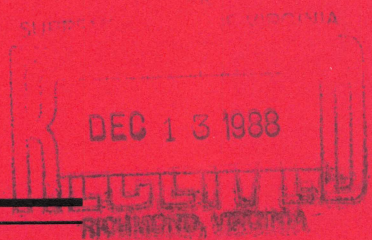


238 Va 192



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IN THE  
**Supreme Court of Virginia**  
AT RICHMOND

---

RECORD NO. 871340

---

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Appellant,

v.

JOHN F. KELLY,

Appellee.

---

JOINT APPENDIX

---

George H. Gray  
OUTLAND, GRAY, O'KEEFE  
AND HUBBARD  
112 Coastal Way  
Post Office Box 1545  
Chesapeake, Virginia 23320  
(804) 547-0171

Counsel for Appellant

John R. Lomax  
FINE, FINE, LEGUM & FINE  
Post Office Box 61549  
Virginia Beach, Virginia 23462  
(804) 490-4545

Counsel for Appellee



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VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

JOHN F. KELLY,

Plaintiff,

v.

AT LAW NO. L86-2266

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY  
Serve: Donald T. Zimmerman, Registered Agent  
1500 State Farm Boulevard  
Charlottesville, Virginia 22909

Defendant.

MOTION FOR JUDGMENT

COMES NOW the plaintiff, John F. Kelly, and moves for judgment against the defendant on the grounds and in the amount as hereinafter set forth:

1. On February 18, 1986, the Norfolk Circuit Court rendered a final judgment in an action entitled John F. Kelly v. Nick Thomas Schnikder, a/k/a Nick Thomas Schneider At Law No. L83-1828, in favor of the plaintiff, the plaintiff therein, and against the defendant therein, for the sum of \$50,000.00 for damages for personal injuries sustained by the plaintiff and costs. A copy of this judgment is attached hereto, marked Exhibit "A", and made a part hereof.

2. Plaintiff is the owner of this judgment.

3. Plaintiff was covered under the provisions of a certain Motor Vehicle Public Liability Policy issued to Joseph A. Myers by State Farm Mutual Automobile Insurance Company under the Uninsured Motorist Provisions of that policy.

4. That policy was in force on the date and at the time plaintiff received the bodily injuries for which he recovered the judgment described in paragraph one above.

5. The policy mentioned above had policy limits of \$20,000.00.

6. The defendant paid the sum of \$15,722.00 on account of the judgment.

7. That prior to the trial of the action resulting in the judgment described in paragraph one, the defendant, without the knowledge or consent of the plaintiff paid to the United States Government the sum of \$4,278.00.

8. As a result of the defendant's action, the plaintiff was unable to prove the government's bill as an element of damages in his trial and was unable to compromise the government's claim for medical services.

9. The defendant had no right to pay the government and instead should have paid the plaintiff the full policy limits of \$20,000.00.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of \$4,278.00 together with a reasonable attorney's fee and his costs in this behalf expended.

JOHN F. KELLY

BY JOHN R. LOMAX  
Of Counsel

John R. Lomax, p.q.  
FINE, FINE, LEGUM & FINE, P.A.  
One Commerce Park  
Post Office Box 61546  
Virginia Beach, Virginia 23462  
(804) 490-4545

Virginia:

In the Circuit Court of the City of Norfolk, on the 18th day  
of February, in the year 19 86

JOHN F. KELLEY

PLAINTIFF

VS AT LAW L83-1828

NICK THOMAS SCHNIKDER a/k/a  
NICK THOMAS SCHNEIDER

L 251- 86

DEFENDANT

JUDGMENT ORDER

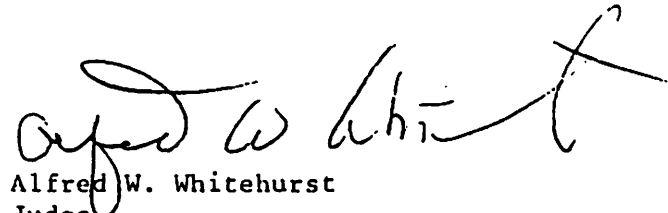
The trial of this case was heard on the 3rd day of February, 1986 whereupon the jury verdict was in favor of the Plaintiff in the amount of Fifty Thousand Dollars and No Cents (\$50,000.00) and was standing on a motion made by the Defendant to set aside the jury verdict as being contrary to the law and the evidence and excessive and to grant him a new trial.

Thereupon, counsel for the Defendant has notified the Court that they no longer wish to pursue the matter of having the jury verdict set aside and judgment should be entered on the jury verdict.

Whereupon it is considered and Ordered by the Court that the Plaintiff, John F. Kelley, recover of and have judgment against the Defendant, Nick Thomas Schnikder a/k/a Nick Thomas Schneider, in the sum of Fifty Thousand Dollars and No Cents (\$50,000.00) with interest to be computed at the rate of twelve percentum (12) per annum from the 3rd day of February, 1986 until paid, together with his costs about his suit herein expended.

Whereupon, judgment is entered on the jury verdict and this case is dismissed from the docket of this Court.

Office of  
William T. Ryan  
Clerk of the  
Circuit Court  
Norfolk, Virginia

  
Alfred W. Whitehurst  
Judge

3

A COPY, TESTE: WILLIAM T. RYAN, CLERK

BY: , D.C.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

JOHN F. KELLY,

Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Defendant

:

:

: LAW DOCKET NO. L86-2266

:

DEMURRER

Defendant demurs to plaintiff's motion for judgment on the following grounds:

1. It states no cause of action because payment to the United States of America as alleged in paragraph 7 of the motion for judgment did not require the "knowledge or consent of the plaintiff."

2. The claim for medical services of the government was not the property of plaintiff, it was the property of the government.

3. There is and was no prohibition in law against defendant paying the government's claim and there was no right in law belonging to plaintiff to compromise the government's claim.

4. Payment to the government was a right of defendant which it exercised.

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY, Defendant

George H. Gray  
Outland, Gray, O'Keefe & Hubbard By  
112 Coastal Way  
Post Office Box 1545  
Chesapeake, Virginia 23320

*George H. Gray*  
Of Counsel

4

I CERTIFY THAT A COPY OF THE FOREGOING  
PLEADING WAS MAILED TO EACH COUNSEL  
OF RECORD ON 10/20/86

*George H. Gray*

FILED 10/21/86

173  
VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

JOHN F. KELLY,

Plaintiff,

v.

AT LAW NO. L86-2266

STATE FARM AUTOMOBILE INSURANCE COMPANY,

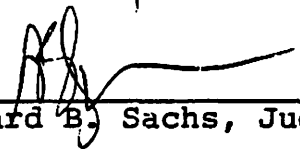
Defendant.

ORDER

This matter came on to be heard on the Demurrer filed by the defendant and was argued by counsel and the Court having maturely considered same, doth

ORDER that the Demurrer be and the same hereby is overruled, to which action of the Court the defendant, by counsel, objects.

161  
ENTER: 12/17/86

  
Leonard B. Sachs, Judge

A COPY, TESTE: WILLIAM T. RYAN, CLERK  
BY: *Carter B. May* D.C.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

JOHN F. KELLY,

Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Defendant

:

:

:

LAW DOCKET NO. L86-2266

:

:

---

PLEAS OF RES JUDICATA  
AND COLLATERIAL ESTOPPEL

For plea of res judicata and plea of collateral estoppel to the claim in plaintiff's motion for judgment, defendant states as follows:

1. In the trial on February 3, 1986 of the suit described in plaintiff's motion for judgment, plaintiff offered in evidence the claim of the United States of America of \$4,278.00 but on the objection of the attorney for defendant that there was no claim of the United States of America to present because the claim had been paid by defendant, the trial court sustained the objection, the claim of the United States of America of \$4,278.00 was refused to be admitted; and to this ruling the plaintiff objected and excepted.

2. The judgment of the court in that case was entered February 18, 1986 and became final.

3. Plaintiff is barred from presenting the claim of the United States of America in this case either for the government or for himself for the reason previously stated and by the



ruling of the trial court in the previous case which went to final judgment.

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY, DEFENDANT

By George H. Gray  
Of Counsel

George H. Gray  
Outland, Gray, O'Keefe and Hubbard  
112 Coastal Way  
Post Office Box 1545  
Chesapeake, Virginia 23320

I CERTIFY THAT A COPY OF THE FOREGOING  
PLEADING WAS MAILED TO EACH COUNSEL  
OF RECORD ON 1/26/87

G. H. Gray



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

March 25, 1987

100 ST. PAUL'S BOULEVARD  
NORFOLK, VIRGINIA 23510  
(804) 441-2467

LEONARD B. SACHS  
JUDGE

John R. Lomax, Esquire  
FINE, FINE, LEGUM & FINE  
One Commerce Park  
P. O. Box 61546  
Virginia Beach, VA 23462

George H. Gray, Esquire  
P. O. Box 1545  
Chesapeake, VA 23320

Re: John F. Kelly  
v.  
State Farm Automobile Insurance Company  
Law No. L86-2266

Gentlemen:

I have considered the pleadings and the argument of counsel with their authorities submitted in support thereof.

It is my judgment that the defendant's plea of res judicata and collateral estoppel ought to be and will be, by proper order, overruled for the reasons set forth hereafter.

FACTS

In this unique case, apparently of first impression, John F. Kelly has sued his automobile liability carrier, State Farm Mutual Automobile Insurance Company in the amount of \$4,278.00 together with reasonable attorney's fees and costs.

The unusual facts are these: Kelly was injured in an automobile accident sometime ago when he was insured by State Farm. The person with whom he was involved in this accident was one Nick Thomas Schnikder or Schneider, (hereinafter, Schenider).

Kelly alleged that Schneider was an uninsured motorist and therefore called upon his liability insurance carrier, State Farm, to provide him the protection accorded under the Virginia Uninsured Motorist Law and the automobile liability insurance policy issued in accordance with that statutory mandate.

Kelly was in the military service and was treated in a military hospital.

John R. Lomax, Esquire  
George H. Gray, Esquire  
March 25, 1987  
Page Two

State Farm paid the United States Government under the Medical Care Recovery Act, 42 U.S.C. §2651, the sum of \$4,278.00 before Kelly obtained his judgment against Schneider.

When Kelly went to trial on motion made by State Farm, Kelly was precluded from proving as damages the reasonable amount of the value of services rendered to Kelly by the United States Government in the amount of \$4,278.00.

Plaintiff's counsel states that prior to the trial of the personal injury case upon its merits, State Farm apparently without notice to plaintiff or plaintiff's counsel, settled with the government only a few days before the trial and when plaintiff's counsel, at the trial of his case on damages, attempted to prove his damages the amount of the government's claim for medical services rendered to the plaintiff, as he is entitled to do under §8.01-37.1 Code of Virginia 1950 as amended, post.

State Farm's attorney objected to the introduction of that evidence arguing that that debt had been paid by State Farm and was not therefore available to the plaintiff as an item of damage. Plaintiff's counsel states that he argued under the collateral source rule which applies in Virginia, that he was entitled to prove it even though it had been paid by some third party just as any doctor's or hospital bill which has been paid by insurance can be offered and will be received in evidence in Virginia. The collateral source rule is based upon the premise that a tortfeasor has no moral or legal right to claim the benefits which accrue to the plaintiff by reason of the prudence of the plaintiff who benefits by such coverage by purchasing insurance or which results from the goodwill and beneficence of an employer, parent, neighbor or other person or organization which voluntarily pays the insured plaintiff's bills or continues to pay his salary during disability.

Counsel for State Farm takes the position here that the ruling of the Court on the admissibility of this evidence at the trial of the accident case (the value of the government's claim for medical services) was an adjudication upon its merits and this therefore entitles State Farm to a ruling in its favor on the basis of collateral estoppel and/or res judicata, in this suit.

John R. Lomax, Esquire  
George H. Gray, Esquire  
March 25, 1987  
Page Three

Kelly's attorney states that that was merely an evidentiary ruling on admission of evidence and therefore not an "issue" which was litigated and decided and which would support a plea of collateral estoppel or res judicata.

Notwithstanding that the Court excluded the value of the services rendered to Kelly in the government hospital, Kelly, nevertheless, obtained a judgment in the amount of \$50,000.00 against Schneider, the uninsured motorist, and then turned to his insurance carrier, State Farm, for the coverage. State Farm gave him, allegedly in satisfaction of their obligation under the insurance contract, the sum of \$15,722.00, which was the difference between \$20,000.00 U.M. coverage under the contract less the amount of the medical bills paid to the USA.

Now, Kelly has brought this suit claiming that State Farm was not legally, nor contractually, nor morally obligated to pay the United States of America any sum of money claimed by the United States of America as reasonable value for the services rendered to Kelly until Kelly had obtained an adjudication of liability against Schneider.

It is Kelly's position that State Farm was a mere volunteer and should look to the United States for the return of the \$4,278.00 paid to the government prior to the time that Kelly obtained his judgment against Schneider and further, that State Farm should pay that sum of money, \$4,278.00 to him as prayed for in the present lawsuit.

State Farm demurred and stated that they are and were obligated by law under the provisions of the Medical Care Recovery Act, 42 U.S.C., §2651 and that they were obligated to do so either before or after the liability of Schneider had been adjudicated with respect to Kelly on the accident complained of. The Court has previously overruled that demurrer.

Kelly, in his argument, states essentially that State Farm wants it both ways: First, in defending the liability case they denied that Schneider was negligent. (State Farm defended in its own name) (The Court here does not believe that that would make any difference for the resolution of this issue). Secondly, plaintiff states that at the time they were denying liability on the part of Schneider, they had already, in essence, admitted liability by paying the claim of the government.

John R. Lomax, Esquire  
George H. Gray, Esquire  
March 25, 1987  
Page Four

Thirdly, Kelly, takes the position that State Farm made the payment so that they could keep out the amount of the medical claim in order to reduce or perhaps in this case, entirely eliminate the special damage claim of Kelly in the liability suit with the expected result that the gross recovery would be diminished proportionately.

#### THE ISSUES

1. Was the ruling by the trial court at trial of the personal injury case upon its merits, excluding the value of the services claimed by the government for medical care rendered to the plaintiff, an "issue" upon which the defendant in this case is entitled to a decree in its favor on grounds of res judicata and collateral estoppel?

The parties are agreed that all of the evidence is before the Court by pleading or stipulation in requests for admissions filed by each of the parties and by agreement of counsel presented to the court. Plaintiff, by counsel, has moved for Summary Judgment.

#### THE LAW

The Medical Care Recovery Act, 42 U.S.C. §2651 in its pertinent part states that:

"....the United States shall have a right to recover from third persons the reasonable value of the care and treatment... furnished...and shall, as to this right be subrogated to any right or claim that the injured...person...has against a third person to the extent of the reasonable value of the care and treatment so furnished... ."

In support of that act, the Virginia Legislature enacted Section 8.01-37.1, Code of Virginia which provides that whenever a person has personal injuries resulting from the negligence of another and is treated at a medical facility of the United States Government resulting in a lien in favor of the government under 42 U.S.C. §2651, then:



John R. Lomax, Esquire  
George H. Gray, Esquire  
March 25, 1987  
Page Five

"....the injured party may on behalf of the United States claim the reasonable value of the medical services provided as an element of damages in a civil action against the person alleged to be liable." (Emphasis added)

Subrogation is defined and explained generally in Volume 18, Michie's Jurisprudence, Subrogation, Section Two, Definition and General Consideration (at page 3) as follows:

"Subrogation is the substitution of another person in the place of the creditor, to whose rights he succeeds in relation to the debt. ....subrogation operates as an equitable assignment of a debt. Its principles are similar to those relating to contribution and exoneration.

....Subrogation springs naturally out of the two equities of contribution and exoneration.... .

....

There are two kinds of subrogation, namely, subrogation by operation of law, as for example when a surety on a note pays the note...and conventional subrogation, that is, by contract."

It seems clear from a fair reading of the statutes of the United States and Virginia and the definitions gleaned from statutory authorities referred to by Michie's Jurisprudence that there is not right of subrogation until the debt has been established either by contract or by law.

In the case of a damage claim arising out of an accident upon which a claim is made based on negligence there is no liability upon the defendant until it is admitted by the defendant by stipulation or by proper pleadings in the court in the form of a judicial admission or it is established by jury verdict and judgment of the court or by judgment of the court upon the merits in a nonjury trial.

In this case, it is understood that the legal responsibility of the defendant (uninsured motorist) was denied and

John R. Lomax, Esquire  
George H. Gray, Esquire  
March 25, 1987  
Page Six

contested by the plaintiff's uninsured motorist carrier. It would be inconsistent for them to deny they owed any money to the plaintiff while at the same time, prior to adjudication of liability on the defendant claiming that there was a debt which was owed to the United States for medical services rendered arising out of this accident.

It is the Court's understanding of the federal statute that the plaintiff does not owe the government for medical services rendered until it has been determined that the plaintiff is entitled to an award and has collected that award. Not until there is an adjudication of liability and an award of damages is there any right of recovery by the United States against a third party to assert the right of recovery. The right which the United States of America has in these cases is the "right to be subrogated". (See 42 U.S.C. §2651) The government could choose to file its own claim or it may permit the plaintiff to bring the claim for his own damages and for the amount of damages to be recovered on behalf of the government in the same claim as set forth in §8.01-37.1, supra.

The doctrine of res judicata is not appropriate here. Res judicata is applicable only when the proceeding in which the plea is offered is (1) upon the same cause of action as the preceding litigation and (2) the same parties were adversary parties in the prior proceeding and not where (3):

"The evidence each offered in that suit was for the purposes of defending against the plaintiff's claim, not for the purposes of having adjudicated an issue between themselves...." (Byrum v. Ames & Webb, Inc. 196 Va. 597 at 601 and also see Greene v. Warrenton Credit Association 223 Va. 462 at 465 (1982)).

The Supreme Court of Virginia has held that in an uninsured motorist case the U.M. carrier, when it files an answer in its own behalf, cannot be identified to the jury as an adverse party but rather someone who is in the proceeding to assist the defendant.

Even if the parties to this litigation were adverse to each other in the preceding litigation, the issues were not the same. In this case, the litigation solely concerns the

John R. Lomax, Esquire  
George H. Gray, Esquire  
March 25, 1987  
Page Seven

the rights and or duties of State Farm under the Medical Care Recovery Act. In the prior litigation the issues were whether or not Schneider was negligent and if so, how much he owed the plaintiff for his injuries.

Accordingly the Court holds that the plea of res judicata is overruled.

The issue of collateral estoppel applies when there is privity and State Farm takes the position that Schneider and State Farm were in privity within the meaning of the collateral estoppel doctrine and that this case ought to be dismissed for that reason. In Kesler v. Fentress 223 Va. 14, at pages 16 and 17, the court quoted from Patterson v. Saunders, 194 Va. 607 (1953) as follows:

"It is generally held that "'privity' means a mutual or successive relationship to the same rights of property, or such an identification in interest of one person with another as to represent the same legal rights, and the term 'privity,' when applied to a judgment or decree refers to one whose interest has been legally represented at the trial." 194 Va. at 613.

Even if it were privity, which the Court does not hold today since State Farm defended in its own name and not in the name of Schneider, the issues were different and an evidentiary ruling on an item or items of damage which was not considered by the jury in its verdict and therefore is not an issue in the judgment which was entered upon the verdict, because the jury was never permitted to hear of this damage for government hospital charges, does not present an issue which was the subject of prior litigation.

The obligations of an uninsured motorist carrier are different from those of a liability carrier. The only obligation or requirement of the uninsured motorist insurer is to pay any judgment to the insured against an uninsured motorist.

The uninsured motorist carrier runs into little or no danger of bad faith in refusing to settle a claim within its uninsured motorist limits as the obligation to pay the insured does not arise until judgment. United Services Association v. Nationwide Mutual Insurance Co., 218 Va. 861, 241 S.E. 2d 784, (1978). In that case, the Court distinguished the differences between liability coverage and uninsured motorist

John R. Lomax, Esquire  
George H. Gray, Esquire  
March 25, 1987  
Page Eight

coverage, saying:

"The liability carrier has the duty to defend the insured and to exercise good faith to settle meritorious claims within the policy limits, an undertaking which is not required of the uninsured motorist carrier."

In *Midwest Mutual Insurance Co. v. Aetna Casualty and Surety Co.*, 216 VA. 926, 223 S.E. 2d 901 (1976), one insured motorist carrier settled the uninsured motorist's claim of its insurer without judgment being entered, or suit even being filed within two years against the uninsured motorist. The Court held that another uninsured motorist carrier of the same insured on the same injury had no obligation in contribution as its liability under the uninsured motorist statute was not yet triggered by a judgment. The Court stated:

"Under the statute, the obligation of the uninsured motorist insurer arises only if it is determined that the insured is 'legally entitled to recover' damages from the owner or operator of an uninsured motorist vehicle. Code § 38.1-381(b), note 1 *supra*. Judgment is the event which determines legal entitlement to recovery. But an uninsured motorist case judgment alone against the tortfeasor will not suffice to fix the obligation of the uninsured motorist carrier."

The insurance carrier argues that to require the defendant to pay the full amount of the judgment would subject the defendant to double liability in that it has already paid the government prior to trial. By paying the government, the defendant acted at its own risk and could have avoided the potential problem by allowing the plaintiff to claim the reasonable value of medical services provided by the United States as an element of his damages in the civil action as provided for in Virginia Statute, and, after judgment, paying the full amount of the policy limits to the plaintiff and the United States of America.

John R. Lomax, Esquire  
George H. Gray, Esquire  
March 25, 1987  
Page Nine

Accordingly the Court holds that the doctrine of collateral estoppel does not apply in this case. See particularly, Midwest Mutual Ins. Co. vs. Aetna Casualty and Surety Co., supra.

All that remains then is for the court to consider the plaintiff's motion for Summary Judgment.

For the reasons previously assigned in this opinion, the Court holds that State Farm Mutual Automobile Insurance Company was a mere volunteer when it made payment to the government in this matter prior to the adjudication of the defendant's liability to the plaintiff, John F. Kelly, and the plaintiff is entitled to a Summary Judgment. Counsel for plaintiff will circulate an order for endorsement by counsel and present same to the Court.

Yours very truly,

  
Leonard B. Sachs  
Judge

LBS/mlj



VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

JOHN F. KELLY,

Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Defendant

:

:

:

:

:

LAW DOCKET NO. L86-2266

GROUND OF DEFENSE

For grounds of defense to plaintiff's motion for judgment or to so much thereof as it is deemed material response be made, the defendant states as follows:

1. The allegation of paragraph 2 of plaintiff's motion for judgment is denied.

2. The allegations of paragraph 7 of plaintiff's motion for judgment are denied. Attached hereto and made a part hereof as exhibits are copies of the following:

(a) letter dated June 29, 1984 from plaintiff's attorney, John R. Lomax, to defendant's attorney and to the attorney for The Insurance Company of Hartford, Connecticut;

(b) letter dated July 5, 1984 from plaintiff's attorney, John R. Lomax, to defendant's attorney and to the attorney for The Insurance Company of Hartford, Connecticut; and

(c) letter dated July 2, 1984 from John M. Payne, Claims Attorney, Naval Legal Service Office, to John R. Lomax, attorney for plaintiff.

3. The allegations of paragraph 8 of plaintiff's motion for judgment are denied. Plaintiff never informed defendant that

he wanted to compromise the federal government's lien or that it could be compromised.

4. The allegations of paragraph 9 are denied.

5. Plaintiff has suffered no damage from payment by defendant of the lien of the federal government.

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY, Defendant

By George H. Gray  
Of Counsel

George H. Gray  
Outland, Gray, O'Keefe and Hubbard  
112 Coastal Way  
Post Office Box 1545  
Chesapeake, Virginia 23320

I CERTIFY THAT A COPY OF THE FOREGOING  
PLEADING WAS MAILED TO EACH COUNSEL  
OF RECORD ON 4/15/87

G. H. Gray

LOUIS B. FINE  
MORRIS H. FINE  
HOWARD I. LEGUM  
ANDREW S. FINE  
  
LEWIS ALLEN  
JOHN R. LOMAX  
GARDINER M. HAIGHT

**FINE, FINE, LEGUM & FINE, P.A.**

ATTORNEYS AT LAW  
ONE COMMERCE PARK  
WITCHDUCK ROAD AT CLEVELAND STREET  
POST OFFICE BOX 61546  
VIRGINIA BEACH, VIRGINIA 23462

TELEPHONE (804) 490-4545

NORFOLK OFFICE  
PLUME CENTER WEST  
SUITE 717  
GRANBY AND PLUME STREETS  
NORFOLK, VIRGINIA 23510  
TELEPHONE (804) 622-7221

June 29, 1984

T. Jeffrey Salb, Esquire  
1700 First Virginia Bank Tower  
101 St. Paul's Boulevard  
Norfolk, Virginia 23510

George H. Gray, Esquire  
112 Coastal Way  
Post Office Box 1545  
Chesapeake, Virginia 23320

Re: John F. Kelly v. Nick Thomas Schnider  
At Law No. 83-1828

Gentlemen:

I am advised by John Payne's office that the Government's  
Lien for services rendered to John F. Kelly are as follows:

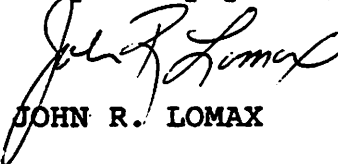
9 Inpatient days @ \$336.00 per day	\$3,024.00
38 Outpatient days @ \$33.00 per day	1,254.00
TOTAL	\$4,278.00

The government is sending us a written notice of their  
lien.

I am taking the liberty of sending a copy of this letter  
to Mr. Lambert of State Farm as he has requested the same.

With kind regards, I remain,

Very truly yours,

  
JOHN R. LOMAX

JRL:ear  
cc: John F. Kelly  
cc: B. D. Lambert

LOUIS B FINE  
MORRIS H FINE  
HOWARD I LEGUM  
ANDREW S FINE  
  
LEWIS ALLEN  
JOHN R. LOMAX  
GARDINER M HAIGHT

**FINE, FINE, LEGUM & FINE, P.A.**

ATTORNEYS AT LAW  
ONE COMMERCE PARK

WITCHDUCK ROAD AT CLEVELAND STREET

POST OFFICE BOX 61546

VIRGINIA BEACH, VIRGINIA 23462

TELEPHONE (804) 490-4545

NORFOLK OFFICE  
PLUME CENTER WEST  
SUITE 717  
GRANBY AND PLUME STREETS  
NORFOLK VIRGINIA 23510  
TELEPHONE (804) 622 7221

July 5, 1984

T. Jeffrey Salb, Esquire  
BREEDEN, HOWARD & MACMILLAN  
1700 First Virginia Bank Tower  
101 St. Paul's Boulevard  
Norfolk, Virginia 23510

George H. Gray, Esquire  
112 Coastal Way  
Post Office Box 1545  
Chesapeake, Virginia 23320

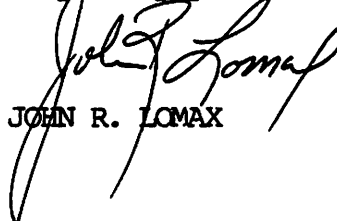
Re: John F. Kelly v. Nick Thomas Schnider  
At Law No. 83-1828

Gentlemen:

I am pleased to enclose a copy of the Government's Lien supplied  
by the Naval Legal Service Office.

I look forward to hearing from you.

Very truly yours,



JOHN R. LOMAX

JRL:ear  
Enclosure  
cc: B. D. Lambert of State Farm  
cc: John F. Kelly

NAVAL LEGAL SERVICE OFFICE  
NAVAL BASE  
NORFOLK, VIRGINIA 23511

30:JMP:sb  
5890/ 2-84M(Kelly)  
Tel. 444-7076  
2 July 1984

John R. Lomax, Esquire  
720 Law Building  
Granby & Plume Sts.  
Norfolk, VA 23510

Re: John F. Kelly

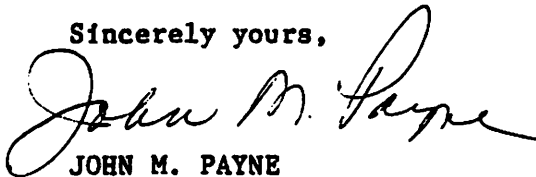
Dear Mr. Lomax:

We are enclosing a copy of the record of medical care provided by the United States in connection with the above-captioned case.

The government's claim for the cost of treatment provided totals \$ 4, 278.00 for which a check should be made payable to the Treasurer of the United States and forwarded to this office.

Your cooperation in this matter will be appreciated.

Sincerely yours,



JOHN M. PAYNE  
Claims Attorney  
By direction

~~XXXXX~~  
~~Encl.~~

(1) Medical Records (furnished by attorney)

P.S. The above figure represents cost of 9 inpatient days @ \$336 each and 38 outpatient visits @ \$33 each,



VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

JOHN F. KELLY,

Plaintiff,

v.

LAW DOCKET NO. L86-2266

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Defendant.

MOTION

COMES NOW the plaintiff, John F. Kelly, by counsel, and renews their Motion for Summary Judgment on the grounds that the additional discovery taken in this matter adds nothing to the matters at issue between the parties and there is no genuine issue of fact in dispute and accordingly renews his Motion for Summary Judgment.

JOHN F. KELLY

BY \_\_\_\_\_  
Of Counsel

John R. Lomax, p.q.  
FINE, FINE, LEGUM & FINE, P.A.  
Post Office Box 61546  
Virginia Beach, Virginia 23462  
(804) 490-4545

CERTIFICATE

I do hereby certify that a true copy of the foregoing Motion was mailed to George H. Gray, counsel for the defendant, on this 6th day of May, 1987.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

JOHN F. KELLY,

Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Defendant

:

:

:

:

:

LAW DOCKET NO. L86-2266

MOTION FOR SUMMARY JUDGMENT

Defendant moves the court for summary judgment in its favor on the stipulation of facts and for the reasons set forth in defendant's brief with supplement previously sent to the clerk with letter dated June 16, 1987.

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY, Defendant

By

George H. Gray  
Of Counsel

George H. Gray  
Outland, Gray, O'Keefe and Hubbard  
112 Coastal Way  
Post Office Box 1545  
Chesapeake, Virginia 23320

I CERTIFY THAT A COPY OF THE FOREGOING  
PLEADING WAS MAILED TO EACH COUNSEL  
OF RECORD ON 9/1/87

S/H Gray

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

JOHN F. KELLY,

Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Defendant

:

:

: LAW DOCKET NO. L86-2266

:

:

STIPULATION OF FACTS

This stipulation of facts is agreed upon by the parties who also agree that no further evidence will be produced, the record is complete, and the case is to be decided by the court on these facts. Included with this stipulation are exhibits previously presented to the court.

John F. Kelly, a member of the United States Navy, was a passenger in an automobile struck in the rear by an automobile operated by an uninsured motorist, Nick Thomas Schneider, in Norfolk, Virginia on October 15, 1981. There was a policy issued by defendant in Maryland to Edward A. Myers, the owner of the automobile in which plaintiff was riding, which policy had uninsured motorist coverage in the amount of \$20,000.00. Attached are certificate of coverage and specimen copy of policy marked, Exhibit A.

In 1983 plaintiff filed suit for injuries and damages against the uninsured motorist and served process on State Farm Mutual Automobile Insurance Company, defendant. The uninsured motorist filed no responsive pleading and was in default.

Defendant filed a responsive pleading in the tort action.

Plaintiff's attorney sent to defendant's attorney with copies directly to defendant three letters dated June 29, 1984, July 2, 1984, and July 5, 1984, copies of which are attached and marked, Exhibits B, C and D.

The letters dated June 29, 1984 and July 5, 1984 were from plaintiff's attorney to defendant's attorney and the attorney for Aetna Casualty and Surety Company which also had uninsured motorist coverage on plaintiff which was secondary to defendant's coverage.

The letter dated July 2, 1984 was from John M. Payne, Claims Attorney, Naval Legal Service Office, to plaintiff's attorney.


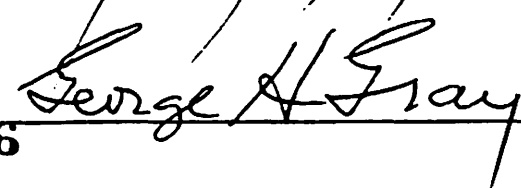
Ultimately, after depositions and other proceedings, the plaintiff had the case set for trial on February 3, 1986. On or about January 30, 1986 defendant paid to the United States of America its claim for \$4,278.00 for medical services to plaintiff stated in the letters dated June 29, 1984 and July 2, 1984.

When the parties appeared for trial on February 3, 1986, the uninsured motorist was still in default and defendant admitted liability as did the secondary uninsured motorist carrier. The case was submitted to the jury on the issue of damages only. Attached is a copy of the order marked, Exhibit E.

In the course of the trial on February 3, 1986 the plaintiff offered in evidence as an element of his damages the claim of the United States of America in the amount of \$4,278.00, the reasonable value of medical services provided by the United

States. A sworn written statement dated January 24, 1986 of the authorized representative of the Department of the Navy prepared and made in accord with §8.01-37.1 of the Code of Virginia and in accordance with 42 U.S.C. §2651, et. seq., was offered as an exhibit by the attorney for plaintiff. A copy of the sworn statement is attached and marked, Exhibit F. The attorney for defendant objected to the exhibit on the ground that there was no claim to present on behalf of the United States pursuant to §8.01-37.1 of the Code of Virginia because the claim had been paid by defendant. The attorney for the plaintiff argued that under the collateral source rule he was entitled to prove it even though it had been paid by defendant. The trial court sustained the objection of the attorney for defendant and the sworn statement was refused to be admitted. The attorney for plaintiff objected and excepted to this ruling.

The jury returned a verdict for plaintiff for \$50,000 and defendant paid to plaintiff \$15,722 plus interest and costs on February 6, 1986. On receipt of the payment, plaintiff's attorney sent to defendant's attorney a letter dated February 6, 1986 which was received February 10, 1986. Attached is a copy of the letter marked, Exhibit I. At no time prior to this letter was defendant ever informed that plaintiff wanted to or could get the United States to accept from defendant less than the full amount of its lien.

  
\_\_\_\_\_. p.q.  
  
\_\_\_\_\_. p.d.



### SECTION III — UNINSURED MOTOR VEHICLE — COVERAGE U

You have this coverage if "U" appears in the "Coverages" space on the declarations page.

We will pay damages for *bodily injury* and *property damage* an *insured* is legally entitled to collect from the owner or driver of an *uninsured motor vehicle*. The *bodily injury* or *property damage* must be caused by accident arising out of the operation, maintenance or use of an *uninsured motor vehicle*.

**Property Damage** — means damage to or destruction of:

1. *your car* or a *newly acquired car*; and
2. property owned by the *insured* while it is in or on *your car* or a *newly acquired car*.

**Uninsured Motor Vehicle** — means:

1. a land motor vehicle, the ownership, maintenance or use of which is:
  - a. not insured or bonded for *bodily injury* and *property damage* liability at the time of the accident; or
  - b. insured or bonded for *bodily injury* and *property damage* liability at the time of the accident; but:
    - (1) the limits of liability are less than required by the financial responsibility act of Maryland; or
    - (2) the insuring company denies coverage or is or becomes insolvent; or
2. a "hit-and-run" land motor vehicle whose owner or driver remains unknown and who was the proximate cause of *bodily injury* to the *insured* or *property damage*.

An *uninsured motor vehicle* does not include a land motor vehicle:

1. insured under the liability coverage of this policy;
2. owned by or furnished for the regular use of *you*, *your spouse* or any *relative*;
3. owned or operated by a self-insurer under any motor vehicle financial responsibility law, a motor carrier law or any similar law;
4. owned by any government or any of its political subdivisions or agencies;
5. or equipment designed for use mainly off public roads except while on public roads; or
6. or trailer operated on rails or crawler-treads or while located for use as premises.

**Who Is an Insured**

**Insured** — means the *person* or *persons* covered by uninsured motor vehicle coverage.

This is:

1. the first *person* named in the declarations;
2. his or her *spouse*;
3. their *relatives*; and
4. any other *person* while *occupying*:
  - a. *your car*, a *temporary substitute car*, a *newly acquired car* or a trailer attached to such *car*. Such vehicle has to be used within the scope of the consent of *you* or *your spouse*; or

- b. a *car* not owned by or furnished for the regular use of *you*, *your spouse* or any resident of *your* household, or a trailer attached to such a *car*. It has to be driven by the first *person* named or that *person's spouse* and within the scope of the owner's consent.

Such other *person occupying* a vehicle used to carry *persons* for a charge is not an *insured*.

5. any *person* entitled to recover damages because of *bodily injury* to an *insured* under 1 through 4 above.

**Consent to Be Bound**

We are not bound by any judgment against any *person* or organization obtained without our written consent.

**Payment of Any Amount Due**

We will pay any amount due:

1. to the *insured*;
2. to a parent or guardian if the *insured* is a minor or an incompetent *person*;
3. to the surviving *spouse*; or
4. at our option, to a *person* authorized by law to receive such payment.

**Limits of Liability**

1. **Bodily Injury**

The amount of coverage is shown on the declarations page under "Limits of Liability — U — Each Person; Each Accident". Under "Each Person" is the amount of coverage for all damages due to *bodily injury* to one *person*. Under "Each Accident" is the total amount of coverage for all damages due to *bodily injury* to two or more *persons* in the same accident.

2. **Property Damage**

The amount of coverage is shown on the declarations page under "Limits of Liability — U — Property Damage, Each Accident". The most we will pay for all *property damage* as the result of one accident is the amount shown less \$100.

3. Any amount payable under this coverage shall be reduced by any amount paid or payable to or for the *insured*:

- a. for *bodily injury*:
  - (1) by or for any *person* or organization who is or may be held legally liable for the *bodily injury* to the *insured*;
  - (2) under the liability coverage; or
  - (3) under any worker's compensation, disability benefits, or similar law.
- b. for *property damage*:
  - (1) by or for any *person* or organization who is or may be held legally liable for the *property damage* sustained by the *insured*;
  - (2) under the liability coverage; or
  - (3) under any policy of property insurance.

4. Any payment made to a *person* under this coverage shall reduce any amount payable to that *person* under the liability coverage.

**When Coverage U Does Not Apply**

**THERE IS NO COVERAGE:**

1. FOR ANY *INSURED* WHO, WITHOUT OUR WRITTEN CONSENT, SETTLES WITH ANY *PERSON* OR ORGANIZATION WHO MAY BE LIABLE FOR THE *BODILY INJURY* OR *PROPERTY DAMAGE*.
2. FOR *BODILY INJURY* TO AN *INSURED* WHILE OCCUPYING A MOTOR VEHICLE OWNED BY YOU, YOUR SPOUSE OR ANY *RELATIVE*. This does not apply to your car, a newly acquired car or a temporary substitute car.
3. TO THE EXTENT IT BENEFITS:
  - a. ANY WORKER'S COMPENSATION OR DISABILITY BENEFITS INSURANCE COMPANY.
  - b. A SELF-INSURER UNDER ANY WORKER'S COMPENSATION, OR DISABILITY BENEFITS OR SIMILAR LAW.
  - c. ANY GOVERNMENTAL BODY OR AGENCY.
  - d. ANY PROPERTY INSURER.
4. FOR THE FIRST \$100 OF *PROPERTY DAMAGE* RESULTING FROM ONE ACCIDENT.

**If There Is Other Coverage**

1. If the *insured* is injured as a pedestrian and other uninsured motor vehicle coverage applies:
  - a. the total limits of liability under all such coverages shall not exceed that of the coverage with the highest limit of liability; and

- b. we are liable only for our share. Our share is that percent of the damages that the limit of liability of this coverage bears to the total of all uninsured motor vehicle coverage applicable to the accident.

2. If the *insured* is injured while occupying your car, and your car is described on the declarations page of another policy providing uninsured motor vehicle coverage:

- a. the total limits of liability under all such coverages shall not exceed that of the coverage with the highest limit of liability; and

- b. we are liable only for our share. Our share is that percent of the damages that the limit of liability of this coverage bears to the total of all such uninsured motor vehicle coverage applicable to the accident.

3. If the *insured* is injured while occupying a vehicle not owned by you or your spouse, this coverage applies:

- a. as excess to any uninsured motor vehicle coverage which applies to the vehicle as primary coverage, but
- b. only in the amount by which it exceeds the primary coverage.

If coverage under more than one policy applies as excess:

- a. the total limit of liability shall not exceed the difference between the limit of liability of the coverage that applies as primary and the highest limit of liability of any one of the coverages that apply as excess; and

- b. we are liable only for our share. Our share is that percent of the damages that the limit of liability of this coverage bears to the total of all uninsured motor vehicle coverage applicable as excess to the accident.

4. This coverage shall be excess over any other insurance that applies to *property damage*.

5. THIS COVERAGE DOES NOT APPLY IF THERE IS OTHER UNINSURED MOTOR VEHICLE COVERAGE ON A NEWLY ACQUIRED CAR.

## SECTION IV — PHYSICAL DAMAGE COVERAGES

**Loss** — means, when used in this section, each direct and accidental loss of or damage to:

1. your car;
2. its equipment which is common to the use of your car as a vehicle; or
3. clothes and luggage insured; and
4. a detachable living quarters attached or removed from your car for storage. Detachable living quarters includes its body and items securely fixed in place as a permanent part of the body. You must have told us about the living quarters before the loss and paid any extra premium needed.

**COMPREHENSIVE — COVERAGE D.** You have this coverage if "D" appears in the "Coverages" space on the declarations page. If a deductible applies the amount is shown by the number beside "D".

1. **Loss to Your Car.** We will pay for loss to your car EXCEPT LOSS BY COLLISION but only for the amount of each such loss in excess of the deductible amount, if any.

Breakage of glass, or loss caused by missiles, falling objects, fire, theft, larceny, explosion, earthquake, windstorm, hail, water, flood, malicious mischief or vandalism, riot or civil commotion, is payable under this coverage. Loss due to hitting or being hit by a bird or an animal is payable under this coverage.

2. We will repay you for transportation costs if your car is stolen. We will pay up to \$10 per day for the period that begins 48 hours after you tell us of the theft. The period ends when we offer to pay for loss.

**COLLISION — COVERAGE G.** You have this coverage if "G" appears in the "Coverages" space on the declarations page. The deductible amount is shown by the number beside "G".

We will pay for loss to your car caused by collision but only for the amount of each such loss in excess of the deductible amount. If the collision is with another motor vehicle insured with us, you do not pay your deductible if it is \$100 or less as we pay it.

**Collision** — means your car upset or hit or was hit by a vehicle or other object.

LOUIS B. FINE  
 MORRIS H. FINE  
 HOWARD I. LEGUM  
 ANDREW S. FINE  
 ———  
 LEWIS ALLEN  
 JOHN R. LOMAX  
 GARDNER M. HIGHT

## FINE, FINE, LEGUM &amp; FINE, P.A.

ATTORNEYS AT LAW  
 ONE COMMERCE PARK  
 WITCHDUCK ROAD AT CLEVELAND STREET  
 POST OFFICE BOX 61546  
 VIRGINIA BEACH, VIRGINIA 23462

TELEPHONE (804) 490-4545

NORFOLK OFFICE  
 PLUME CENTER WEST  
 SUITE 717  
 GRANBY AND PLUME STREETS  
 NORFOLK, VIRGINIA 23510  
 TELEPHONE (804) 622-7221

June 29, 1984

T. Jeffrey Salb, Esquire  
 1700 First Virginia Bank Tower  
 101 St. Paul's Boulevard  
 Norfolk, Virginia 23510

George H. Gray, Esquire  
 112 Coastal Way  
 Post Office Box 1545  
 Chesapeake, Virginia 23320

Re: John F. Kelly v. Nick Thomas Schnider  
 At Law No. 83-1828

Gentlemen:

I am advised by John Payne's office that the Government's Lien for services rendered to John F. Kelly are as follows:

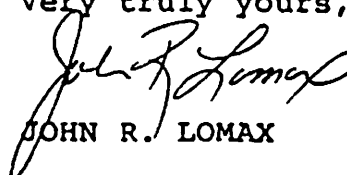
9 Inpatient days @ \$336.00 per day	\$3,024.00
38 Outpatient days @ \$33.00 per day	1,254.00
TOTAL	\$4,278.00

The government is sending us a written notice of their lien.

I am taking the liberty of sending a copy of this letter to Mr. Lambert of State Farm as he has requested the same.

With kind regards, I remain,

Very truly yours,

  
 JOHN R. LOMAX

JRL:ear  
 cc: John F. Kelly  
 cc: B. D. Lambert

LOUIS B FINE  
 MARSH H FINE  
 HOWARD I LEGUM  
 ANDREW S FINE  
 LEWIS ALLEN  
 JOHN R LOMAX  
 GARDNER M HAIGHT

FINE, FINE, LEGUM & FINE, P.A.

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 PLUME CENTER WEST  
 SUITE 717  
 CRANBY AND PLUME STREETS  
 NORFOLK VIRGINIA 23510  
 TELEPHONE (804) 822 7221

July 5, 1984

T. Jeffrey Salb, Esquire  
 BREEDEN, HOWARD & MACMILLAN  
 1700 First Virginia Bank Tower  
 101 St. Paul's Boulevard  
 Norfolk, Virginia 23510

George H. Gray, Esquire  
 112 Coastal Way  
 Post Office Box 1545  
 Chesapeake, Virginia 23320

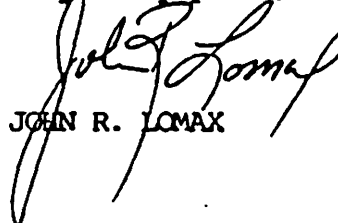
Re: John F. Kelly v. Nick Thomas Schnider  
 At Law No. 83-1828

Gentlemen:

I am pleased to enclose a copy of the Government's Lien supplied by the Naval Legal Service Office.

I look forward to hearing from you.

Very truly yours,

  
 JOHN R. LOMAX

JRL:ear  
 Enclosure  
 cc: B. D. Lambert of State Farm  
 cc: John F. Kelly

NAVAL LEGAL SERVICE OFFICE  
NAVAL BASE  
NORFOLK, VIRGINIA 23511

30:JMP:sb  
5890/2-84M(Kelly)  
Tel. 444-7076  
2 July 1984

John R. Lomax, Esquire  
720 Law Building  
Granby & Plume Sts.  
Norfolk, VA 23510

Re: John F. Kelly

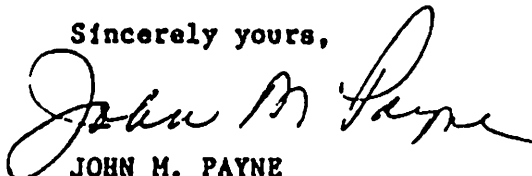
Dear Mr. Lomax:

We are enclosing a copy of the record of medical care provided by the United States in connection with the above-captioned case.

The government's claim for the cost of treatment provided totals \$4,278.00 for which a check should be made payable to the Treasurer of the United States and forwarded to this office.

Your cooperation in this matter will be appreciated.

Sincerely yours,



JOHN M. PAYNE  
Claims Attorney  
By direction

~~XXXX~~

(1) Medical Records (furnished by attorney)

P.S. The above figure represents cost of 9 inpatient days @ \$336 each and 38 outpatient visits @ \$33 each,

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

JOHN F. KELLY,

Plaintiff,

v.

LAW DOCKET NO. L83-1828

NICK THOMAS SCHNIDER,

a/k/a Nick Thomas Schneider,

Defendant

O R D E R

This day came the plaintiff in person and by counsel; State Farm Mutual Automobile Insurance Company, upon which process was served pursuant to Section 38.1-381 of the Code of Virginia, by counsel; The Automobile Insurance Company of Hartford, Connecticut, upon which process was served pursuant to Section 38.1-381 of the Code of Virginia, by counsel; the defendant although served with process being in default and not having answered or otherwise responded and not being entitled to deny liability; on motion of State Farm Mutual Automobile Insurance Company and The Automobile Insurance Company of Hartford, Connecticut who waive only their right to defend the case on the issue of liability, it is ordered that on the issue of liability summary judgment shall be entered for the plaintiff against the defendant and the only issue to be tried is that of damages. It is further ordered that only evidence of damages shall be admitted before the jury.

ENTER: 7-6 3. 1986

Seen

*John P. Lomas*

n.q.

*George H. Tracy*  
Attorney for State Farm Mutual  
Automobile Insurance Company

32

*[Signature]*  
The Automobile Insurance Company  
of Hartford, Connecticut

SWORN STATEMENT

Now comes the undersigned, John M. Payne, on this 24<sup>th</sup> day of January 1986 in accord with Section 8.01-37.1, Code of Virginia, 1950, as amended, who deposes and says that he is the Head of the Claims Division of the Naval Legal Service Office, Norfolk, Virginia and as such is an authorized representative of the United States Navy for the purpose of establishing the amount of claims arising pursuant to 42 U.S.C., Section 2651, et. seq., for the cost of medical and hospital services.

He further says that from information in his file, the United States has incurred costs of \$4,278.00 for care provided AK3 John Francis Kelley, USN, at Naval medical facilities, allegedly in treatment of injuries suffered in an automobile accident which occurred on October 16, 1981 in Norfolk, Virginia. Such care consisted of 9 days of bedrest from January 7th, 1982 through January 15, 1982 in the medical facility aboard the USS DWIGHT D. EISENHOWER (CVN 69) at the prevailing cost of \$336.00 per day and 38 outpatient visits at various medical facilities at the prevailing cost of \$33.00 per visit and the figure of \$4,278.00 consequently represents the total of the government's claim under the provisions of 42 U.S.C. 2651, et. seq., for care provided Petty Officer Kelley.

Signed and sealed the 24<sup>th</sup> day of January 1986.

John M. Payne  
JOHN M. PAYNE  
Head, Claims Division  
Naval Legal Service Office  
Norfolk, Virginia 23511

Subscribed and sworn to before me this 24<sup>th</sup> day of January, 1986

Donald D. [Signature], Notary Public

My Commission Expires 4-4, 1988

732

EXHIBIT G

Virginia:

In the Circuit Court of the City of Norfolk, on the 18th day  
of February, in the year 19 86

JOHN F. KELLEY

PLAINTIFF

VS AT LAW L83-1828

NICK THOMAS SCHNIKDER a/k/a  
NICK THOMAS SCHNEIDER

L 251-86

DEFENDANT

JUDGMENT ORDER

The trial of this case was heard on the 3rd day of February, 1986 whereupon the jury verdict was in favor of the Plaintiff in the amount of Fifty Thousand Dollars and No Cents (\$50,000.00) and was standing on a motion made by the Defendant to set aside the jury verdict as being contrary to the law and the evidence and excessive and to grant him a new trial.

Thereupon, counsel for the Defendant has notified the Court that they no longer wish to pursue the matter of having the jury verdict set aside and judgment should be entered on the jury verdict.

Whereupon it is considered and Ordered by the Court that the Plaintiff, John F. Kelley, recover of and have judgment against the Defendant Nick Thomas Schnikder a/k/a Nick Thomas Schneider, in the sum of Fifty Thousand Dollars and No Cents (\$50,000.00) with interest to be computed at the rate of twelve percentum (12) per annum from the 3rd day of February, 1986 until paid, together with his costs about his suit herein expended.

Whereupon, judgment is entered on the jury verdict and this case is dismissed from the docket of this Court.

Office of  
William T. Ryan  
Clerk of the  
Circuit Court  
Norfolk, Virginia

34

Alfred W. Whitehurst  
Judge

CM



LOUIS S. FINE  
 MORRIS H. FINE  
 HOWARD I. LEGUM  
 ANDREW S. FINE  
 ———  
 LEWIS ALLEN  
 JOHN R. LOMAX  
 PETER MCGRIDE

## FINE, FINE, LEGUM &amp; FINE, P.A.

ATTORNEYS AT LAW  
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 POST OFFICE BOX 61546  
 VIRGINIA BEACH, VIRGINIA 23462  
 ———  
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NORFOLK OFFICE  
 PLUME-RANDOLPH BUILDING  
 PLUME AND RANDOLPH STREETS  
 NORFOLK, VIRGINIA 23510  
 TELEPHONE (804) 490-4545

February 6, 1986

George H. Gray, Esquire  
 112 Coastal Way  
 Post Office Box 1545  
 Chesapeake, Virginia 23320

Re: John F. Kelly v. Nick Thomas Schnider  
 Law Docket No. L83-1828

Dear Mr. Gray:

This will acknowledge receipt of your letter dated February 5, 1986 together with State Farm's draft in the amount of \$15,722.00, and your check in the amount of \$49.98.

As you will recall, we provided your office and State Farm a sworn statement from the United States Government in answer to Mr. Salb's request for updated discovery. Of course, we intended to improve the government's lien as an element of plaintiff's damage. State Farm paid this claim voluntarily and the court did not allow plaintiff to put on evidence of the government's lien as a medical expense. State Farm paid the full amount of the government's claim without notice to the plaintiff so that plaintiff was precluded from compromising the government's lien.

State Farm's draft will be credited toward the judgment obtained on behalf of Mr. Kelly. Of course, by crediting your client's draft toward the judgment, we, in no way concede that this is the extent of State Farm's liability in this matter.

With kind regards, I remain,

Very truly yours,

JOHN R. LOMAX

JRL:ear

cc: T. Jeffrey Salb, Esquire  
 John F. Kelly  
 Seymour Fox, Esquire  
 Mr. Doug Lambert

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

JOHN F. KELLY,

Plaintiff,

v.

AT LAW NO. L86-2266

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

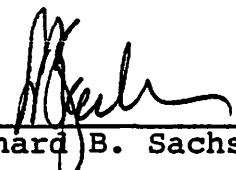
Defendants.

ORDER

This matter came on to be heard upon the Motions for Summary Judgment filed by both Plaintiff and Defendant, by counsel, the stipulation and argument of counsel and the Court having maturely considered same doth ORDER that:


1. Plaintiff's Motion for Summary Judgment be and the same hereby is sustained and,
2. Defendant's Motion for Summary Judgment be and the same hereby is overruled to all of which the defendant by counsel objects.

ENTER:

  
\_\_\_\_\_  
Leonard B. Sachs, Judge

10/22/87

A COPY, TESTE: WILLIAM T. RYAN, CLERK

BY:  , D.C.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

JOHN F. KELLY,

Plaintiff,

v.

LAW DOCKET NO. L86-2266

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Defendant.

AMENDED JUDGMENT ORDER

This day came the parties by their respective attorneys to be heard on plaintiff's motion for judgment; defendant's grounds of defense thereto; a stipulation of facts agreed upon by the parties and signed by their attorneys, with exhibits A through I, inclusive, which stipulation of facts is signed and the exhibits initialed by the court and made a part of the record; the defendant's plea of res judicata and collateral estoppel; plaintiff's motion for summary judgment in his favor; defendant's motion for summary judgment in its favor; and was argued by counsel orally and by written briefs; and upon consideration whereof, the defendant's plea of res judicata and collateral estoppel is overruled and the defendant's motion for summary judgment is denied, plaintiff's motion for summary judgment is granted, and it is ORDERED that plaintiff recover of and have judgment against the defendant in the amount of \$4,278.00 with interest thereon from February 3, 1986 plus costs; to which rulings the defendant duly objected and excepted.

ENTER:

Edward B. Kelly  
JUDGE

Seen:

37

p.g.

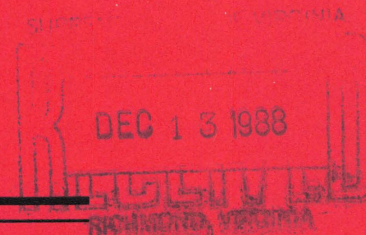
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A COPY, TESTED WILLIAM T. RYAN, CLERK

BY: Ann D. Ryan, D.C.



238 Va. 192



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IN THE  
**Supreme Court of Virginia**  
AT RICHMOND

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RECORD NO. 871340

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STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Appellant,

v.

JOHN F. KELLY,

Appellee.

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JOINT APPENDIX

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George H. Gray  
OUTLAND, GRAY, O'KEEFE  
AND HUBBARD  
112 Coastal Way  
Post Office Box 1545  
Chesapeake, Virginia 23320  
(804) 547-0171

Counsel for Appellant

John R. Lomax  
FINE, FINE, LEGUM & FINE  
Post Office Box 61549  
Virginia Beach, Virginia 23462  
(804) 490-4545

Counsel for Appellee



### ASSIGNMENTS OF ERROR

1. The trial court erred in overruling and failing to sustain defendant's plea of res judicata and collateral estoppel.
2. The trial court erred in denying defendant's motion for summary judgment.
3. The trial court erred in granting plaintiff's motion for summary judgment.