent whose name is noted in this policy.

1. Charlton v. Hackett, 11 Utah 2d 388, 390 P.2d 176 (1961).

[3,4] Before an award of attorney fee could be made in the declaratory action, it must appear that the insurance company acted in bad faith or was stubbornly litigious.² In our practice an attorney's fee is not allowed in the ordinary lawsuit unless provided for by statute or by contract. Its policy the insurance company agreed to pay all sums which the insured was legally obligated to pay as a result of injury sustained by any person, failing to defend the action against Dixie Ann Walker, it caused her to sustain expenses which resulted because of the collision. It does not dispute its liability for this fee. It does question the award of declaratory judgment action. The Walker and Mr. Clubb contend that the company acted in bad faith and was stubbornly litigious in bringing and maintaining the action. The record shows that the garnishment was served on the insurance company June 30, 1970, and the declaratory judgment action was commenced. The company could have quashed the writ and appealed from any judgment rendered against it and have raised all points which it asserted in the action it filed. We can see no reason for the bringing of this new action to compel the defendants therein to seek counsel in order to avoid a default judgment. The trial court without making specific finding to that effect apparently thought the company was acting in bad faith and was stubbornly litigious, and made an award of an attorney's fee in the matter. We think he acted within his prerogative in doing so.

The judgment is affirmed, with costs of appeal awarded to the respondents.

CALLISTER, C. J., and TUCKER, CROCKETT, JJ., concur.

HENRIOD, J., concurs in the result.

2. Maryland Casualty Co. v. Baltimore, Ga.App. 323, 11 S.E.2d 66 (1940).

26 Utah 2d 105

Richard L. GILLMAN, by and through his
Guardian ad Litem, Norman Gillman,
Plaintiff and Respondent,

v.

Blanche W. HANSEN, Defendant
and Appellant.
No. 12299.

Supreme Court of Utah.
June 28, 1971.

Action arising from intersectional collision. The Third District Court, Salt Lake County, Marcellus K. Snow, J., refused to allow defendant to amend her answer by way of a counterclaim, and defendant appealed. The Supreme Court, Ellett, J., held that refusal to allow lawyer, selected by insurer to defend insured in action arising from intersectional collision, to amend insured's answer by way of a counterclaim for personal injuries and property damage was not in furtherance of justice, even though plaintiff might be required to take a further deposition of insured, where neither party had made any effort to set case for trial, nor had a pretrial conference been requested, and where refusal to permit amendment would forever bar insured from having her day in court when failure to assert claim earlier was no fault of hers.

Reversed and remanded with directions.

1. Pleading 6-236(1)

Ordinarily, allowance of an amendment by leave of court is a matter which lies within sound discretion of trial court, but such discretion is to be exercised in furtherance of justice and must not be exercised so as to defeat justice. Rules of Civil Procedure, rule 15(a).

2. Pleading 6-262

Refusal to allow lawyer, selected by insurer to defend insured in action arising from intersectional collision, to amend insured's answer by way of a counterclaim

for personal injuries and property damage was not in furtherance of justice, even though plaintiff might be required to take a further deposition of insured, where neither party had made any effort to set case for trial, nor had a pretrial conference been requested, and where refusal to permit amendment would forever bar insured from having her day in court when failure to assert claim earlier was no fault of hers. Rules of Civil Procedure, rules 13(a), 15(a).

Harold G. Christensen, of Worsley, Snow & Christensen, Salt Lake City, for defendant and appellant.

James R. Amschler, and Clifford L. Ashton, of Van Cott, Bagley, Cornwall & McCarthy, Salt Lake City, for plaintiff and respondent.

ELLETT, Justice:

Blanche W. Hansen was involved in an automobile accident in an intersection controlled by semaphore lights and was sued by the driver of the other car. Her insurance carrier undertook the defense of the case and filed an answer in her behalf. Each party served interrogatories on the other. Certain motions were made, and the deposition of the defendant was taken.

Since the attorneys for the defendant were selected by the insurance company, they had not met the defendant until just prior to the taking of her deposition. At this meeting she told them that she herself had been injured in the collision and that the plaintiff was the one who ran the red light.

Immediately after the deposition was finished, her counsel informed the insurance company of the possible counterclaim which defendant was asserting. The company instructed the lawyers to include the claim by way of an amendment to the answer.

Since the defendant's claim arose out of the same transaction as did that of the plaintiff, it would be forever barred unless

part of the law of this State in varying forms since 1857 and was not repealed by Section 6518-07.5 Mississippi Code 1942 Annotated (1956).

In addition to the provisions of Section 9889 vesting authority to levy taxes in the board of supervisors, both the original Act of 1954 and the amendment of 1962, (Chapter 360, Laws of Mississippi 1962) contain the following language:

[T]he board of supervisors or governing authorities of the municipality, as the case may be, shall annually levy said tax upon all of the taxable property of the school district *at the same time and in the same manner as other ad valorem taxes are levied.* . . . [Section 6518-07 Mississippi Code 1942 Annotated]. (Emphasis added).

Sections 6328-90 and 6328-93 Mississippi Code 1942 Annotated (Supp.1972) provide that all statutes relating to the assessment, levying and collection of ad valorem taxes for a municipal separate school district shall be applicable to special municipal separate school districts except that the assessment and levy shall be made by the board of supervisors, and that the provisions of Section 6, Chapter 261, Laws of 1954 and any other applicable statutes shall be fully applicable to special municipal separate school districts.

[2] Section 6518-07 is clear and unambiguous, and the other statutes referred to

by appellant neither cast doubt on its meaning nor render it ambiguous. It clearly vests authority in the board of supervisors to levy the additional tax in the same manner and at the same time "as other ad valorem taxes are levied," thus retaining the authority conferred on the board of supervisors to levy taxes as provided by Section 9889 Mississippi Code 1942 Annotated (Supp.1972).

[3] It is a well recognized principle of law in this State that ambiguity must exist in the language used by the Legislature in a statute before resort will be had to any rules of statutory construction or interpretation. Without ambiguity, the controlling law of this State requires that the Court look no further than the clear language of the statute and apply it. In *State v. Heard*, 246 Miss. 774, 151 So.2d 417 (1963) this Court said:

Where the legislative language is plain and unambiguous, and conveys a clear and definite meaning, as we think section 5904 does, there is no occasion for resorting to rules of statutory interpretation. 50 Am.Jur., Statutes, sec. 410. [246 Miss. at 781, 151 So.2d at 420].

For the reasons stated, the action of the trial court is affirmed.

Affirmed.

RODGERS, P. J., and JONES, INZER and BROOM, JJ., concur.

George D. CROSSETT

v.

ST. LOUIS FIRE AND MARINE INSURANCE CO., a Corporation.
8C 33.

Supreme Court of Alabama.
Nov. 30, 1972.

Proceeding on insurer's bill in equity against insured homeowners' university student son and others seeking declaratory judgment as to its obligations under homeowners' policy with respect to suit by the student's classmate against the student to recover for injuries sustained in dormitory altercation. The Circuit Court, in Equity, Jefferson County, William C. Barber, J., entered decree exonerating insurer from liability under the policy, and student appealed. The Supreme Court, Bloodworth, J., held that insureds' son who, while attending university 116 miles away from family home, had room in family home, came home on most weekends and kept personal belongings at home except those he needed at school, who had tuition and some other expenses provided for by his father and who listed parents' address on his driver's license, registered for draft near parents' home and was at home during all holiday periods was a "resident of household" of his parents on day of the accident within meaning of omnibus clause of homeowners' policy.

Reversed and remanded.

Coleman, J., concurred in result.

Somerville, J., concurred specially and filed opinion.

1. Insurance 435.8(4)

Insured homeowners' university student son who, while attending university 116 miles away from family home, had room in family home, came home on most weekends and kept most personal belongings

at home, who had tuition and some other expenses provided for by his father and who listed parents' address on his driver's license, registered for draft near their home and was at home during holiday periods was a "resident of household" of his parents on day of accident resulting in injuries to university classmate in dormitory within meaning of omnibus clause of homeowners' policy.

See publication Words and Phrases for other judicial constructions and definitions.

2. Insurance 148.7(5)

The term "residents," with respect to references in policies to households of named insureds, is ambiguous and is capable of two rational constructions, and thus construction should be adopted which is in favor of the insured.

See publication Words and Phrases for other judicial constructions and definitions.

Rives, Peterson, Pettus, Conway & Burge, Birmingham, for appellant.

Huie, Fernambucq & Stewart, Birmingham, for appellee St. Louis Fire and Marine Ins. Co.

Cato & Hicks, Birmingham, for appellee Cavell Co., Inc.

BLOODWORTH, Justice.

This is an appeal from a final decree in a declaratory judgment action. The trial court held that the bodily injury liability coverage, provided for under the omnibus clause of a homeowners insurance policy, did not apply to the son of the named insureds, who was then a student at Auburn University, Auburn, Alabama, living in Cavell Dormitory.

Appellant is George D. (Don) Crossett. The homeowners policy was issued to his parents, who lived in Birmingham, Alabama. On the evening of November 4,

1967, Don Crossett allegedly injured a classmate, Jerry Patterson, who was a close friend and former roommate, while they were engaged in an alleged altercation in Cavell Dormitory at Auburn, Alabama. The injury allegedly resulted in the loss of the classmate's eye. Don Crossett is the defendant in a lawsuit filed by the injured party, Jerry Patterson, which suit is pending in the Circuit Court of Jefferson County.

The insurer, St. Louis Fire and Marine, filed this declaratory judgment action to obtain a determination that it is not obligated to defend Crossett nor to afford him protection under the policy in that suit. Crossett's father and mother (George W. and Elizabeth B. Crossett) are the named insureds under the homeowners policy and were made parties respondent along with Jerry Patterson and Cavell Company, the dormitory owner.

The trial court held that Don Crossett was not an insured within the meaning of the policy terms under the omnibus clause, which reads as follows, viz:

"2. DEFINITIONS:

- (a) Insured: The unqualified word 'Insured' includes (1) the Named Insured and (2) if residents of his household, his spouse, the relatives of either, and any other person under the age of twenty-one in the care of an Insured." (Emphasis ours.)

The trial court declined to make findings on the questions as to whether the alleged injury was "caused intentionally" or as to whether the alleged acts of Don Crossett were "business pursuits," both being policy exclusions. The trial judge decreed that both these questions were issues to be determined on the law side of the court. The trial court further held that St. Louis Fire and Marine Insurance Company had no obligation to defend Don Crossett nor any obligation to the injured party arising out of the incident.

The issue presented to us on this appeal is whether Don Crossett was a resident of the household of the named insureds, his parents (George W. and Elizabeth B. Crossett), on the date of the alleged incident.

Although Don Crossett was attending Auburn University, whereas his parents lived in Birmingham, Don had a room in the family home. (Auburn, Alabama, is 116 miles distant from Birmingham, Alabama.) Don was an only child and came home on weekends, except when Auburn was playing football at Auburn. He kept all of his personal belongings at his parents' home, including his off-season clothes; except those clothes he needed at school, his radio, books, and personal necessities. At the time of the incident, Don Crossett was 20 years old and a senior. He became 21 on November 21, 1967, and married the next day. St. Louis Fire infers from the testimony that the reason Don went "home" was to see his girl friend, who lived in Birmingham and whom he subsequently married.

Don's father paid his tuition, automobile expenses, board, and provided him with money for incidental expenses. He was receiving his room rent free in Cavell Dormitory in exchange for serving as a counselor. Don sometimes worked during Christmas vacation in order to buy presents. He worked one summer driving a truck for the City of Birmingham and worked the Coke concession during one football season at Auburn's home football games, earning five to ten dollars per game.

Don listed his parents' address on his driver's license and registered for the draft in Ensley, near his parents' home.

He was at his family home during all holiday periods. When at his parents' home, they put restrictions on him, such as requiring him to be in at a reasonable hour.

When at school, he did as he pleased. He went to school all four quarters, but there were breaks between quarters of several weeks duration, when he was at his father's home in Birmingham, Alabama.

Resolution of the primary issue in this case turns upon an interpretation of the omnibus clause, which defines additional insureds as being relatives "if residents of his [the named insured's] household." Don Crossett was, of course, a relative of the named insureds, his mother and father.

Counsel for Crossett contend that the clause "residents of his household" is ambiguous and is due to be construed so as to extend coverage to the person seeking to become an additional insured if he can qualify in any ordinary sense, citing *State Farm Mutual Automobile Ins. Co. v. Hanna*, 277 Ala. 32, 166 So.2d 872 (1964).

The insurer also cites *State Farm Mutual Automobile Ins. Co. v. Hanna*, supra, contending that it is factually almost identical with the case at bar, dealt with a policy provision with almost identical provisions, and ought to be followed. The insurer argues that to follow *Hanna*, supra, will result in an affirmance of the trial court's decree, which held Don Crossett was not a resident of his father's household in Birmingham.

[1] We must state our disagreement with the insurer's arguments and our agreement with Crossett's contentions. For it is our conclusion that the trial judge erred in holding that Don Crossett was not an additional insured within the meaning of, and as defined in the policy of insurance.

Perhaps at this point we ought to restate some general principles which we consider to be controlling in this case.

In *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Preston*, 287 Ala. 493, 253 So.2d 4 (1971), it was said, viz:

"Insurance contracts, like other contracts, are not to be construed so technically as to defeat the intention of the parties, but are to be given a rational and practical construction. We are not at liberty to make a new contract for the parties by a tortured construction. • • •"

On the other hand, we stated in *Hanna*, supra, viz:

"The rule is too well settled by our decisions to require citation of authority that where provisions of an insurance policy are susceptible of plural constructions, consistent with the object of the obligation, that construction will be adopted which is favorable to the insured."

Neither party has presented us with a decision of any court interpreting a like provision in a homeowners policy in a similar factual situation. Nor, has our research disclosed such a case. We have found one case interpreting an identical policy provision. It is *Stadelmann v. Glen Falls Insurance Co. of Glen Falls* (1967), 5 Mich.App. 536, 147 N.W.2d 460.

In *Stadelmann*, supra, it was held that a sister of the insured, member of another household and resident of a foreign country, was not a "resident of his household," within a homeowners policy definition of "insured," which included "residents of his household" and would not be entitled to recover for loss of personal property. While factually the case is inapposite, the policy provision is identical. The court did go on to hold that relatives, such as plaintiff, are temporary guests when visiting (as in this case), for definite periods of time and do not fall within the terms of the policy provisions as to additional insureds.

We have found other cases from other jurisdictions interpreting similar, or almost identical, policy provisions. For the most part, they have arisen in the construction of automobile liability policies extending coverage to additional insureds or excluding coverage to those who are residents of the insured's household. See *Barker v. Iowa Mutual Insurance Company*, 241 N.C. 397, 85 S.E.2d 305 (1955) (construing clause "residing with insured" in loss away from premises in fire policy); *Bartholet v. Berkness* (1971), 291 Minn. 123, 189 N.W.2d 410 (construing clause "members

of the same household" within meaning of auto liability exclusion).

Two cases interpreting similar or like clauses in automobile liability policies appear to us to be in point. They are: *American States Ins. Co., Western Pac. Div. v. Walker*, 26 Utah 2d 161, 486 P.2d 1042 (1971), and *Manuel v. American Employees Insurance Company* (La.Ct. of App. Third Circuit, 1969), 228 So.2d 321.

In *Walker*, supra, the daughter of insured, who kept some furniture, books and clothing in her father's home in Idaho, who had Idaho driver's license and voted there, but who had gone to Utah to college and was in training as x-ray technician, was held to be a "resident of the same household" as her father, the insured, and thus covered under his automobile liability insurance policy.

The Supreme Court of Utah, speaking through Mr. Justice Ellett, had this to say about the meaning of the clause in question:

"A resident of a household is one who is a member of a family who live under the same roof. Residence emphasizes membership in a group rather than an attachment to a building. It is a matter of intention and choice rather than one of geography.

"Ordinarily when a child is away from home attending school, he remains a member of the family household, and the question of when he ceases to be such is one which must be determined from all of the facts and circumstances as revealed by the evidence."

In *Manuel*, supra, the Court of Appeal of Louisiana, Third Circuit, in an opinion authored by Judge Tate now Associate Justice, Supreme Court of Louisiana, held that a son of insured, who attended college 40 miles from his father's home, where he rented an apartment, but who kept most of his possessions and clothes in his father's home, and who returned there every week-end and on vacation, and whose permanent

mailing address was the father's home, was a "resident of the same household," as the father within the uninsured motorist provision of the father's policy.

Concerning the meaning of the term "resident of the same household" as applied to the facts of the son's attendance at college, the court held:

"He had changed his temporary college residences several times before trial, but he always returned home weekly and during vacations to his room in his father's house. He and those who testified regarded his father's house as his home.

"We find no error in the trial court's factual finding that the plaintiff was a resident of his father's household—that his residence (indeed, his principal residence) was with his father.

"Under the evidence, even if the temporary dwelling places in which he lived during the college week were his residences, nevertheless, he was also a resident in his father's home, where he maintained his possessions and to which he returned weekly and which was, in fact, his permanent home. While a person may have only one domicile (his permanent residence and principal establishment), he may as a matter of fact have more than one residence (his actual dwelling place, or where he actually lives).

"Here, however, the plaintiff had never moved from his permanent home with his parents. His schooling residences were intended to be temporary in nature, and he had never severed his ties with his parents' home as his permanent residence to which he returned whenever free. He actually lived with his father, within the meaning of the policy term of being 'a resident of the same household.'"

Factually, *Manuel*, supra, is very close to being on "all-fours" with the case at bar.

While this case involved interpretation of an automobile liability uninsured motorist provision and the case at bar a homeowners policy, this is a distinction without a difference. Both cases involve policy provisions extending coverage to additional insureds.

It has been so often repeated as to scarcely require authority that policies of insurance should be construed liberally in respect to persons insured and strictly with respect to the insurer. This, for the reason that policies of insurance are unipartite. We denominate them "contracts" yet only the insurer signs them. The insured generally sees the policy only after he has already paid the premium. The policy provisions are inserted by those skilled in insurance law and acting in the interest of the company. Thus, the principle above enunciated has arisen. *Barker v. Iowa Mutual Insurance Company*, supra; *Union Mutual Life Ins. Co. v. Wilkinson*, 13 Wall. 222, 232, 80 U.S. 222, 232, 20 L.Ed. 617 (1871).

We must conclude that the two cases, *Walker*, supra, and *Manuel*, supra, provide ample authority for our finding that the trial court erred in holding Don Crossett was not an insured within the definition of that term under his father's homeowners policy. Moreover, the holding of the *Hanna* case, supra, also sustains our conclusion.

Under a somewhat similar fact situation, involving a similarly worded automobile liability insurance policy clause, this Court in *State Farm Mutual Automobile Ins. Co. v. Hanna*, supra, held, viz:

"The word 'residing' is an ambiguous elastic, or relative term, and includes a very temporary, as well as a permanent, abode. *Phillips v. South Carolina Tax Comm.*, 195 S.C. 472, 12 S.E.2d 13. It means a dwelling place for the time being, as distinguished from a mere temporary locality of existence. *Drew v. Drew*, 37 Me. 389. It indicates some in-

tent of permanency of occupation as distinguished from boarding or lodging, but does not require the intent of permanency to the degree required in domicile. 2 Kent's Comm. (10th Ed.) 576. While residence is a necessary component of domicile, residence is not always domicile. One may have a legal domicile with his family, and reside actually and personally away from his family. In such event the word 'reside' may correctly denote either the technical domicile, or the actual personal residence. The word 'reside' is often used to express a different meaning according to the subject matter. In re Seidel, 204 Minn. 357, 283 N.W. 742." (Emphasis ours.)

The facts of *Hanna*, supra, were that the insured, a 20 year old college student living in a dormitory at Howard College in Birmingham, Alabama, was involved in an automobile accident while at the family home in Tallapoosa, Alabama, for the week-end. His father was injured in the accident. The insured's automobile liability policy contained a provision which excluded from coverage "bodily injury to the insured or any member of the family of the insured residing in the same household as the insured." The insured spent his vacations and occasional weekends in the family home, kept some of his possessions there, and gave it as his address to the draft board. His driver's license listed it as his home. In selling the policy, the insurer's agent stated that he considered him to be a member of his father's household.

This Court held that the trial court did not err in its conclusion that Hanna was a resident of his father's household.

In *Hanna*, supra, a family exclusion clause in an automobile liability policy was involved, and it is obvious that the construction of the word "residing" was adopted which permitted the father to sue his son in tort for the injuries he sustained.

We repeat, this Court specifically held in *Hanna*, supra:

"The word 'residing' is an ambiguous, elastic, or relative term, and includes a very temporary, as well as a permanent, abode.

* * * * *

"The rule is too well settled by our decisions to require citation of authority that where provisions of an insurance policy are susceptible of plural constructions, consistent with the object of the obligation, that construction will be adopted which is favorable to the insured." (Emphasis ours.)

Thus, the rule as to plural construction of insurance contracts was followed in order to give a favorable construction to the insured.

[2] While in the instant case a clause in a homeowners insurance policy is involved extending coverage to "residents" of the household of the named insured, the term "residents" is clearly an ambiguous one and is capable of two rational constructions.

Thus, that construction should be adopted which is in favor of the insured. It is clearly favorable to the named insured (and his son) in this case to have the son defended in the tort action filed by Jerry Patterson against him. It is thus that we hold *Don Crossett* was a resident of the household of his parents, the named insureds under the insurance policy, at the time of the incident.

The insurer, St. Louis Fire and Marine, however, contends that *Hanna*, supra, held the father (the injured party) and his son (the insured) were not residing in the same household at the time of the accident; and therefore, such holding would authorize our affirming the trial court in the instant case.

We think such a construction of *Hanna*, supra, completely overlooks the obvious

basis for the *Hanna* holding, which is that the court found the exclusionary clause "residing in the same household" to be ambiguous and, under the rule, adopted that construction which was favorable to the insured. Here, we follow the same rule and adopt that construction which is favorable to the insured, extending coverage, after finding an almost identical clause to be ambiguous.

In conclusion, we hold that Don Crossett is an insured under the St. Louis Fire and Marine Insurance Company policy.

We do not say, nor do we hold, that St. Louis Fire is obligated to defend Don Crossett, because it has not been determined by the trial court whether the alleged injury was "caused intentionally" or whether Don Crossett was then engaged in "any business pursuit * * * except * * * activities therein which are ordinarily incident to non-business pursuit," within the meaning of these two special policy exclusions. As to these two issues the trial court made no ruling.

In brief, counsel for Crossett urge that we dispose of these two issues on this appeal so that the litigation may be finally terminated. At the time of submission, both counsel suggested that we dispose of these issues.

While we might like to dispose of these matters, in the interest of judicial economy, we cannot do so, because the trial court did not rule on either issue. This Court recently held in a like situation, viz:

"* * * Since the lower court's decree does not mention these matters, but denied relief on specific grounds heretofore mentioned, this Court construes that the lower court did not rule upon the issues presented by appellee in this regard. This is a court of appellate jurisdiction, with few exceptions, and this court is not disposed to pass on questions upon appeal not considered or decided by the trial court. *City of Birmingham v. Wheeler*, 225 Ala. 678, 145 So. 140; *Penn*

Mut. Life Ins. Co. v. State, 223 Ala. 332, 135 So. 346." *Hogan v. Allstate Insurance Company*, 287 Ala. 696, 255 So.2d 35 (1971).

See also: *Brockway et al. v. United States Finance Co., Inc.*, (1972) 289 Ala. 198, 266 So.2d 756.

This decree of the trial court is therefore reversed and the case remanded for a consideration by the trial court of the other two issues, and for a determination as to what are the insurer's obligations under its policy of insurance to Don Crossett and the injured party.

Reversed and remanded.

HEFLIN, C. J., and MERRILL, HARWOOD, MADDOX and McCALL, JJ., concur.

COLEMAN, J., concurs in the result.

SOMERVILLE, J., concurs specially.

SOMERVILLE, Justice (concurring specially).

I agree that the appellant, George D. Crossett, was a resident of his parents' household at the time of the altercation with his classmate and hence I concur in the result reached in the foregoing opinion of Justice Bloodworth. However, I feel that our holding here is inconsistent with our decision in *Hanna*, supra, and that our present decision should expressly overrule *Hanna*. I take no issue with the well entrenched rule that where provisions of an insurance policy are susceptible of plural constructions, consistent with the object of the obligation, that construction should be adopted which is favorable to the insured. Also, I agree that the word "residents" in the appellee's policy in the instant case has no precise inflexible meaning applicable to all situations and is correctly construed here. But in *Hanna* we held that a college student living in a dormitory at Howard College

in Birmingham was not "residing in the household" of his father at Tallassee and we thereby removed the ambiguity of that phrase and gave it a definite meaning as applied to the facts in that case. Now, in a similar factual situation, we hold that a college student (Crossett) while living in a dormitory at Auburn University was a "resident of the household" of his father in Birmingham.

My point is that the same phrase (or a phrase acknowledged to be substantially the same) when applied to a similar or a substantially similar situation, should not be held to mean one thing on one occasion and the opposite thing on another. Having, by construction in *Hanna*, removed any ambiguity as to the meaning of the phrase "residing in the household" when applied to a college student temporarily living away from his parents, consistency should require that we either continue that construction or, as I urge, overrule *Hanna*.



MERCHANTS BANK, a State Banking Corporation

v.

John Franklin COTTON et al.

SC 14.

Supreme Court of Alabama.

Nov. 30, 1972.

State banking corporation brought action to recover balance due on note allegedly endorsed by defendants. The Circuit Court, Clarke County, William G. Lindsey, J., entered judgment for defendants, and plaintiff appealed. The Supreme Court, Somerville, J., held that evidence in such

Vern S. GOODSSELL and Sandra Fae
Goodsell, Appellees,

v.

STATE AUTOMOBILE AND CASUALTY
UNDERWRITERS, Appellant.

No. 52398.

Supreme Court of Iowa.

Oct. 17, 1967.

Action by father and daughter to recover under collision and medical payments provisions of insurance policy. The Bremer District Court, B. C. Sullivan, J., found for plaintiffs and insurer appealed. The Supreme Court, Le Grand, J., held that where title to automobile was put in father's name when purchased in 1963 but was transferred to daughter in 1964 and thereafter daughter went to another city for training as airline stewardess and was involved in collision, daughter was "resident" of father's household as such term was used in policy which designated father as insured and listed the automobile as an "owned automobile".

Affirmed.

Mason, J., and Garfield, C. J., dissented.

1. Appeal and Error ⇨719(1)

In reviewing law action, reviewing court is limited to considering errors assigned on appeal. 58 I.C.A. Rules of Civil Procedure, rule 334.

2. Insurance ⇨487.7

Term "resident" has many meanings and has been defined in many ways for different purposes.

See publication Words and Phrases for other judicial constructions and definitions.

3. Insurance ⇨146.5(3)

In considering meaning of term in policy court should ascertain what insured as

reasonable person understood policy mean not what insurer actually intended.

4. Insurance ⇨419

Where title to automobile was put in father's name when purchased in 1963 but was transferred to daughter in 1964 and insurance policy listed father as named insured and listed the automobile as owned automobile, court was justified in concluding that father, as reasonable person, did not understand his policy would extend protection to automobile which was covered by its terms while that automobile was being driven by daughter in another city while daughter was living while training as airline stewardess.

5. Insurance ⇨146.7(1)

In insurance cases all doubts or ambiguities are to be construed strictly against insurer and liberally in favor of insured.

6. Insurance ⇨487.7

Where title to automobile was put in father's name when purchased in 1963 but was transferred to daughter in 1964 and thereafter daughter went to another city for training as airline stewardess and was involved in collision daughter was "resident" of father's household as such term was used in policy which designated father as insured and listed the automobile as an "owned automobile", as respects medical payments coverage.

7. Appeal and Error ⇨170(1)

Issue of driver's failure to comply with Financial Responsibility Act which was presented to trial court could not be raised on appeal. I.C.A. § 321A.1 et seq.

8. Appeal and Error ⇨1010(1)

Where there was substantial evidence to support findings of fact made by trial court in law action, reviewing court was bound by such findings. 58 I.C.A. Rules of Civil Procedure, rule 344(f), par. 1.

CITE as 183 N.W.2d 458

Gene V. Kellenberger and Keyes, Crawford & Bradley, Cedar Rapids, for appellant.

Engelbrecht & Ackerman, Waverly, for appellees.

Le GRAND, Justice.

On September 21, 1964, Sandra Goodsell, one of the plaintiffs, was involved in an automobile accident in Detroit, Michigan. The accident resulted in damage to Miss Goodsell's Volkswagen automobile in the amount of \$900.12 and caused injury to her for which she incurred medical and hospital expense of \$62.00.

Some time prior to this accident the plaintiff, Vern S. Goodsell, father of Sandra Goodsell, had purchased a family automobile insurance policy from defendant. This policy was in full force and effect on the date of the accident, and it listed the Volkswagen as one of the cars covered by its terms, even though the policy was issued to Vern S. Goodsell and the Volkswagen was owned by Sandra Goodsell. The defendant admits in his argument that the Volkswagen is an "owned car" as defined in the policy.

Plaintiffs made claim for the amount of the repairs to the car and for reimbursement of the medical and hospital expense above referred to. Defendants denied coverage and refused payment of plaintiffs' claim. This suit was then started to compel payment by defendant.

After trial to the court, judgment was entered for plaintiffs in the amount of \$962.12, from which defendant appeals. Defendant assigns four errors for our consideration. Since all raise but a single issue, we will discuss and dispose of them as one. Defendant strenuously urges that Sandra Goodsell's operation of the Volkswagen was not covered by the policy unless she was, at the time of the accident, a resident of Vern S. Goodsell's household. Defendant alleges that the trial court erred in its findings of fact and its conclusions of

law which resulted in the determination that she was such a resident and that she was therefore entitled to recover under the terms of the policy. If the trial court properly held that Sandra Goodsell was a resident of her father's household, then the judgment must be affirmed; if she was not such a resident at that time, then it must be reversed.

[1] This is a law action and we are limited to considering the errors assigned on appeal. Rule 334, Rules of Civil Procedure, 58 I.C.A.; Farm Service v. Tobin, 254 Iowa 1328, 1332, 121 N.W.2d 128, 130 and citations; Phoenix v. Stevens, 256 Iowa 432, 435, 127 N.W.2d 640, 642. We might say, however, that certain definitions in the policy, particularly those in Parts II and III which deal with coverage for collision loss and for medical payment benefits, are ambiguous and might justify extension of coverage to Sandra Goodsell regardless of her status in the Vern S. Goodsell household. Under Part II defendant agrees to pay for medical, hospital and other expenses incurred for injuries sustained by any person "while occupying the owned automobile, while being used by the named assured, by any resident of the same household or by any other person with the permission of the named insured." Under Part III dealing with collision coverage the policy states that "insured means (a) with respect to the owned automobile (1) the named insured and (2) any person • • • using or having custody of said automobile with the permission of the named insured." Since the claims at issue arise under Parts II and III of the policy and since the record shows that Sandra Goodsell was operating the car with the consent of her father, it is difficult to see why these specific policy provisions do not extend protection to Sandra Goodsell. However, since the case was neither tried nor decided on this theory, we disregard it in our determination of the matter.

The facts giving rise to this litigation are: Sandra Goodsell, a single girl, ap-

proximately 20 years of age, resided with her mother and father in Denver, Iowa. In March of 1963 she purchased a Volkswagen automobile, although title was put in her father's name because he had supplied the purchase price and desired to retain title until his daughter had repaid the amount advanced. Title was transferred to the name of Sandra Goodsell in May of 1964. In July of 1964 Sandra Goodsell began a training course with Northwest Airlines in Minneapolis, Minnesota. After attending school there for some time, she was sent to Detroit, Michigan for additional training. The Volkswagen was left with Mr. Goodsell in Denver, Iowa, until about the middle of August, when Sandra Goodsell drove it to Detroit, where she kept it until the accident one month later.

The policy of insurance designated Vern S. Goodsell as the only named assured. The Volkswagen, however, was described therein as an "owned automobile". It remained so described even after title was transferred from Vern S. Goodsell to Sandra Goodsell. Defendant concedes that the Volkswagen is an owned automobile within the terms of the policy.

Defendant's appeal is based solely upon the proposition that there can be no recovery unless Sandra Goodsell was a resident in the household of Vern S. Goodsell on September 21, 1964. It is, of course, admitted that Sandra Goodsell was attending a job training course in Detroit, Michigan when the accident occurred. Did this prevent her from being a resident of her father's household within the policy provisions?

Evidence was introduced to show that when she went to Detroit, her future plans were uncertain. A fair interpretation of the evidence sustains the conclusion neither she nor the company knew if she would be employed when her training was completed. She did not know if she would desire such employment. She testified that "she had not made up her mind." She did not know if the company would accept her

as an employee. If she were employed, she did not know where she would be assigned for duty. The most that can be said when Sandra Goodsell went to Detroit is that she was hopeful of securing employment with the company upon completion of her training and was willing to locate where the company assigned her, but the events which would decide this had not yet occurred when she was involved in the accident.

Defendant claims Sandra Goodsell ceased to be a resident in her father's household for the purposes of coverage under the policy when she went to Detroit. Thereafter, according to defendant, she operated her automobile without insurance protection under the policy issued to her father.

[2] We are unable to agree with defendant and find there was ample evidence in the record to justify the conclusion reached by the trial court. The narrow and dogmatic definition of residence for which appellant contends ignores the long history of litigation over the meaning of this word. "Resident" has many meanings and has been defined in many ways. The term may mean different things for different purposes. It has been interpreted, under various statutes and in various factual situations, in cases involving taxation; venue; poor relief; voting rights; attachment proceedings; school attendance; military service; unemployment compensation benefits; jurisdiction for divorce purposes; and presumption of death resulting from unexplained absence. This list is illustrative, but by no means exhaustive, of the confusion and uncertainty over the term. No purpose would be served here in detailing the facts surrounding these various decisions. For a further discussion see 4 Iowa Law Bulletin 3; 37 Words and Phrases, Permanent Edition, pp. 317-451; *In re Seidel*, 204 Minn. 357, 283 N.W. 742, 743; *State v. Savre*, 129 Iowa 122, 124, 105 N.W. 387, 3 L.R.A., N.S., 455; *Harris v. Harris*, 205 Iowa 108, 112, 215 N.W. 661, 663.

In view of the many meanings which the word "resident" may have and in view of the various interpretations which have been placed upon the term both by this court and by courts of other jurisdictions, it would be unreasonable to expect plaintiffs to understand precisely which meaning was intended by defendant. Certainly it is susceptible of the meaning for which the plaintiffs now contend, although that may not be what defendant had in mind.

[3,4] In these circumstances the established rules for the interpretation of insurance contracts become important. One of these rules is that the court should ascertain what the insured, as a reasonable person, understood the policy to mean, not what the insurer actually intended. *Umbarger v. State Farm Mutual Automobile Insurance Company*, 218 Iowa 203, 206, 254 N.W. 87, 88. We have said on several occasions a contract of insurance should not be construed through the magnifying eye of the technical lawyer but rather from the standpoint of what an ordinary man would believe it to mean. *Murphy v. New York Life Insurance Company*, 219 Iowa 609, 613, 258 N.W. 749, 751; *Aeroline Flight Service, Inc. v. Insurance Company of North America*, 257 Iowa 409, 417, 133 N.W.2d 80, 85. As applied to this case the trial court was justified in concluding that Vern S. Goodsell, as a reasonable person, did not understand his policy would extend no protection to an automobile which was covered by its terms while that automobile was being driven by his daughter in Detroit, Michigan.

[5,6] Another rule of construction in insurance cases requires doubt or ambiguity to be construed strictly against the insurer and liberally in favor of the insured. This rule is peculiarly applicable here. *Struble v. Square Deal Insurance Company*, 237 Iowa 1155, 1159, 24 N.W.2d 441, 442, and citations; *West v. Hartford Fire Insurance Company*, 248 Iowa 993, 998, 83 N.W.2d 465, 468; *Rogers v. Maryland Casualty Company*, 252 Iowa, 1096, 1099, 109 N.W.2d

435, 437, and citations. Under these authorities we cannot limit the meaning of the word resident as used in this policy as strictly as defendant would like. We hold that there is substantial evidence in the record justifying the trial court's conclusion that Sandra Goodsell was a resident of her father's household within the terms of the policy at the time in question.

We have not overlooked the testimony of Sandra Goodsell upon which defendant so strongly relies. It is set out in full as follows:

"Q. Would it be fair to say, Sandra, that when you moved to Detroit or went to Detroit it was with the intention of staying there permanently subject to changing your mind if the airline job didn't turn out? In other words, maybe I can rephrase it a little, did you go to Detroit with the intention of going there and staying there with the intention if things didn't work out you would come back? A. I went there with the intention of working out my three months' probationary period to see if I did like it. They stipulate when they hire you that this is not a definite job. You are not hired for ever and ever. That they have the right to get rid of you in three months or sooner if you don't work out.

"Q. And I suppose by the same token they could assign you at a Northwest Terminal other than Detroit? A. Yes.

"Q. This may be a fine distinction, but you went to Detroit with the idea of staying there and living there permanently unless you decided it wasn't going to work out or something else happened that changed your mind, that's true, isn't it? A. Yes.

"Q. You understand what I mean by that? A. Yes.

"Q. If you don't understand, say so? A. I Do."

Defendant contends this testimony conclusively bars recovery by plaintiffs. Defendant contends further it conclusively shows that Sandra Goodsell changed her

residence when she went to Detroit and had no intention of returning to her father's home in Denver, Iowa. The trial court placed far less importance on this testimony than does defendant. When related to Sandra Goodsell's testimony as a whole, this evidence is consistent with the finding that she went to Detroit willing to take a job if one were offered, ready to change her residence if that were necessary, but with no idea as to what the ultimate outcome of her training would be.

[7] In its reply brief and argument defendant raises the question of Sandra Goodsell's failure to comply with the Financial Responsibility Act of the State of Iowa. We do not see how this failure could in any event be material to a determination of this case. However, we find that this issue was not before the trial court, and was not raised on this appeal until the filing of the reply brief and argument. Under these circumstances it cannot be considered here. *Verschoor v. Miller*, 259 Iowa 170, 143 N.W.2d 385, 389, and citations.

[8] We find that there is substantial evidence to support the findings of fact made by the trial court. Since this is a law action, these findings are therefore binding upon us. Rule 344(f) (1), Rules of Civil Procedure, 58 I.C.A.

We find no error and the judgment is, therefore, affirmed.

Affirmed.

All Justices concur except MASON, J., and GARFIELD, C. J., who dissent.

MASON, Justice.

I dissent. Defendant's appeal presents the issue whether Sandra Fae Goodsell was an insured under an automobile insurance policy issued by defendant to her father.

The policy defines insured as including the named insured and any resident of the same household. The majority holds there

is substantial evidence in the record justifying the trial court's conclusion that Sandra was a resident of her father's household within the terms of the policy at the time in question. I disagree.

The question of who are members of the same household in cases involving insurance coverage has been before the Wisconsin court on at least four occasions that I find.

In *Raymond v. Century Indemnity Co.*, 264 Wis. 429, 59 N.W.2d 459, 460, the provision for interpretation was "with the permission of an adult member of such assured's household." The issue was whether the person operating an automobile insured by defendant company at time of accident was driving it "with the permission of an adult member of such assured's household." The policy had been issued to a Mrs. Hasseler whose 22-year-old son was in the armed forces stationed at Camp McCoy. It was he who had granted permission to drive the insured vehicle to the person operating it at the time of the accident. The son had lived with his mother at Green Bay prior to entering the army. The court held the son's absence in the army did not destroy his status as an adult member of his mother's household.

The trial court was reversed for excluding facts bearing upon the son's right under the policy of the named insured to permit the driver to use the car and having that right relate back to his mother.

In *Lontkowski v. Ignarski*, 6 Wis.2d 561, 95 N.W.2d 230, 232, the policy before the court excluded coverage with respect to any car "furnished for regular use to the named insured or a member of his household."

The court said:

"Household" is defined by Webster as 'those who dwell under the same roof and constitute a family.' That definition corresponds with the common and approved usage of the term and is supported by judicial authority. 'Persons who dwell together as a family constitute a household.'

Arthur v. Morgan, 1884, 112 U.S. 495, 499, 5 S.Ct. 241, 243, 28 L.Ed. 825."

The trial court's finding that the driver of the insured vehicle was a member of the owner's household was affirmed.

The third case, *National Farmers Union Property & Cas. Co. v. Maca*, 26 Wis.2d 399, 132 N.W.2d 517, 521-522, involved a liability policy covering farm accidents subject to the exclusion that coverage was not extended to bodily injury to the named insured and his spouse and "the relatives of either . . . if such . . . relative is a resident of the household of the insured . . ." The policyholder's 32-year-old son was injured while operating a corn picker on his father's farm approximately five months after he came to live with his parents. He had accepted a job which he could have retained on a permanent basis, but claimed he was only living with his parents until he could find a better job.

Plaintiff insurance company claimed the son was a resident of the father's household, and, being his son, would therefore have the protection of being an insured under the policy but that any liability to him for bodily injury was excluded. The son contended he was not "resident," because he did not intend to remain permanently, arguing that the word "resident" must be construed with the connotation of "domicile," and cannot apply to one who does not have the present intention to remain. The court said: "We have so construed the word 'resident' where used in certain statutes. The word however, 'is an elastic term which may refer to a temporary sojourner as well as to one possessing a legal domicile.'"

In affirming the trial court's granting of a summary judgment on the basis that the son was a member of the father's household as a matter of law within the wording of the policy, the court said:

"We think that one is not a resident of the household or member of the family if, even though he has no other place of abode,

he comes under the family roof for a definite short period or for an indefinite period under such circumstances that an early termination is highly probable. If, however, the circumstances of his stay are otherwise consistent with a family or household relationship, and his stay is likely to be of substantial duration, the fact that he attempts to find employment, gaining which he would live elsewhere, would not, in our opinion, prevent his being a resident of the household or a member of the family."

The remaining case referred to, *Doern v. Crawford*, 30 Wis.2d 206, 140 N.W.2d 193, 196, involved a policy issued to a Mr. Paulson which extended coverage to non-owned automobiles when operated by the named insured or a relative residing in the same household. Paulson's wife was also a "named insured" under the policy definitions. For some time before the accident Paulson, his wife and her son by a prior marriage resided together in the same home. Six days before the accident Paulson instituted divorce proceedings and removed from the home. At the time of the accident the stepson was driving a "loaner" automobile.

The insurance company denied coverage and moved for summary judgment dismissing the complaint as to it. Its appeal from the court's order denying the motion presents the question whether Paulson, the policyholder, on the date of the accident was residing in the same household with his wife and stepson.

In affirming the action of the trial court in denying the insurance company's motion for summary judgment the court said, after referring to the above cases:

"The holdings of these three cases demonstrate that the controlling test of whether persons are members of a household at a particular time is not solely whether they are then residing together under one roof. Living together under one roof is a factor to be considered and must have occurred at some time. When not occurring at the time in question, the absence from the fam-

ily roof must be of a temporary nature with intent on the part of the absent person to return thereto. There is a close analogy between the concepts of household and domicile because intent of the person involved plays such a significant part. The one material difference between the two is that a domicile once acquired is not lost when a person leaves it, even though intending never to return, until he establishes a domicile elsewhere. We determine that this is not true with respect to a household, and, therefore, physical absence coupled with intent not to return is sufficient to sever the absent person's membership in the household. Every person has a domicile but not every person is a member of a household.

"Whether the absence from the household is of long or short duration is immaterial except as it may give rise to an inference of intent to remain away permanently or only temporarily * * *" (Emphasis supplied).

This controlling test is repeated with approval in *Giese v. Karstedt*, 30 Wis.2d 630, 141 N.W.2d 886, 889.

From the foregoing pronouncements, it logically follows that the question is not whether Sandra intended to establish a domicile in Detroit, rather whether it was her intent to return to Denver after she left for training in Detroit.

I think this is where the trial court erred in its conclusions of law.

The trial court determined Sandra was a resident of her father's household based upon his fact finding that "Sandra Fae Goodsell did not have at the specific time that she went to Detroit, Michigan an intention to reside there permanently and with no present intention of moving back to Denver, Iowa or to any other place * * *" (Emphasis supplied).

The trial court seemed to be under the impression that his finding that "she was there only on a probationary basis and on a

training basis and would be transferred somewhere in North America that Northwest Airlines decided upon in the event her training was successful * * *" vitiates any idea that Sandra intended to reside permanently in Detroit. It does negate the idea that Detroit may have been her domicile at the time of the accident, however, it does not negate, rather tends to substantiate plaintiff's failure to meet the crucial standard, i. e., she would not be coming back to Denver.

I fail to find substantial evidence that would support a finding that Sandra intended to return to Denver. In fact, I believe the record establishes that she was going to take up a permanent residence elsewhere but did not know where. It depended upon whether the company was satisfied with her work and where, if any place, it wished to send her.

I would reverse.

GARFIELD, C. J., joins in this dissent.



STATE of Iowa, Appellee,
v.

Worley Morton HARDESTY, Appellant.
No. 52355.

Supreme Court of Iowa.

Oct. 17, 1967.

Rehearing Denied Dec. 13, 1967.

Defendant was convicted in the Monroe District Court, Charles N. Pettit, J., of larceny of vacuum cleaner and clipper, and he appealed. The Supreme Court, Larson, J., held that although clipper was not listed in search warrant pursuant to which officers were searching defendant's house when they seized clipper, its admission into evidence was proper inasmuch as clipper

was listed in complaint and complainant saw and claimed it when it was discovered, and that vacuum cleaner from which bag had been removed after it was taken from defendant's premises under a search warrant was in substantially the same condition as when taken and therefore was properly admitted into evidence.

Affirmed.

1. Courts ¶100(1)

Rules laid down in *Miranda* were inapplicable where defendant's trial preceded *Miranda* decision.

2. Criminal Law ¶1030(1)

Objections not made in the trial court will not ordinarily be considered for the first time on appeal.

3. Criminal Law ¶1030(2)

Constitutional questions cannot be considered by the Supreme Court unless specifically raised in the trial court.

4. Criminal Law ¶1036(2)

Defendant who did not object to question whether he had ever been convicted of a felony but answered in the affirmative could not raise objection to interrogation for the first time on appeal. I.C.A. § 622.17.

5. Searches and Seizures ¶3.8(2)

Officers looking for certain goods described in a search warrant under which they are operating are not necessarily limited to a seizure of goods therein described but may seize stolen goods or contraband found on the premises.

6. Searches and Seizures ¶7(10)

If entry of the premises is authorized and the search is valid, the Fourth Amendment does not inhibit the seizure of property the possession of which is a crime. U.S.C.A.Const. Amend. 4.

7. Criminal Law ¶394.4(6)

Although clipper was not listed in search warrant pursuant to which officers were searching defendant's house when they seized it, its admission into evidence at defendant's trial for larceny was proper inasmuch as clipper was listed in complaint and complainant saw and claimed it when it was discovered. U.S.C.A.Const. Amend. 4.

8. Criminal Law ¶404(4)

To be admitted in evidence, property legally seized by police officers must be shown to be in substantially the same condition as when taken, and in the first instance this question is to be resolved by the trial court.

9. Criminal Law ¶404(4)

Although bag had been removed from vacuum cleaner after it was taken from defendant's premises under a search warrant, it was in substantially the same condition as when taken and was therefore properly admitted into evidence at defendant's trial for larceny. I.C.A. § 709.1.

10. Criminal Law ¶452(1)

Larceny ¶48

The general market value of stolen property is to govern in determining the value in cases of larceny, yet, when the property has no general market value, other testimony by persons who are familiar with the property and its condition and are qualified to express an opinion can be received to aid the jury in establishing its true value. I.C.A. § 709.1.

11. Criminal Law ¶452(1)

Where clipper allegedly stolen by defendant was obsolete and market value for it was not readily establishable, testimony of one who had been an auctioneer in locality for over 25 years, had himself purchased clipper for \$5, and sold it to complaining witness for same figure but who placed its fair market value at from \$5 to \$12 was properly received in evidence at

TRAVELERS INDEMNITY COMPANY,
Appellant,
v.

J. L. MATTOX, Appellee.

No. 7271.

Court of Civil Appeals of Texas.

Texarkana.

March 14, 1961.

Rehearing Denied April 11, 1961.

Suit against an insurer on a policy issued to a father of a boy against whom judgment had been rendered in an automobile accident case. The District Court, Harrison County, Sam B. Hall, J., rendered a judgment for the plaintiff, and the insurer appealed. The Court of Civil Appeals, Davis, J., held that the evidence sustained the finding that the boy was a resident of his father's household within the policy covering members of the insured's household, although the boy had at the time of the accident been working for his brother in another town.

Affirmed.

1. Domicile ⇨2

"Residence" is a lesser included element within term "domicile".

See publication Words and Phrases, for other judicial constructions and definitions of "Residence".

2. Domicile ⇨5

Domicile of minor child is that of father.

3. Domicile ⇨4(1)

A minor cannot change his domicile.

4. Insurance ⇨665(4)

Evidence sustained finding that although 17-year old boy had left his father's home to work in another town he was a resident of same household as his father

within father's automobile liability insuring residents of father's household.

5. Insurance ⇨665(1)

Evidence sustained finding that it was actual trial of case brought against party insured under policy covering members of his household and providing that action should lie against insurer if insured's obligations were determined by judgment against insured after actual trial.

6. Insurance ⇨514½

Refusal of insurer to defend insured in automobile accident case was error of policy insuring members of insured's household.

7. Infants ⇨10

Boy who was past 18 years of age, he married was an adult person for purposes of defending action against him. A.T.S. Probate Code, § 3(t).

David M. Kendall, Jr., Thompson, Knapp, Wright, & Simmons, Dallas, Charles Allen, Marshall, for appellant.

Jones, Brian & Jones, Marshall, for appellee.

DAVIS, Justice.

In February of 1958, Charles Morton Hayner, a boy 17 years old, resident of Karnack, Harrison County, Texas, got into some trouble and quit school. On March 5, 1958, he went to Terrell, Texas, to work for a brother who was in the filling station business. He carried only his work clothes, leaving at G. H. Hayner's, his father, his good blue jeans, all of his dress clothes, his dress shoes, rifle and shotgun, and about everything else of his personal belongings. Prior to his leaving, G. H. Hayner talked to him about finishing high school, and he was of the opinion that he would return and finish high school the next year, provided a change of teachers was made at the school.

On April 14, 1958, G. H. Hayner purchased an automobile liability insurance policy from The Travelers Indemnity Company, with a limit of \$5,000 coverage for injuries sustained by one person. The policy covered a 1958 Plymouth automobile, and insured G. H. Hayner and any relative living with G. H. Hayner. The policy was brought more than a month after Charles Morton Hayner had left the residence of his father to work in Terrell, but it carried additional coverage so as to include Charles Morton Hayner.

On June 16, 1958, Charles Morton Hayner, while staying with his parents and driving an uninsured 1958 Chevrolet automobile, was involved in an accident in which the minor daughter of J. L. Mattox was killed. There was no question of liability as to the coverage of the policy so far as the Chevrolet automobile is concerned.

Suit was filed against Charles Morton Hayner and T. J. Taylor. The Travelers Indemnity Company was given notice of the accident in plenty of time to have defended the suit. The Travelers Indemnity Company decided that young Hayner was not a resident of his father's household and refused to defend the same. Charles Morton Hayner filed an answer under his own name, but because of his minority an attorney was appointed as guardian ad litem for him.

On August 14, 1958, he plead guilty to a charge of negligent homicide before a County Judge of Harrison County. In August, 1958, he registered with the Draft Board at Marshall, Harrison County, Texas, and gave his address as Route 1, Karnack, Texas. On January 3, 1959, he secured a marriage license in Kaufman County, Texas, and was married on January 4, 1959. At the time of his marriage he was past eighteen years of age.

On February 11, 1959, the case of J. L. Mattox and wife against Charles Morton Hayner and T. J. Taylor came on for trial. At that time Charles Morton Hayner announced to the court that he was married,

he had become of age as a matter of law, and that an attorney of Terrell, Texas, would represent him in the case. After the case was tried and had been submitted to the jury, J. L. Mattox and wife announced to the court that they had settled the differences between them, with the covenant to no further prosecute their suit against him. Whereupon Charles Morton Hayner filed a written agreement that the case could be withdrawn from the jury, and that the trial court should enter judgment thereon. A judgment was rendered against Charles Morton Hayner in the sum of \$22,500, with 6% interest thereon from date until paid. No appeal was taken from the judgment.

On July 3, 1959 J. L. Mattox, plaintiff, sued The Travelers Indemnity Company, defendant, on the policy issued to G. H. Hayner. The defendant Indemnity Company specifically denied any liability for the reason that Charles Morton Hayner, a relative of G. H. Hayner, was not a resident of the same household as G. H. Hayner, and further because the policy provided:

"No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial, or by written agreement of the insured, the claimant and the company."

Charles Morton Hayner filed a plea of intervention in the case and adopted the pleadings of J. L. Mattox, in which he alleged that the judgment taken against him was directly and proximately caused by the failure and refusal of the Indemnity Company to defend the suit against him.

The case was tried before a jury, and in response to the special issues submitted, the jury found on June 16, 1958, Charles Morton Hayner was a resident of the same household with G. H. Hayner; and, that there was an actual trial of the case brought by J. L. Mattox and wife against Charles Mor-

ton Hayner. Judgment was entered against The Travelers Indemnity Company for \$5,000, and it has perfected its appeal.

[1-4] Appellant brings forward four points of error in which it complains of the action of the trial court in submitting Issues 1 and 2 because there is no evidence, and that the answers of the jury to such issues are against the great weight and preponderance of the evidence. The evidence supports the statements hereinabove set out. There is definitely sufficient evidence to support the jury findings. The appellant argues in its brief that Charles Morton Hayner was residing in Terrell, Texas, at the time of the collision. It relies upon the case of *The Travelers Indemnity Company v. American Indemnity Co.*, Tex.Civ.App., 315 S.W.2d 677, n.w.h. In that case a divorced man was involved in the accident while driving an automobile belonging to his father. The decision went off on the theory that such divorced driver was not a member of the household of his father, and the decision of the trial court was affirmed. In this case there is a distinct difference. Charles Morton Hayner was 17 years of age at the time of the accident. It is well-settled law that "residence" is a lesser included element within the technical definition of the much broader term "domicile". *Snyder v. Pitts*, 150 Tex. 407, 241 S.W.2d 136. If young Hayner had his domicile at the house of his father, G. H. Hayner, it follows that he had a residence there also, even though he may have at the same time, other residences. If he had a residence there, then he was a resident of the same household with the named insured in appellant's policy. *Switzerland General Ins. Co. Limited v. Gulf Ins. Co.*, Tex.Civ.App., 213 S.W.2d 161, err. dismissed; *Stone et al. v. Phillips*, Tex.Civ.App., 171 S.W.2d 156, affirmed 142 Tex. 216, 176 S.W.2d 932; and *Major et al. v. Loy et al.*, Tex.Civ.App., 155 S.W.2d 617, n.w.h. Much has been written on the residence and domicile of minor children. *Sivalls v. United States*, 5 Cir., 205 F.2d 444. It has always been held that the domicile of a minor child is that

of the father. It is fixed by law. *Bradshaw*, 145 Tex. 68, 194 S.W.2d 411. A minor cannot change his domicile. *Daly v. Wells, et al.*, Tex.Civ.App., 53 S.W.2d 847, err. ref.; and *Gulf, C. & S. F. Ry. v. Lemons*, 109 Tex. 244, 206 S.W.2d 93, A.L.R. 943. Whether or not the place of residence of Charles Morton Hayner was the same household with his father is a matter of fact. There was plenty of evidence to support the jury's findings at such time as Charles Morton Hayner came married on January 4, 1959. Prior to his marriage his residence was with his father. *Cal-Farm Ins. Co. v. Boissac*, 151 Cal.App.2d 775, 312 P.2d 401; *Wesley v. Lavy et al.*, Tex.Civ.App., 314 S.W.2d 101, wr. ref., n.r.e.; *Pittman v. Time Securities et al.*, Tex.Civ.App., 301 S.W.2d 101, n.w.h.; *Allstate Insurance Co. v. McKee*, 5 Cir., 246 F.2d 151.

[5-7] We think that the refusal of appellant to defend the suit constituted breach of its contract. 49 A.L.R.2d 711, 717. Therefore, we doubt the validity of 3rd and 4th points of error relative to 2nd issue of the court's charge as to whether or not there was an actual trial of case. Our Probate Code, Sec. 3(t), Vernon's Ann. Texas Civ. St., reads as follows:

"3(t) 'Minors' are all persons under twenty-one years of age who have never been married, except persons under that age whose disabilities of minority have been removed generally, except as to the right to vote, in accordance with the laws of this State."

We think that under this Statute and decisions in *Ward v. Lavy*, supra, and *Pittman v. Time Securities et al.*, supra, that Charles Morton Hayner became an adult person for all purposes except to vote on January 4, 1959, the date he was married. Appellant admits the holding in the *Pittman* case. It cites in support of its contention the case of *Lowery v. Berry*, 153 Tex. 269 S.W.2d 795. After his marriage Charles Morton Hayner filed an answer and admissions in the case. That

was actually a trial. The trial court used the exact definition of the term set out in *Lawyers Lloyds of Texas et al. v. Webb et al.*, 137 Tex. 107, 152 S.W.2d 1096, in submitting the issue to the jury. The jury answered the issue in the affirmative. There was plenty of evidence to support the jury finding.

Appellant's points are overruled, and the judgment of the trial court is affirmed.



ROBERTSON TRANSPORT COMPANY,
Appellant,

v.

Mrs. Hattie HUNT, Appellee.
No. 13709.

Court of Civil Appeals of Texas,
San Antonio.
March 15, 1961.

Rehearing Denied April 12, 1961.

Action arising out of collision between automobile and defendant's following truck. The 28th District Court, Kleberg County, J. D. Todd, J., rendered a judgment for plaintiff, and the defendant appealed. The Court of Civil Appeals, Pope, J., held that evidence supported findings that automobile driver had not driven onto traveled portion of highway immediately before accident, and had not been negligent and had not proximately caused accident.

Judgment affirmed.

1. Automobiles ⇨242(1)

Defendant in automobile accident case had burden to prove its defenses.

2. Automobiles ⇨244(44, 50)

Evidence in action arising out of collision between automobile and defendant's

following truck supported findings that automobile driver had not driven onto traveled portion of highway immediately before accident, and had not been negligent and had not proximately caused accident.

3. Trial ⇨356(5)

Jury in automobile accident case was not required to answer issues which were conditioned upon affirmative answers to other issues, which in turn were properly answered in negative.

4. Trial ⇨358

Verdict in automobile accident case was not fatally conflicting where allegedly conflicting answers were given to special issues which became immaterial when jury returned negative answers to issues on which former issues were conditioned.

Lewright, Dyer & Redford, Corpus Christi, for appellant.

Kleberg, Mobley, Lockett & Weil, Corpus Christi, Carter, Stiernberg, Skaggs & Koppel, Harlingen, for appellee.

POPE, Justice.

Mrs. Hattie Hunt sued Robertson Transport Company and obtained a judgment for \$68,000 for the death of her husband as a result of a highway rear-end collision. Defendant Robertson appeals and urges that (1) certain findings have no support in the evidence, and, alternatively, are against the great weight of the evidence, (2) the verdict is incomplete, and (3) there are irreconcilable conflicts in the jury findings.

The accident occurred on the morning of July 15, 1958, on the highway between Kingsville and Raymondville. Deceased was driving a Ford and Robertson's driver was operating a tractor and tank trailer loaded with aviation gasoline. Both vehicles were headed in a southerly direction when Robertson's vehicle struck the rear end of the Ford driven by Hunt. Hunt was

Lacey DUGAS, Plaintiff-Appellant,

v.

TRAVELERS INSURANCE COMPANY,
Defendant-Appellee.

No. 2697.

Court of Appeal of Louisiana.

Third Circuit.

Nov. 25, 1969.

Action for personal injuries sustained when stopped vehicle in which plaintiff was passenger was struck by truck. The Fifteenth Judicial District Court, Parish of Lafayette, Lucien C. Bertrand, J., awarded plaintiff \$250 for alleged whiplash injury to her neck and back, and she appealed. The Court of Appeal, Tate, J., held that in light of evidence tending to show that plaintiff's injuries were minimal and extremely temporary in duration, there was no abuse of discretion in awarding plaintiff only \$250 for her injury.

Affirmed.

1. Appeal and Error §1013

Damages §98

Trial court has great discretion in award of general damages for personal injuries, exercise of which reviewing court will not disturb in absence of clear abuse. LSA-C.C. art. 1934.

2. Damages §131(5)

Where evidence tended to show that effects of whiplash injury were minimal and extremely temporary in duration, award of \$250 was not so minimal as to constitute abuse of discretion. LSA-C.C. art. 1934.

Marshall J. Stockstill, Lafayette, for plaintiff-appellant.

Davidson, Meaux, Onebane & Donohoe, by Burgess McCranie, Jr., Lafayette, for defendant-appellee.

Before TATE, CULPEPPER and MILLER, JJ.

TATE, Judge.

The sole issue raised by the appeal of Mrs. Lacey Dugas, plaintiff-appellant, is: Did the trial court abuse its discretion in awarding her only \$250.00 for a whiplash injury to the neck and back?

Mrs. Dugas was injured when a passenger in her husband's automobile. The vehicle was stopped when it was struck by the truck of the defendant insured. The truck was proceeding only 1-2 mph.

Mrs. Dugas testified that, after she went to bed on the night of the accident, she commenced to feel pain in her neck and back. She testified that she still occasionally felt the pain at the time of trial, some two years later.

She was examined only once, some two and a half months after the injury. The doctor felt that she had sustained a neck and back strain.

Both the doctor's report (his report was admitted by stipulation in lieu of any testimony from him) and Mrs. Dugas's testimony are susceptible of the interpretation that the effects of the strain were minimal and extremely temporary in duration. Some corroboration is furnished by the circumstance that she consulted a physician only once, some time after the accident, and then not for purposes of treatment. Further, the trial court is in a better position to evaluate the sincerity of testimony of residual pain than is an appellate court on review.

[1,2] The trial court has great discretion in the award of general damages for personal injuries, which the reviewing court should not disturb in the absence of clear abuse. Civil Code Article 1934; Lomenick v. Schoeffler, 250 La. 959, 200 So.2d 127. We find no such abuse here in the award of \$250.00 for minimal personal injury resulting from this slight

Cite as, I.A., 228 No.24 321

impact. See, e. g.: Johnson v. Shreveport Transport Co., La.App. 2d Cir., 188 So.2d 713; Harvey v. Indemnity Insurance Co. of North America, La.App. 1st Cir., 147 So.2d 925; Dowies v. Traders and Gen. Ins. Co., La.App. 3d Cir., 124 So.2d 610 (syllabus 1).

We therefore affirm the award of the trial court. Plaintiff-appellant is to pay the cost of this appeal.

Affirmed.



Roland MANUEL, Plaintiff-Appellee,

v.

AMERICAN EMPLOYERS INSURANCE
COMPANY, Defendant-Appellant.

No. 2675.

Court of Appeal of Louisiana.

Third Circuit.

Nov. 25, 1969.

Suit by insured's son against insurer to recover under uninsured motorist provision of father's policy. The Thirteenth Judicial District Court, Parish of Evangeline, Joe R. Vidrine, J., entered judgment for plaintiff, and insurer appealed. The Court of Appeal, Tate, J., held that son, who was attending college 40 miles from insured-father's home, who rented apartment at location of school but kept most of his possessions and clothes in father's home and returned there every weekend and on vacation and was at home while injured by uninsured motorist, and whose permanent mailing address was father's home was "resident of same household" as father within uninsured motorist provisions of father's insurance policy.

Affirmed.

228 So.2d—21

1. Insurance §467.51

Son, who was attending college 40 miles from insured-father's home, who rented apartment at location of school but kept most of his possessions and clothes in father's home and returned there every weekend and on vacation and was at home while injured by uninsured motorist, and whose permanent mailing address was father's home was "resident of same household" as his father within uninsured motorist provisions of father's insurance policy.

See publication Words and Phrases for other judicial constructions and definitions.

2. Domicile §2

While a person may have only one domicile, his permanent residence and principal establishment, he may have more than one residence, his actual dwelling place, or where he actually lives.

3. Damages §130(1)

Award of \$4,000 general damages for moderately severe whiplash injury to neck, which required six months of medical treatment for relatively severe complaints of pain and headaches, and with diminishing residual symptoms for another five months, was not an abuse of discretion.

Lewis & Lewis, by Seth Lewis, Jr., Opelousas, for defendant-appellant.

Francis E. Mire, Lake Charles, for plaintiff-appellee.

Before TATE, CULPEPPER and MILLER, JJ.

TATE, Judge.

The plaintiff was struck and injured through the negligence of an uninsured motorist. The principal issue on this appeal is whether he was a "resident of the same household" as his father, the named insured, so as to be within the protection of

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the uninsured motorist's coverage issued to the latter by the defendant insurer.¹

The trial court resolved this issue in favor of the plaintiff and granted him recovery. The defendant insurer appeals.

The evidence shows that the plaintiff, Roland Manuel, was a 24-year-old son at the time of the accident. He was attending college in Lafayette, Louisiana, some 40 miles distant from his father's home.

While in Lafayette, he rented an apartment, in which he had lived during the school weeks for the four months of the semester in question. However, he kept most of his possessions and clothes in his father's home, to which he returned every weekend and on vacation. That, he was injured while at home with his father on a weekend.

His permanent mailing address was at his father's home, where he received his bills and government allotment checks. (He was a discharged veteran who had returned to school after his military service.)

He had changed his temporary college residences several times before trial, but he always returned home weekly and during vacations to his room in his father's house. He and those who testified regarded his father's house as his home.

We find no error in the trial court's factual finding that the plaintiff was a resident of his father's household—that his residence (indeed, his principal residence) was with his father.

[1,2] Under the evidence, even if the temporary dwelling places in which he lived during the college week were his residences, nevertheless, he was also a resident in his father's home, where he maintained his possessions and to which he returned weekly and which was, in fact, his permanent home. While a person may

1. See also La.App., 212 So.2d 527, an earlier appeal, in which the proceedings were remanded for further proof of the

have only one domicile (his permanent residence and principal establishment), he may as a matter of fact have more than one residence (his actual dwelling place, or where he actually lives).

See: Taylor v. State Farm Mut. Auto. Ins. Co., 248 La. 246, 178 So.2d 238; Stavis v. Engler, La.App. 4th Cir., 202 So. 2d 672; Vehrs v. Jefferson Ins. Co., La. App. 3d Cir., 168 So.2d 873; Foreman v. Jordan, La.App. 3d Cir., 131 So.2d 796.

The defendant-appellant relies upon Ladner v. Andrews, La.App. 3d Cir., 216 So.2d 365. The decision applies to distinguishable facts. There, a grandchild who had formerly lived with her grandparents, was held to be no longer a resident of their household for purposes of liability insurance coverage.

The grandchild had completed her schooling and had moved to a nearby city, where she obtained full-time employment. She rented her own apartment there. She returned to her grandparents' home only for a few brief visits on some weekends during the nine months she had lived away before the accident.

Here, however, the plaintiff had never moved from his permanent home with his parents. His schooling residences were intended to be temporary in nature, and he had never severed his ties with his parents' home as his permanent residence to which he returned whenever free. He actually lived with his father, within the meaning of the policy term of being "a resident of the same household."

Thus, in Giese v. Karnstedt, 30 Wis.2d 630, 631, 141 N.W.2d 886 (1966), a son who had enlisted in the military service for a temporary three-year term was held still to be a member of his father's household. He had left his unneeded personal belongings with his father and used his father's home as his permanent mailing address. The court noted, in so holding, that

non-insured status of the negligent motorist.

the absence from the family roof should be of a temporary nature with intent on the part of the absent person to return thereto. See also Doern v. Crawford, 36 Wis.2d 470, 153 N.W.2d 581 (1968) (husband who left home six days before accident and instituted divorce suit, still member of same household as wife and stepson, because of credible evidence of his intention to return home if possible after mere temporary separation).

[3] With regard to quantum, we find no abuse of discretion in the trial court's award of \$4,000 general damages for a moderately severe spraining whiplash injury to the neck, which required six months of medical treatment for relatively severe complaints of pain and headaches, and with diminishing residual symptoms for another five months.

For the foregoing reasons, we affirm the trial court judgment, at the cost of the defendant-appellant.

Affirmed.



GENERAL MOTORS ACCEPTANCE CORPORATION, Plaintiff-Appellee,

v.

I. Edwin HENDERSON, Defendant-Appellant.

No. 2835.

Court of Appeal of Louisiana.

Third Circuit.

Nov. 25, 1969.

Proceeding on mortgagee's petition for deficiency judgment, in which mortgagor filed third-party demand. The Fourteenth Judicial District Court, Parish of Calcasieu, Cecil C. Cutrer, J., entered deficiency judgment and mortgagor appealed. The Court

of Appeal, Miller, J., held that mortgagor's testimony that he had never received notice of seizure of mortgaged automobile was inadmissible and properly excluded where mortgagor had not alleged that he was not personally served with notice of seizure, as opposed to the sheriff's return stating that he had been personally served.

Affirmed.

1. Chattel Mortgages ¶281

Statutory requirement that on seizure of property after mortgagor's default the sheriff shall serve on mortgagor a written notice of the seizure is mandatory and may not be waived. LSA-C.C.P. art. 2721.

2. Chattel Mortgages ¶287

Mortgagor's testimony that he had never received notice of seizure of automobile, taken by executory process after mortgagor defaulted in payments on chattel mortgage, was inadmissible and properly excluded from trial of mortgagee's petition seeking deficiency judgment where mortgagor had not alleged that he was not personally served with notice of seizure, as opposed to the sheriff's return stating that he was personally served. LSA-C.C.P. arts. 2631-2724, 2721, 2772.

3. Chattel Mortgages ¶287

Evidence supported finding that mortgagor, who filed third-party demand in proceedings on mortgagee's petition for deficiency judgment, failed to prove any breach of legal duty on the part of the appointed appraisers in valuing the subject automobile.

I. Edwin Henderson, Baton Rouge, for defendant-appellant.

William L. McLeod, Jr., Lake Charles, for plaintiff-appellee.

Before TATE, CULPEPPER and MILLER, JJ.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

BLOOMINGTON, ILLINOIS.

A Mutual Insurance Company Herein Called The Company

Agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to all of the terms of this policy:

PART I — LIABILITY

COVERAGE A — Bodily Injury Liability;

COVERAGE B — Property Damage Liability. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of:

A. bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury", sustained by any person;

B. injury to or destruction of property, including loss of use thereof, hereinafter called "property damage";

arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile, and the company shall defend any suit alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent; but the company may make such investigation and settlement of any claim or suit as it deems expedient.

Supplementary Payments. To pay, in addition to the applicable limits of liability:

(a) all expenses incurred by the company, all costs taxed against the insured in any such suit and all interest on the entire amount of any judgment therein which accrues after entry of the judgment and before the company has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the company's liability thereon;

(b) premiums on appeal bonds required in any such suit, premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy; and the cost of bail bonds required of the insured because of accident or traffic law violation arising out of the use of an automobile insured hereunder, not to exceed \$100 per bail bond, but without any obligation to apply for or furnish any such bonds;

(c) expenses incurred by the insured for such immediate medical and surgical relief to others as shall be imperative at the time of an accident involving an automobile insured hereunder and not due to war;

(d) all reasonable expenses, other than loss of earnings, incurred by the insured at the company's request.

Persons Insured. The following are insureds under Part I:

(a) with respect to the owned automobile,

(1) the named insured and any resident of the same household,

(2) any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, and

(3) any other person or organization but only with respect to his or its liability because of acts or omissions of an insured under (a)(1) or (2) above;

(b) with respect to a non-owned automobile,

(1) the named insured,

(2) any relative, but only with respect to a private passenger automobile or trailer,

provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission, and

(3) any other person or organization not owning or hiring the automobile, but only with respect to his or its liability because of acts or omissions of an insured under (b)(1) or (2) above.

The insurance afforded under Part I applies separately to each insured against whom claim is made or suit is brought, but the inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

Definitions. Under Part I:

"named insured" means the individual named as named insured in the declarations and also includes his spouse, if a resident of the same household;

"insured" means a person or organization described under "Persons Insured";

"relative" means a relative of the named insured who is a resident of the same household;

"owned automobile" means

(a) a private passenger, farm or utility automobile described in this policy for which a specific premium charge indicates that coverage is afforded;

(b) a trailer owned by the named insured;

(c) a private passenger, farm or utility automobile ownership of which is acquired by the named insured during the policy period, provided

(1) it replaces an owned automobile as defined in (a) above, or

(2) the company insures all private passenger, farm and utility automobiles owned by the named insured on the date of such acquisition and the named insured notifies the company within 30 days after the date of such acquisition of his election to make this and no other policy issued by the company applicable to such automobile, or

(d) a temporary substitute automobile;

"temporary substitute automobile" means any automobile or trailer, not owned by the named insured, while temporarily used with the permission of the owner as a substitute for the owned automobile or trailer when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction;

"non-owned automobile" means an automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile;

"private passenger automobile" means a four wheel private passenger, station wagon or jeep type automobile;

"farm automobile" means an automobile of the truck type with a load capacity of fifteen hundred pounds or less not used for business or commercial purposes other than farming;

"utility automobile" means an automobile, other than a farm automobile, with a load capacity of fifteen hundred pounds or less of the pick-up body, sedan delivery or panel truck type not used for business or commercial purposes;

"trailer" means a trailer designed for use with a private passenger automobile, if not being used for business or commercial purposes with other than a private passenger, farm or utility automobile, or a farm wagon or farm implement while used with a farm automobile;

"automobile business" means the business or occupation of selling, repairing, servicing, storing or parking automobiles;

"use" of an automobile includes the loading and unloading thereof;

"war" means war, whether or not declared, civil war, insurrection, rebellion or revolution, or any act or condition incident to any of the foregoing.

Exclusions. This policy does not apply under Part I:

(a) to any automobile while used as a public or livery conveyance, but this exclusion does not apply to the named insured with respect to bodily injury or property damage which results from the named insured's occupancy of a non-owned automobile other than as the operator thereof;

(b) to bodily injury or property damage caused intentionally by or at the direction of the insured;

(c) to injury, sickness, disease, death or destruction with respect to which an insured under the policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability;

(d) to bodily injury or property damage arising out of the operation of farm machinery;

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

(f) to bodily injury to any fellow employee of the insured injured in the course of his employment if such injury arises out of the use of an automobile in the business of his employer, but this exclusion does not apply to the named insured with respect to injury sustained by any such fellow employee;

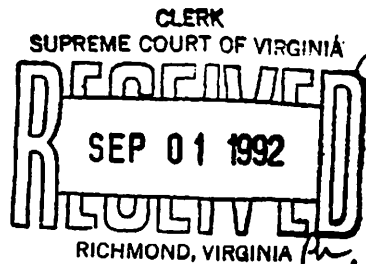
(g) to an owned automobile while used by any person while such person is employed or otherwise engaged in the automobile business, but this exclusion does not apply to the named insured, a resident of the same household as the named insured, a partnership in which the named insured or such resident is a partner, or any partner, agent or employee of the named insured, such resident or partnership;

(h) to a non-owned automobile while maintained or used by any person while such person is employed or otherwise engaged in

(1) the automobile business of the insured or of any other person or organization,

(2) any other business or occupation of the insured, but this exclusion (h) (2) does not apply to a private passenger automobile operated or occupied by the

020429.



APPEAL BOND

KNOW ALL MEN BY THESE PRESENTS, That I, Anna L. Phelps, principal, and Robert T. Wandrei, surety, are held and firmly bound unto State Farm Mutual Automobile Insurance Company, et al, in the sum of Five Hundred Dollars (\$500.00) to the payment of which we bind ourselves, our heirs, successors, personal representatives and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such that:

Whereas, the Supreme Court of Virginia on the 17th day of August, 1992, awarded an appeal from a judgment rendered against Anna L. Phelps by the Circuit Court of Bedford County, on the 24th day of December, 1991, upon Anna L. Phelps, or someone for her, filing an appeal bond with sufficient security in the Clerk's Office of the Circuit Court of Bedford County, in the penalty of Five Hundred Dollars (\$500.00) within fifteen (15) days of the date of the certificate of appeal, with condition as the law directs:

Now, therefore, if Anna L. Phelps shall pay all damages, costs, and fees which may be awarded against her in the Supreme Court, then this obligation shall be void, otherwise to remain in full force and virtue.

1

FILED IN THE CLERK'S OFFICE

The 31st day of Aug., 1992

TESTE:

Angela L. Newby Clerk
D.C.

251

RADFORD, WANDREI
HARRISON
ATTORNEYS AT LAW
BEDFORD, VIRGINIA
24323-1008

In witness whereof, the said Anna L. Phelps, principal, and Robert T. Wandrei, surety, have hereunto set their hands and seals, this 29 day of August, 1992.

Anna L. Phelps
ANNA L. PHELPS, PRINCIPAL
Robert T. Wandrei
SURETY

STATE OF VIRGINIA

CITY/COUNTY OF Arlington

The foregoing instrument was acknowledged before me this the 29th day of August, 1992, by ANNA L. PHELPS.

Gladys Colby
Notary Public

My commission expires My Commission Expires January 31, 1994

STATE OF VIRGINIA

CITY/COUNTY OF Bedford

The foregoing instrument was acknowledged before me this the 31st day of August, 1992, by Robert T. Wandrei

Sydney M. Simpson
Notary Public

My commission expires March 31, 1993.

2

RADFORD, WANDREI
HARRISON
ATTORNEYS AT LAW
BEDFORD, VIRGINIA
24523-1008

a COPY TESTE
Carol W. Black, Clerk
Angela M. Newby, Deputy Clerk
8-31-92

RECEIVED
SEP 01 1992
MULTIPLE

RICHMOND, VIRGINIA

COMMONWEALTH OF VIRGINIA



(14-0-05 1061)

OFFICIAL RECEIPT
BEDFORD COUNTY CIRCUIT COURT
LAW/CHANCERY

DATE: 08/31/92 TIME: 11:59:57 ACCOUNT: 019CH89015473-00 RECEIPT: 92000014093
CASHIER: AMN REG: BC02 FILING: PET TYPE: FULL PAYMENT
STYLE OF CASE: PHELPS, ANNA L VS. STATE FARM MUT AUTO INS
ACCT OF: PHELPS, ANNA L RECD: RADFORD & C-CX8686

CHECK: \$500.00
DESCRIPTION 1: APPEAL BOND

CODE DESCRIPTION	PAID	CODE DESCRIPTION	PAID
503 BONDS - CIVIL	500.00		
		TENDERED	500.00
		AMOUNT PAID	500.00
		CHANGE AMT	00

CLERK OF COURT: CAROL W. BLACK

DC-18 (4/92)

ANNA L. PHELPS, et al

Plaintiff/Appellants,

v.){

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ET AL

Defendant/Appellee.

PETITION FOR APPEAL

ASSIGNMENT OF ERROR

The trial Court erred in ignoring the test promulgated by this court in finding that Anna L. Phelps and Mary Catherine Phelps were residents of their mother's household under the terms of the State Farm Automobile Insurance policy.