

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

RECORD NO. 950005

TINA MARIE CARR,
Defendant/Appellant,
v.

THE HOME INSURANCE COMPANY,
as Subrogee for its Insured,
GREEN THUMB ENTERPRISES,

Plaintiff/Appellee

Appeal from the
Circuit Court of Loudoun County
The Honorable Carleton Penn

JOINT APPENDIX

Charles W. Sickels
Va. Bar #13954
HALL, MARKLE, SICKELS & FUDALA, P.C.
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COUNSEL FOR APPELLANT

COUNSEL FOR APPELLEE

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V I R G I N I A:

IN THE CIRCUIT COURT FOR LOUDOUN COUNTY

THE HOME INSURANCE COMPANY)
As Subrogee for its Insured,)
GREEN THUMB ENTERPRISES, INC.)
P.O. Box 945990)
Maitland, Florida 32794)

Plaintiff)

-v-)

At Law No. 15126

TINA MARIE CARR)
HCR01 Box 540)
Jeffersontown, Virginia 22427)

Defendant)

MOTION FOR JUDGMENT

COMES NOW, the Plaintiff, The Home Insurance Company as Subrogee for its insured, Green Thumb Enterprises (hereafter "Home") and moves this Court for judgment against the Defendant, Tina M. Carr (hereinafter "Carr") on the grounds and in the amount set forth below:

1) At all times relevant, Plaintiff, Home is a corporation authorized to conduct business in the Commonwealth of Virginia;

2) On or about December 4, 1991, Plaintiff's insured, Green Thumb Enterprises' employee was operating a motor vehicle, traveling northbound on Old Ox Road, Route 606 in Loudoun County, Virginia;

3) At the aforementioned time and place, Defendant, Carr, was operating a vehicle which was owned by her husband in a southbound direction on Old Ox Road, Route 606.

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4) At that time and place, it was the duty of Defendant, Carr, to operate her automobile with reasonable care and due regard for the safety of others using the road;

5) Notwithstanding his duties, Defendant, Carr operated her automobile in such a careless, reckless and negligent manner in that he allowed his vehicle to cross a double yellow line, thus striking Plaintiff's insured's vehicle with great force and causing personal injury to Plaintiff's insured driver and property damage to their vehicle.

6) Defendant, Carr, was negligent in that she:

(a) Failed to keep a proper lookout;

(b) Failed to maintain proper control of her automobile;

(c) Operated her automobile at an unlawful and unsafe speed.

(d) Failed to stay on her side of the road,

7) As a direct and proximate result of Defendant's negligence, Plaintiff's insured has sustained extensive property damage to their vehicle;

8) As a direct and proximate result of Defendant's negligence, Plaintiff in February and May of 1992 has reimbursed its insured, driver, Marios G. Brooks for property damage and personal injuries he sustained from said collision.

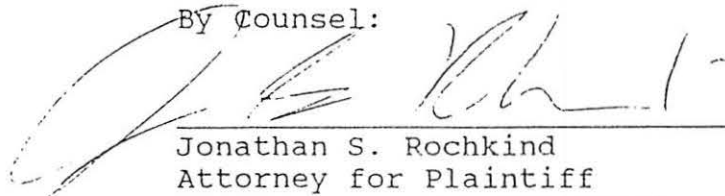
9) Plaintiff accordingly has an action against the Defendant for contribution for the amount paid by them on behalf of their insured as a result of the Defendant's negligence. -

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WHEREFORE, Plaintiff demands judgment against Defendants in the amount of Thirty Three Thousand Eight Hundred and 00/100 Dollars (\$33,800.00) together with interest, attorney's fees and costs expended on their behalf.

THE HOME INSURANCE COMPANY

By Counsel:

A handwritten signature in dark ink, appearing to read 'J. Rochkind', is written over a horizontal line.

Jonathan S. Rochkind
Attorney for Plaintiff
PROTAS & SPIVOK, CHARTERED
2060 N. 14th Street, Suite 306
Arlington, Virginia 22201
(703) 525-4766
VA Bar No. 30341

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NOTICE

TO THE DEFENDANTS: If you believe that Plaintiff has filed this suit in a city or county other than in a city or county in which this suit may be filed by law, you may file a written request to have the case tried in Circuit Court in a city or county in which the case may be filed by law. To do so, you must:

1) Prepare a written request which contains: (a) the court's name; (b) the case number, (c) Plaintiff's name and Defendant's name, (d) "I move to object to venue to this Court because" (state reason for objection and also state in which city or county the case should be tried), and (e) your signature and mailing address.

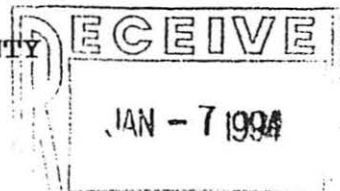
2) File the written request in the Clerk's Office before the trial date (use the mail at your own risk) or give it to the Judge when your case is called on the return date.

3) If mailed to the Court, you will be notified only if your request is granted.

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V I R G I N I A :

IN THE CIRCUIT COURT OF LOUDOUN COUNTY



THE HOME INSURANCE COMPANY :
As Subrogee for its Insured, :
GREEN THUMB ENTERPRISES, :
INC., :

Plaintiff, :

v. : AT LAW NO. 15126

TINA MARIE CARR, :

Defendant. :

DEFENDANT'S ANSWER AND GROUNDS OF DEFENSE

COMES NOW, the Defendant, Tina Marie Carr, by counsel, and files this her Answer and Grounds of Defense to the Motion for Judgment previously filed herein, and in support thereof states as follows:

1. The allegations contained in paragraphs, 1, 2, 3, and 4 of the Motion for Judgment are hereby admitted.

2. The allegations contained in paragraphs 5, 6, 7 and 9 of the Motion for Judgment are hereby denied.

3. This Defendant is without sufficient knowledge or belief as to the allegations contained in paragraph 8 of the Motion for Judgment and demands strict proof thereof.

AFFIRMATIVE DEFENSES

4. This Defendant will rely on the affirmative defenses of the expiration of the statute of limitations, contributory negligence, non joinder of an indispensable party plaintiff,

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intervening cause, and such other defenses that are developed during the course of discovery.

WHEREFORE, having fully answered the Motion for Judgment filed herein, the Defendant prays that the same be dismissed with an award of costs.

Tina Marie Carr
Tina Marie Carr

STATE OF VIRGINIA)
) To-Wit:
COUNTY OF FAIRFAX)

Personally appeared before me this 3rd day of January, 1994, the undersigned, a Notary Public in and for the State and County aforesaid, TINA MARIE CARR, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

[SEAL]

Jonathan S. Rochkind
Notary Public

My Commission Expires: February 28, 1995

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of January, 1994, a true copy of the Defendant's Answer and Grounds of Defense was mailed first class, postage prepaid to Jonathan S. Rochkind, Esq. of PROTAS & SPIVAK, CHARTERED, at 2060 N. 14th Street, Suite 306, Arlington, Virginia 22201, counsel for Plaintiff.

Tina Marie Carr
Tina Marie Carr

V I R G I N I A :

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

THE HOME INSURANCE COMPANY	:	
As Subrogee for its Insured,	:	
GREEN THUMB ENTERPRISES,	:	
INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	AT LAW NO. 15126
	:	
TINA MARIE CARR,	:	
	:	
Defendant.	:	

PLEA IN BAR

COMES NOW, the Defendant, Tina Marie Carr and files this her Plea In Bar/Motion to Dismiss, and in support thereof states the following:

1. The applicable statute of limitations [Va. Code § 8.01-243(A)] expired prior to the filing of this action, and subrogee Home Insurance Co. steps into the shoes of and can have no greater rights than the original plaintiff in this action and is therefore also barred from bringing this action.

WHEREFORE, the Defendant prays that this cause be dismissed with an award of cost and attorneys fees to the Defendant.

TINA MARIE CARR
By Counsel

HALL, MARKLE, SICKELS & FUDALA, P. C.



Charles W. Sickels, Esquire
V.S.B. #13954
4010 University Drive
Suite 200
Fairfax, Virginia 22030
Telephone: (703) 591-8600
Counsel for Defendant

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 25th day of March, 1994, a true copy of the foregoing was mailed first class, postage prepaid, to Jonathan S. Rochkind, Esq. of PROTAS & SPIVAK, CHARTERED, at 2060 N. 14th Street, Suite 306, Arlington, Virginia 22201, counsel for Plaintiff.



Charles W. Sickels

V I R G I N I A :

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

THE HOME INSURANCE COMPANY	:	
As Subrogee for its Insured,	:	
GREEN THUMB ENTERPRISES,	:	
INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	AT LAW NO. 15126
	:	
TINA MARIE CARR,	:	
	:	
Defendant.	:	

MEMORANDUM IN SUPPORT OF DEFENDANT'S PLEA IN BAR

Defendant Tina Marie Carr files this Memorandum in support of her Plea in Bar.

Argument

I. PLAINTIFF'S ACTION IS TIME BARRED BECAUSE IT WAS FILED AFTER THE APPLICABLE STATUTE OF LIMITATIONS HAD EXPIRED AND THIS LIMITATION APPLIES TO THE SUBROGEE HOME INSURANCE CO.

A. This Action is Barred by the Statute of limitations

Va. Code § 8.01-243(A) states: "every action for personal injuries, whatever the theory of recovery, and every action for damages resulting from fraud, shall be brought within two years after the cause of action accrues." Plaintiff alleges injuries and damages arising from the automobile accident of December 4, 1991. See Plaintiff's Motion for Judgment at 1. Plaintiff is alleging that the injuries complained of are the result of Defendant's alleged wrongful acts. Under the limitation set by § 8.01-243(A) an action accrues on the date of injury. This statutory

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requirement was explained in Scarpa v. Melzig, 237 Va. 509, 379 S.E.2d 307 (1989), where it was held:

Accrual of the cause of action is governed by Code § 8.01-230, which provides, as pertinent, that a 'cause of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person... and not when the resulting damage is discovered....' We construe the word 'injury,' as used in § 8.01-230, 'to mean positive, physical or mental hurt to the claimant.' Locke v. Johns-Manville Corp., 221 Va. 951, 957, 275 S.E.2d 900, 904 (1981).

Moreover, when any injury, though slight, is sustained as the consequence of an alleged wrong, the right of action for a personal injury accrues and the statute of limitations begins to run at once. See Richmond Redevelopment and Housing Authority v. Laburnum Construction Corp., 195 Va. 827, 838-39, 80 S.E.2d 574, 581 (1954). It is immaterial that all the damages resulting from the wrong may not have been sustained at the time of the negligent act; the running of the statute of limitations is not postponed by the fact that substantial damages do not occur until a later date.

Scarpa, 237 Va. at 512.

See also Brown v. ABC, 704 F.2d 1296 (4th Cir. 1983); Granahan v. Pearson, 782 F.2d 30 (4th Cir. 1985).

This present action would have to have been filed within two years from the date the action accrued, the date of the auto accident and alleged injury - December 4, 1993. The file date stamped on Plaintiff's Motion for Judgment, however, is December 10, 1993. This action was filed six days past the applicable statute of limitations and is therefore time barred, and the case must therefore be dismissed.

B. This Limitation of Action Applies Equally to Plaintiff Green Thumb and its Subrogee, Home Insurance Co.

Subrogation, according to Virginia courts, has been defined as:

"[t]he substitution of one person in the place of another with reference to a lawful claim, demand or right ... so that he who is substituted succeeds to *rights* of the other in relation to the debt or claim, and its *rights, remedies, or securities*." (emphasis supplied). Black's Law Dictionary 1595 (rev. 4th ed. 1968).

It has also been defined as "the substitution of one for another as a creditor so that the new creditor succeeds to the former's *rights* in law and equity." (emphasis supplied). Webster's Third New International Dictionary 2278 (1969). Thus, substitution of both rights and remedies is a crucial characteristic of subrogation.

Reynolds Metals v. Smith, 218 Va. 881, 883-884, 241 S.E.2d 794 (1978).

This rule was announced early on by Virginia courts as evidenced by the holding in Brighthope Railway v. Rogers, 76 Va. 443 (1881): "the insurer, by the payment of the loss, becomes subrogated to the rights of the assured to the extent of the sum paid under the policy, and may bring an action in the name of the assured to recover the amount so paid." Brighthope, 76 Va. at 446.

A clause providing for subrogation in an insurance contract places the insurer, with regard to the right of subrogation, opposite the alleged tort-feasor in the shoes of the insured. If the insured is time barred from filing an action, then the insurer cannot file the action either. The subrogee has the same rights, and no greater rights, than the primary plaintiff. See State Farm Mut. Auto Ins. Co. v. De Wees, 143 W.Va. 75, 101 S.E.2d 273 (1957). Since the primary plaintiff here was time barred from filing this

suit, so is Plaintiff\Subrogee Home Insurance Co., and this action must be dismissed as untimely.

Conclusion

For all the foregoing reasons, Defendant Tina Marie Carr prays that this Honorable Court sustain her plea in bar and dismiss this matter. Defendant further prays that this court award her costs and attorneys' fees expended in this behalf.

TINA MARIE CARR
By Counsel

HALL, MARKLE, SICKELS & FUDALA, P.C.

A handwritten signature in cursive script, appearing to read "Charles W. Sickels", is written over a horizontal line.

Charles W. Sickels, Esq.
VA Bar #13954
4010 University Drive
Suite 200
Fairfax, VA 22030
(703) 591-8600
Counsel for Defendant
Tina Marie Carr

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March, 1994, a true copy of the Memorandum in Support of Defendant's Plea in Bar was mailed first class, postage prepaid to Jonathan S. Rochkind, Esq. of PROTAS & SPIVAK, CHARTERED, at 2060 N. 14th Street, Suite 306, Arlington, Virginia 22201, counsel for Plaintiff.



Charles W. Sickels

V I R G I N I A:

IN THE CIRCUIT COURT FOR LOUDOUN COUNTY

THE HOME INSURANCE COMPANY)
as Subrogee for its Insured,)
GREEN THUMB ENTERPRISES, INC.)

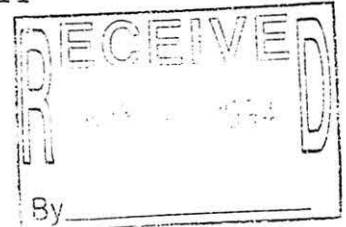
Plaintiff)

v.)

TINA MARIE CARR)

Defendant)

At Law No.: 15126



ORDER

Upon consideration of Plaintiff's Consent Motion for leave to file an Amended Motion for Judgment, it is, by the Court, this 20th day of May, 1994

ORDERED, that Plaintiff's Motion be GRANTED; and it is further

ORDERED, that Plaintiff's Amended Motion for Judgment be deemed filed as of the date of this Order.


BY THE COURT:

Thomas D. Horne
JUDGE


A Copy-Teste
Richard Kirk, Clerk
By Richard Kirk
Deputy Clerk

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WE ASK FOR THIS:



John J. Beins, Esquire
PROTAS & SPIVOK, CHARTERED
6707 Democracy Blvd., #400
Bethesda, MD 20817
Bar No.: 35345



Charles W. Sickels, Esquire
HALL, MARKLE, SICKELS & FUDALA, P.C.A
4010 University Drive, Suite 200
Fairfax, Virginia 22030
Bar No.: 13954

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V I R G I N I A:

IN THE CIRCUIT COURT FOR LOUDOUN COUNTY

THE HOME INSURANCE COMPANY
As Subrogee for its Insured,
GREEN THUMB ENTERPRISES, INC.

Plaintiff

-v-

TINA MARIE CARR

Defendant

At Law No. 15126

AMENDED MOTION FOR JUDGMENT

COMES NOW, the Plaintiff, The Home Insurance Company as Subrogee for its insured, Green Thumb Enterprises (hereafter "Home") and moves this Court for judgment against the Defendant, Tina M. Carr (hereinafter "Carr") on the grounds and in the amount set forth below:

1) At all times relevant, Plaintiff, Home is a corporation authorized to conduct business in the Commonwealth of Virginia;

2) On or about December 4, 1991, Plaintiff's insured, Green Thumb Enterprises' employee was operating a motor vehicle, traveling northbound on Old Ox Road, Route 606 in Loudoun County, Virginia;

3) At the aforementioned time and place, Defendant, Carr, was operating a vehicle which was owned by her husband in a southbound direction on Old Ox Road, Route 606.

4) At that time and place, it was the duty of Defendant, Carr, to operate her automobile with reasonable care and due regard for the safety of others using the road;

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5) Notwithstanding his duties, Defendant, Carr operated her automobile in such a careless, reckless and negligent manner in that he allowed his vehicle to cross a double yellow line, thus striking Plaintiff's insured's vehicle with great force and causing personal injury to Plaintiff's insured driver and property damage to their vehicle.

6) Defendant, Carr, was negligent in that she:

(a) Failed to keep a proper lookout;

(b) Failed to maintain proper control of her automobile;

(c) Operated her automobile at an unlawful and unsafe speed.

(d) Failed to stay on her side of the road,

7) As a direct and proximate result of Defendant's negligence, Plaintiff's insured has sustained extensive property damage to their vehicle;

8) As a direct and proximate result of Defendant's negligence, Plaintiff in February and May of 1992 has reimbursed its insured, driver, Marios G. Brooks for property damage and personal injuries he sustained from said collision.

9) Plaintiff accordingly has an action against the Defendant for contribution and/or implied or equitable indemnification.

WHEREFORE, Plaintiff demands judgment against Defendants in the amount of Thirty Three Thousand Eight Hundred and 00/100 Dollars (\$33,800.00) together with interest,

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attorney's fees and costs expended on their behalf.

Respectfully submitted,

John J. Beins, Esquire
PROTAS & SPIVOK, CHARTERED
Counsel for Plaintiff
2060 N. 14th Street, Suite 306
Arlington, VA 22201
(703) 525-4766
Bar No.: 35345

V I R G I N I A:

IN THE CIRCUIT COURT FOR LOUDOUN COUNTY

THE HOME INSURANCE COMPANY
As Subrogee for its Insured,
GREEN THUMB ENTERPRISES, INC.

Plaintiff

-v-

TINA MARIE CARR

Defendant

At Law No. 15126

PLAINTIFF'S OPPOSITION TO DEFENDANT'S
PLEA IN BAR

Plaintiff, The Home Insurance Company, by and through counsel, John J. Beins and Protas & Spivok, Chartered, and in Opposition to Defendant's Plea in Bar, states as follows:

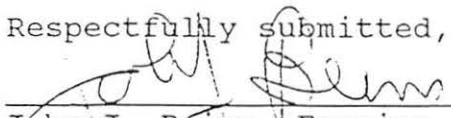
1. Plaintiff has asserted a timely cause of action for implied and/or equitable indemnification since the Motion for Judgment was filed within two years of the date of payment.

Virginia Code Section 8.01-249.5.

2. Plaintiff submits the attached Memorandum of Points and Authorities in Opposition to Defendant's Plea in Bar.

WHEREFORE, Plaintiff, The Home Insurance Company, requests that this Court deny Defendant's Plea in Bar.

Respectfully submitted,




John J. Beins, Esquire
PROTAS & SPIVOK, CHARTERED
Counsel for Plaintiff
2060 N. 14th Street, Suite 306
Arlington, VA 22201
(703) 525-4766
Bar No.: 35345

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Plaintiff's Opposition to Defendant's Plea in Bar, Memorandum of Points and Authorities and Order was mailed, postage prepaid, this 8 day of June, 1994 to:

Charles W. Sickels, Esquire
Brian M. McCormick, Esquire
HALL, MARKLE, SICKELS & FUDALA, P.C.
4010 University Drive, Suite 200
Fairfax, Virginia 22030



John J. Beins, Esquire
PROTAS & SPIVOK, CHARTERED
Counsel for Plaintiff

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V I R G I N I A:

IN THE CIRCUIT COURT FOR LOUDOUN COUNTY

THE HOME INSURANCE COMPANY
As Subrogee for its Insured,
GREEN THUMB ENTERPRISES, INC.

Plaintiff

-v-

TINA MARIE CARR

Defendant

At Law No. 15126

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFF'S OPPOSITION TO
DEFENDANT'S PLEA IN BAR

Plaintiff, The Home Insurance Company, submits this Memorandum of Points and Authorities in Support of its Opposition to Defendant, Tina Marie Carr's Plea in Bar.

I. FACTUAL BACKGROUND

This action arises out of an automobile accident which occurred on December 4, 1991. At that time, two employees of Green Thumb Enterprises, Inc. ("Green Thumb"), Gary Blue and Marcus C. Brooks, were traveling south in a company vehicle on Virginia Route 606 in Loudoun County. Suddenly, Defendant, Tina Marie Carr, traveling north on Virginia Route 606 drifted across the double solid line and struck the Green Thumb vehicle, causing property damage to the vehicle and personal injuries to Messrs. Blue and Brooks. A copy of the police report is attached hereto as Plaintiff's Exhibit 1.

Following the accident, Ms. Carr informed the police officer that her insurance company was Allstate. However, on December 27, 1991, Allstate's claim adjuster informed Green Thumb that the

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Defendant's policy was not in effect at the time of the accident. A copy of the letter denying coverage is attached hereto as Plaintiff's Exhibit 2.

Accordingly, Green Thumb and its employees, Messrs. Blue and Brooks, filed an uninsured motorist claim with Green Thumb's insurance carrier, The Home Insurance Company. Thereafter, on February 19 and 25, 1992, The Home Insurance Company paid Green Thumb the total amount of \$4,210 for property damage and towing charges. A copy of the checks are attached hereto as Plaintiff's Exhibit 3.

On May 21 and 28, 1992, The Home Insurance Company paid Messrs. Blue and Brooks the total amount of \$29,500 in full and final settlement of their personal injury claims. A copy of the checks are attached hereto as Plaintiff's Exhibit 4.

On August 19, 1992, The Home Insurance Company notified Defendant, Tina Marie Carr, of its intention to seek reimbursement of the amount of \$33,710 due to Defendant's responsibility for the automobile accident.¹ A copy of the notification letter is attached hereto as Plaintiff's Exhibit 5

When Defendant failed to make arrangements to pay her debt, Plaintiff filed this on December 10, 1993 action seeking "contribution" for the amounts paid to Green Thumb and its employees.

On March 25, 1994, Defendant filed a Plea in Bar asserting

¹ Plaintiff's claim also includes Green Thumb's \$100-deductible; therefore, the actual amount claimed is \$33,810.

that Plaintiff's Motion for Judgment was filed after the expiration of the Statute of Limitations. Thereafter, on May 18, 1994, Plaintiff filed a Consent Motion to Amend the Motion for Judgment asserting a separate cause of action for implied and/or equitable indemnification. That Motion was granted on May 20, 1994, by Judge Horne. On June 3, 1994, the parties appeared before Judge Penn on Defendant's Plea in Bar. Following oral argument by both sides, the Court requested a brief more fully setting forth Plaintiff's position.

II. LEGAL ARGUMENT

In its Plea in Bar, Defendant's argues that Plaintiff's Motion for Judgment is time barred under Virginia Code Section 8.01-243(A) due to the expiration of the applicable Statute of Limitations. However, Defendant's assertion lacks merit for two reasons. First, \$4,310 of Plaintiff's claim is for property damage (including Green Thumb's \$100 deductible), not personal injuries. Therefore, the applicable period of limitations is five (5) years under Virginia Code Section 8.07-243(B). Accordingly, Plaintiff's claim for property damage filed two years and six (6) days after the accident in December, 1991, and one year and ten (10) months after payment, in February, 1992, is timely filed.

With respect to Plaintiff's remaining claim for contribution and/or indemnification from Defendant for personal injury payments made to Messrs. Blue and Brooks, Plaintiff's Motion for Judgment is timely filed because it is filed within two years of

the date of payment, in accordance with Section 8.01-249.5²
which states:

When cause of action shall be
deemed to accrue in certain
personal actions. The cause of
action and the actions herein
listed shall be deemed to accrue as
follows:

5. In actions for contribution or
for indemnification, when the
contributor or the indemnitee has
paid or discharged the obligation.
A third party claim permitted by
subsection A of Section 8.01-281
and the Rules of Court may be
asserted before such cause of
action is deemed to accrue
hereunder;

Since Plaintiff settled the personal injury claim on May 21
and 28, 1992, it had until May 21 and 28, 1994 in which to file
its claim. Therefore, the Motion for Judgment filed on December
10, 1993, almost six (6) months prior to the expiration of the
Statute of Limitations, is timely filed.

In her Plea in Bar, Defendant relies heavily on United
Services Automobile Assoc. v. Nationwide Mutual Ins. Co., 241
S.E. 2d 784, 218 Va. 861 (Va. 1978). However, that reliance is
misplaced. First, that opinion was rendered in March, 1978,
eight (8) years before the Virginia Legislature amended Section
8.01-249 to include paragraph 5 specifically addressing actions

² At the June 3, 1994 hearing, defense counsel asserted
that Virginia Code Section 8.01-249 refers to actions sounding
only in contract, not tort. However, a quick review of Section
8.01-249.1-7 reflects a number of actions lying in tort as well
as contract, such as fraud, malicious prosecution, asbestos
litigation, sexual abuse, products liability and contribution
and/or indemnification.

for contribution or for indemnification.

The revisors notes, following Section 8.01-249, explains the Legislature's intention with regard to the seven (7) exceptions set forth in that revision. It explains that:

Section 8.01-249 provides that certain causes of action should not accrue for the purposes of applying statutes of limitations until the damage or injuries are discoverable by the plaintiff. While this represents an exception to the general rule embodied in Section 8.01-230 that a cause of action shall be deemed to accrue when the wrong occurs or when the technical breach of contract duty occurs, Section 8.01-249 follows Virginia law.

Therefore, even if Plaintiff's cause of action were barred by United Services, supra, that decision would be superseded by Virginia Code Section 8.01-249.5 which was passed eight (8) years later. Moreover, a careful reading of United Services suggests that Plaintiff's cause of action may be timely filed even before Section 8.01-249.5. In that case, United Services, an uninsured motorist carrier, settled with its insured for personal injury and property damage received in an automobile accident and then brought a direct action against the tortfeasors' insurance company seeking contribution. Defendant's demur was sustained on the grounds that the insured's action was barred by the Statute of Limitations. The Supreme Court of Virginia affirmed holding that (1) Plaintiff could not maintain a direct action against the tortfeasors insurance carrier without first reducing its claim to a judgment against the tort feisor; and (2) Plaintiff's cause of

action was barred by the expiration of the two year Statute of Limitations for asserting personal injury action.

United Services is distinguishable from the present case. In that case, Plaintiff's Motion for Judgment was procedurally defective due to its failure to reduce its claim against the tortfeasor to a judgment prior to proceeding against the tortfeasor's liability carrier. Moreover, the Plaintiff in that action failed to assert a cause of action for indemnification. In making a veiled reference to that shortcoming, the Court stated:

We do not hold that subrogation was the exclusive remedy available to United Services. We merely observed that the admitted Motion for Judgment filed herein specified that subrogation is the vehicle by which relief is sought.

Id. at 868.

Although it is not entirely clear to what the Supreme Court was referring, it is clear that United Services failed to assert a cause of action for indemnity, unlike The Home Insurance Company in the present action. Moreover, the United Services opinion concluded with an admonition to the Virginia Legislature that:

If the right of subrogation in the uninsured motorist law is to be further expanded to encourage the settlement of claims out of court, it is appropriate that this be done by legislative action rather than by judicial determination.

Id.

Eight (8) years later, in 1986, the Virginia Legislature heeded the Supreme Court of Virginia's advice and passed Virginia Code Section 8.01-249.5. This action placed Virginia law squarely in the mainstream of the law of indemnification and is consistent with the law in surrounding jurisdictions, See Indiana Lumberman Mut. Ins. Co. v. State Farm Mut. Ins. Co., 511 S.W.2d 713 (Tenn.App. 1982); TSZ Kim Zim v. Home Indemnity Co., 95 FRD 349 (D.D.C. 1982); Hager v. Brewer Equipment Co., 17 N.C.App. 489, 195 S.E.2d 54 (N.C. 1960); Chesapeake Utilities Corp. v. Chesapeake & Potomac Telephone Co., 401 A.2d 101 (Del. 1979); Koonce v. Quaker Safety Prod. & Manuf. Co., 798 F.2d 700 (5th Cir. 1986) (applying Texas law) (defendant seeking indemnity or contribution from a third party tortfeasor is not barred from relief simply because the plaintiff's direct cause of action against a third party is barred by a general statute of limitations); as well as the opinions expressed in Wingo v. Norfolk & W.Ry., 638 F.Supp. 107 (W.D. Va 1986) (a cause of action for indemnity does not accrue until the indemnitee has been "injured." The date of injury is better linked to the time in which the indemnitee makes payment, not the time in which the original Plaintiff was injured).

The only remaining issue before the Court is whether Plaintiff has properly asserted a cause of action for indemnification. It is generally held that a person who, without fault on his own part, has been compelled to pay damages is entitled to recover indemnity where, as between the parties to

the indemnity action, the Defendant is primarily liable where the Plaintiff is only secondarily liable. U.S. v. Savage Truck Line, Inc., 209 F.2d 442, cert. denied 347 U.S. 952, 98 L.Ed. 1098, 74 Sup.Ct. 677 (4th Cir. 1954) (applying Virginia law). Indemnity may arise either in contract or in tort; by an express or implied contract to indemnify or by equitable concepts based on the tort theory of indemnity. General Electric Co. v. Cuban American Nickel Co., 396 F.2d 89 (5th Cir. 1965).

The basis underlying equitable or implied indemnity is set forth succinctly in Corpus Juris Secundum, Indemnity at 42 CJS 122:

[Implied or equitable] indemnity is based on the principle that everyone is responsible for his own wrongdoing, and if another person has been compelled to pay the damages which ought to have been paid by the wrongdoer than the entire loss should be shifted to the party who should bear the loss so as to prevent an unjust result at the expense of a party who was either free from fault or negligent to a lesser degree.

See also Builder Supply Co., v. McCabe, 366 Pa. 322, 77 A.2d 368 (Pa. 1973) (indemnity is a right which inures to a person who, without active fault, has been compelled by reason of some legal obligation to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable); Larson v. Minn., 262 Mn.142, 114 N.W.2d 68 (Mn. 1961) (indemnity is essentially an equitable doctrine, its application being particularly appropriate in cases where it is invoked to protect

one who is legally liable but morally innocent, against one whose wrongful conduct or omission has caused liability to be imposed upon him).

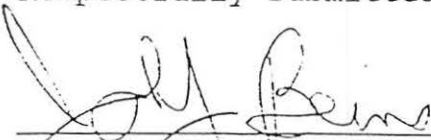
Insofar as Plaintiff was legally liable but morally innocent for Green Thumb and its employees' claims for property damage and personal injuries, it is entitled to seek indemnity and/or contribution from the party who is primarily liable, Defendant, Tina Marie Carr. Therefore, Plaintiff has properly asserted a cause of action for indemnification and/or contribution.

III. CONCLUSION

In this action, The Home Insurance Company asserts a cause of action for indemnification or in the alternative, contribution seeking reimbursement of personal injury and property damages, paid to its insureds due to the sole negligence of Defendant, Tina Marie Carr. As such, Plaintiff's cause of action is governed by Virginia Code Section 8.01-249.5 which states that Plaintiff's cause of action for indemnification and/or contribution did not commence until payment. Therefore, Plaintiff's Motion for Judgment filed one and one-half (1 1/2) years after payment is timely filed.

For the reasons asserted above and at the June 3, 1994 hearing, Plaintiff requests that this Court deny Defendant's Plea in Bar.

Respectfully submitted,


John J. Beins, Esquire

DEC 11 '91 14:42

GREEN

LMB ENT.

POLICE INSURANCE CLAIMS

11, P03

ALTA OF VIRGINIA - DEPARTMENT OF MOTOR VEHICLES
POLICE ACCIDENT REPORT

AGENCY COPY

PR 800F (REV. 7/78)

PAGES 1

DATE DAY OF WEEK TIME AM PM
12/11/91 8:17 AM

COUNTY OF ACCIDENT LONDON

LANDMARKS AT SCENE VETCO POLE #0904

VEHICLE NO. 1 2

VEHICLE NO. 2 FOR PEDESTRIAN

OFFICIAL USE ONLY
CASE # 91-035612

GRID 247 TIME 0817 HET

OR STREET NAME AT SCENE 606 (OLD OX RD)

ROUTE NUMBER OR STREET NAME

INTERSECTION WITH OR 1 MILES 0 FEET 4 5 6 7 OF MERCURY CIR

NAME (LAST, FIRST, MIDDLE) OCCUPATION DRIVER'S NAME (LAST, FIRST, MIDDLE) OCCUPATION

MR. TINA MARIE SURVIVOR BROOKS MARCOS C. M. CHANIC

STREET & NO. YEARS OF DRIVING EXPERIENCE ADDRESS (STREET & NO.) YEARS OF DRIVING EXPERIENCE

201 OLD OX RD 10 4027 MEDFORD DR #30 12

STATE ZIP CODE CITY STATE ZIP CODE

VA 22427 ANNAPOLIS VA 22003

DATE OF BIRTH SEX DRIVER'S LICENSE NUMBER DATE OF BIRTH SEX DRIVER'S LICENSE NUMBER

10/13/63 M 016-58-7298

VEHICLE OWNER'S NAME (LAST, FIRST, MIDDLE) ADDRESS (STREET & NO.)

GREEN THUMB ENT. INC. 2305 OLD OX RD. SUITE A

CITY STATE ZIP CODE

STERLING VA 22170

VEHICLE (SHOW MAKE, MOTORCYCLE, AMBULANCE, ETC.) YEAR REPAIR COST MAKE & TYPE OF VEHICLE (SHOW MAKE, MOTORCYCLE, AMBULANCE, ETC.) YEAR REPAIR COST

200 41K 88 4000 FORD TRK 84 3000

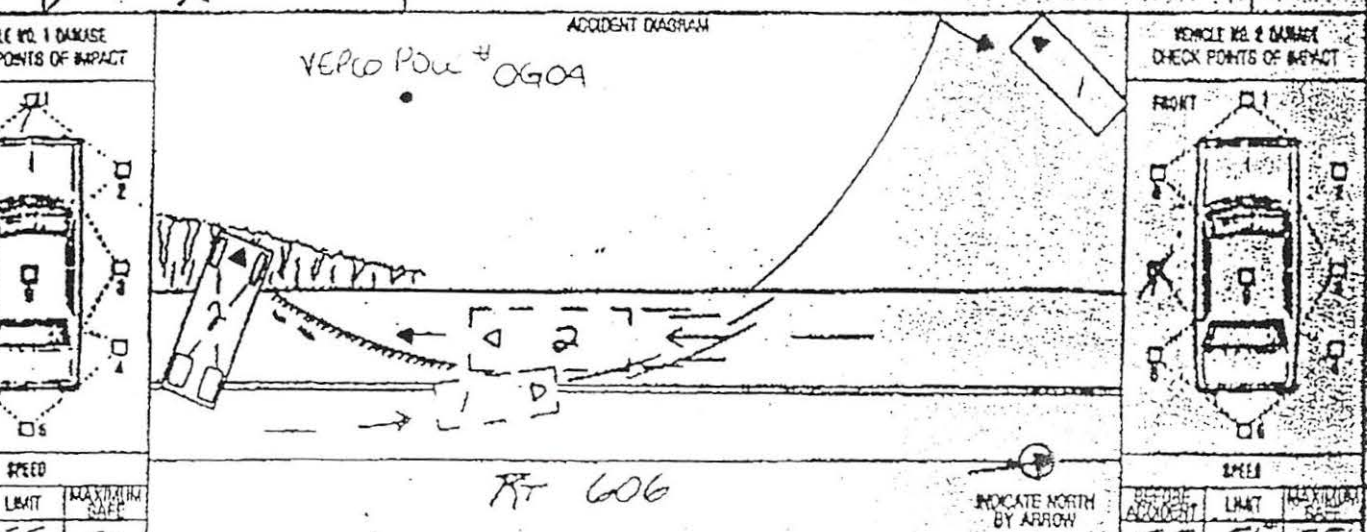
DATE NUMBER STATE NAME OF INSURANCE CO. (NOT AGENT) LICENSE PLATE NUMBER STATE NAME OF INSURANCE CO. (NOT AGENT)

0970 VA ALLSTATE TL 108787 VA HOLIE

OBJECT STRUCK (TREE, FENCE, ETC.) OWNER'S NAME (LAST, FIRST, MIDDLE) ADDRESS REPAIR COST

X

VEHICLE NO. 1 DAMAGE POINTS OF IMPACT



SPEED LIMIT MAXIMUM SPEED

55 55 55

DAMAGE: OVERTURNED 3 UNDERCARRIAGE 6 BY FIRE 7 VEHICLE NO. 2 DAMAGE: OVERTURNED 3 UNDERCARRIAGE 6 BY FIRE 7

NO DAMAGE MOTOR 4 TOTALED 8 OTHER 8 UNKNOWN NO DAMAGE MOTOR 4 TOTALED 8 OTHER 8

VEH 2 WAS TRAVELING SOUTHWEST ALONG VEH 1 DRIVE ACROSS DOUBLE SOLID LINE AND IMPACTED VEH 2 LEFT LANE OVER THE DRAINAGE LINE VEH 2 SPUN SIDEWAYS AND SLIPPED ON ITS ROOF AGAINST EMBANKMENT VEH 1 CONTINUED ON LEAVING THE ROADWAY AND WENT TO REST 231 FT FROM THE POINT OF IMPACT.

VEHICLE NO. 1 DAMAGE POINTS OF IMPACT

10	11	12	13	14	15	16	NAMES OF INJURED - IF DECEASED, INCLUDE DATE OF DEATH
1	4	1	8/24/61	F	3	X	CARR TINA MARIE
1	4	1	10/31/63	M	2	X	BROOKS MARCOS C.
2	2	1	9/13/55	M	2	X	BLUE GARY L.

EXHIBIT

10003

Allstate

ALLSTATE INSURANCE COMPANY
MARKET CLAIM OFFICE
PO BOX 10805
CHANTILLY VA 22021
703-631-7600

December 27, 1991

Green Thumb
Attn: Beth Helki
2305 Old Ox Rd.
Ste. A
Sterling, VA 22170

POLICYHOLDER: David & Tina Carr
CLAIM NUMBER: 4951158253H34
DOL : 12/4/91

Dear Ms. Helki:

We have carefully examined the circumstances surrounding your loss and believe that we have sufficient information at this time to make a proper decision regarding your claim.

Please understand that our obligation as an insurer is not to pay all claims, but to pay only those claims for which our insured is legally liable.

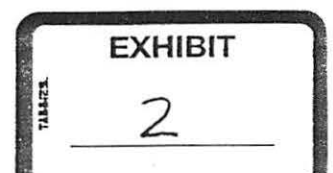
Our investigation reveals that Mr. & Mrs. Carr's policy was not in effect at the time of this accident. Therefore, we must respectfully deny making any payment for your damages.

Sincerely,

Laura L. Jackson
Claim Department

mp

000031





THE HOME INSURANCE COMPANIES
Customer Service Comes First

28161661

★
62-20
311

Issuing
Office
531

Claim Number Policy Number Issue Date Insured Name
531-A-641826-159 BA 4028812 02/25/92 GREEN THUMB
1 826 15

28161661

Upon acceptance
Pay to the Order of GREEN THUMB ENTERPRISES

*****215.00*

In payment of TOWING CHARGES

Occurrence Date
12/04/91

Payable through GREEN THUMB ENTERPRISES
Citibank (DELAWARE) RT. 1 BOX 200
CITICORP ATTN: MARYSE NIEVES
Process through
Federal Reserve CHANTILLY
System

Void if not presented within six
months from date of issue

VA 22021

Jackie White
Not Negotiable

FILE COPY

WE ARE PLEASED TO PRESENT YOU WITH THIS PAYMENT.
SHOULD YOU HAVE ANY QUESTIONS CONCERNING THIS DRAFT, PLEASE CONTACT:
PEYTON ARTZ AT 804-346-0800



THE HOME INSURANCE COMPANIES
Customer Service Comes First

28161568

★
62-20
311

Issuing
Office

531

Claim Number Policy Number Issue Date Insured Name
531-A-641826-600 BA 4028812 02/19/92 GREEN THUMB
1 826 13

28161568

Upon acceptance
Pay to the Order of GREEN THUMB ENTERPRISES

*****3,995.00*

In payment of SETTLMNT OF TOTAL LOSS LESS SALVAGE & DEDUCT

Occurrence Date
12/04/91

Payable through GREEN THUMB ENTERPRISES
Citibank (DELAWARE) RT 1 BOX 200
CITICORP GERY CHAUVIN
Process through
Federal Reserve CHANTILLY
System

Void if not presented within six
months from date of issue

VA 22021

Peyton Artz
Not Negotiable
FILE COPY

000032

WE ARE PLEASED TO PRESENT YOU WITH THIS PAYMENT.
SHOULD YOU HAVE ANY QUESTIONS CONCERNING THIS DRAFT, PLEASE CONTACT:
CLAIM DEPARTMENT AT 804-346-0800





THE HOME INSURANCE COMPANIES
Customer Service Comes First

28166107

★
62-20
311
Issuing
Office
531

Claim Number Policy Number Issue Date Insured Name
531-A-641826-159 BA 4028812 05/21/92 GREEN THUMB
5 811 13

28166107

Upon acceptance
Pay to the Order of GARY BLUE & HIS ATTY. ADRIAN RICCI

*****4,500.00*

In payment of FULL & FINAL SETTLEMENT OF ALL CLAIMS

Occurrence Date
12/04/91

Payable through
Citibank (DELAWARE) SHIFFMAN & RICCI
CITICORP 1700 PENNSYLVANIA AVE NW
Process through WASHINGTON DC 20006
Federal Reserve
System

Void if not presented within six
months from date of issue

Jackie White
Not Negotiable

FILE COPY

WE ARE PLEASED TO PRESENT YOU WITH THIS PAYMENT.
SHOULD YOU HAVE ANY QUESTIONS CONCERNING THIS DRAFT, PLEASE CONTACT:

FEYTON ARTZ AT 804-346-0800



THE HOME INSURANCE COMPANIES
Customer Service Comes First

28166154

★
62-20
311
Issuing
Office
531

Claim Number Policy Number Issue Date Insured Name
531-A-641826-159 BA 4028812 05/28/92 GREEN THUMB
4 811 13

28166154

Upon acceptance
Pay to the Order of MARCUS C. BROOKS & HIS ATTY ADRIAN RICCI

*****25,000.00*

In payment of FULL & FINAL SETTLEMENT OF ANY & ALL CLAIMS

Occurrence Date
12/04/91

Payable through
Citibank (DELAWARE) SHIFFMAN & RICCI
CITICORP 1700 PENNSYLVANIA AVE NW
Process through WASHINGTON DC 20006
Federal Reserve
System

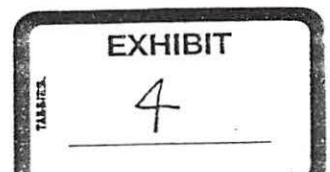
Void if not presented within six
months from date of issue

Davey
Not Negotiable
FILE COPY

000033

WE ARE PLEASED TO PRESENT YOU WITH THIS PAYMENT.
SHOULD YOU HAVE ANY QUESTIONS CONCERNING THIS DRAFT, PLEASE CONTACT:

FEYTON ARTZ AT 804-346-0800



THE HOME
INSURANCE
COMPANY



P.O. BOX 945990
MAITLAND, FL 32794-5990

407-661-7400
1-800-877-8547
FAX: 407-661-7150
FAX: 800-877-7458

August 19, 1992

Tina Marie Carr
HCR01 Box 540
Jefferson Town, VA. 22427

RII

Re:

Claim Number: 531-A-641826-201
Insured: Green Thumb Enterprises
Date of Loss: 12-4-91

Dear Ms. Carr:

We are the Insurance Carrier for Green Thumb who sustained damages to the extent of \$33,710.00 as a result of an Auto loss which occurred on the above-captioned date.

Our investigation reveals that you were responsible for this loss and we look to you for reimbursement. If you are not insured for this loss, please contact me within the next ten (10) days, to make arrangements for repayment. If you are insured, please complete the information below and return this letter to us in the enclosed self-addressed envelope, so that we may contact your insurance carrier direct.

Very truly yours,

Garth Metcalfe

Garth Metcalfe
Recovery Specialist

Insurance Carrier: *Allstate*
Address: *PO Box 1255 Roanoke, VA 24022-2055*
Policy Number: *628 270130 11/07*
Agency Name & Telephone Number: *Mark Atherton 703-354-9566*

Insurance Carrier Notified? Yes ☒ No

Your Signature: *Jim Mac*

Dated: *9-19-92*

Enclosure:

HOME COS.

SEP 25 1992

CLAIMS

EXHIBIT

5

8/CARTWRVF

000034

V. Discard as Mark Atherton is not the agent for initial...

V I R G I N I A :

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

THE HOME INSURANCE COMPANY	:	
As Subrogee for its Insured,	:	
GREEN THUMB ENTERPRISES,	:	
INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	AT LAW NO. 15126
	:	
TINA MARIE CARR,	:	
	:	
Defendant.	:	

SUPPLEMENT TO MEMORANDUM IN SUPPORT OF DEFENDANT'S PLEA IN BAR

Defendant Tina Marie Carr files this Supplement to her Memorandum in Support of her Plea in Bar/Motion to Dismiss.

ARGUMENT

THE PLAINTIFF'S THEORY OF INDEMNITY IN THE AMENDED MOTION FOR JUDGMENT IS INAPPLICABLE TO THIS CASE AND THEREFORE DISMISSAL IS PROPER

In his amended motion for judgment the Plaintiff relies upon theories of "contribution and/or implied or equitable indemnification" (Plaintiff's Amended Motion for Judgment at 2) to enlarge the applicable two year statute of limitations for personal injury actions under Va. Code § 8.01-243(A). He seeks to do this by applying Va. Code § 8.01-249(5), a general statute regarding the accrual of actions for indemnity. Plaintiff argued at the hearing on the motion to dismiss that 249(5) sets the accrual date at the time the indemnity obligation is paid, which would put the date of accrual in this case past the date of the accident, and put the filing of plaintiff's motion for judgment within the two year time limit.

What plaintiff failed to argue is why 249(5) would apply in this case. Where is the contract of indemnification that properly invokes the accrual date of 249(5)? The contract between plaintiff Home Insurance Co. and its insured Green Thumb Enterprises was a contract of insurance. The rights of Home Insurance in this matter arise out of that contract of insurance, hence the filing of this case by Home Insurance "As Subrogee for its Insured Green Thumb Enterprises." Home Insurance Company's claim is based solely on its status as Green Thumb's insurer, not on any contract of indemnification. This is a subrogation claim, not one for indemnification. No amount of legal argument on plaintiff's behalf will alter this fact. Because of this fact 249(5) clearly does not apply in this case.

Home Insurance is seeking to apply the putative claim of equitable indemnification directly against Tina Carr. There is no legal basis for this assertion. The case brought to the court's attention by the defendant at the hearing on this motion is directly on point with regard to this issue. *United Services Automobile Association v. Nationwide Mutual Insurance Company*, 218 Va. 861 (1978), is still good law and continues to be quoted by Virginia courts. The clear holding of USAA is that

if an uninsured motorist carrier settled with its insured without consulting the uninsured motorist there could be no implied promise by the uninsured motorist to pay, but merely a tort claim assigned by law and barred two years after the accident.

USAA, 218 Va. at 867.

This ruling is completely applicable in the present case. Home Insurance has not pled or alleged any consent on the part of Tina Carr to its settlement with Green Thumb. Therefore they cannot claim any right of implied or equitable indemnification against Tina Carr. As such 249(5) covering accrual of indemnification claim does not apply; this cause of action accrued at the time of the accident, and must have been filed within two years from that date; it was not and the plaintiff's claim is time barred.

Conclusion

For all the foregoing reasons, Defendant Tina Marie Carr prays that this Honorable Court sustain her plea in bar and dismiss this matter. Defendant further prays that this court award her costs and attorneys' fees expended on her behalf.

TINA MARIE CARR
By Counsel

HALL, MARKLE, SICKELS & FUDALA, P.C.



Charles W. Sickels, Esq.
VA Bar #13954
4010 University Drive
Suite 200
Fairfax, VA 22030
(703) 591-8600
Counsel for Defendant
Tina Marie Carr

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June, 1994, a true copy of the Memorandum in Support of Defendant's Plea in Bar was mailed first class, postage prepaid to John Beins, Esq. of PROTAS & SPIVAK, CHARTERED, at 6707 Democracy Blvd, No. 400, Bethesda, Maryland, 35345, counsel for Plaintiff.



Charles W. Sickels

TWENTIETH JUDICIAL CIRCUIT
OF VIRGINIA

RAYNER V. SNEAD, JUDGE RETIRED
CARLETON PENN, JUDGE RETIRED

WILLIAM SHORE ROBERTSON, JUDGE
POST OFFICE BOX 985
WARRENTON, VIRGINIA 22186



FAUQUIER, LOUDOUN AND
RAPPAHANNOCK COUNTIES

THOMAS D. HORNE, JUDGE
POST OFFICE BOX 727
LEESBURG, VIRGINIA 22075

JAMES H. CHAMBLIN, JUDGE
POST OFFICE BOX 123
LEESBURG, VIRGINIA 22075

15 June 1994

John J. Beins, Esq.
Protas & Spivok, Chartered
6707 Democracy Blvd. #400
Bethesda, MD 20817

Charles W. Sickels, Esq.
Hall, MARKle, Sickels & Fudala
4010 University Drive Suite 200
Fairfax, VA 22030


In re: The Home Insurance Company, as subrogee for its insured,
Green Thumb Enterprises, Inc. v. Tina Marie Carr
At Law No. 15126

Gentlemen:

Upon consideration of your arguments upon Defendant's Motion to Dismiss herein and your supplemental memoranda, I am of the opinion that §8.01-249(5), Code of Virginia, is controlling and that the Motion should be denied.

Plaintiff's counsel may submit an endorsed Order consistent herewith.

Very truly yours,


Carleton Penn
Judge Designate

000039

V I R G I N I A:

IN THE CIRCUIT COURT FOR LOUDOUN COUNTY

THE HOME INSURANCE COMPANY
As Subrogee for its Insured,
GREEN THUMB ENTERPRISES, INC.

Plaintiff

-v-

TINA MARIE CARR

Defendant

At Law No. 15126

ORDER

Upon consideration of Defendant's Plea in Bar, and
Plaintiff, The Home Insurance Company's Opposition thereto, and
for the reasons set forth at the June 3, 1994 hearing, it is,
this 7th day of July, 1994

ORDERED, that Defendant's Plea in Bar is DENIED due to the
fact that Plaintiff's claim is timely filed under Va. Code §8.01-
249(5).


BY THE COURT:

A Copy-Teste
Richard Kirk, Clerk



Clerk

Carleton Penn
JUDGE PENN

I ASK FOR THIS:


John J. Beins, Esquire
PROTAS & SPIVOK, CHARTERED
2060 N. 14th Street, Suite 306
Arlington, VA 22201

I OBJECT TO THIS:


Charles W. Sickels, Esquire
HALL, MARKLE, SICKELS & FUDALA
4010 University Dr., #200
Fairfax, VA 22030

000040

COPIES TO:

John J. Beins, Esquire
PROTAS & SPIVOK, CHARTERED
2060 N. 14th Street, Suite 306
Arlington, VA 22201

Charles W. Sickels, Esquire
Brian M. McCormick, Esquire
HALL, MARKLE, SICKELS & FUDALA, P.C.
4010 University Drive, Suite 200
Fairfax, Virginia 22030

V I R G I N I A:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

THE HOME INSURANCE COMPANY)
As Subrogee for its Insured,)
GREEN THUMB ENTERPRISES, INC.)

Plaintiff)

v.)

At Law No. 15126)

TINA MARIE CARR)

Defendant)

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

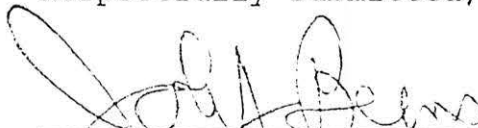
Plaintiff, The Home Insurance Company, by and through counsel, John J. Beins and Protas & Spivok, Chartered, moves for Summary Judgment in the amount of \$33,800, together with interest and costs, against Defendant, Tina Marie Carr, and states as follows:

1. It is undisputed that Defendant, Tina Marie Carr, was solely responsible for the automobile accident in question.

2. Therefore, Plaintiff, The Home Insurance Company, is entitled to judgment as a matter of law.

3. Plaintiff submits its Memorandum of Points and Authorities in Support of its Motion for Summary Judgment.

Respectfully submitted,




John J. Beins, Esquire
PROTAS & SPIVOK, CHARTERED
Counsel for Plaintiff
2060 N. 14th Street, Suite 306
Arlington, VA 22201
(703) 525-4766
Bar No.: 35345

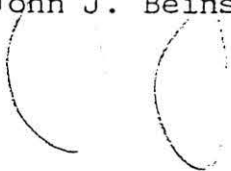
000042

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Plaintiff's Motion for Summary Judgment, Memorandum of Points, Statement of Material Facts Not in Dispute and Authorities and Order was mailed, postage prepaid, this 31 day of August, 1994 to:

Charles W. Sickels, Esquire
HALL, MARKLE, SICKELS & FUDALA
4010 University Drive, Suite 200
Fairfax, VA 22030



John J. Beins, Esquire


000043

V I R G I N I A:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

THE HOME INSURANCE COMPANY)
As Subrogee for its Insured,)
GREEN THUMB ENTERPRISES, INC.)

Plaintiff)

v.)

At Law No. 15126

TINA MARIE CARR)

Defendant)

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, The Home Insurance Company, submits this Memorandum of Points and Authorities in support of its Motion for Summary Judgment.

I. FACTUAL BACKGROUND

This action arises out of an automobile accident which occurred on December 4, 1991. At that time, two employees of Green Thumb Enterprises, Inc. ("Green Thumb"), Gary Blue and Marcus C. Brooks, were traveling south in a company vehicle on Virginia Route 606 in Loudoun County. Suddenly, Defendant, Tina Marie Carr, traveling north on Virginia Route 606 drifted across the double solid line and struck the Green Thumb vehicle, causing property damage to the vehicle and personal injuries to Messrs. Blue and Brooks. A copy of the police report is attached hereto as Plaintiff's Exhibit 1.

Following the accident, Ms. Carr informed the police officer that her insurance company was Allstate. However, on December 27, 1991, Allstate's claim adjuster informed Green Thumb that the Defendant's policy was not in effect at the time of the accident.

000044

A copy of the letter denying coverage is attached hereto as Plaintiff's Exhibit 2.

Accordingly, Green Thumb and its employees, Messrs. Blue and Brooks, filed an uninsured motorist claim with Green Thumb's insurance carrier, The Home Insurance Company. Thereafter, on February 19 and 25, 1992, The Home Insurance Company paid Green Thumb the total amount of \$4,210 for property damage and towing charges. A copy of the checks are attached hereto as Plaintiff's Exhibit 3.

On May 21 and 28, 1992, The Home Insurance Company paid Messrs. Blue and Brooks the total amount of \$29,500 in full and final settlement of their personal injury claims. A copy of the checks are attached hereto as Plaintiff's Exhibit 4.

On August 19, 1992, The Home Insurance Company notified Defendant, Tina Marie Carr, of its intention to seek reimbursement of the amount of \$33,710 due to Defendant's responsibility for the automobile accident.¹ A copy of the notification letter is attached hereto as Plaintiff's Exhibit 5 When Defendant failed to make arrangements to pay her debt, Plaintiff filed this on December 10, 1993 action seeking "contribution" for the amounts paid to Green Thumb and its employees.

On March 25, 1994, Defendant filed a Plea in Bar asserting that Plaintiff's Motion for Judgment was filed after the expiration of the Statute of Limitations. Thereafter, on May 18, 1994, Plaintiff filed a Consent Motion to Amend the Motion for Judgment

¹ Plaintiff's claim also includes Green Thumb's \$100 deductible; therefore, the actual amount claimed is \$33,810.

asserting a separate cause of action for implied and/or equitable indemnification. That Motion was granted on May 20, 1994, by Judge Horne. On June 3, 1994, the parties appeared before Judge Penn on Defendant's Plea in Bar. Following oral argument by both sides, the Court requested a brief more fully setting forth Plaintiff's position.

On June 15, 1994, Judge Penn denied Defendant's Motion to Dismiss. Shortly thereafter, Plaintiff's counsel served Interrogatories, Requests for Production of Documents and Requests for Admissions on Defendant's counsel. Defendant's failure to respond to those discovery requests is the subject of the accompanying Motion to Compel.

II. LEGAL ARGUMENT

Ordinarily, issues of negligence and proximate cause are for the jury; but, where reasonable men may not disagree on the facts, those issues become questions of law for the Court to decide. Lubowiecki v. Donnell, 235 Va.131, 366 S.E.2d 90 (1988); Phillip Morris, Inc. v. Emerson, 235 Va.380, 368 S.E.2d 268 (1988).

In the case at bar, it is undisputed that Defendant, Carr, crossed the double yellow line and struck the Green Thumb Vehicle causing damage to the vehicle and to Messrs. Blue and Brooks in the total amount of \$33,810. It is also undisputed that Plaintiff, The Home Insurance Company, paid Green Thumb and its employees \$33,710 in full and final settlement of their respective claims for personal injuries and property damage.² Therefore, Plaintiff, The

² Plaintiff is also obligated to recover its insureds' \$100 deductible.

Home Insurance Company, is entitled to judgment in the amount of \$33,810, as a matter of law, against Defendant, Tina Marie Carr.

III. CONCLUSION

For the reasons asserted above, Plaintiff, The Home Insurance Company, requests judgment in the amount of \$33,810, against Defendant, Tina Marie Carr.

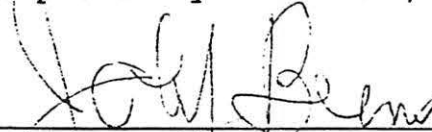
Respectfully submitted,



John J. Beins, Esquire
PROTAS & SPIVOK, CHARTERED
Counsel for Plaintiff
2060 N. 14th Street, Suite 306
Arlington, VA 22201
(703) 525-4766
Bar No.: 35345

employees.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "John J. Beins", is written over a horizontal line.

John J. Beins, Esquire
PROTAS & SPIVOK, CHARTERED
Counsel for Plaintiff
2060 N. 14th Street, Suite 306
Arlington, VA 22201
(703) 525-4766
Bar No.: 35345

000048

DEC 11 '91 14:42

GREEN

LMB ENT.

POLICE INSURANCE CLAIMS

11 P03

COMM

ALTH OF VIRGINIA - DEPARTMENT OF MOTOR VEHICLES
POLICE ACCIDENT REPORT

AGENCY COPY

PR 300P (REV. 7/86)

OF 1 PAGES

DATE 12/11/91	DAY OF WEEK WED	TIME 8:17	AM PM X	COUNTY OF ACCIDENT LADDEN	MILE POST NUMBER 11.1	RAILROAD CROSSING NO. NO. IF WITHIN 150 FEET X
LANDMARKS AT SCENE VEIC POLE # 0604	NUMBER OF VEHICLES 2	OFFICIAL USE ONLY CASE # 91-035612				
OR STREET NAME AT SCENE 606 (OLD OX RD)				GRID 247 TIME 0817 HR		

INTERSECTION WITH OR L X MILES 1 FEET X	ROUTE NUMBER OR STREET NAME MERCURE CIR
--	--


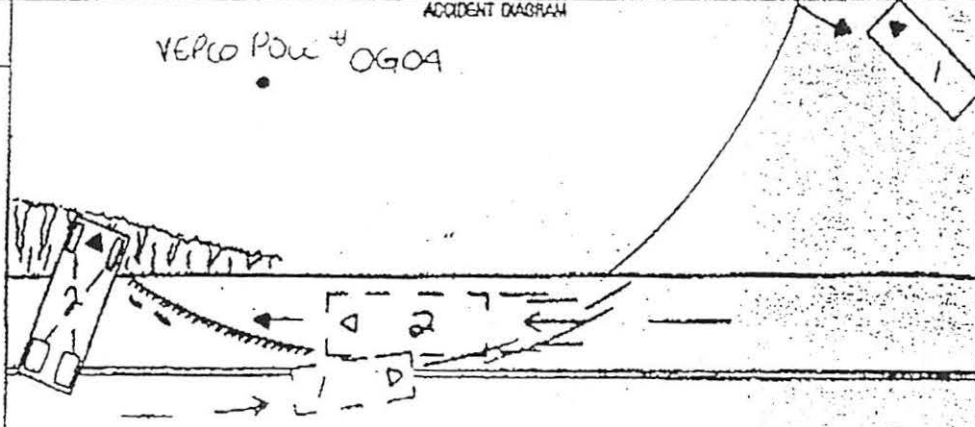
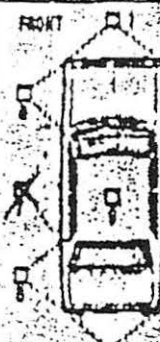
NAME (LAST, FIRST, MIDDLE) RR TINA MARIE	OCCUPATION SUPERVISOR	DRIVER'S NAME (LAST, FIRST, MIDDLE) BROOKS MARCOS C.	OCCUPATION MECHANIC
STREET & NO. CR DI 1200 S40	YEARS OF DRIVING EXPERIENCE 10	ADDRESS (STREET & NO.) 4027 MEDFORD DR #30	YEARS OF DRIVING EXPERIENCE 12
STATE VA	ZIP CODE 22427	CITY ANNANDALE	STATE VA

BIRTH 1/1/61	SEX F	DRIVER'S LICENSE NUMBER 218-78-4458	STATE VA	DATE OF BIRTH Month Day Year 10/31/63	SEX M	DRIVER'S LICENSE NUMBER 016-58-7298	STATE VA
OWNER'S NAME (LAST, FIRST, MIDDLE) RR DAVID A & TINA M				VEHICLE OWNER'S NAME (LAST, FIRST, MIDDLE) GREEN THUMB ENT. INC.			
STREET & NO. 5/A				ADDRESS (STREET & NO.) 2305 OLD OX RD. SUITE A			
STATE VA				CITY STERLING			

TYPE OF VEHICLE (SHOW MAKE, MOTORCYCLE, AMBULANCE, ETC.) 92DA 41K	YEAR 88	REPAIR COST 4000	MAKE & TYPE OF VEHICLE (SHOW MAKE, MOTORCYCLE, AMBULANCE, ETC.) FORD TRK	YEAR 84	REPAIR COST 3000
--	------------	---------------------	---	------------	---------------------

PLATE NUMBER N970	STATE VA	NAME OF INSURANCE CO. (NOT AGENT) ALLSTATE	LICENSE PLATE NUMBER TL 68787	STATE VA	NAME OF INSURANCE CO. (NOT AGENT) HOLIE
----------------------	-------------	---	----------------------------------	-------------	--

TO H	OBJECT STRUCK (TREE, FENCE, ETC.) X	OWNER'S NAME (LAST, FIRST, MIDDLE)	ADDRESS	REPAIR COST
---------	--	------------------------------------	---------	-------------

VEHICLE NO. 1 DAMAGE X POINTS OF IMPACT	ACCIDENT DIAGRAM VEIC POLE # 0604 RT 606	VEHICLE NO. 2 DAMAGE CHECK POINTS OF IMPACT
		
SPEED LIMIT 55	INDICATE NORTH BY ARROW	SPEED LIMIT 55

VEHICLE NO. 1 DAMAGES: UNKNOWN NO DAMAGE	OVERTURNED MOTOR	UNDERCARRIAGE TODDED	BY FIRE OTHER	VEHICLE NO. 2 DAMAGES: UNKNOWN NO DAMAGE	OVERTURNED MOTOR	UNDERCARRIAGE TODDED	BY FIRE OTHER
---	---------------------	-------------------------	------------------	---	---------------------	-------------------------	------------------

VEH 2 WAS TRAVELING STRAIGHT AHEAD. VEH 1 DRIFTED ACROSS DOUBLE SOLID LINE AND IMPACTED VEH 2 1FT IN IS OVER THE DUB LINE VEH 2 SPUN SIDEWAYS AND SLIPPED ON ITS ROOF AGAINST E FENCEMENT. VEH 1 CONTINUED ON LEAVING THE ROADWAY AND WENT TO REST 231FT FROM THE POINT OF IMPACT.

S CHARGED

10	11	12	13	14	15	16	NAMES OF INJURED - IF DECEASED, INCLUDE DATE OF DEATH
1	4	1	8124101	F	3	X	CARR TINA MARIE
1	4	1	1031103	M	2	X	BROOKS MARCOS C.
2	2	1	2112153	M	2	X	BLUE GARY L.

EXHIBIT

000049

Allstate

ALLSTATE INSURANCE COMPANY
MARKET CLAIM OFFICE
PO BOX 10805
CHANTILLY VA 22021
703-631-7600

December 27, 1991

Green Thumb
Attn: Beth Helki
2305 Old Ox Rd.
Ste. A
Sterling, VA 22170

POLICYHOLDER: David & Tina Carr
CLAIM NUMBER: 4951158253H34
DOL : 12/4/91

Dear Ms. Helki:

We have carefully examined the circumstances surrounding your loss and believe that we have sufficient information at this time to make a proper decision regarding your claim.

Please understand that our obligation as an insurer is not to pay all claims, but to pay only those claims for which our insured is legally liable.

Our investigation reveals that Mr. & Mrs. Carr's policy was not in effect at the time of this accident. Therefore, we must respectfully deny making any payment for your damages.

Sincerely,

Laura L. Jackson
Claim Department

mp

EXHIBIT
000050
2



THE HOME INSURANCE COMPANIES
Customer Service Comes First

28161661



62-20
311

Claim Number

Policy Number

Issue Date

Insured Name

Issuing
Office
531

531-A-641826-159 BA 4028812
1 826 15

02/25/92 GREEN THUMB

28161661

Upon acceptance

Pay to the Order of GREEN THUMB ENTERPRISES

\$*****215.00*

In payment of TOWING CHARGES

Occurrence Date
12/04/91

Payable through

Citibank (DELAWARE)

CITICORP

GREEN THUMB ENTERPRISES

RT. 1 BOX 200

ATTN: MARYSE NIEVES

CHANTILLY

Process through
Federal Reserve
System

VA 22021

Jackie White
Not Negotiable

FILE COPY

WE ARE PLEASED TO PRESENT YOU WITH THIS PAYMENT.

SHOULD YOU HAVE ANY QUESTIONS CONCERNING THIS DRAFT, PLEASE CONTACT:

PEYTON ARTZ AT 804-346-0800



THE HOME INSURANCE COMPANIES
Customer Service Comes First

28161568



62-20
311

Claim Number

Policy Number

Issue Date

Insured Name

Issuing
Office

531-A-641826-600 BA 4028812
1 826 13

02/19/92 GREEN THUMB

531

28161568

Upon acceptance

Pay to the Order of GREEN THUMB ENTERPRISES

\$*****3,995.00*

In payment of SETTLMNT OF TOTAL LOSS LESS SALVAGE & DEDUCT

Occurrence Date
12/04/91

Payable through

Citibank (DELAWARE)

CITICORP

GREEN THUMB ENTERPRISES

RT 1 BOX 200

GERY CHAUVIN

CHANTILLY

Process through
Federal Reserve
System

VA 22021

Void if not presented within six
months from date of issue

Peyton Artz
Not Negotiable

FILE COPY

000051

WE ARE PLEASED TO PRESENT YOU WITH THIS PAYMENT.

SHOULD YOU HAVE ANY QUESTIONS CONCERNING THIS DRAFT, PLEASE CONTACT:

CLAIM DEPARTMENT AT 804-346-0800

EXHIBIT

3



THE HOME INSURANCE COMPANIES
Customer Service Comes First

28166107



62-20
311

Issuing
Office

531

Claim Number

Policy Number

Issue Date

Insured Name

531-A-641826-159 BA 4028812
5 811 13

05/21/92 GREEN THUMB

28166107

Upon acceptance

Pay to the Order of GARY BLUE & HIS ATTY. ADRIAN RICCI

*****4,500.00*

Occurrence Date

12/04/91

In payment of

FULL & FINAL SETTLEMENT OF ALL CLAIMS

Payable through

Citibank (DELAWARE)

CITICORP

SHIFFMAN & RICCI

1700 PENNSYLVANIA AVE NW

Process through

Federal Reserve
System

WASHINGTON DC 20006

Void if not presented within six
months from date of issue

Jackie White
Not Negotiable

FILE COPY

WE ARE PLEASED TO PRESENT YOU WITH THIS PAYMENT.

SHOULD YOU HAVE ANY QUESTIONS CONCERNING THIS DRAFT, PLEASE CONTACT:

PEYTON ARTZ AT 804-346-0800



THE HOME INSURANCE COMPANIES
Customer Service Comes First

28166154



62-20
311

Issuing
Office

531

Claim Number

Policy Number

Issue Date

Insured Name

531-A-641826-159 BA 4028812
4 811 13

05/28/92 GREEN THUMB

28166154

Upon acceptance

Pay to the Order of MARCUS C. BROOKS & HIS ATTY ADRIAN RICCI

*****25,000.00*

Occurrence Date

12/04/91

In payment of

FULL & FINAL SETTLEMENT OF ANY & ALL CLAIMS

Payable through

Citibank (DELAWARE)

CITICORP

SHIFFMAN & RICCI

1700 PENNSYLVANIA AVE NW

Process through

Federal Reserve
System

WASHINGTON DC 20006

Void if not presented within six
months from date of issue

Davey
Peyton Artz
Not Negotiable

FILE COPY

000052

WE ARE PLEASED TO PRESENT YOU WITH THIS PAYMENT.

SHOULD YOU HAVE ANY QUESTIONS CONCERNING THIS DRAFT, PLEASE CONTACT:

PEYTON ARTZ AT 804-346-0800

EXHIBIT

4

THE HOME
INSURANCE
COMPANY



P.O. BOX 945990
MAITLAND, FL 32794-5990

407-661-7400
1-800-877-8547
FAX: 407-661-7150
FAX: 800-877-7458

August 19, 1992

Tina Marie Carr
HCR01 Box 540
Jefferson Town, VA. 22427

RII

Re:

Claim Number: 531-A-641826-201
Insured: Green Thumb Enterprises
Date of Loss: 12-4-91

Dear Ms. Carr:

We are the Insurance Carrier for Green Thumb who sustained damages to the extent of \$33,710.00 as a result of an Auto loss which occurred on the above-captioned date.

Our investigation reveals that you were responsible for this loss and we look to you for reimbursement. If you are not insured for this loss, please contact me within the next ten (10) days, to make arrangements for repayment. If you are insured, please complete the information below and return this letter to us in the enclosed self-addressed envelope, so that we may contact your insurance carrier direct.

Very truly yours,

Garth Metcalfe /uc

Garth Metcalfe
Recovery Specialist

Insurance Carrier: *Allstate*
Address: *PO Box 1255 Roanoke, VA 24022-2055*
Policy Number: *625 270130 11/07*
Agency Name & Telephone Number: *Mark Atherton 703-354-9566*

Insurance Carrier Notified? Yes *X* No

Your Signature: *Jim Mc*

Dated: *9-19-92*

Enclosure:

HOME COS.

SEP 25 1992

CLAIMS

EXHIBIT

5

8/CARTWRVF

V. Dancer who Mark Atherton is not the agent we in Maitland

000053

V I R G I N I A:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

THE HOME INSURANCE COMPANY)
As Subrogee for its Insured,)
GREEN THUMB ENTERPRISES, INC.)

Plaintiff)

v.)

At Law No. 15126

TINA MARIE CARR)

Defendant)

ORDER

Upon consideration of Plaintiff's Motion for Summary Judgment,
and any Opposition thereto, it is, by the Court, this 7th day of
October, 1994

ORDERED, that Plaintiff's Motion be GRANTED; and it is further

ORDERED, that judgment be, and the same is hereby entered
against Defendant, Tina Marie Carr, in the amount of \$33,810, plus
costs.

BY THE COURT:

Thomas D. Home
JUDGE

I ASK FOR THIS:

John J. Beins
John J. Beins, Esquire
PROTAS & SPIVOK, CHARTERED
Counsel for Plaintiff
2060 N. 14th Street, Suite 306
Arlington, VA 22201
(703) 525-4766
Bar No.: 35345

Seen and Objections
Noted:

Brian M. McCormick
Brian M. McCormick
Hall, Markle, Sicketts & Fiala
4010 University Dr.
Suite 200
Fairfax, Va. 22030

000054