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CLERK
SUPREME COURT OF VIRGINIA

FEB 20 2001

IN THE
Supreme Court of Virginia

RECORD NO. 002532

**ROBINS INSURANCE AGENCY, INC. and
WILLIAM RALEIGH ROBINS,**

Appellants,

v.

**TRANSCONTINENTAL INSURANCE COMPANY
and RBMW, INC. t/a JORDAN POINT YACHT HAVEN,**

Appellees.

APPENDIX

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V I R G I N I A:

IN THE CIRCUIT COURT OF PRINCE GEORGE COUNTY

RBMW, INC.,
t/a JORDAN POINT YACHT HAVEN,
A VIRGINIA CORPORATION

Plaintiff,

v.

CASE NO. _____

✓ ROBINS INSURANCE AGENCY, INC.,
A VIRGINIA CORPORATION,

SERVE: John F. Robins, Registered Agent
2800 Parham Road
Post Office Box 71300
Richmond, Virginia 23294-4409

AND

✓ WILLIAM RALEIGH ROBINS

SERVE: ROBINS INSURANCE AGENCY, INC.
2800 Parham Road
Post Office Box 71300
Richmond, Virginia 23294-4409

AND

✓ TRANSCONTINENTAL INSURANCE COMPANY,
A NEW YORK CORPORATION
DEFENDANT AND A MEMBER OF THE
CNA INSURANCE GROUP,

SERVE: Edward R. Parker, Registered Agent
5511 Staples Mill Road
Richmond, Virginia 23228-0000

AND

✓ AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA,
A PENNSYLVANIA CORPORATION
DEFENDANT AND A MEMBER OF THE
CNA INSURANCE GROUP,

SERVE: Edward R. Parker, Registered Agent
5511 Staples Mill Road
Richmond, Virginia 23228-0000

AND

✓ CONTINENTAL CASUALTY COMPANY,
AN ILLINOIS CORPORATION
DEFENDANT AND A MEMBER OF THE
CNA INSURANCE GROUP,

filed in the Clerk's Office the 22nd day of June, 19 98

Writ Tax \$ 25.00

Teste,

Fee 150.00

Deposit 400

Total Paid \$ 210 1/2

1

12 B Smith

Clerk

D.C.

SERVE: Edward R. Parker, Registered Agent
5511 Staples Mill Road
Richmond, Virginia 23228-0000

AND

✓ NATIONAL FIRE INSURANCE COMPANY OF HARTFORD,
A CONNECTICUT CORPORATION
DEFENDANT AND A MEMBER OF THE
CNA INSURANCE GROUP,

SERVE: Edward R. Parker, Registered Agent
5511 Staples Mill Road
Richmond, Virginia 23228-0000

AND

✓ TRANSPORTATION INSURANCE COMPANY,
A NEW YORK CORPORATION
DEFENDANT AND A MEMBER OF THE
CNA INSURANCE GROUP,

SERVE: Edward R. Parker, Registered Agent
5511 Staples Mill Road
Richmond, Virginia 23228-0000

AND

VALLEY FORGE INSURANCE COMPANY,
A PENNSYLVANIA CORPORATION
DEFENDANT AND A MEMBER OF THE
CNA INSURANCE GROUP,

SERVE: Edward R. Parker, Registered Agent
5511 Staples Mill Road
Richmond, Virginia 23228-0000

AND

✓ BOSTON OLD COLONY INSURANCE COMPANY,
A MASSACHUSETTS CORPORATION
DEFENDANT AND A MEMBER OF THE
CNA INSURANCE GROUP,

SERVE: Edward R. Parker, Registered Agent
5511 Staples Mill Road
Richmond, Virginia 23228-0000

AND

✓ THE BUCKEYE UNION INSURANCE COMPANY,
AN OHIO CORPORATION
DEFENDANT AND A MEMBER OF THE
CNA INSURANCE GROUP,

SERVE: Edward R. Parker, Registered Agent
5511 Staples Mill Road
Richmond, Virginia 23228-0000

AND

✓ COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY,
A NEW JERSEY CORPORATION
DEFENDANT AND A MEMBER OF THE
CNA INSURANCE GROUP,

SERVE: Edward R. Parker, Registered Agent
5511 Staples Mill Road
Richmond, Virginia 23228-0000

AND

✓ THE CONTINENTAL INSURANCE COMPANY,
A NEW HAMPSHIRE CORPORATION
DEFENDANT AND A MEMBER OF THE
CNA INSURANCE GROUP,

SERVE: Edward R. Parker, Registered Agent
5511 Staples Mill Road
Richmond, Virginia 23228-0000

AND

✓ CONTINENTAL REINSURANCE CORPORATION,
A CALIFORNIA CORPORATION
DEFENDANT AND A MEMBER OF THE
CNA INSURANCE GROUP,

SERVE: Edward R. Parker, Registered Agent
5511 Staples Mill Road
Richmond, Virginia 23228-0000

AND

✓ THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,
A NEW HAMPSHIRE CORPORATION
DEFENDANT AND A MEMBER OF THE
CNA INSURANCE GROUP,

SERVE: Edward R. Parker, Registered Agent
5511 Staples Mill Road
Richmond, Virginia 23228-0000

AND

✓ FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY,
A NEW JERSEY CORPORATION
DEFENDANT AND A MEMBER OF THE
CNA INSURANCE GROUP,

SERVE: Edward R. Parker, Registered Agent
5511 Staples Mill Road
Richmond, Virginia 23228-0000

AND

✓ THE GLENS FALLS INSURANCE COMPANY,
A DELAWARE CORPORATION
DEFENDANT AND A MEMBER OF THE
CNA INSURANCE GROUP,

SERVE: Edward R. Parker, Registered Agent
5511 Staples Mill Road
Richmond, Virginia 23228-0000

AND

✓ KANSAS CITY FIRE AND MARINE INSURANCE COMPANY,
A MISSOURI CORPORATION
DEFENDANT AND A MEMBER OF THE
CNA INSURANCE GROUP,

SERVE: Edward R. Parker, Registered Agent
5511 Staples Mill Road
Richmond, Virginia 23228-0000

AND

✓ NIAGARA FIRE INSURANCE COMPANY,
A DELAWARE CORPORATION
DEFENDANT AND A MEMBER OF THE
CNA INSURANCE GROUP,

SERVE: Edward R. Parker, Registered Agent
5511 Staples Mill Road
Richmond, Virginia 23228-0000

Defendants.

MOTION FOR JUDGMENT

COMES NOW the Plaintiff, by counsel, and for its
Motion for Judgment against the Defendants, states as follows:

1. At all times relevant Plaintiff, RBMW, Inc. ("RBMW"), was a Corporation organized and existing under the laws of the Commonwealth of Virginia, with its principal place of business in Prince George County, Virginia and mailing address of 101 Jordan Point Road, Hopewell, Virginia. RBMW is engaged in the marina business and trades under the name of Jordan Point Yacht Haven.

2. At all times relevant Defendant, Robins Insurance Agency, Inc. ("Robins"), was a Corporation organized and existing under the laws of the Commonwealth of Virginia, with its principal place of business in Henrico County, Virginia. Robins is engaged in the business of soliciting, selling, negotiating and effecting insurance as an independent insurance agency.

3. At all times relevant, William Raleigh Robins was a duly licensed Virginia agent, an officer with Robins and represented to the plaintiff that he was an authorized agent as to represent insurers within the CNA Insurance Companies.

4. At all times relevant, Defendant, Transcontinental Insurance Company ("Transcontinental"), a New York Corporation, authorized to do business in Virginia, engaged in the business as an insurance company. Transcontinental is a member of the CNA Insurance Companies.

5. At all times relevant, Defendant, American Casualty Company of Reading, Pennsylvania ("American Casualty"), a Pennsylvania Corporation, authorized to do business in Virginia, engaged in the business as an insurance company. American Casualty is a member of the CNA Insurance Companies.

6. At all times relevant, Defendant, Continental Casualty Company ("Continental Casualty"), an Illinois Corporation, authorized to do business in Virginia, engaged in the business as an insurance company. Continental Casualty is a member of the CNA Insurance Companies.

7. At all times relevant, Defendant, National Fire Insurance Company of Hartford ("National Fire"), a Connecticut Corporation, authorized to do business in Virginia, engaged in the business as an insurance company. National Fire is a member of the CNA Insurance Companies.

8. At all times relevant, Defendant, Transportation Insurance Company ("Transportation"), an Illinois Corporation, authorized to do business in Virginia, engaged in the business as an insurance company. Transportation is a member of the CNA Insurance Companies.

9. At all times relevant, Defendant, Valley Forge Insurance Company ("Valley Forge"), a Pennsylvania Corporation, authorized to do business in Virginia, engaged in the business as an insurance company. Valley Forge is a member of the CNA Insurance Companies.

10. At all times relevant, Defendant, Boston Old Colony Insurance Company ("Boston Old Colony"), a Massachusetts Corporation, authorized to do business in Virginia, engaged in the business as an insurance company. Boston Old Colony is a member of the CNA Insurance Companies.

11. At all times relevant, Defendant, The Buckeye Union Insurance Company ("Buckeye Union"), an Ohio Corporation,

authorized to do business in Virginia, engaged in the business as an insurance company. Buckeye Union is a member of the CNA Insurance Companies.

12. At all times relevant, Defendant, Commercial Insurance Company of Newark, New Jersey ("Commercial"), a New Jersey Corporation, authorized to do business in Virginia, engaged in the business as an insurance company. Commercial is a member of the CNA Insurance Companies.

13. At all times relevant, Defendant, The Continental Insurance Company ("Continental"), a New Hampshire Corporation, authorized to do business in Virginia, engaged in the business as an insurance company. Continental is a member of the CNA Insurance Companies.

14. At all times relevant, Defendant, Continental Reinsurance Corporation ("Continental Reinsurance"), a California Corporation, authorized to do business in Virginia, engaged in the business as an insurance company. Continental Reinsurance is a member of the CNA Insurance Companies.

15. At all times relevant, Defendant, The Fidelity and Casualty Company of New York ("Fidelity and Casualty"), a New Hampshire Corporation, authorized to do business in Virginia, engaged in the business as an insurance company. Fidelity and Casualty is a member of the CNA Insurance Companies.

16. At all times relevant, Defendant, Firemen's Insurance Company of Newark, New Jersey ("Firemen's"), a New Jersey Corporation, authorized to do business in Virginia, engaged in the

business as an insurance company. Firemen's is a member of the CNA Insurance Companies.

17. At all times relevant, Defendant, The Glens Falls Insurance Company ("Glens Falls"), a Delaware Corporation, authorized to do business in Virginia, engaged in the business as an insurance company. Glens Falls is a member of the CNA Insurance Companies.

18. At all times relevant, Defendant, Kansas City Fire and Marine Insurance Company ("Kansas City"), a Missouri Corporation, authorized to do business in Virginia, engaged in the business as an insurance company. Kansas City is a member of the CNA Insurance Companies.

19. At all times relevant, Defendant, Niagara Fire Insurance Company ("Niagara Fire"), a Delaware Corporation, authorized to do business in Virginia, engaged in the business as an insurance company. Niagara Fire is a member of the CNA Insurance Companies.

20. On or about March 15, 1995, William Raleigh Robins, as a duly licensed Virginia agent and an officer with Robins, was an agent for Robins and insurers within the CNA Insurance Companies, and in such capacity presented a written proposal of insurance to RBMW (a copy of which is attached and labelled as "Exhibit A") stating in the proposal that the insurer would be the CNA Insurance Companies.

21. Prior to delivering the proposal, William Raleigh Robins, on behalf of both Robins and CNA Insurance Companies, physically inspected the RBMW premises and reviewed all the prior insurance

coverages carried by RBMW.

22. Based on the representations contained in the proposal by Robins, Robins review of all prior insurance coverages carried by RBMW, Robins physical examination of RBMW's premises and telephone conversations between Robins and RBMW, subsequently, RBMW was induced to replace its existing insurance policy affording coverage for the marina.

23. On or about March 20, 1995, RBMW relying on the representations, proposal, marketing and materials of Robins, purchased a package policy of insurance (the "Policy") through various CNA Insurance Companies as more particularly described in the declarations pages of each coverage part, to cover its exposures on its business as a marina. The "piers, wharves and docks coverage portion" of the Policy was numbered C133 9920 45, written through Transcontinental, and had a term of coverage from March 20, 1995 to March 20, 1996.

24. On its anniversary the "piers, wharves and docks coverage portion" of the Policy was renewed through Transcontinental with policy number: B133 9920 45, term of coverage from March 20, 1996 to March 20, 1997, along with the other portion of the Policy (the renewal Policy) was written through other CNA Insurance Companies as more particularly identified on each coverage declaration page.

25. RBMW paid \$14,778.00 to Robins as premiums for this renewal Policy through the various CNA Insurance Companies specified in each policy declaration.

26. On or about September 6, 1996, a storm, Hurricane Fran,

severely damaged RBMW's premises, (the "Marina"). The damages to the Marina totalled \$139,712.17¹ as itemized on the attached schedule, labelled as "Exhibit B".

27. The day after the storm William Raleigh Robins after being informed of the storm damage came to the Marina, surveyed the damage and assured the owners that they need not worry that the damage would be covered under their renewal Policy.

28. RBMW, at the request of the CNA Insurance Companies, obtained several proposals from various marine contractors and presented them to the adjuster.

29. The CNA Insurance Companies have since paid \$18,143.80 to RBMW to compensate RBMW for its loss and has denied the rest of the claim of RBMW related to the damage to wharves, piers and docks, along with damage to the boathouse and replacement of a sign.

COUNT I

BREACH OF CONTRACT

30. The foregoing paragraphs of this Motion for Judgment are incorporated by reference as if fully set forth herein.

31. The renewal Policy, among other things, requires that the CNA Insurance Companies pay validly presented claims.

32. RBMW presented to the CNA Insurance Companies a valid claim for payment as a result of the storm damage.

¹ This figure (\$139,712.17) includes the monies that CNA Insurance Companies have paid to RBMW, which totalled \$18,143.80.

33. The renewal Policy afforded coverage for this storm damage yet the CNA Insurance Companies have failed to pay the entire claim, except for \$18,143.80, and the CNA Insurance Companies have denied any obligation for the majority of this claim.

COUNT II

AGENT MATERIALLY MISREPRESENTED THE TERMS OF THE MARINA'S
COVERAGE

34. The foregoing paragraphs of this Motion For Judgment are incorporated by reference as if fully set forth herein.

35. Robins intentionally or negligently represented to RBMW that as agent he was knowledgeable in the coverages required for a Marina.

36. Robins further represented to RBMW that as agent for CNA Insurance Companies he had the markets to cover the risk exposures of a Marina.

37. Robins never informed RBMW that such storm damage was excluded under either the Policy or the renewal Policy.


38. In reliance upon these representations by Robins, RBMW purchased both the Policy and the renewal Policy.

39. But for these misrepresentations by Robins, RBMW would never have purchased the Policy or the renewal Policy.

WHEREFORE the Plaintiff, by counsel, demands judgment against the Defendants on all counts, jointly and severally, in the amount

of \$121,568.37, plus prejudgment interest thereon, costs, and attorneys' fees incurred. Trial by jury is demanded.

RBMW, INC., t/a
JORDAN POINT YACHT HAVEN,

BY: 
Of Counsel

Bruce M. Marshall (VSB 18093)
Junie L. Bradshaw (VSB 05274)
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Counsel for the Plaintiff

VIRGINIA:

FILED

IN THE CIRCUIT COURT FOR THE COUNT OF PRINCE GEORGE 98 JUL 20 PM 4:44

RBMW, INC.,)
t/a JORDAN POINT YACHT HAVEN,)
)
Plaintiff,)
)
v.)
)
ROBINS INSURANCE AGENCY, INC.,)
WILLIAM RALEIGH ROBINS, et al.,)
)
Defendants.)

CIRCUIT COURT CLERK'S OFFICE
PRINCE GEORGE COUNTY, VA.
BISHOP KNOTT, JR., CLERK
BY L. Blunt D.C.

Case No.: 149CL98000050-00

**PLEA OF THE STATUTE OF LIMITATIONS AND DEMURRER
OF ROBINS INSURANCE AGENCY, INC. AND
WILLIAM RALEIGH ROBINS**

Defendants Robins Insurance Agency, Inc. (the "Agency") and William Raleigh Robins ("Robins"), by counsel, for their Plea of the Statute of Limitations and Demurrer to the Motion for Judgment filed by RBMW, Inc. t/a Jordan Point Yacht Haven ("Jordan Point"), state as follows:

Plea of the Statute of Limitations

1. Jordan Point's claim against the Agency and Robins is barred by the applicable two-year statute of limitations.

WHEREFORE, the Agency and Robins respectfully request that the Court enter an Order sustaining their Plea of the Statute of Limitations, dismissing the Motion for Judgment with prejudice and awarding to them their cost incurred herein.

Demurrer

1. The Motion for Judgment does not state a cause of action and fails to state facts upon which relief demanded against the Agency or Robins can be granted because the Motion for Judgment affirmatively alleges coverage for storm damage under the insurance policy at issue. Having affirmatively alleged such coverage, read as a whole, the Motion for Judgment does not factually allege any tort or breach of any contract by the Agency or by Robins.

2. The Motion for Judgment further does not state a cause of action and fails to state facts upon which relief demanded against the Agency or Robins can be granted because Virginia law imposes an affirmative obligation on a policy holder to read its policy. There is no allegation in the Motion for Judgment that the insurance policy at issue was not delivered in a timely fashion to Jordan Point. Accordingly, having either failed to read its insurance policy, or having read the policy and failed to request from the Agency or Robins a change in the policy, Jordan Point has waived any claim in tort or contract that it may have had against the Agency or Robins.

3. Finally, the Motion for Judgment does not state a cause of action against the Agency or Robins for the recovery of attorney's fees. The Code of Virginia provides for the recovery of attorney's fees, when a claim has been denied in bad faith, solely against insurers. In reality and as alleged in the Motion for Judgment, the Agency and Robins are an insurance agency and an insurance agent, respectively, and attorney's fees in favor of Jordan Point cannot be awarded against non-insurer defendants.

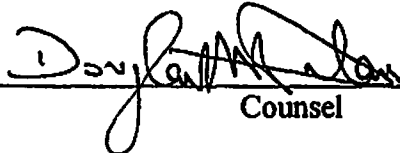
WHEREFORE, the Agency and Robins respectfully request that the Court sustain their Demurrer, dismiss the Motion for Judgment with prejudice and award to them their costs incurred herein. In the alternative, should the Court decline to sustain their Demurrer in its

entirety, the Agency and Robins respectfully request that the Court dismiss with prejudice Jordan Points' prayer for attorney's fees against them.

Respectfully submitted,

ROBINS INSURANCE AGENCY, INC. and
WILLIAM RALIEGH ROBINS

By:

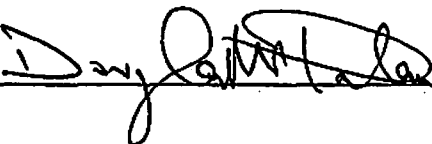

Counsel

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MEZZULLO & McCANDLISH, P.C.
1111 East Main Street, Suite 1500
P. O. Box 796
Richmond, Virginia 23218
(804) 775-3885

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was mailed, postage-prepaid, on this 20th day of July, 1998, to:

Bruce M. Marshall, Esq.
DURRETT, IRVIN & BRADSHAW, P.C.
Main Street Center
600 East Main Street, 20th Floor
Richmond, Virginia 23219



VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF PRINCE GEORGE

RBMW, INC.,
t/a Jordan Point Yacht Haven,

Plaintiff,

v.

Case No. CL98-050

ROBINS INSURANCE AGENCY, INC.,

WILLIAM RALEIGH ROBINS,

TRANSCONTINENTAL INSURANCE COMPANY,

AMERICAN CASUALTY COMPANY OF READING, PA,

CONTINENTAL CASUALTY COMPANY,

NATIONAL LIFE INSURANCE COMPANY OF HARTFORD,

TRANSPORTATION INSURANCE COMPANY,

VALLEY FORGE INSURANCE COMPANY,

BOSTON OLD COLONY INSURANCE COMPANY,

THE BUCKEYE UNION INSURANCE COMPANY,

COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY,

THE CONTINENTAL INSURANCE COMPANY,

CONTINENTAL REINSURANCE CORPORATION,

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,

FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY,

THE GLEN FALLS INSURANCE COMPANY,

KANSAS CITY FIRE AND MARINE INSURANCE COMPANY,

AND

NIAGRA FIRE INSURANCE COMPANY,

Defendants.

CIRCUIT COURT CLERK'S OFFICE
PRINCE GEORGE COUNTY, VA.
BISHOP KNOTT, JR., CLERK
BY John L. Kott D.C.

98 JUL 23 PM 3:00

FILED

GROUND OF DEFENSE

COME NOW the defendants, TRANSCONTINENTAL INSURANCE COMPANY, AMERICAN CASUALTY COMPANY OF READING, PA, CONTINENTAL CASUALTY COMPANY, NATIONAL LIFE INSURANCE COMPANY OF HARTFORD, TRANSPORTATION INSURANCE COMPANY, VALLEY FORGE INSURANCE COMPANY, BOSTON OLD COLONY INSURANCE COMPANY, THE BUCKEYE UNION INSURANCE COMPANY, COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY, THE CONTINENTAL INSURANCE COMPANY, CONTINENTAL REINSURANCE CORPORATION, THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, THE GLEN FALLS INSURANCE COMPANY, KANSAS CITY FIRE AND MARINE INSURANCE COMPANY, AND NIAGRA FIRE INSURANCE COMPANY, (hereinafter referred to as "CNA"), by counsel, and for its Grounds of Defense to the Motion for Judgment filed by the plaintiff states the following:

1. CNA admits the following allegations contained in paragraphs 1 through 19.
2. CNA does not know if the facts alleged in paragraphs 20, 21 and 22 exist and would require strict proof of same.
3. In response to paragraph 23, CNA admits that a policy was issued contained the standard piers, wharfs and docks coverage for the period from March 20, 1995 to March 20, 1996. CNA does not know if the remaining facts alleged in paragraph 23 exist and would require strict proof of same. CNA asserts that the piers, wharfs and docks coverage provides a specific exclusion for damage caused by flood and wind driven water.

4. In response to paragraph 24, CNA admits that the piers, wharfs and docks coverage was renewed providing coverage under that provision from March 20, 1996 to March 20, 1997. CNA asserts that the piers, wharfs and docks coverage provides a specific exclusion for damage caused by flood and wind driven water.

5. CNA admits the allegations contained in paragraph 25.

6. In response to paragraph 26, CNA admits that a storm known as Hurricane Fran struck causing damage to various properties. CNA does not know if the remaining facts exist and would require strict proof of same.

7. CNA does not know if the facts alleged in paragraph 27 exist and would require strict proof of same.

8. CNA admits the allegations contained in paragraphs 28 and 29.

COUNT ONE

BREACH OF CONTRACT

9. In response to paragraph 30, CNA repleads and reasserts its responses to paragraphs 1 through 29 in the Motion for Judgment as if fully set forth herein.

10. In response to paragraph 31, CNA asserts that the language of the policy is clear and unambiguous. The terms and conditions of the policies' set forth the coverage provided. To the extent paragraph 31 does not accurately state the terms of the policies, paragraph 31 is denied.

11. CNA denies the allegations contained in paragraph 32 and 33 of the Motion for Judgment.

COUNT TWO

12. In response to paragraph 34, CNA repleads and reasserts its responses to paragraphs 1 through 33 in the Motion for Judgment as if fully set forth herein.

13. CNA does not know if the allegations contained in paragraphs 35, 36, 37, 38 and 39 exist and would require strict proof of same.

AFFIRMATIVE DEFENSES

14. The plaintiffs' claims are barred by the applicable Statute of Limitations and/or the Doctrine of Laches.

15. The plaintiffs' recovery is barred by their own negligence.

16. The plaintiffs' recovery is barred by the failure to fulfill their own obligations under the CNA policy.

17. The plaintiffs' injuries, if any, were due to perils not covered or specifically excluded by their CNA Insurance policy.

18. The plaintiffs have failed to mitigate their damages.

19. CNA pleads accord and satisfaction of the claims giving rise to the instant action.

20. CNA affirmatively pleads that the only policy of insurance in question in this action was issued by the Transcontinental Insurance Company. Though the other companies are CNA insurance companies, they have not issued any of the policies in question in this case.

Transcontinental Insurance Company is the only proper defendant for the claims asserted by the plaintiffs in this action.

WHEREFORE, CNA prays that the plaintiffs' action would be dismissed and it would be awarded the costs of these proceedings, including reasonable attorney fees.

TRANSCONTINENTAL INSURANCE COMPANY,
AMERICAN CASUALTY COMPANY OF READING, PA,
CONTINENTAL CASUALTY COMPANY,
NATIONAL LIFE INSURANCE COMPANY OF HARTFORD,
TRANSPORTATION INSURANCE COMPANY,
VALLEY FORGE INSURANCE COMPANY,
BOSTON OLD COLONY INSURANCE COMPANY,

THE BUCKEYE UNION INSURANCE COMPANY,
COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW
JERSEY,
THE CONTINENTAL INSURANCE COMPANY,
CONTINENTAL REINSURANCE CORPORATION,
THE FIDELITY AND CASUALTY COMPANY OF NEW
YORK,
FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW
JERSEY,
THE GLEN FALLS INSURANCE COMPANY,
KANSAS CITY FIRE AND MARINE INSURANCE COMPANY,
AND
NIAGRA FIRE INSURANCE COMPANY,

BY: _____

Of Counsel

W. Joseph Owen, III
VSB# 15963
COWAN & OWEN, P.C.
P. O. Box 35655
1930 Huguenot Road
Richmond, Virginia 23235-0655
(804) 320-9100

CERTIFICATE OF MAILING

I hereby certify that a true and exact copy of the foregoing Grounds of Defense was
mailed this 23 day of July, 1998 to Bruce M. Marshall, DURRETTE, IRVIN &
BRADSHAW, Twentieth Floor, Main Street Centre, 600 East Main Street, Richmond, Virginia
23219, counsel for the plaintiffs, and John F. Robins, Registered Agent, ROBINS INSURANCE
AGENCY, INC., 2800 Parham Road, P. O. Box 71300, Richmond, Virginia 23294-4409.

W. Joseph Owen, III

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE GEORGE COUNTY

FILED

98 OCT 22 PM 1:35

RBMW, INC.,
t/a JORDAN POINT YACHT HAVEN,

Plaintiff,

v.

CASE NO. CL98-050

ROBINS INSURANCE AGENCY, INC.,

WILLIAM RALEIGH ROBINS,

TRANSCONTINENTAL INSURANCE
COMPANY,

AMERICAN CASUALTY COMPANY OF
READING, PENNSYLVANIA,

CONTINENTAL CASUALTY COMPANY,

NATIONAL FIRE INSURANCE
COMPANY OF HARTFORD,

TRANSPORTATION INSURANCE
COMPANY,

VALLEY FORGE INSURANCE
COMPANY,

BOSTON OLD COLONY INSURANCE
COMPANY,

THE BUCKEYE UNION INSURANCE
COMPANY,

COMMERCIAL INSURANCE COMPANY
OF NEWARK, NEW JERSEY,

THE CONTINENTAL INSURANCE
COMPANY,

CONTINENTAL REINSURANCE
CORPORATION,

CIRCUIT COURT CLERK'S OFFICE
PRINCE GEORGE COUNTY, VA.
BISHOP KNOTT, JR., CLERK
BY Salmon D.C.

THE FIDELITY AND CASUALTY)
 COMPANY OF NEW YORK,)
)
 FIREMEN'S INSURANCE COMPANY OF)
 NEWARK, NEW JERSEY,)
)
 THE GLENS FALLS INSURANCE)
 COMPANY,)
)
 KANSAS CITY FIRE AND MARINE)
 INSURANCE COMPANY,)
)
 AND)
)
 NIAGARA FIRE INSURANCE COMPANY,)
)
 Defendants.)

NOTICE OF HEARING

TO: Douglas M. Palais
 MEZZULLO & McCANDLISH, P.C.
 1111 East Main Street, Suite 1500
 P. O. Box 796
 Richmond, Virginia 23218

W. Joseph Owen, III
 COWAN & OWEN, P.C.
 1930 Huguenot Road
 Post Office Box 35655
 Richmond, Virginia 23235-0655

PLEASE TAKE NOTICE that at 2:30 p.m. on the 17th day of November 1998 in the Prince George Circuit Court, the plaintiff, RBMW, INC. t/a JORDAN POINT YACHT HAVEN, by counsel, in the above-entitled action will move this Honorable Court to dismiss the Plea of the Statute of Limitations and Demurrer of Robins Insurance Agency, Inc. and William Raleigh Robins to the Motion for Judgment filed by RBMW, Inc. t/a Jordan Point Yacht Haven.

This is the 21st day of October 1998.

RBMW, INC. t/a
JORDAN POINT YACHT HAVEN

By 
Of Counsel

Bruce M. Marshall
(VSB No. 18093)
Junie L. Bradshaw
(VSB No. 05274)
JoAnne L. Nolte
(VSB No. 19383)
DURRETTE, IRVIN & BRADSHAW, P.C.
Twentieth Floor, Main Street Centre
600 East Main Street
Richmond, Virginia 23219
(804) 775-6900

CERTIFICATE

I hereby certify that a true copy of the foregoing Notice of Hearing was mailed, first class, postage prepaid, to:

Douglas M. Palais
MEZZULLO & McCANDLISH, P.C.
1111 East Main Street, Suite 1500
P. O. Box 796
Richmond, Virginia 23218

W. Joseph Owen, III
COWAN & OWEN, P.C.
1930 Huguenot Road
Post Office Box 35655
Richmond, Virginia 23235-0655

on this 21st day of October 1998.


Bruce M. Marshall

f:\jn\jordan\notice

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE GEORGE COUNTY

RBMW, INC.,)
t/a JORDAN POINT YACHT HAVEN,)

Plaintiff,)

v.)

CASE NO. CL98-050

ROBINS INSURANCE AGENCY, INC.,)

WILLIAM RALEIGH ROBINS,)

TRANSCONTINENTAL INSURANCE)
COMPANY,)

AMERICAN CASUALTY COMPANY OF)
READING, PENNSYLVANIA,)

CONTINENTAL CASUALTY COMPANY,)

NATIONAL FIRE INSURANCE)
COMPANY OF HARTFORD,)

TRANSPORTATION INSURANCE)
COMPANY,)

VALLEY FORGE INSURANCE)
COMPANY,)

BOSTON OLD COLONY INSURANCE)
COMPANY,)

THE BUCKEYE UNION INSURANCE)
COMPANY,)

COMMERCIAL INSURANCE COMPANY)
OF NEWARK, NEW JERSEY,)

THE CONTINENTAL INSURANCE)
COMPANY,)

CONTINENTAL REINSURANCE)
CORPORATION,)

THE FIDELITY AND CASUALTY)
COMPANY OF NEW YORK,)
)
FIREMEN'S INSURANCE COMPANY OF)
NEWARK, NEW JERSEY,)
)
THE GLENS FALLS INSURANCE)
COMPANY,)
)
KANSAS CITY FIRE AND MARINE)
INSURANCE COMPANY,)
)
AND)
)
NIAGARA FIRE INSURANCE COMPANY,)
)
Defendants.)

STIPULATION AND ORDER

THIS CAME the parties, by counsel, and stipulated as follows:

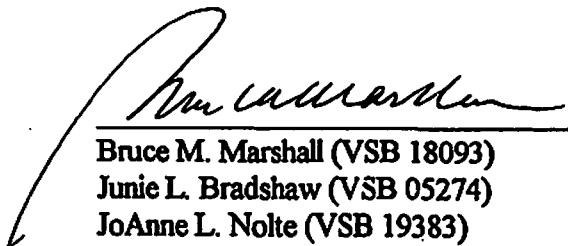
1. Transcontinental Insurance Company (Transcontinental) agrees that it underwrote the only policy of insurance in question in this action and is the sole insurer on that policy of insurance.
2. This Stipulation is intended to eliminate the need to continue this litigation against those additional insurance company defendants, American Casualty Company Of Reading, Pennsylvania, Continental Casualty Company, National Fire Insurance Company Of Hartford, Transportation Insurance Company, Valley Forge Insurance Company, Boston Old Colony Insurance Company, The Buckeye Union Insurance Company, Commercial Insurance Company Of Newark, New Jersey, The Continental Insurance Company, Continental Reinsurance Corporation, The Fidelity and Casualty Company Of New York, Firemen's Insurance Company Of Newark, New Jersey, The Glens Falls Insurance Company, Kansas City Fire And Marine Insurance Company, Niagara Fire Insurance Company.

3. Based on this Stipulation of the parties it is ORDERED that those named insurance company defendants, American Casualty Company Of Reading, Pennsylvania, Continental Casualty Company, National Fire Insurance Company Of Hartford, Transportation Insurance Company, Valley Forge Insurance Company, Boston Old Colony Insurance Company, The Buckeye Union Insurance Company, Commercial Insurance Company Of Newark, New Jersey, The Continental Insurance Company, Continental Reinsurance Corporation, The Fidelity And Casualty Company Of New York, Firemen's Insurance Company Of Newark, New Jersey, The Glens Falls Insurance Company, Kansas City Fire And Marine Insurance Company, Niagara Fire Insurance Company, are dismissed as party defendants, without prejudice.

ENTER: 11/12/98


Judge

We ask for this:


Bruce M. Marshall (VSB 18093)
Junie L. Bradshaw (VSB 05274)
JoAnne L. Nolte (VSB 19383)
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Counsel for Plaintiff,
RBMW, Inc. t/a Jordan Point Yacht Haven

RBMW, Inc. v.
Robins Insurance Agency, et al.
Stipulation and Order



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William Raleigh Robins.



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Counsel for the Defendants,
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American Casualty Company of Reading, PA
Continental Casualty Company
National Life Insurance Company of Hartford
Transportation Insurance Company
Valley Forge Insurance Company
Boston Old Colony Insurance Company
The Buckeye Union Insurance Company
Commercial Insurance Company of Newark, New Jersey
The Continental Insurance Company
Continental Reinsurance Corporation
The Fidelity and Casualty Company of New York
Fireman's Insurance Company of Newark, New Jersey
The Glen Falls Insurance Company
Kansas City Fire and Marine Insurance Company
Niagra Fire Insurance Company.

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VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF PRINCE GEORGE

RBMW, INC.,)
t/a JORDAN POINT YACHT HAVEN,)
)
Plaintiff,)
)
v.)
)
ROBINS INSURANCE AGENCY, INC.,)
WILLIAM RALEIGH ROBINS, et al.,)
)
Defendants.)

Case No. 149CL9800005000

Seidman
CIRCUIT COURT
PRINCE GEORGE COUNTY
JUDGE KNOX JR., CL.

98 NOV 16 AM 11:15

FILED

**MEMORANDUM IN SUPPORT OF SPECIAL PLEA AND DEMURRER OF
ROBINS INSURANCE AGENCY, INC. AND WILLIAM RALEIGH ROBINS**

Defendants Robins Insurance Agency, Inc. ("Robins Insurance" or the "Agency")
and William Raleigh Robins ("Robins" or the "Agent"), by counsel, for their
Memorandum in Support of Plea of Statute of Limitations and Memorandum in Support
of Demurrer to the Motion for Judgment filed by RBMW, Inc. t/a Jordan Point Yacht
Haven ("RBMW"), state as follows:

INTRODUCTION

Robins provided RBMW with an insurance policy for their marina—the first
policy was for the period covering March 20, 1995, through March 20, 1996; and, the
second for the period covering March 20, 1996, through March 20, 1997. RBMW has
alleged damage to their marina which occurred on September 6, 1996, as a result of
Hurricane Fran. A claim was submitted to the insurer which was rejected, in part, due to
a policy exclusion. Of the damages allegedly sustained, \$121,568.37 was not covered by
the insurer. On June 23, 1998, RBMW filed suit against the insurer, the Agency and
Robinson, jointly and severally, for \$121,568.37. RBMW has alleged breach of contract

against the insurer (see Count I of Motion for Judgment), and that the Agent "materially misrepresented the terms of the marina's coverage" (see Count II of Motion for Judgment). RBMW has pled inconsistent facts—stating affirmatively that coverage for the loss sustained existed, on the one hand (see ¶ 33 of Motion for Judgment); and, that the Agent failed to inform them, on the other hand, of the exclusion obviating coverage (see ¶ 37 of Motion for Judgment).

As this Memorandum will demonstrate, Plaintiff's allegations against the Agency and Robinson are time-barred since they were not brought within two years from March 20, 1995, the date the policy was issued and the date RBMW allegedly relied upon the "representations, proposal, marketing and materials of Robins." (see ¶ 23 of Motion for Judgment). Va. Code §8.01-243 (1950), as amended.

In the alternative, in the event that the defendants' plea is not sustained, the plaintiff has failed to state a claim upon which relief can be granted against Robins and Robins Insurance since the Motion for Judgment affirmatively alleges coverage for storm damage under the policy at issue. See ¶ 33 of Motion for Judgment. Hence, the plaintiff, as a matter of law, has not stated a cognizable claim for tort or breach of any contract by the Agent or the Agency. Moreover, the plaintiff is barred as a matter of law from recovery against Robins or Robins Insurance for its failure to read the policy. Finally, the claim for attorney' fees must also be dismissed since the facts do not support this request as a matter of law.

ARGUMENT

A. RBMW'S Cause of Action is Barred By the Statute of Limitations.

RBMW's cause of action against Robins Insurance and Robins is one for personal injury. As such, it is governed by Virginia's two-year statute of limitation. The plaintiff

did not file the present suit until June 23, 1998, more than three years after the policy was issued. Hence, the claim is time-barred and this court is without jurisdiction.

The Supreme Court has been extremely technical in its determination of whether the damage for which a plaintiff seeks to recover is a direct injury to property and thereby qualifies for the benefit of the five-year statute of limitations. In order for the five-year statute to apply, the following facts, among other things, must be found: "(1) the injury must be against and affect directly the plaintiff's property; ... (2) the plaintiff must sue only for the direct injury. ...; and (3) the injury, to qualify as a direct injury, must be the very first injury which results from the wrongful act." Brown v. ABC, Inc., 704 F.2d 1296, 1303 (4th Cir. 1983) (citations omitted).

Where the injury to property is an indirect or consequential injury resulting from a direct injury to the person, the two-year statute of limitation for personal injury applies. Evans v. Sturgill, 430 F. Supp. 1209 (W.D. Va. 1977); Holdford v. Leonard, 355 F. Supp. 261 (W.D. Va. 1973).

The Supreme Court was confronted with a case strikingly analogous to the set of facts involved in the matter at hand in Carva Food Corp. v. Dawley, 202 Va. 543, 118 S.E.2d 664 (1961). In Dawley, the plaintiff brought suit against the insurance agency and insurance agent who secured its sprinkler leakage policy for its grocery store. The plaintiff sustained \$26,000.00 in damages to its stock of groceries after a hurricane blew the roof off of its grocery store. The sprinkler system then activated and damaged the stock of groceries inside the store. The insurance company denied the claim since there was an exclusion in the policy for sprinkler leakage caused by windstorm. The plaintiff pled that the insurance agent falsely or inadvertently represented that the policy would provide coverage for the type of loss that was sustained. Moreover, the plaintiff alleged

that if it had not been misled by the conduct and representations of the agent, it would have purchased a policy which provided the desired coverage. The plaintiff sought to recover the amount of money it would have received from its insurance for the damages it sustained as a result of the water damage. RBMW has pled nearly identical allegations. See ¶¶ 35-39 of Motion for Judgment.

The Supreme Court found that the plaintiff's motion for judgment did not state a cause of action for property damage and was therefore barred by Va. Code §8-24 (presently §§ 8-243 and -248 of Va. Code (1950), as amended) since it was brought more than four years after the last policy had been issued. The Court found that the cause of action against the insurance agent and agency was "not an action to enforce the collection of damages to property under an insurance policy; but...an action seeking to hold [the defendant] personally responsible for his failure to procure for [the plaintiff] the policy requested by [the plaintiff]." Dawley, 202 Va. at 547, 118 S.E.2d at 667. The Court further explained:

[The plaintiff's] property was not damaged when the insurance policy was issued without full sprinkler leakage coverage. Its property was damaged when water was discharged from the sprinkler system as the result of a windstorm. [The defendant] was not instrumental in causing the windstorm, nor was he responsible for its results. The damage would not have occurred except for the happening of a severe windstorm, an intervening event which might have never happened. They were the indirect and consequential results of the wrong charged to [the defendant].

Id.

RBMW's allegation that Robins materially misrepresented the terms of the marina's coverage (see Count II of Motion for Judgment) is simply an action to recover for consequential damages to their marina resulting from those alleged misrepresentations. Hence, the two-year statute of limitation bars recovery. Like the

plaintiff in Dawley, RBMW's marina was not damaged when the insurance policy was issued without full coverage for its piers and docks. Its property was damaged when waves caused damage to the marina. RBMW's loss was the indirect result of the wrong charged to the Agent and the Agency.

B. RBMW Has Not Pled a Cause of Action for Tort or Breach of Any Contract by Robins Insurance or Robins.

The Motion for Judgment does not state a cause of action and fails to state a claim upon which relief can be granted against the Agency or Robins since the Motion for Judgment affirmatively alleges coverage for storm damage under the insurance policy at issue. Having affirmatively alleged coverage, read as a whole, the Motion for Judgment does not factually allege any tort or breach of any contract by the Agency or Robins. RBMW has pled that "the renewal Policy afforded coverage for this storm yet the CNA Insurance Companies have failed to pay the entire claim..." (see ¶ 33 of Motion for Judgment). For purposes of demurrer, all facts pled are considered true. West Alexandria Properties, Inc. v. First Va. Mtg. & Real Estate Inv. Trust, 221 Va. 134, 267 S.E.2d 149 (1980). While it is true that the common law requirements for pleading have been relaxed by statute, it is still necessary for a plaintiff to plead sufficient facts to apprise the opposing party of the nature of the claim. Rule 1:4(d); Va. Code § 8.01-275 (1950), as amended.

RBMW has pled two entirely disparate set of facts against the Agency and Robins. On the one hand, RBMW has affirmatively pled that "the policy afforded coverage" (see ¶ 33 of Motion for Judgment). On the other hand, RBMW has pled that the Agency and Robins were errant for not notifying the marina that the policy excluded losses such as that they suffered (see ¶ 37 of Motion for Judgment). RBMW can rise no

higher than its own pleadings. The allegation of coverage, which must be accepted as true for purposes of demurrer, vitiates any claim of tort or breach of any contract by the Agency and/or Robins.

It is true that Virginia permits parties to plead alternative facts when the opponent would be equally liable under either theory. Manassas Park Development Company v. Offutt, 203 Va. 382, 124 S.E.2d 29 (1962). However, there is no support for permitting parties to plead, like RBMW has, alternative facts—one which would not permit a recovery under any theory. A party is estopped from taking a position which is inconsistent with one previously asserted in the same legal proceeding. This has been referred to as the prohibition of a litigant from being allowed to "approbate and reprobate at the same time." Leech v. Beasley, 203 Va. 955, 128 S.E.2d 293 (1962); see also Strickland v. Dunn, 219 Va. 76, 244 S.E.2d 764 (1978). RBW is estopped from pleading two entirely inconsistent set of facts relative to whether coverage was afforded for the loss sustained.

C. RBMW is Barred as a Matter of Law for Any Recovery Against Robins Insurance or Robins for Any Claim in Tort or Contract.

The Virginia Supreme Court has recently made it clear that an insured has a duty to read its policy and that failure to do so will bar any claim against an insurance agent for lack of insurance. In General Insurance of Roanoke v. Page, 250 Va. 409, 464 S.E.2d 343 (1995), the Supreme Court reversed a jury verdict in favor of an insured and directed that final judgment be entered in favor of the defendant insurance agent. Page, who increased the value of his inventory and improved his building insured through this agent, asked for higher limits. The agent told him that he would take care of it and ultimately

delivered an insurance policy. Page testified that he never read the policy. Finding that he was underinsured after a loss, Page sued the agent.

Even though Page had reading difficulties, the Virginia Supreme Court held that he nevertheless had a duty to read the policy or have his wife read it to him; his failure to do so "constitutes negligence as a matter of law that bars a recovery against the agent." Page, 250 Va. at 412, 464 S.E.2d at 345. The Supreme Court made it clear that its ruling was based on both contract and tort principles:

While we previously have not decided the precise issue presented in the present case, we have held that one who signs an application for life insurance without reading the application or having someone read it to him is chargeable with notice of the application's contents and is bound thereby... We also have held that failure of a grantor to read a deed will not relieve him of obligations contained therein... While the decisions cited are contract cases, we think the same rule should apply in negligence actions.

Page, 250 Va. at 412, 464 S.E.2d at 344. (citations omitted).

There is no allegation in the Motion for Judgment that the insurance policy at issue was not delivered in a timely fashion to RBMW. Accordingly, having either failed to read its insurance policy, or having read the policy and failed to request from the Agency or Robins a change in the policy, RBMW has waived any claim in tort or contract that it may have had against the Agency or Robins. The crux of plaintiff's cause of action against the agent and the Agency appears to rest upon their allegation that "Robins never informed [them] that such storm damage was excluded." (see ¶ 37 of the Motion for Judgment). These facts are insufficient as a matter of law to establish any claim in tort or contract against Robins and/or Robins Insurance. RBMW, a sophisticated business, is chargeable with notice of the contents of the insurance contract and bound by it. RBMW's failure to read

the policy, including the unambiguous exclusion at issue, constitutes negligence as a matter of law which bars any recovery against the agent and/or the Agency.

D. RBMW May Not Recover Attorney's Fees from Robins Insurance or Robins.

Under Virginia law, the only basis upon which an award of attorney's fees can be made is under common law (as an element of damages in another proceeding), by statute or by contract. There is no such right to recovery of attorney's fees in this action and none has been pled. RBMW must bear its own attorney's fees.¹

CONCLUSION

RBMW's cause of action against Robins and Robins Insurance is time-barred since it is governed by Virginia's two-year statute of limitation. RBMW has pled facts of alleged misconduct by the Agent and the Agency with consequential injury to property.


Alternatively, in the event that the defendants' plea is not sustained, the pleading still fails as a matter of law. Since RBMW has pled that coverage existed for their loss, it should be determined, as a matter of law, that there can be no recovery against the Agent and/or the Agency for any breach of contract or tort. Also, RBMW's failure to read its policy constitutes negligence as a matter of law which bars recovery against Robins or Robins Insurance. Finally, plaintiff's request for attorney's fees is inappropriate in this matter.

¹ Robins Insurance and Robins recognize that Va. Code §38.2-209, as amended (1950) does provide that a party may recover attorney's fees from his "insurer" if it is found that the insurer in bad faith has denied coverage or refused payment under the policy. See also Joseph P. Bornstein, Ltd. v. National Union Fire Ins. Co., 828 F.2d 242 (4th Cir. 1987). This provision is inapplicable, however, to insurance agents and/or insurance agencies.

Respectfully submitted,

ROBINS INSURANCE AGENCY, INC. and
WILLIAM RALEIGH ROBINS

By: _____



Douglas M. Palais (VSB No. 19460)
Scott C. Ford (VSB No. 39078)
MEZULLO & McCANDLISH
A Professional Corporation
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(804) 775-3885

CERTIFICATE OF SERVICE

I hereby certify that, this 13th day of November, 1998, I delivered by Facsimile and First Class Mail, postage prepaid, a true and correct copy of the foregoing to:

Bruce M. Marshall, Esq.
Durette, Irvin & Bradshaw, P.C.
Main Street Centre
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Richmond, VA 23219

W. Joseph Owen, III, Esq.
Cowan & Owen, P.C.
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Richmond, VA 23235-0655



VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF PRINCE GEORGE

FILED

SEP 17 PM 2:09

CIRCUIT COURT CLERK'S OFFICE
PRINCE GEORGE COUNTY, VA.
BISHOP KHOTT, JR., CLERK
BY *[Signature]* D.C.

RBMW, INC.,
t/a JORDAN POINT YACHT HAVEN,

Plaintiff,

v.

ROBINS INSURANCE AGENCY, INC.,
WILLIAM RALEIGH ROBINS, et al.

Defendants.

Case No. 149CL98000050-00

**MEMORANDUM IN SUPPORT OF OVERRULING DEFENDANTS' SPECIAL
PLEA OF THE STATUTE OF LIMITATIONS AND DEMURRER**

Your Plaintiff, RBMW, Inc. t/a Jordan Point Yacht Haven, ("RBMW"), has alleged that Defendants, Robins Insurance Agency, Inc., and William Raleigh Robins, a principal of the agency (hereinafter both of these Defendants will be collectively referred to as "Robins") were, at all times relevant, licensed by the insurer that provided the policy in issue and were its authorized agent in the solicitation, sale, negotiation and effecting of the policy of insurance in issue.

RBMW operated a marina, which prior to dealing with Robins, was insured for the type of losses that are the subject matter of that involved in this suit. Robins reviewed the existing insurance coverage in effect for RBMW, examined the premises of RBMW, and based on representations proposed marketing and materials of Robins, RBMW allowed Robins to replace the existing insurance policy with that which is the subject matter of this lawsuit, assuring RBMW that the new policy was comparable to the old to the extent of coverage it afforded.

On September 6, 1996, Hurricane Fran caused extensive damage to RBMW's marina. Robins was notified of the loss, inspected the loss, and assured RBMW that there was coverage for it under the replacement policy that Robins had provided. The insurer, however, refused to

cover all but the smallest portion of the loss, maintaining that the loss sustained was excluded under the terms of the policy.

RBMW disagrees with the insurer's position as to whether the loss is covered or not under the terms of the policy. If, however, it is not a covered loss, then RBMW avers that it relied on the misrepresentations of Robins, the agent of the insurer, that the policy of insurance would provide coverage for the type of losses sustained by RBMW and that such representations of Robins were intentional or negligent.

Robins has filed a special plea of the statute of limitations and a demurrer to plaintiff's Motion for Judgment, neither of which are supported by the case law of the Commonwealth of Virginia nor under the facts of this case. For the reasons set forth below, both the statute of limitation plea and the demurrer should be overruled:

ARGUMENT

A. RBMW's Cause of Action Occurred on September 6, 1996, and the Statute of Limitations for Bringing its Action Against Robins Started Running at that Time.

Robins reliance on the Supreme Court of Virginia's decision in Carva Food Corp v. Dawley, 202 Va. 543, 118 S.E.2d 664 (1961), suggests that the Court's ruling is still applicable case law in Virginia. The precedent suggested by Carva, supra - attempting to distinguish direct and consequential damages under §8-24 Code of Virginia (now §8.01 243, Code of Virginia) (1950, as Amended) - was strongly questioned and implicitly overruled by the Supreme Court of Virginia in Keepe v. Shell Oil, 220 Va. 587, 594 (1979), and specifically overruled by the Court in First Va. Bank - Colonial v. Baker, 225 Va. 72, 84 (1983).

Still must read policy

As made clear by First Va. Bank, supra, at 82, the statute of limitations does not, as Plaintiff maintains, begin to run from the commission of the wrongful or negligent act (in this case the issuance of the final insurance policy by Robins, without the promised coverage) irrespective of the time of the occurrence of the injury underlying the damages claimed. The statute of limitation begins to run at the time that the Plaintiff suffered injury (in this case on September 6, 1996). Otherwise, the plaintiff in absence of any injury or damage within two (2) years of the "wrong doing" of Robins would have no right of action, as the statute of limitations would have run before the cause of action ripened into a right of action.

The Supreme Court thereby clarified the confusion between a "cause of action" and "right of action" - a confusion Robins is attempting to reinstate in support of its plea. RBMW's right of action accrued on September 6, 1996, wherein this cause of action accrued. (Whether the action is governed by a two (2) year statute of limitation which governs personal injury or a five year statute of limitations which concerns damage to property is academic, in that suit was filed on June 23, 1998, within the two (2) year period from the accrued of the cause of action.)

B. RBMW is Allowed Under the Rules of the Supreme Court of Virginia to Plead Alternative Facts and Theories of Recovery.

Under Rule 1:4 (k) of the Rules of The Supreme Court of Virginia a party "asserting either a claim . . . may plead alternative facts and theories of recovery against alternative parties . . . [A] party may also state as many claims . . . as he has regardless of consistency and whether based on legal or equitable grounds." This paragraph was added by the Supreme Court in 1977, and resolves the issue that Robins would suggest exists in

this case, although the citations relied on by Robins are inapplicable to the case at hand. For example, pleading in the alternative is strikingly different from pleading and proving one set of facts in one action and thereafter pleading and attempting to prove inapposite facts in a subsequent action arising out of the same transaction and occurrence.

C. RBMW Relied in the Apparent Misrepresentations of Robins Regarding the Coverage Provided by the Policy of Insurance.

Robin's argues that either RBMW did not read its policy of insurance (or read it and failed to have Robins change it) and therefore as a matter of law is barred from any claim against Robins, citing General Insurance of Roanoke v. Page 250 Va. 409, 464 S.E. 2d 393(1995). The distinction between the facts in the case at hand and those of General Insurance, supra are severalfold. In General Insurance the claim was that the insurance agent failed to procure adequate coverage (in amounts of coverage) against losses, there was a concession that the agent made no misrepresentations or committed no fraud and therefore, no reliance on the assurances of the agent, and the terms of the policy in question were readily ascertained. In the case at hand, RBMW relied on the representations that the loss would be (and even insisted so after the fact) a covered loss. As stated earlier, RBMW disagrees with the insurer that its interpretation of the policy precludes the recovery being sought - so the language of the policy itself is a question being litigated in this matter as well. General Insurance, therefore is inapplicable.

D. RBMW is Entitled to Attorneys Fee Against Robins Upon Proof that there was Bad Faith.

Robins concedes that 38.2 – 209 Code of Virginia (1950 as Amended) provides for the award of attorney's fees in action by an insured agent his "insurer" in

certain cases. Robins suggests however, it is not an "insurer" as set out by the statute.

To the contrary, Robins is an insurer as set on in 38.2-100 Code of Virginia (1950 as Amended) in that it is an "insurance company" which is defined as "any company [which includes individuals] engaged in the business of making contracts of insurance".

Therefore, RBMW maintains it does have a cause of action for attorney fees against Robins.

Robins only sells, it does not "make".

RBMW, INC., t/a
JORDAN POINT YACHT HAVEN

By *Bruce M. Marshall*
Of Counsel

Bruce M. Marshall
(VSB No. 18093)
Junie L. Bradshaw
(VSB No. 05274)
JoAnne L. Nolte
(VSB No. 19383)
DURRETTE, IRVIN & BRADSHAW, P.C.
600 East Main Street, 20th Floor
Richmond, Virginia 23219
(804) 775-6900

Attorney for Plaintiff

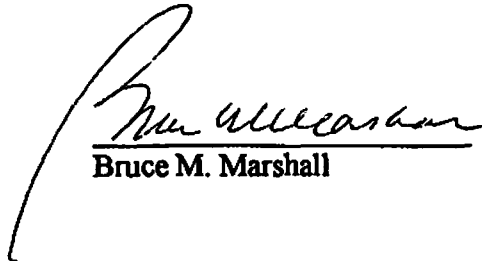
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum of Law was sent via facsimile and was mailed, first class, postage prepaid. to:

Douglas M Palais, Esq.
Scott C. Ford, Esq.
Mezullo & McCandlish
1111 East Main Street
P.O. Box 796
Richmond, Virginia 23218

W. Joseph Owen, III
COWAN & OWEN, P.C.
1930 Huguenot Road
P.O. Box 35655
Richmond, Virginia 23235-0655

On this 16th day of November 1998.



Bruce M. Marshall

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF PRINCE GEORGE

RBMW, INC.,)
t/a JORDAN POINT YACHT HAVEN,)

Plaintiff,)

v.)

ROBINS INSURANCE AGENCY, INC.,)
WILLIAM RALEIGH ROBINS, et al.,)

Defendants.)

Case No. 149CL98000050-00

CIRCUIT COURT OF CLERK'S OFFICE
PRINCE GEORGE COUNTY, VA.
BISHOP KNOTT, JR., CLERK
BY *[Signature]*
D.C.

98 DEC -2 PM 4:12

FILED

MOTION TO RECONSIDER

COME NOW defendants Robins Insurance Agency, Inc. ("Robins Insurance") and William Raleigh Robins ("Robins"), by counsel, and respectfully request that the Court reconsider its ruling from the bench on November 17, 1998¹, overruling the demurrer and special plea filed by Robins Insurance and Robins. Robins Insurance and Robins respectfully request that the Court permit them to present argument on their demurrer and special plea. In support thereof, defendants state as follows:

1. Counsel unintentionally was late for the hearing scheduled for November 17, 1998, at 2:30 p.m. due to his mistaken belief that the hearing was to take place in Prince William. Counsel did not intend to inconvenience the Court or the other parties in the matter.
2. That upon discovery of his error, counsel immediately notified the Court of his error and that he would attempt to arrive at the courthouse as soon as possible and estimated that he would arrive at 3:15 p.m.

¹ An order reflecting the Court's ruling has not yet been entered.

3. That counsel arrived at the courthouse at approximately 3:10 p.m. after the Court had concluded hearing matters for the day.
4. That Robins Insurance and Robins should have an opportunity to be heard and present substantive argument before the Court on their demurrer and special plea.

Respectfully submitted,

ROBINS INSURANCE AGENCY, INC. and
WILLIAM RALEIGH ROBINS

By:  _____

Douglas M. Palais (VSB No. 19460)
Scott C. Ford (VSB No. 39078)
MEZULLO & McCANDLISH
A Professional Corporation
1111 East Main Street
P.O. Box 796
Richmond, Virginia 23218
(804) 775-3885

CERTIFICATE OF SERVICE

I hereby certify that, this 30th day of November, 1998, I delivered by First Class Mail, postage prepaid, a true and correct copy of the foregoing to:

Bruce M. Marshall, Esq.
Durette, Irvin & Bradshaw, P.C.
Main Street Centre
600 East Main Street
Richmond, VA 23219

W. Joseph Owen, III, Esq.
Cowan & Owen, P.C.
P. O. Box 35655
Richmond, VA 23235-0655

A handwritten signature in black ink, consisting of several loops and a final flourish, positioned above a horizontal line.

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE GEORGE COUNTY

RBMW, INC.,
t/a JORDAN POINT YACHT HAVEN,

Plaintiff,

v.

ROBINS INSURANCE AGENCY, INC.,

WILLIAM RALEIGH ROBINS,

and

TRANSCONTINENTAL INSURANCE
COMPANY,


Defendants.

CASE NO. CL98-050

ORDER


On the 17th day of November 1998, came the parties on the Demurrer and Special Plea of the Statute of Limitations filed by counsel for defendants, Robins Insurance Agency, Inc. and William Raleigh Robins, and the Court thereupon overruled both the Special Plea of Limitations and defendants' Demurrer to which action of the Court those defendants, by counsel, object and except.

ENTER: 12/14/98



Judge

RBMW, Inc. v.
Robins Insurance Agency, et al.
Order


I ask for this:


Bruce M. Marshall (VSB 18093)
Junie L. Bradshaw (VSB 05274)
JoAnne L. Nolte (VSB 19383)
DURRETTE, IRVIN & BRADSHAW, P.C.
Twentieth Floor, Main Street Centre
600 East Main Street
Richmond, Virginia 23219
(804) 775-6900
Counsel for Plaintiff,
RBMW, Inc. t/a Jordan Point Yacht Haven

Seen:


W. Joseph Owen, III (VSB 15963)
COWAN & OWEN, P.C.
Post Office Box 35655
Richmond, Virginia 23235-0655
(804) 320-9100
Counsel for the Defendant,
Transcontinental Insurance Company.

Seen and Objected to:


Douglas M. Palais (VSB 19460)
Scott C. Ford (VSB 39078)
MEZZULLO & McCANDLISH, P.C.
1111 East Main Street, Suite 1500
P. O. Box 796
Richmond, Virginia 23218
Counsel for Defendants,
Robins Insurance Agency, Inc.
William Raleigh Robins.
t:\jn\Jordan\order1

HAVE SEEN AND OBJECTED TO FOR THE
REASONS SET FORTH IN DEFENDANTS'
MOTION TO RECONSIDER FILED 11/30/98;
PLEA OF THE STATUTE OF LIMITATIONS
AND DEMURRER FILED 7/20/98; and
MEMORANDUM IN SUPPORT OF PLEA OF THE
STATUTE OF LIMITATIONS AND DEMURRER
FILED 11/13/98.

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF PRINCE GEORGE

RBMW, INC.,)
t/a JORDAN POINT YACHT HAVEN,)

Plaintiff,)

v.)

Case No.: 149CL98000050-00

ROBINS INSURANCE AGENCY, INC.,)
WILLIAM RALIEGH ROBINS, et al.,)

Defendants.)

NOTICE OF HEARING

PLEASE TAKE NOTICE that the defendants, Robins Insurance Agency, Inc. and William Raleigh Robins, by counsel, beginning at 10:00 a.m., or as soon thereafter as counsel may be heard, on January 11, 1999, will bring on for hearing before the Honorable J. A. Luke their previously filed Motion to Reconsider.

Respectfully submitted,

ROBINS INSURANCE AGENCY, INC. and
WILLIAM RALIEGH ROBINS

By: _____

Counsel

Douglas M. Palais, VSB #19460
Scott C. Ford, VSB #39078
MEZZULLO & McCANDLISH, P.C.
1111 East Main Street, Suite 1500
P. O. Box 796
Richmond, Virginia 23218
(804) 775-3885

FILED
98 DEC 29 PM 4:22
CIRCUIT COURT FOR THE COUNTY OF PRINCE GEORGE, VA.
PRINCE GEORGE COUNTY, VA.
BISHOP KNIGHT, JR., CLERK
BY *Stadwell* D.C.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was mailed, postage-prepaid, on this 22nd day of December, 1998, to:

Bruce M. Marshall, Esq.
Junie L. Bradshaw, Esq.
JoAnne L. Nolte, Esq.
DURRETT, IRVIN & BRADSHAW, P.C.
Main Street Center
600 East Main Street, 20th Floor
Richmond, Virginia 23219

W. Joseph Owen, Esq.
COWAN & OWEN, P.C.
1930 Huguenot Road
P. O. Box 35655
Richmond, Virginia 23235-0655

A handwritten signature in black ink, appearing to be 'W. Joseph Owen', is written above a horizontal line.

VIRGINIA:

IN THE CIRCUIT COURT FOR PRINCE GEORGE COUNTY

RBMW, INC.,
t/a JORDAN POINT YACHT HAVEN,

Plaintiff,

v.

ROBINS INSURANCE AGENCY, INC.,
WILLIAM RALIEGH ROBINS, et al.,

Defendants.

Case No.: 149CL98000050-00


ORDER

UPON the motion of Robins Insurance Agency, Inc. and William Ralieggh Robins, by counsel, and with the consent of defendant Transcontinental Insurance Company and plaintiff RBMW, Inc., t/a Jordan Point Yacht Haven, which is evidenced by their counsel's signature below, it is hereby ORDERED that the court's Order Overruling the Special Plea of Limitations and defendants' Demurrer entered on December 14, 1998, shall be suspended as of the date of the entry of this Order. The December 14, 1998 Order shall remain suspended pending the court's ruling on defendants' Motion for Reconsideration set for argument on January 11, 1999 at 10:00 a.m.

ENTER: 12/29/98

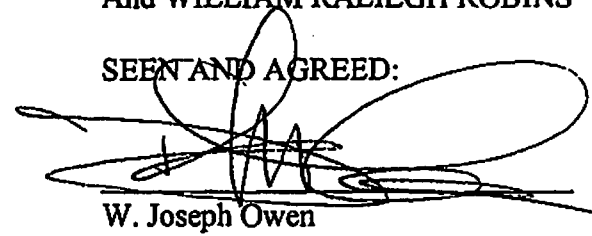

Judge

I ASK FOR THIS:

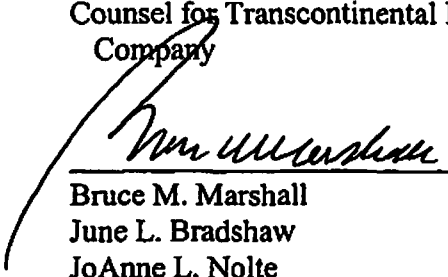


Douglas M. Palais, VSB #19460
Scott C. Ford, VSB #39078
MEZZULLO & McCANDLISH, P.C.
1111 East Main Street, Suite 1500
P. O. Box 796
Richmond, Virginia 23218
(804) 775-3885
Counsel for ROBINS INSURANCE AGENCY, INC.;
And WILLIAM RALIEGH ROBINS

SEEN AND AGREED:



W. Joseph Owen
Derrick Thomas
Cowan & Owen, P. C.
P. O. Box 35655
Richmond, VA 23235
Counsel for Transcontinental Insurance
Company



Bruce M. Marshall
June L. Bradshaw
JoAnne L. Nolte
Durette, Irvin & Bradshaw, P.C.
600 East Main Street
Richmond, VA 23219
Counsel for RBMW, Inc., t/a
Jordan Point Yacht Haven

MEZZULLO & McCANDLISH

A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS AT LAW

1111 EAST MAIN STREET, SUITE 1500
P.O. BOX 796
RICHMOND, VIRGINIA 23218

SCOTT C. FORD
DIRECT DIAL: (804) 775-7202
E-MAIL: sford@mezzullo.com

TELEPHONE: (804) 775-3100
FACSIMILE: (804) 775-3800
WEB SITE: www.mezzullo.com

December 28, 1998

By Federal Express Delivery

Ms. Sally Neblett
Judge's Chambers
Prince George County Circuit Court
6601 Courts Drive, 2nd Floor
Prince George, Virginia 23875

Re: **RBMW, Inc. t/a Jordan Point Yacht Haven
v. Robins Insurance Agency, et. al**
Case No.: 149CL98000050-00

Dear Sally:

Enclosed please find a fully executed agreed Order relative to the above matter. Per your request, I am sending this Order directly to your attention with a copy to the Clerk. This Order is necessary in order to suspend Judge Luke's December 14, 1998 ruling pending the January 11 Motion for Reconsideration set before Judge Luke. Please present the enclosed Order to the Judge for entry and forward an attested copy of the Order to counsel of record.

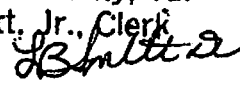
Should you have any questions, please do not hesitate to contact me. I thank you for your kind assistance in this regard.

Sincerely,


Scott C. Ford

SCF:db
w/Enclosure
cc: Douglas M. Palais, Esq.
Bruce M. Marshall, Esq.
Derrick Thomas, Esq.
Mr. William Raleigh Robins
✓ The Honorable Bishop Knott, Jr.

FILED

File No. #98-50
Date 12/30/98 Time _____ M.
Circuit Court Clerk's Office
Prince George County, Va.
Bishop Knott, Jr., Clerk


Richmond, Virginia Norfolk, Virginia Raleigh, North Carolina Washington, D.C. Guangzhou, China Paris, France

Handwritten: ned: 12/30/98

VIRGINIA:

IN THE CIRCUIT COURT FOR PRINCE GEORGE COUNTY

RBMW, INC.,)
t/a JORDAN POINT YACHT HAVEN,)
)
Plaintiff,)

v.)

Case No.: 149CL98000050-00

)
ROBINS INSURANCE AGENCY, INC.,)
WILLIAM RALIEGH ROBINS, et al.,)
)
Defendants.)


ORDER

UPON the motion of Robins Insurance Agency, Inc. and William Ralieggh Robins, by counsel, and with the consent of defendant Transcontinental Insurance Company and plaintiff RBMW, Inc., t/a Jordan Point Yacht Haven, which is evidenced by their counsel's signature below, it is hereby ORDERED that the court's Order Overruling the Special Plea of Limitations and defendants' Demurrer entered on December 14, 1998, shall be suspended as of the date of the entry of this Order. The December 14, 1998 Order shall remain suspended pending the court's ruling on defendants' Motion for Reconsideration set for argument on January 11, 1999 at 10:00 a.m.

ENTER: / /

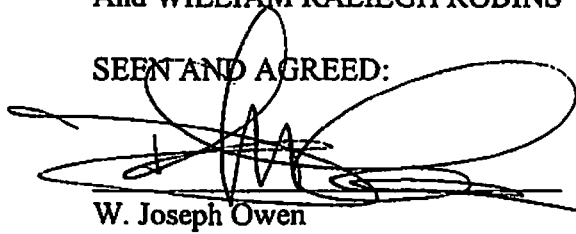
Judge

I ASK FOR THIS:

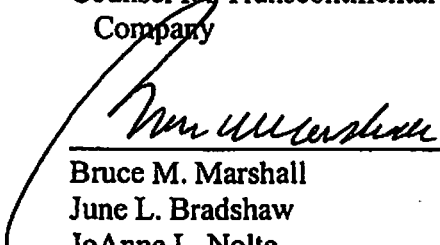


Douglas M. Palais, VSB #19460
Scott C. Ford, VSB #39078
MEZZULLO & McCANDLISH, P.C.
1111 East Main Street, Suite 1500
P. O. Box 796
Richmond, Virginia 23218
(804) 775-3885
Counsel for ROBINS INSURANCE AGENCY, INC.;
And WILLIAM RALIEGH ROBINS

SEEN AND AGREED:



W. Joseph Owen
Derrick Thomas
Cowan & Owen, P. C.
P. O. Box 35655
Richmond, VA 23235
Counsel for Transcontinental Insurance
Company



Bruce M. Marshall
June L. Bradshaw
JoAnne L. Nolte
Durette, Irvin & Bradshaw, P.C.
600 East Main Street
Richmond, VA 23219
Counsel for RBMW, Inc., t/a
Jordan Point Yacht Haven

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE GEORGE COUNTY

RBMW, INC., t/a JORDAN POINT
YACHT HAVEN,

Plaintiff,

v.

Case No.: 149CL19850-00

ROBINS INSURANCE AGENCY,
INC., WILLIAM RALEIGH ROBINS,
ET AL.,

Defendants.

FILED
09 APR 16 11:11:53
CLERK OF THE COURT
PRINCE GEORGE COUNTY
BY *DeWitt*

GROUND OF DEFENSE

Defendants, Robins Insurance Agency, Inc. (the "Agency") and William Raleigh Robins ("Robins"), by counsel, for their Grounds of Defense to the Motion for Judgment filed by plaintiff, RBMW, Inc., t/a Jordan Point Yacht Haven ("RBMW"), state as follows:

GROUND OF DEFENSE TO MOTION FOR JUDGMENT

1. Upon information and belief, the Agency and Robins admit the allegations contained in paragraph 1 of the Motion for Judgment.
2. The Agency and Robins admit the allegations contained in paragraph 2 of the Motion for Judgment.
3. The Agency and Robins admit the allegations contained in paragraph 3 of the Motion for Judgment.
4. Upon information and belief, the Agency and Robins admit the allegations contained in paragraph 4 of the Motion for Judgment.

5. The Agency and Robins admit the allegations contained in paragraph 5 of the Motion for Judgment. It is noted, however, that this party was dismissed as a party defendant by the Court on November 12, 1998, based upon stipulation by the parties.

6. The Agency and Robins admit the allegations contained in paragraph 6 of the Motion for Judgment. It is noted, however, that this party was dismissed as a party defendant by the Court on November 12, 1998, based upon stipulation by the parties.

7. The Agency and Robins admit the allegations contained in paragraph 7 of the Motion for Judgment. It is noted, however, that this party was dismissed as a party defendant by the Court on November 12, 1998, based upon stipulation by the parties.

8. The Agency and Robins admit the allegations contained in paragraph 8 of the Motion for Judgment. It is noted, however, that this party was dismissed as a party defendant by the Court on November 12, 1998, based upon stipulation by the parties.

9. The Agency and Robins admit the allegations contained in paragraph 9 of the Motion for Judgment. It is noted, however, that this party was dismissed as a party defendant by the Court on November 12, 1998, based upon stipulation by the parties.

10. The Agency and Robins admit the allegations contained in paragraph 10 of the Motion for Judgment. It is noted, however, that this party was dismissed as a party defendant by the Court on November 12, 1998, based upon stipulation by the parties.

11. The Agency and Robins admit the allegations contained in paragraph 11 of the Motion for Judgment. It is noted, however, that this party was dismissed as a party defendant by the Court on November 12, 1998, based upon stipulation by the parties.

12. The Agency and Robins admit the allegations contained in paragraph 12 of the Motion for Judgment. It is noted, however, that this party was dismissed as a party defendant by the Court on November 12, 1998, based upon stipulation by the parties.

13. The Agency and Robins admit the allegations contained in paragraph 13 of the Motion for Judgment. It is noted, however, that this party was dismissed as a party defendant by the Court on November 12, 1998, based upon stipulation by the parties.

14. The Agency and Robins admit the allegations contained in paragraph 14 of the Motion for Judgment. It is noted, however, that this party was dismissed as a party defendant by the Court on November 12, 1998, based upon stipulation by the parties.

15. The Agency and Robins admit the allegations contained in paragraph 15 of the Motion for Judgment. It is noted, however, that this party was dismissed as a party defendant by the Court on November 12, 1998, based upon stipulation by the parties.

16. The Agency and Robins admit the allegations contained in paragraph 16 of the Motion for Judgment. It is noted, however, that this party was dismissed as a party defendant by the Court on November 12, 1998, based upon stipulation by the parties.

17. The Agency and Robins admit the allegations contained in paragraph 17 of the Motion for Judgment. It is noted, however, that this party was dismissed as a party defendant by the Court on November 12, 1998, based upon stipulation by the parties.

18. The Agency and Robins admit the allegations contained in paragraph 18 of the Motion for Judgment. It is noted, however, that this party was dismissed as a party defendant by the Court on November 12, 1998, based upon stipulation by the parties.

19. The Agency and Robins admit the allegations contained in paragraph 19 of the Motion for Judgment. It is noted, however, that this party was dismissed as a party defendant by the Court on November 12, 1998, based upon stipulation by the parties.

20. In response to the allegations contained in paragraph 20 of the Motion for Judgment, the Agency and Robins admit that a written proposal of insurance was provided to RBMW, and further state that the document speaks for itself. The remaining allegations contained in paragraph 20 of the Motion for Judgment are legal conclusions to which no response is required.

21. In response to the allegations contained in paragraph 21 of the Motion for Judgment, the Agency and Robins admit only that Robins visited and toured RBMW's marina prior to securing an insurance policy on their behalf. The Agency and Robins deny that Robins performed a physical inspection, deny that Robins reviewed all of the prior insurance coverages carried by RBMW, and deny all the remaining allegations contained in paragraph 21 of the Motion for Judgment.

22. The allegations contained in paragraph 22 of the Motion for Judgment are denied.

23. In response to the allegations contained in paragraph 23 of the Motion for Judgment, the Agency and Robins admit that the policy for the period covering March 20, 1995 through March 26, 1996 was Policy Number C1 33992045 and included a piers, wharfs and docks coverage form. The remaining allegations contained in paragraph 23 of the Motion for Judgment are denied.

24. In response to the allegations contained in paragraph 24 of the Motion for Judgment, the Agency and Robins admit that the policy was renewed through

Transcontinental for a subsequent term of coverage from March 20, 1996 through March 20, 1997. The remaining allegations in paragraph 24 of the Motion for Judgment are denied.

25. The allegations contained in paragraph 25 of the Motion for Judgment are denied.

26. In response to the allegations contained in paragraph 26 of the Motion for Judgment, the Agency and Robins admit that there was a storm, Hurricane Fran, on or about September 6, 1996. The remaining allegations in paragraph 26 are denied.

27. The allegations contained in paragraph 27 of the Motion for Judgment are denied.

28. The Agency and Robins lack sufficient facts to admit or deny the allegations contained in paragraph 28 of the Motion for Judgment.

29. In response to the allegations contained in paragraph 29 of the Motion for Judgment, the Agency and Robins, upon information and belief, admit that the claim has been denied, in part, for alleged damages to the wharves, piers, and docks. The Agency and Robins lack sufficient facts to admit or deny the remaining allegations contained in paragraph 29 of the Motion for Judgment directed towards the actions of the CNA Insurance Companies.

30. In response to paragraph 30 of the Motion for Judgment, the Agency and Robins repeat each of their responses in paragraphs 1-29 above.

31. In response to paragraph 31 of the Motion for Judgment, the Agency and Robins state that these allegations are directed against a third party to which no response is required by the Agency or Robins. Furthermore, the allegations contained in paragraph

31 of the Motion for Judgment are legal conclusions to which no response is required. The Agency and Robins deny breaching any contract, oral or written, with RBMW and demand strict proof thereof.

32. In response to paragraph 32 of the Motion for Judgment, the Agency and Robins state that these allegations are directed against a third party to which no response is required by the Agency or Robins. Furthermore, the allegations contained in paragraph 32 of the Motion for Judgment are legal conclusions to which no response is required. The Agency and Robins deny breaching any contract, oral or written, with RBMW and demand strict proof thereof.

33. In response to paragraph 33 of the Motion for Judgment, the Agency and Robins state that these allegations are directed against a third party to which no response is required by the Agency or Robins. Furthermore, the allegations contained in paragraph 33 of the Motion for Judgment are legal conclusions to which no response is required. The Agency and Robins deny breaching any contract, oral or written, with RBMW and demand strict proof thereof.

34. In response to paragraph 34 of the Motion for Judgment, the Agency and Robins repeat each of their responses to paragraphs 1-33 above.

35. In response to paragraph 35 of the Motion for Judgment, the Agency and Robins deny that Robins intentionally or negligently made any representations to RBMW that were improper or inaccurate. The Agency and Robins deny that they acted improperly or that they breached any duty or contract and strict proof is demanded.

36. The allegations contained in paragraph 36 of the Motion for Judgment are denied. The Agency and Robins deny that they acted improperly or that they breached

any duty, breached any contract, or made any misrepresentation, and strict proof is demanded. Robins denies ever communicating that "he had the markets to cover the risk exposures of a marina."

37. In response to the allegations contained in paragraph 37 of the Motion for Judgment, the Agency and Robins state that this paragraph of the Motion for Judgment is ambiguous and subject to multiple interpretations. The Agency and Robins made no representations whatsoever with respect to the exclusion relied upon by CNA (exclusion B(1)(e)(4)). The Agency and Robins made no representations whatsoever on any occasion as to interpretation of language under the insurance policy. The Agency and Robins deny that they acted improperly or that they breached any duty or contract and strict proof is demanded.

38. The allegations contained in paragraph 38 of the Motion for Judgment are denied.

39. The allegations contained in paragraph 39 of the Motion for Judgment are denied.

40. The Agency and Robins deny that RBMW is entitled to any of the relief sought in any of the numbered or unnumbered paragraphs of the Motion for Judgment including, but not limited to, the final paragraph seeking \$121,568.37 in damages, plus pre-judgment interest, costs, and attorney's fees.

41. The Agency and Robins deny that plaintiff is entitled to recovery of attorney fees under Virginia law.

42. The Agency and Robins deny that they are liable to RBMW in any amount whatsoever under any theory of law and demand strict proof of each and every allegation contained in the Motion for Judgment and not expressly admitted herein.

43. The Agency and Robins deny that they breached any contract with RBMW.

44. The Agency and Robins deny that they materially misrepresented the terms of the Marina's coverage.

45. The Agency and Robins did not proximately cause RBMW any damage.

46. The Agency and Robins deny that the alleged damages caused or were related to the September 6, 1996 storm to the extent sought by RBMW.

47. Each and every allegation contained in the Motion for Judgment and not expressly admitted herein is denied.

48. The Agency and Robins deny that they were negligent or that they breached any duty owed to RBMW.

49. The Agency and Robins did not proximately cause RBMW any damage.

50. RBMW's failure to read the policy or have someone read it to them constitutes negligence as a matter of law which bars their recovery against Robins or the Agency.

51. RBMW's claims are barred by their own negligence, which was the proximate cause of their alleged loss.

52. RBMW assumed the risk of its alleged damages.

53. RBMW's damages, if any, are the result of actions or inactions of a third party over whom the Agency and Robins had no control nor duty to control.

54. The Agency and Robins reserve the right to amend or enlarge their Grounds of Defense based upon information obtained through discovery, investigation or at trial.

WHEREFORE, the Agency and Robins respectfully request that the Court enter an Order dismissing the Motion for Judgment with prejudice and awarding to them their costs incurred herein.

ROBINS INSURANCE AGENCY, INC.
and WILLIAM RALEIGH ROBINS,

By: 
Counsel

Douglas M. Palais VSB #19460)
Scott C. Ford (VSB #39078)
Mezzullo & McCandlish
1111 East Main Street
Suite 1500
Richmond, Virginia 23219
Telephone: 804-775-3702
Fax No.: 804-775-3816

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Grounds of Defense was mailed, postage prepaid, on this 15th day of April 1999 to W. Joseph Owen, III, Esquire, Cowan & Owen, P. O. Box 35655, Richmond, VA 23235-0655; Bruce M. Marshall, Esquire, Junie L. Bradshaw, Esquire, and to Joanne Naulty, Esquire, Durrette, Irvin & Bradshaw, Twentieth Floor, Main Street Centre, 600 E. Main Street, Richmond, VA 23219



VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF PRINCE GEORGE

RBMW, INC.,
t/a Jordan Point Yacht Haven,

Plaintiff,

v.

Case No. CL98-050

ROBINS INSURANCE AGENCY, INC., et al,

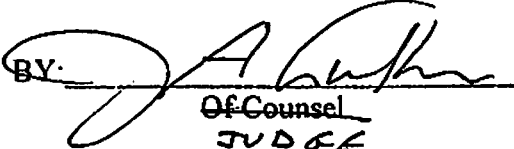
Defendants.

ORDER FOR CONTINUANCE

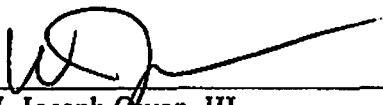
THIS DAY CAME the defendant, **TRANSCONTINENTAL INSURANCE COMPANY**, by counsel, and moved the Court for a continuance due to the medical emergency in the family of the defendant's expert witness, Edward Stewart. Counsel for the plaintiff, **RBMW, INC., t/a Jordan Point Yacht Haven**, and the co-defendant, **ROBINS INSURANCE AGENCY, INC.**, have no objection.

It appearing to the court that the Motion for Continuance is proper with no objection it is hereby ORDERED that the case be continued to be reset as soon as practical.

ENTER: 12-9-99

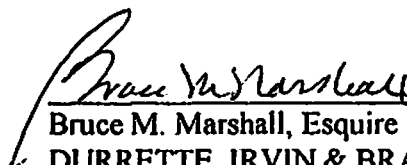
BY: 
Of Counsel
JUDGE

I ASK FOR THIS:




W. Joseph Owen, III
VSB# 15963
COWAN & OWEN, P.C.
P. O. Box 35655
1930 Huguenot Road
Richmond, Virginia 23235-0655
(804) 320-9100
(804) 330-3140 Fax#

SEEN AND AGREED:



Bruce M. Marshall, Esquire
DURRETTE, IRVIN & BRADSHAW
Twentieth Floor, Main Street Centre
600 East Main Street
Richmond, Virginia 23219



Scott C. Ford, Esquire
MEZZULLO & MCCANDLISH
Post Office Box 796
Richmond, Virginia 23218

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF PRINCE GEORGE

RBMW, INC.,
t/a Jordan Point Yacht Haven,

Plaintiff,

v.

Case No. CL98-050

ROBINS INSURANCE AGENCY, INC., et al,

Defendants.

MOTION FOR CONTINUANCE

COMES NOW defendant, TRANSCONTINENTAL INSURANCE
COMPANY, by counsel, and in support of said Motion states the following:

1. A key expert witness for the defendant, Edward Stewart, called the defendant
Friday, April 28, 2000, and notified counsel that his nephew died this morning and
because of the death he would not be able to come to trial.

2. Mr. Stewart is a crucial witness to the defense of the case and the defendant
would be highly prejudiced if he is not present to testify.

WHEREFORE, Transcontinental Insurance Company, moves the Court for an
entry of an Order to continue the case until Mr. Stewart is available for trial, a period of
less than 30 days.

TRANSCONTINENTAL
INSURANCE COMPANY

BY: WJ

Of Counsel

FILED

File No. 98-50

Date 04/28/00 Time _____ M.

Circuit Court Clerk's Office
Prince George County, Va.

Bishop Knott, Jr., Clerk

JB Smith

W. Joseph Owen, III
VSB# 15963
COWAN & OWEN, P.C.
P. O. Box 35655
1930 Huguenot Road
Richmond, Virginia 23235-0655
(804) 320-9100
(804) 330-3140 Fax#

CERTIFICATE

I hereby certify that a true and exact copy of the foregoing Motion for
Continuance was sent via Facsimile this 28th day of April, 2000, to:

Bruce M. Marshall, Esquire
DURRETTE, IRVIN & BRADSHAW
Twentieth Floor, Main Street Centre
600 East Main Street
Richmond, Virginia 23219

Scott C. Ford, Esquire
MEZZULLO & MCCANDLISH
Post Office Box 796
Richmond, Virginia 23218

and

The Honorable James A. Luke, Judge
Prince George County Circuit Court
Circuit Court Administrator
P. O. Box 290
6601 Courts Drive, 2nd Floor
Prince George, Virginia 23875



W. Joseph Owen, III

ORIGINAL

1

1 VIRGINIA :

2 IN THE CIRCUIT COURT OF PRINCE GEORGE COUNTY CLERK

3 _____

4 RBMW, INC., :

5 d/b/a :

6 JORDAN POINT YACHT HAVEN, :

7 Plaintiff, :

8 v. :

Case No. CL98-050

9 ROBINS INSURANCE AGENCY, INC., :

10 and :

11 WILLIAM RALEIGH ROBINS, et al., :

12 Defendants. :

13 _____

14

15

16 A TRIAL BEFORE THE HONORABLE JAMES A. LUKE

17

18 May 1, 2000

19 Prince George, Virginia

20 9:05 a.m.

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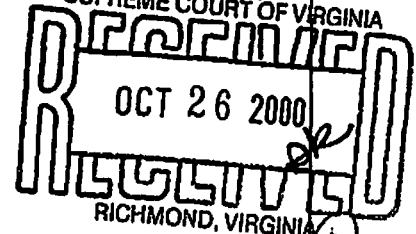
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6 For the Defendants:

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9 Scott C. Ford, Esquire
Douglas M. Palais, Esquire
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PROCEEDINGS

(The court reporter was sworn.)

THE COURT: Good morning. Mr. Owen's request is moot.

MR. MARSHALL: Yes, sir.

MR. OWEN: Yes, sir. It is.

THE COURT: We can lay that aside.

Any other preliminary matters?

MR. PALAIS: Your Honor, one small housekeeping matter. Doug Palais on behalf of Raleigh Robins and the Robins Agency. May I please file with the court the original transcript of the deposition of Michael Winn?

THE COURT: Yes, sir.

MR. PALAIS: Thank you, Your Honor.

THE COURT: There's no objection?

MR. MARSHALL: Certainly not, Your Honor.

Your Honor, based on the court's remarks moments ago, I'm a little unclear as to if the court would want to take up the issue of the contract, using the court's words, but the policy, the 3-page policy in question, on the front end, as opposed to the back end, to sort of see where this thing is going.

I don't have any wisdom on that. I'm

1 asking. And because I don't think that there is as
2 large a dispute as to how the damages occurred as the
3 defense thinks there is, I think the question becomes,
4 as far as CNA is concerned, an interpretation of the
5 policy itself.

6 That does not get to the issue we have
7 with the Robins Agency and Mr. Robins, but it does get
8 to the issue with CNA. And I'm sort of flailing
9 around here trying to figure out how the court wants
10 to proceed on that issue, or if it does. Or if
11 counsel --

12 THE COURT: We had some pretrial
13 hearings on this thing quite some time ago and none
14 recent. I took it home Thursday, Friday some time, and
15 went through it. And in going through it, those things
16 that I just talked about occurred to me, and I felt
17 like I was hindered because nowhere in all of this is
18 the insurance policy. The court has never seen that
19 document.

20 MR. OWEN: Would the court like one
21 now?

22 THE COURT: Sooner or later I think it
23 will drift up this way.

24 MR. MARSHALL: The court will be seeing
25 one very shortly. I'll assure you that.

1 THE COURT: I think that since -- I
2 think it's pretty clear that no one else had thought
3 about it, except that you said you thought about asking
4 to bifurcate it at some point, which I think would have
5 to be agreed by everyone or you couldn't do it.

6 MR. MARSHALL: Absolutely.

7 THE COURT: I think the best thing to do
8 is forget my comments. Because I think it struck
9 everyone by surprise and caused more problem than it
10 would good at this point. I simply think you should
11 proceed as you planned.

12 MR. PALAIS: Your Honor, if it's of any
13 help to the court, I would think that we can all
14 stipulate to what constitutes the policy. I don't
15 think there's any dispute among any party, if that
16 helps to simplify things.

17 MR. MARSHALL: I think so too.

18 THE COURT: Well, it would help.
19 Because in a cursory reading of all the papers that
20 were filed, and some knowledge of insurance policies, I
21 could see the possible argument as to what was covered
22 and whether the contract covered these damages and
23 whether it's either by water or wind-driven water, and
24 all those sorts of things. I didn't have any of
25 that.

1 MR. MARSHALL: Your Honor, I would be
2 happy -- I have copies. Not that everybody needs
3 copies of the policy. The only thing I've done with
4 the copies is marked pages where the coverage issues
5 are raised and just because it's a thick policy.

6 But the very last mark, the yellow one,
7 has the -- the piers, wharves, and docks coverage form
8 on it with the yellow tab on it. And that's the one at
9 issue. And if counsel doesn't mind, I'll give it to
10 the court. That's not --

11 MR. PALAIS: That's fine with us.

12 THE COURT: Wait until you get going to
13 see whether it's even relevant or not.

14 MR. PALAIS: This is more than their own
15 policy though.

16 MR. MARSHALL: That's the whole thing.

17 MR. OWEN: Yes. That's the whole thing,
18 including worker's comp.

19 MR. MARSHALL: It includes all sorts of
20 stuff.

21 THE COURT: One section of it is the
22 only thing involved.

23 MR. MARSHALL: The very last section,
24 the section marked in yellow, Your Honor. And perhaps
25 it would benefit the court, if you want to look at it

1 for a few moments before we get going. You can have
2 the thing that you didn't have this weekend.

3 MR. PALAIS: I'm sure I'm speaking for
4 everyone when I say we apologize that you didn't have
5 it.

6 THE COURT: Had I realized it sooner, I
7 would have. But I just looked in here, and the
8 proposal had been filed, and I didn't realize it
9 wasn't. I didn't have the points of the policy in
10 here.

11 MR. PALAIS: Happily, despite the
12 thickness of what Mr. Marshall just gave me, Your
13 Honor, what we're really talking about here is a total
14 of 3 pages.

15 MR. OWEN: I'm sorry I made all my
16 copies.

17 THE COURT: What did you say?

18 MR. OWEN: I said you have to be
19 prepared. I'm sorry I made 4 copies of it myself.

20 (Discussion off the record.)

21 THE COURT: I don't think we need to
22 wait while I read it at the moment.

23 MR. MARSHALL: That's fine, Your
24 Honor.

25 THE COURT: You may proceed. If you

1 think you need opening statements, fine. If you don't
2 think you need them, then just jump right in.

3 Go ahead.

4 MR. MARSHALL: I do want to make an
5 opening statement, Your Honor, to sort of put this
6 thing in context.

7 Your Honor, with me is JoAnne Nolte, who
8 is co-counsel with me, and Mike Winn, who is the
9 general manager of RBMW, Inc., also known as Jordan
10 Point Yacht Haven.

11 And I will refer to the Yacht Haven as
12 Jordan Point for purposes of ease as opposed to trying
13 to get through all the initials and doing them wrong.

14 THE COURT: All right. And good morning
15 to you all.

16 MR. MARSHALL: We are here this morning,
17 Your Honor, regarding the marina policy. Specifically,
18 that add-on provision to that policy known as the
19 piers, wharves, and docks coverage form.

20 As the court can see, this particular
21 add-on is a part of a larger policy that was sold or
22 that was created by CNA -- Transcontinental -- which is
23 a division of CNA. And it includes such things as
24 worker's comp, automobile, property, general liability,
25 and that sort of thing.

1 But the specific provision of that
2 policy is the add-on coverage that you have before you
3 called the piers, wharves, and docks coverage form.

4 Now, that form is CNA's form. The
5 entity and the person that solicited, negotiated, and
6 sold that policy to Mr. Winn at Jordan Point is Raleigh
7 Robins, and his firm is Robins Insurance Agency.

8 Now, the facts or the evidence
9 concerning the storm itself aren't terribly
10 complicated. On September 6, 1996, Hurricane Fran blew
11 through the Hopewell area and caused significant damage
12 to the Jordan Point Marina to the tune of \$139,712.17
13 of damage that we believe should have been covered by
14 the policy. There was additional damage to the
15 bulkhead and the seawalls that was not covered by the
16 policy, and we're not making any argument concerning
17 that.

18 I don't believe, Your Honor, that the
19 damages themselves are hotly contested; whether they're
20 reasonable or not and whether they result from
21 Hurricane Fran or not. And I don't believe, while I
22 think it's just been stated, that the policy itself was
23 in full force and effect at the time of the loss. So I
24 don't think we have an issue as to whether there was a
25 policy in existence.

1 Now, what is in dispute, Your Honor, is
2 that CNA determined that it was only responsible for
3 \$18,143.17 of that damage. And the sole reason -- the
4 sole reason -- on which CNA relies in limiting its
5 liability to that is the exclusion in the piers,
6 wharves, and docks endorsement, which is known as the
7 water inclusion or B1E4. It's easier just to say it
8 starts at the bottom left-hand corner of the first page
9 and goes to item 4, which is the right-hand corner of
10 the second page.

11 Your Honor, that is what CNA has
12 maintained since this loss was adjusted -- and I use
13 that term loosely -- that that exclusion precludes it
14 from having to pay any more of the damages at Jordan
15 Point of those piers, wharves, and docks that were just
16 decimated by this storm because they believe that the
17 damage was caused by water or wave action.

18 The water exclusion on which CNA relies
19 is, Your Honor, a standard flood insurance exclusion
20 that's found on policy -- business and personal
21 property policies all across the United States. It's
22 not an unusual exclusion. I have a question as to why
23 in the world it appears on piers, wharves, and docks
24 riders. And that's one of the questions I'm going to
25 get to. But it's not an unusual exclusion.

1 Mr. Turner, who is here at the end of
2 this table right here, is the CNA senior adjuster who
3 adjusted this claim; down at the end of counsel table.
4 And he's going to say, under his reading of that
5 policy, that we're not entitled to any more money.

6 Now, we will submit to the court, and I
7 think the evidence will be, that what caused the
8 destruction of the piers, wharves, and docks and to the
9 marina itself was a combination of things. It was a
10 hurricane, Your Honor. You have strong wind blowing
11 through the marina. You have a full marina. It was
12 full of boats at the time. Those boats were tied up to
13 the docks and the piers and the pilings. And they were
14 being rocked around by the wind, by the waves.

15 There was debris that was being blown
16 off of the boats and off the piers and wharves that
17 were in the water. The boats were banging against each
18 other. The boats were yanking on the piers. The boats
19 were yanking on the wharves. The boats were banging
20 into each other. You had waves that were hitting the
21 piers, wharves and docks. We don't dispute that. It
22 is the soup, that ugly soup, all mixed together that
23 caused the damage to this marina.

24 And I will show the court a video at
25 some point in time this morning that was taken the

1 evening -- the night of the storm and the next morning
2 that shows all this activity boiling together. And
3 that was taken at that time.

4 Before I go any further talking about
5 that, let me set the stage as to how the policy came
6 about being.

7 In December of 1994, Raleigh Robins made
8 a cold-call to Mike Winn about selling him marina
9 coverage for Jordan Point. Mr. Winn said at that point
10 in time that for Mr. Robins to call him back the first
11 part of the year and they would discuss it then.
12 Indeed, Mr. Robins did call him the first part of the
13 year and they began talking about what product he
14 wanted to sell them from CNA.

15 Now, Mr. Robins is not a novice in
16 selling marine insurance policies. He had been doing
17 it a couple years beforehand. And he was licensed by
18 CNA of a special license by CNA to sell this package.
19 He was fairly active in trying to sell these packages
20 to various marinas all around the State of Virginia or
21 close-by to him.

22 So when he shows up in January of 1994
23 -- excuse me -- 1995, he starts talking to Mr. Winn
24 about this product. And he tells Mr. Winn that this
25 product is a bunch of different policies loaded into a

1 master policy -- what the court has in front of it --
2 including the other things that aren't at issue here,
3 such as worker's comp, automobile, property, and other
4 things. But it also has the piers, wharves, and docks
5 provision, which is a specialty provision, obviously,
6 for piers, wharves, and docks.

7 He told Mr. Winn that his agency was a
8 family agency. It had been in business for some years,
9 had a lot of stability. He was very familiar with the
10 boating industry. They had a lot of common friends in
11 the boating business. And that the CNA package had
12 been endorsed by the Virginia Marine Institute, which
13 is a boaters' association which Mr. Winn's father had
14 previously been president of, ironically.

15 At the time, Mr. Winn had coverage with
16 somebody else, with Commercial Union, and he was
17 frustrated with his agent because his agent was in the
18 process of changing agencies and there was a squabble
19 between who he was going to deal with and who he wasn't
20 going to deal with. He had had some problems with the
21 Commercial Union coverage because it specifically
22 excluded wind damage -- specifically excluded wind
23 damage -- and he had had some wind losses.

24 So he listened to Mr. Robins, and he was
25 interested in what Mr. Robins had to say. And Mr.

1 Robins took pictures of the marina. He wandered
2 around. They -- Mr. Robins looked at his existing
3 insurance policies, saw the value, saw what was
4 covered, and took an application from Mr. Winn to see
5 what kind of proposal CNA could make. And, indeed, in
6 March 15, 1995, a proposal was made. A written
7 proposal was made by Mr. Robins to Mr. Winn and Jordan
8 Point listing what it was they proposed to sell him;
9 the cost of each, the highlights of each type of
10 coverage, the makeup, the big exclusions, and that sort
11 of thing.

12 Now, at that time, Mr. Winn again was
13 concerned about this wind damage that he suffered
14 before, and he talked to Mr. Robins about that. And
15 he was also concerned about storm damage because the
16 back end of his marina opens up to the northeast and
17 he was concerned about a nor-easter coming through
18 there and tearing him up. And so they talked about
19 that, and he was assured that he would be covered for
20 that.

21 Based on all these meetings and this
22 sort of thing, Mr. Winn thought about that, and,
23 shortly thereafter, talked to Mr. Robins and accepted
24 the coverage. And part of that coverage he accepted --
25 roughly 30 percent of the premium -- was for piers,

1 wharves, and docks -- the piers, wharves, and docks
2 endorsement itself -- because he was very concerned if
3 his piers, wharves, and docks were torn down, he didn't
4 have a whole lot to sell at the marina.

5 Now, during the first year of that
6 policy, '95 to '96, spring of '95 to '96, there was one
7 minor claim he made; an ice-related claim. He called
8 Mr. Robins' agency, reported the ice damage. It was
9 taken care of. The adjuster didn't show there. The
10 Robins Agency took care of it wonderfully.

11 The anniversary of the policy came up,
12 and we're down to the spring of 1995. And because Mr.
13 Winn liked how he had been treated, liked dealing with
14 the Robins people, he renewed the policy. And the
15 renewal policy is that which you have in front of you,
16 Your Honor. And the renewal policy, as far as any of
17 the issues we're talking about today, was the same as
18 the existing policy. There was nothing exchanged. And
19 that's not in dispute, Your Honor.

20 And then in September of 1996, Hurricane
21 Fran struck. Now, Mike Winn spent the night on -- most
22 of the night on September 6 doing what he could do to
23 save his marina and save his customers' boats and try
24 to protect his livelihood. And it was all collapsing
25 around him.

1 And by daybreak and as the tide starting
2 coming back in, he lost 2 of his major docks. His boat
3 houses had been knocked off kilter. The roofs of his
4 boat house were torn asunder. There were pilings that
5 had been sheered off and lying over in the water.
6 There were boats that sunk being tied up to the docks.
7 There were boats that were wandering around. There
8 were people still on boats that couldn't even get back
9 across.

10 The electricity out to all these boats
11 was knocked out because the lines went along these
12 docks. The water to all these boats was out because
13 the line went along with all these docks.

14 In the end, he sat there helplessly and
15 watched his marina start floating up and up and up
16 towards his parking lot as the tide came in. And a lot
17 of it ended up in his parking lot because they had --
18 with all that water blown out and coming back in and
19 with the tide coming to high tide later that morning --
20 it was an enormously high tide -- and his marina, a lot
21 of it, was sitting in his parking lot.

22 His wife, June, who you will hear from
23 today -- she's primarily here to talk about the damages
24 -- called the Robins Agency that morning on a cell
25 phone as soon as she figured someone would be in

1 there. Mr. Robins was in Philadelphia getting his
2 marriage license that morning so, obviously, he
3 couldn't be there that morning. He had a bigger fish
4 to fry. And it wasn't until the next day or a couple
5 days after -- I'm not sure which -- that Mr. Robins was
6 able to come down to the marina.

7 And he came down to the marina and he
8 walked around with Mike Winn and surveyed the damage.
9 And then he went into the office, the marina office,
10 with Mike; his wife, June; and his father, Bo, who
11 you'll also hear from today, and he started flipping
12 through the policy. And Mike -- and he was nodding and
13 giving Mike the impression and June the impression and
14 Bo the impression that things were going to be all
15 right, that the insurance company would take care of
16 them.

17 And Mike got up and left the room to go
18 back out to work on the marina some more, and June was
19 starting to make notes about what she had to do. She
20 was going to get estimates and she was supposed to keep
21 careful measure of all the time they spent fixing the
22 place back up because all this had to be presented to
23 the insurance company.

24 And the testimony from Bo Winn will be
25 that Raleigh Robins told him don't worry about it.

1 You're covered. You're covered. They're going to take
2 care of you and fix this place back up. So the Winn
3 family felt pretty good at that point in time and they
4 went about putting their lives and their marina back
5 together.

6 And they got a little frustrated because
7 someone from CNA -- they were told someone from CNA was
8 coming, and someone from CNA didn't come fast enough.
9 So Bo Winn called to raise hell with the Robins Agency
10 about getting someone down there. And, indeed, shortly
11 thereafter, John Fitzpatrick, who will be testifying
12 today, came in and appeared to adjust the claim.

13 And Mr. Fitzpatrick indicated to Mr.
14 Winn that he was there for the duration. He was there
15 to help them. He was there to get it straight. And he
16 told him that he hired an engineer and that the
17 engineer was going to help them figure out the
18 structural issues, what really needed to be fixed and
19 how it needed to be fixed and that sort of thing.

20 And then Mr. Fitzpatrick was coming.
21 Mr. Fitzpatrick is the senior gentleman from CNA. He
22 was going to come at some point in time as well.
23 Mr. Turner. I did say Mr. Turner. Okay. I'm looking
24 at my notes. So I'm --

25 Now, things were moving along. And one

1 day or a few days later after Mr. Turner and Mr.
2 Fitzpatrick were there, Mr. Robins came back to the
3 marina and he went over and talked to either Mr.
4 Fitzpatrick or Mr. Turner and, for the first time, he
5 gave Mike Winn pause. He said, have they told you what
6 caused this damage. Mike said no, they haven't said
7 anything to me about that. Mr. Robins said well, let's
8 wait and see what happens. Let's wait and see what
9 happens.

10 Well, what happened is a couple days
11 thereafter, Mr. Fitzpatrick shows up in the office with
12 a torn piece of notebook paper and puts it's under
13 Mr. Bo Winn's nose and it says \$18,143.17. That's all
14 we're prepared to pay you at this point in time based
15 on the estimates you've give me and based on what we've
16 seen.

17 Well, the Winns were absolutely
18 shocked. They had submitted at that point in time
19 about \$90,000 worth of estimates. And they just didn't
20 understand what was going on. So they asked to get
21 something in writing that explained to them why it was
22 that only 18,000 on 130 some thousand dollars was to be
23 covered -- be paid.

24 And they got a letter from Mr. Turner
25 that set it out in the way Mr. Turner wanted to set it

1 out. And they called the Robins Agency and they said
2 guys, we don't understand what's happening to us. Mr.
3 Robins and Mr. Robins' father said we'll come down
4 there and meet with the CNA people and we'll get it
5 straight for you or we'll try to get it straight for
6 you.

7 And again, the Winns were thinking well,
8 this is going to work out now, because they respected
9 the Robins. And, indeed, on October 14, there was a
10 meeting. And at that meeting were Mr. Turner, Mr.
11 Fitzpatrick, Mr. Robins, Mr. Robins' father -- Hugo
12 Raleigh (phonetic) -- Mr. Winn and his father and Mrs.
13 Winn.

14 And at that meeting, the Robins
15 presented an argument saying, in effect, that CNA was
16 misconstruing its own policy and it wasn't right. This
17 should be covered damages. And they disputed
18 Mr. Turner's interpretation of his own policy.
19 Mr. Turner listened to them. Mr. Turner said that he
20 thought that all that's covered was water damage -- I
21 mean wind damage.

22 They showed Mr. Turner a video, the
23 video I'm going to show you today. They gave
24 Mr. Turner some more estimates of damages, some 20,000
25 -- \$25,000 more worth of damages. And Mr. Turner left

1 that meeting saying he would think about it.

2 At the conclusion of that meeting, Bo
3 Winn went to Mr. Robins, Sr., and said I've got this
4 check for \$18,147 or whatever; can I take it and use
5 it. And there was no endorsement on the back of it.
6 And so Mr. Robins said go ahead. Endorse it. Put it
7 in the bank and start working on getting this marina
8 set up.

9 Well, a few days later on the 29th of
10 October, another letter came from Mr. Turner. In that
11 letter, Mr. Turner said I've considered everything else
12 you said. I considered what I saw. I considered your
13 arguments. I haven't changed my mind. All you're
14 getting is \$18,000.

15 Well, again, the Winns called the Robins
16 and said what do we do now. The Robins said well, they
17 would try to take it up the marketing side and see if
18 they could politically get this thing undone. And they
19 made an effort to do that. Nothing happened. Nothing
20 happened. CNA never changes its position.

21 Now, that brings us to where we are
22 today. And, Your Honor, it is our position that the
23 exclusion that CNA relies on does not apply to the
24 damage to that marina. If it does apply, then we
25 think, on a worse case basis, to be -- the policy is

1 ambiguous and that the coverage would then be there.

2 And finally, Your Honor, if the court
3 agreed somehow with Mr. Turner's interpretation of his
4 own policy, then we think we're entitled to be
5 compensated by somebody who sold us the policy, never
6 explaining to us what -- the piers, wharves, and docks
7 coverage is not going to protect us from storm damage;
8 as a matter of fact, telling us the opposite. They
9 either should have known or they did know and sold
10 something that didn't warrant it.

11 That's why we're here, and that's our
12 position, Your Honor.

13 THE COURT: Thank you.

14 MR. FORD: Your Honor, I'm Scott Ford,
15 and along with my colleague, Doug Palais, we represent
16 Robins Insurance Agency and Raleigh Robins. My
17 comments to you, Judge, will be brief.

18 Robins Insurance has been selling
19 insurance here in the Commonwealth of Virginia for the
20 last 40 years. Mr. Robins, who is seated at counsel
21 table, has been selling insurance for the last 13 years
22 for Robins Insurance and is vice president of Robins
23 Insurance.

24 Judge, as to Robins Insurance and Mr.
25 Robins, there has been but one cause of action pled,

1 and that is fraud. Our position in this case, Judge,
2 is very simple. The facts will reveal that this, plain
3 and simply, is not a fraud case but rather is a policy
4 dispute involving the court's determination on the
5 standard exclusion that Mr. Marshall described as a
6 standard exclusion.

7 Specifically, whether CNA -- and I use
8 -- refer to the defendant, Transcontinental Insurance,
9 Judge, occasionally as CNA interchangeably. And like
10 Mr. Marshall, I'll refer to the plaintiff as Jordan
11 Point for ease of communication.

12 But, Your Honor, it involves a policy
13 dispute. Specifically, whether the standard exclusion,
14 B1E4, in this policy was properly relied upon by CNA
15 and denied coverage as a result of Hurricane Fran, at
16 least in part. CNA did pay a portion that they
17 considered related to wind damage.

18 Very simply, Judge, there will not be a
19 single piece of evidence presented by Jordan Point in
20 this case supporting fraud against Mr. Robins and
21 Robins Insurance. On that question, Judge, there are 2
22 witnesses and only 2 witnesses that are relevant to
23 that determination. They are Mike Winn and Raleigh
24 Robins. And I said that because those are the only 2
25 gentleman, Your Honor, that had any interaction

1 whatsoever before Hurricane Fran on matters related to
2 insurance for Jordan Point.

3 You'll hear from Bo Winn and you'll hear
4 from June Winn, but they both will testify that they
5 had absolutely no communication with Mr. Robins before
6 Hurricane Fran.

7 I won't belabor the communications. Mr.
8 Marshall has gone through them and I think has
9 accurately laid the time line out.

10 There was a meeting in January of '95
11 when Mr. Robins met with Mr. Winn. Judge, at that
12 time, the only peril that Mike Winn discussed that he
13 wanted coverage for was wind damage. And, in fact,
14 Transcontinental's policy, CNA's policy, did cover wind
15 damage.

16 There was absolutely no discussion, Your
17 Honor, at that meeting or any other meeting, for that
18 matter, that there was any type of request for flood
19 and/or wave damage to piers, wharves, and docks; the
20 substance of this exclusion. Moreover, there was never
21 any assurance by Mr. Robins in a general sense that
22 they would be covered for, quote, storm damage.

23 The next meeting, Your Honor, occurred
24 in March of '95. That's when Mr. Robins again met with
25 Mr. Winn with the proposal to -- to discuss purchase of

1 the product, the insurance policy of CNA. And you'll
2 hear evidence that this was an easy sale because Mike
3 Winn was particularly enamored with this product
4 because CNA had its stamp of approval on
5 Transcontinental's policy because it was endorsed by
6 the Virginia Association of Marine Industries.

7 And you'll hear evidence in this case
8 that that was particularly important to the plaintiff
9 because Mr. Winn's dad, Bo Winn, was the former
10 president of that association that reviewed this policy
11 and placed its stamp of approval on the policy.

12 The next meeting, Your Honor, was in
13 March of '95; the actual delivery of the first policy.
14 And the evidence will reveal that Mr. Robins actually
15 personally delivered the policy, which included this
16 standard exclusion. That Mike Winn obtained the policy
17 at the time -- it was handed to him -- reviewed it at
18 that time.

19 Mr. Winn will acknowledge that and will
20 testify that he reviewed it. And Mr. Winn will also
21 acknowledge and testify that he had no communications
22 with Mr. Robins at that March of '95 meeting about the
23 issue of coverages whatsoever.

24 The fourth and final meeting, Your
25 Honor, before the hurricane, was March of '96. That's

1 when this policy re-uped, renewed, for year number 2.
2 And as Mr. Marshall said in his opening, and I think
3 the parties agree, that policy was identical to year
4 number 2.

5 Same testimony, Judge. Mr. Robins again
6 personally hand-delivered the policy. Mike Winn
7 received the policy, read the policy again. And at
8 that time, Mr. Winn will acknowledge that he had
9 absolutely no questions about coverage issues. That
10 policy that was in place of Hurricane Fran remained at
11 the marina. And the evidence you'll see is that they
12 maintained the policy up until Hurricane Fran.

13 Very simply, Judge, this is not a fraud
14 case. We're going to prove from Mr. Winn that he was
15 never told he would have coverage for flood or wave
16 damage to his piers, wharves, and docks, the type of
17 damage that occurred in this case.

18 Mr. Robins will concur and he'll testify
19 to the court that he never told Mr. Winn that he would
20 be covered for flood or wave damage to his piers,
21 wharves, and docks. He'll also testify he never
22 discussed, in any general sense, don't worry, you'll be
23 covered for storm damage.

24 And most importantly, Judge, from Mr.
25 Winn, Mr. Winn will testify that there was no single

1 statement ever made -- ever made -- by Mr. Robins that
2 in any way misled him as to what was going to be
3 contained in the policy that was actually issued by
4 CNA.

5 Judge, this is not a fraud case. It's a
6 dispute that properly should be between Jordan Point
7 and CNA. And that will be our case. Thank you,
8 Judge.

9 THE COURT: Mr. Owen.

10 MR. OWEN: Morning, Your Honor.

11 Your Honor, I don't think there is a
12 clearer exclusion in any policy of insurance around
13 anywhere. Mr. Marshall has already conceded that it is
14 a standard exclusion used all over the country. It's
15 not unusual. It's not an unusual exclusion.

16 And when you look at that exclusion
17 carefully, it says we will not pay for a loss caused
18 directly or indirectly by any of the following. Such
19 loss is excluded regardless of any other causes or
20 event that contributes concurrently or in any sequence
21 to the loss. That's the preamble to the exclusions.

22 And under water, it says flood, surface
23 water, waves, tides, tidal waves, overflowing of any
24 body of water, or their spray, all weather driven by
25 wind or not.

1 In Mr. Marshall's own opening statement,
2 he acknowledged that the damage that occurred was a
3 combination of things. But most prevalent in his
4 opening statement -- and the evidence will support this
5 -- most prevalent was the wind-driven waves, the wave
6 action on the docks and the boats.

7 You will see the video. We want the
8 court to see the video -- in fact, we'll probably show
9 the long version rather than the short version.
10 There's 2 versions of it -- that were taken the night
11 of the storm by tenants of the marina. And this --
12 we've never had a case in CNA like this where we had
13 the storm being filmed to show why our exclusion
14 applied.

15 In that, you'll see the waves rocking
16 these boats, banging them up against the piers -- the
17 things holding the roof up -- banging them up against
18 the docks. You'll see -- and this is very important --
19 Mr. Honeycutt, who is of Seacrest Marina who did most
20 of the repair, he describes the phenomenon of wind
21 waves. This is what he calls wind waves. He's been
22 doing marina work for over 30 years. And you'll see it
23 on the video. Because the way he describes these docks
24 being broken up -- these were fixed docks. They're
25 about 3 feet off the maximum high tide.

1 Well, because of the storm, that water
2 was up, in some cases, covering it, but up in it. And
3 you'll see the waves come along and hit underneath that
4 dock, just roll all along hitting underneath it.
5 You'll see the spray coming out between the dock
6 boards.

7 What Mr. Honeycutt told us in his
8 deposition -- he's here today to testify -- is that's
9 just like taking a hammer and beating that thing from
10 the underside and breaking it up. It is a specifically
11 excluded event; these waves.

12 Also, the waves pitching. He says that
13 the roof in the inside of these boat houses had to be
14 repaired because the boats were pitching and knocking
15 back and forth and those support pilings that held the
16 roof up were knocked out of alignment and had to be
17 repaired -- that's another major thing -- the
18 electrical, the water; all of that. When the waves
19 broke up the dock, or the boats being driven by the
20 waves broke up the docks, it caused the damage.

21 Well, Your Honor, this exclusion is
22 clear as it can be. That whether it's a combination or
23 just the waves themselves or a combination with
24 anything else, weather driven by wind or not, couldn't
25 be any clearer. It's excluded. It's not part of the

1 policy.

2 What's important to note too, Judge, Mr.
3 Winn, in his deposition, which has already been filed,
4 at pages 69 and 70, testified that he and Mr. Robins
5 discussed whether or not flood coverage would be a part
6 of this. And he said he didn't need it. The James
7 River out here was a big, wide place and they didn't
8 have a flood problem.

9 Well, he got the standard flood
10 exclusion that not only is in the piers, docks, and
11 wharves section but under the special cause of loss
12 form, under any property form, that's part of this
13 policy. It's both places. It's both places.

14 So when you get the flood, which is the
15 standard flood exclusion throughout the country that
16 Mr. Marshall has already agreed, that's what he got.
17 That's what he got.

18 Now, it's also important too, Judge, to
19 keep in mind that he did have a conversation -- he
20 testified about a conversation -- and this is pages 21
21 and 22 of the deposition -- he wanted to make sure that
22 if wind blew the roof off his boat shed, it would be
23 covered under this piers, docks, and wharves.

24 Well, Judge, we took the position that
25 when we came in and Mr. Turner and Mr. Fitzpatrick

1 adjusted this claim, they looked at the wind that had
2 blown off portions of the roof on the boat sheds. Said
3 fine. We owe that. We paid for that. We covered
4 that. The things that he specifically was concerned
5 with and that he wanted to buy as parts of this
6 coverage we paid for.

7 What we didn't pay for and won't pay
8 for, unless the court tells us we have to -- but we
9 submit that it's not required under the policy -- is
10 the flood.

11 And the definition of flood is clear.
12 The wind -- the waves driven by the wind that are
13 moving the boats around that are beating up the dock
14 itself, when you talk about that ugly soup of damage to
15 the marina, it's exactly what -- under the exclusion
16 where it says directly or indirectly whether
17 contributes concurrently or in sequence to the loss,
18 that's exactly what that says. It couldn't be any
19 clearer.

20 When you have the soup and everything
21 mashing at one time, the exclusion applies. And that's
22 our position, Judge. And we submit to you when you see
23 the evidence, there's going be no question.
24 Particularly, the video. And there's a number of
25 photographs that show exactly how all this was.

1 And, in fact, as Mr. Marshall talked
2 about all of the pieces of these docks and the marina,
3 and it shows the marina docks were floated up in the
4 parking lot of the marina. The flood washed them up in
5 the parking lot. The flood did all this damage,
6 Judge. And it's defined what the flood means.

7 And under the terms of this policy,
8 there was no coverage. There's coverage for a lot of
9 other things with this piers, docks, and wharves. The
10 wind. If there had been a fire. If the gas tank --
11 there's gas pumps right out there -- if they had
12 exploded, that would have been covered. But all of
13 these other things were not covered, or the flood was
14 not covered. And they talked about it. That's what's
15 so important. They talked about it. And Mr. Winn
16 specifically said I don't need flood.

17 And so we would submit, Your Honor, that
18 the policy is clear. It is an exclusion that Mr.
19 Marshall acknowledges that's used all over the
20 country. And in this case, unfortunately for Mr. Winn,
21 he did not purchase that coverage. He chose to reject
22 it. And so here we are.

23 THE COURT: Thank you. Are you ready
24 for your first witness?

25 MR. MARSHALL: Yes, Your Honor. The

1 first witness is Mike Winn.

2 Your Honor, does the court have an easel
3 of some sort?

4 THE COURT: Do we have an easel of some
5 sort?

6 THE BAILIFF: Yes, sir. I believe
7 there's one in here.

8 THE COURT: It's somewhere.

9 (Witness sworn.)

10 MR. MARSHALL: Your Honor, for purposes
11 of ease, this is an overhead shot of the Jordan Point
12 Marina before the storm hit. And it has the various
13 structures that were involved. And when people are
14 talking about various things, perhaps this can be used
15 to point out what's what as opposed to try to figure
16 out where the hell B-dock is.

17 THE COURT: I'm as familiar with it as
18 one crossing the Harrison Bridge and glancing to his
19 right can be.

20 MR. MARSHALL: That's the one.

21 (Discussion off the record.)

22 WILLIAM MICHAEL WINN,
23 a witness, was sworn and examined, as follows:

24 DIRECT EXAMINATION

25 BY MR. MARSHALL:

1 Q Would you please state your name?

2 A My full name is William Michael Winn. Mike
3 Winn is what everybody calls me.

4 Q And what is your current position with Jordan
5 Point?

6 A I'm president of the corporation that runs
7 the marina; general manager. There's just a few of
8 us. It's strictly family. I pretty much wear all the
9 hats.

10 Q And in 1990 --- late 1994, early 1995, what
11 was your role at that point in time?

12 A The same.

13 Q Now, I've taped -- hopefully, this picture is
14 going to stay up there. Is this a picture that depicts
15 your marina before --

16 A Yes, sir.

17 Q -- the hurricane?

18 A Yes.

19 MR. MARSHALL: Judge, can you see that
20 from there?

21 THE COURT: I can see it.

22 MR. MARSHALL: Would you mind if I ask
23 the witness to go up and point out what's what and sort
24 of --

25 THE COURT: That's fine.

1 MR. PALAIS: Your Honor, would you mind
2 if I stood up over here?

3 THE COURT: Move wherever you need to,
4 to see it. That's fine.

5 (Discussion off the record.)

6 MR. MARSHALL: What I would like to do,
7 Your Honor, is have him walk through what's there and
8 what was damaged at this point in time just to give you
9 a feel for that.

10 BY MR. MARSHALL:

11 Q Can you do that for me, Mike, or for the
12 court?

13 A Sure. The aerial photo of the marina here
14 was taken before the storm. We've got the western end
15 of the marina this way. Eastern here. The Ben
16 Harrison Bridge runs north and south.

17 We've got a travel lift, a service area,
18 over here on the far western end with a couple of
19 slips. At the time, we were renting these 2 to
20 customers instead of using them for service. These 2
21 were damaged, along with the walkways on each side of
22 the travel lift, which is a machine that runs out over
23 top of the water and we pick the larger boats up out of
24 the water and set them on blocks here in the boat
25 yard.

1 THE COURT: Let me interrupt you for a
2 second to orient myself. I'm looking at it with Route
3 156 on the far side of it?

4 THE WITNESS: Yes, sir.

5 THE COURT: Okay. Go ahead.

6 THE WITNESS: 156 is the approach up to
7 the bridge here.

8 THE COURT: That's fine. Okay.

9 THE WITNESS: We have a land-side boat
10 house with a crosswalk going to an outboard, or
11 riverside boat house right here. The land side is a
12 little larger -- 50-foot length as opposed to 40-foot
13 length on the riverside.

14 We had damage inside the shed here from
15 the boats hitting the poles and knocking the
16 underpinnings out from underneath roof. Lost ten of
17 the imperilings off of this roof also. This boat house
18 here, it didn't sustain a tremendous amount of --
19 called tin damage.

20 Probably the biggest problem here right
21 in the middle, I had a 38-foot boat sink and pull the
22 entire walkway that goes behind this or behind the wall
23 here -- how you get to the outside -- the boat pulled
24 the walkway down into the water. So when you're
25 standing here and looking at it, it did an S-curve

1 right into the water.

2 This section of dock, the front end back
3 here, is B-dock. It consists of approximately 6 larger
4 slips. We can accommodate up to about a 35-foot boat.
5 The balance of the slips, anywhere from a 20- to a 24-
6 or 25-foot boat. And they're back to back with a
7 walkway that connects the -- that goes right down
8 through it and just ends here at the end.

9 This small stretch of dock coming out
10 which is not attached to any of the other out here is
11 our C-dock, and it consists of a -- slips facing
12 towards the crosswalk in here which is a dead-end up in
13 the marina basin itself. And there's also a slip on
14 the backside of that also which really faced the
15 bridge. And you got onto that by this little gravel
16 area walking down the walkway here.

17 This entire dock was essentially
18 destroyed. Again, this boat house, the major damage
19 here was the walkway that had gotten banged into the
20 river. C-dock was destroyed also. We had some -- a
21 fueling dock out front here with a few slips that we
22 designate as A. We sustained damage with finger piers
23 and broken holes in there also.

24 The entire property really from the boat
25 ramp, which is over here on this corner, and coming all

1 the way across just on the other side of the travel
2 lift has a timber sheet-pile bulkhead. The way the
3 marina was dug out, at low tide, you visually see sand
4 and rock and gravel with the water not being up to the
5 bulkhead. At high tide, that's all covered with
6 water.

7 The other damage which I knew was not
8 covered consisted of several holes broken through the
9 bulkhead in and along this entire section. And it
10 caved in. We had some large holes.

11 Underneath my 2-story office building,
12 there's an office apartment upstairs, a ship store down
13 below. This is also the ship storage which was an
14 original building built in the late '60s. No damage
15 was done to these buildings other than the bulkhead
16 that faced underneath here was essentially completely
17 destroyed.

18 This is one of the reasons the county
19 condemned my facility. They were afraid that this here
20 would topple into the river.

21 We had, after the brunt of the storm, an
22 incoming tide essentially from dawn up until
23 approximately before lunchtime. And that did bring
24 water up behind the property and actually breached from
25 this direction going up this way and also from where

1 this home is here on the point on the other side of the
2 bridge coming along this way.

3 We really never had water over top of
4 this middle section of the bulkhead. The property has
5 got a slight crown to it and goes down like this. So
6 we had the water infusion coming around from the
7 backside. Never had any water in my store. The carpet
8 was never wet.

9 But the docks and the boat house and out
10 here, which are actually lower than the ones in here,
11 they were -- at approximately 10:30 that morning, that
12 was under water. But by then, the river looked like
13 this picture. It was like a millpond. The wind had
14 subsided.

15 THE COURT: Thank you.

16 BY MR. MARSHALL:

17 Q Thank you, Mr. Winn.

18 Mr. Winn, I want to talk to you about,
19 or have you tell the court to explain how this policy
20 came to be. And I want to ask you when is the first
21 time you ever heard of or from Mr. Robins?

22 A It was a sales call Mr. Robins made to -- to
23 myself at the marina for the purpose of seeing if I
24 would be interested in getting insurance coverage with
25 his firm, being CNA.

1 Q Do you remember when that occurred?

2 A I had thought the dates were around February
3 when we initially came up with contact between the
4 cold-call and getting the meetings together. That's
5 when I remember it.

6 Q But you remember the cold-call was the end
7 of --

8 A Mr. Marshall, I thought the cold-call was
9 actually in January sometime; the end of January.

10 Q And he called you to see if you were
11 interested in buying some insurance?

12 A Yes, sir.

13 Q And what did you do?

14 A I was in the process of trying to renew with
15 my existing company, Commercial Union. I was having
16 some problems with what I felt like the agent was
17 dragging his feet in getting me the renewals. So I
18 said yeah, sure. I'll talk to you. Let's sit down and
19 see what you have to go through. And, you know, so we
20 made an appointment for him to come to the marina.

21 Q And he came to the marina sometime in
22 February, March?

23 A I thought it was February, March sometime.

24 Q And what happened when he came to the
25 marina?

1 A Came down, introduced himself. We had some
2 casual small talk that -- you know, essentially telling
3 me who he was. I didn't know him from anybody. I had
4 actually never heard of the Robins Agency so -- that he
5 was representing this CNA policy. That they were a
6 family-owned business, been in business for 40 years.

7 And I felt like I had -- I was -- I
8 liked to listen to that because I had been back and
9 forth between 2 other agents I was trying to get prices
10 on and they just wanted to squabble about agents and
11 stealing business from each other. And I was really
12 frustrated because this is one of the largest expenses
13 I have at the marina is insurance. And Raleigh made me
14 feel comfortable.

15 We went on to talk about my business
16 some, some revenue numbers from different sources,
17 individual values on the store building, piers. I have
18 a little upholstery shop that we rent out. It was an
19 overview that I was used to going over with other
20 insurance agencies in the past with trying to get the
21 right dollar amount of coverages on different parts of
22 the marina.

23 I felt very confident with Raleigh
24 after he left there. And he told me that he had -- we
25 had a couple of mutual friends in -- that fooled around

1 with boats, and that with this CNA policy, he insured
2 some other marinas also. So that made me feel
3 confident.

4 Q So did you discuss anything about the
5 specific coverages at that early meeting or did you
6 just discuss things in general?

7 A We just discussed essentially things in
8 general. No specifics.

9 Q What happened after that as far as Mr. Robins
10 was concerned?

11 A I'm a little confused on how many meetings we
12 had up to when the policy was since it was several
13 years ago. I was under the impression that after this
14 initial meeting, we had actually another meeting where
15 he brought a proposal to me with some numbers on it
16 with the actual values of different items at the
17 marina.

18 MR. MARSHALL: May I approach the
19 witness, Your Honor?

20 THE COURT: Yes.

21 BY MR. MARSHALL:

22 Q I'll put a document in front of you and see
23 if that's the proposal that you're talking about?

24 A Yes, sir. It is.

25 Q That's a proposal Mr. Robins gave to you at a

1 subsequent meeting?

2 A Right.

3 Q And did you discuss that proposal at that
4 point?

5 A We went over it really page by page on what
6 was going to be in the policy. Excuse me. You know,
7 as you can see, it was -- it's several pages long. And
8 we went over it page by page on what was involved in
9 this proposal.

10 Q Did you talk about the various types of
11 coverages that were in the proposal?

12 A Well, we talked about what was in this
13 proposal right here. And it was not a discussion as to
14 if a UFO falls on the marina, you're not covered, or
15 that type of thing. So it was just strictly page by
16 page on this right here.

17 Q Did you talk about any of the types of
18 coverages that you were interested in having for your
19 marina?

20 A At one of the meetings -- and, again, I'm
21 sorry. I can't -- I'm a little foggy on which one it
22 was. My previous policy with Commercial Union had
23 excluded wind damage. And it was a blank piece of 8
24 and half by 11 paper with the very middle of it, you
25 are not covered if the wind blows the roof off of the

1 building. So that was something that I just really
2 couldn't afford not to have. I needed to have the
3 coverage for the roofs on the building like that.

4 At either that meeting or one of the
5 others, we also touched on what I refer to as storm
6 damage.

7 Q When you say you refer to it, what do you
8 mean by that?

9 A Well, we -- Raleigh didn't come up with any
10 kind of -- any type of comment like well, you are
11 covered for this; you aren't covered for that. But by
12 storm damage, I've got the roofs and I need to get the
13 roofs covered on this. And also, we talked about the
14 northeast exposure to the marina right here.

15 Q Which direction -- show the court which
16 direction is northeast.

17 A This is almost -- the airplane was in the
18 northeast position. You have essentially this
19 direction right here coming up right on this corner.

20 Q So you were concerned about -- I interrupted
21 you. Go ahead.

22 A That's all right. Concerned about a pretty
23 vulnerable northeast exposure to the marina. And if I
24 -- if that would be taken care of.

25 Q And his response was?

1 A Sure. I mean it was -- it wasn't a matter of
2 no, Mike, there's something in here that is not going
3 to be covered. It's everything we talked about. We
4 did talk about flood damage. But it was a mutual
5 conversation on the flood damage, not a one-sided from
6 me where, you know, here is this. You know, do you
7 want it or not. It didn't happen like that.

8 We touched on the fact that some of the
9 marina is farther up river where the river is thinner,
10 overflows its banks and goes over top of everything
11 down there. I never incurred that type of damage here
12 at the marina before. The river is so wide right
13 here.

14 I did not know in conjunction with the
15 flood and in conjunction with wind is really what that
16 had to do with. But as a mutual decision, that no,
17 hey, you've never had that kind of problem. Flooding
18 isn't a problem here. We don't need it.

19 Q Okay. Now, you eventually did get a policy
20 from Mr. Robins; didn't you?

21 A Yes, sir.

22 MR. MARSHALL: And, Your Honor, that
23 policy -- I've already handed the copy up to the
24 court. But I don't think it's in dispute that that's
25 the policy he got. I would like to label the exhibit

1 in front of Mr. Winn as exhibit number one and the
2 exhibit in the court's hand as exhibit number 2, if
3 that's all right.

4 THE COURT: The proposal you want as
5 one.

6 MR. MARSHALL: The proposal number one.
7 The policy exhibit 2, Your Honor.

8 THE COURT: The proposal is in the court
9 file. I'll mark it as your exhibit one today. And the
10 policy itself you want to be 2. I believe we've
11 already done that; haven't we?

12 THE CLERK: We marked it number one.

13 MR. MARSHALL: That's fine. If you want
14 the policy exhibit one and the proposal number 2,
15 that's fine.

16 THE COURT: I'll change it. I'll do
17 that. Okay. They're admitted. And this is admitted
18 without objection.

19 MR. OWEN: Yes, sir.

20 (Plaintiff's Exhibit Nos. 1 and 2 were marked
21 for identification and received in evidence.)

22 BY MR. MARSHALL:

23 Q When Mr. Robins brought you the policy
24 itself, which is exhibit 2 --

25 MR. MARSHALL: Is that right, Your

1 Honor? I think we ended up with that as exhibit 2.

2 THE COURT: The policy is one and the
3 proposal is 2.

4 BY MR. MARSHALL:

5 Q -- number one. When Mr. Robins brought you
6 exhibit number 1, did he go over what was in that
7 binder?

8 A We matched the proposal and the amounts in
9 here with the policy -- all policies I've had through
10 the years, they have a computer-generated sheet in
11 front of essentially each section. And we matched the
12 proposal to the computer-generated sheets in the policy
13 as we were going through it.

14 Q And they matched up?

15 A Right.

16 Q And you had a policy then?

17 A Right.

18 Q And that policy -- did you have any claims
19 during that first year?

20 A Yes. I did. We had a bit of ice damage.
21 The river froze up that year. We had an incoming
22 tide. And if I can show you here on the corner, we had
23 -- this section here was crushed from some ice damage
24 coming up here in the corner.

25 Q And what did you do?

1 A Called Raleigh.

2 Q What happened?

3 A Johnny on the spot; get an estimate. Marine
4 Construction. It's not like there's everybody who does
5 it. So I had a guy that I had done -- had worked with
6 me before. Called him and he came down, gave me an
7 estimate. I submitted it to Raleigh and it was taken
8 care of. I don't even remember an adjuster showing up;
9 although, one could have. But I don't remember.

10 Q The policy came up for renewal. Did you get
11 another policy?

12 A Yes, sir. Same thick notebook. You know,
13 again, Raleigh gave me a call. Hey, it's renewal
14 time. I was happy with the coverage we had had to this
15 point. Didn't have any reason to change it. He -- we
16 did have some -- changed a few things with some
17 computer equipment and files on it. But everything
18 else was exactly the same.

19 Q Tell me about Hurricane Fran. How did you
20 first know what was going on?

21 A We had been watching the Weather Channel.
22 Had really no inkling that I was going to have any kind
23 of major catastrophe like we had. Business as usual on
24 the day of the 4th and 5th. I had some customers that
25 were aware, asking me what I thought. I can't legally

1 make somebody leave the marina, to vacate the premises
2 so they can leave.

3 The consensus among all the people in
4 the marina was we're going to dodge the bullet and this
5 wasn't going to be a problem. So I had a full house.

6 I went home that night about 7 o'clock
7 after work on the 5th. Got a phone call at the house
8 about 11, 11:30 from one of my tenants. Mike, you
9 better get down here. We're having some -- we're
10 having some big problems. You know, I -- I missed the
11 6 o'clock news but had seen nothing about a major
12 weather warning at all.

13 Drove down to the marina. My wife
14 didn't want me to go because we could see the wind was
15 blowing pretty heavy outside. She was a little
16 concerned. The lights had flickered at our house
17 some. I really didn't know what to expect. Drove into
18 the marina and just had boats bouncing around
19 willy-nilly. Wind and rain.

20 I've never been in a hurricane. But it
21 was bad. I mean the wind was blowing hard. The rain
22 was pouring down. The boats were bouncing around. I
23 had some people that lived on their boats really
24 concerned that their property was getting smashed all
25 up. I was concerned that my property was getting

1 messed up. But we were at the point of no return.

2 You -- it was so rough we couldn't get
3 in the boats and actually take off to get them out of
4 the marina. And by that time also, the way the tide
5 was working, we essentially had a high tide at about 11
6 o'clock. And by that time, some of these larger boats,
7 the way the roof eaves comes down on them, they
8 couldn't get out from underneath the roof if they
9 wanted to anyway.

10 I had several boats on the C-dock over
11 here that had become untied and just were swinging
12 around everywhere, running into other boats, running
13 into docks. But -- and it just wasn't worth somebody
14 getting hurt to try to -- you can fix the boat or do
15 whatever. But we had a couple guys trying to do what I
16 felt like were some stupid things to lasso boats and
17 get them on.

18 I didn't want to see anybody get messed
19 -- I actually had people stay on their boats through
20 all this thing.

21 So I really rode the storm out for the
22 next -- essentially, all night long. I stayed up to
23 try to go through the boats we could get to re-tie and
24 try to help some of the boat owners keep their property
25 from getting all messed up. And it went on really

1 until about 6 or 7 o'clock in the morning, and we got
2 daylight.

3 By then, we had -- several people had
4 heard from one way or the other -- I hadn't been on the
5 phone yet calling customers to tell them that if they
6 weren't there that hey, you better get down here, your
7 boat is getting all messed up.

8 About that 7 o'clock in the morning
9 period, that's when my wife came down a little later
10 that morning. My father came down. Then we tried to
11 get on the phone with some of our boat customers to
12 tell them what happened using the phone in my truck.
13 We had the electricity gone out. We had no phone
14 service.

15 The -- the water, as the morning tide
16 dropped out and then the tide kept coming back in at
17 about approximately ten or so the next morning. Then
18 our bathroom stopped working because my septic tank got
19 filled from the backside with water coming across
20 there.

21 That's kind of it in a nutshell.

22 Q At dawn the next morning, it was light enough
23 to see?

24 A Right.

25 Q What was the status of your piers, wharves,

1 and docks at that point in time?

2 A The open stuff was in total disarray. The
3 shed on the river side, we had a 38-foot performance
4 boat had sunk and it was still tied to the pier. We
5 crossed the stern lines. And he was in the middle of
6 that boat shed there with the back of the walkway still
7 tied to his boat, and that was pulled away from the
8 wall.

9 You could walk to the end of it but you
10 had to really put all your weight on the handrail. You
11 were essentially walking on the edge of the handrail
12 instead of the dock itself.

13 I still had a couple, believe it or not,
14 on a boat on C-dock -- B-dock -- excuse me -- that had
15 rode the storm out. Their boat was completely
16 battered. Had 2 boats that knocked a hole in the side
17 of theirs. It didn't sink. But they couldn't get back
18 because they were tied to a pole, and that was what was
19 left. There was no walkway or anything they could get
20 back in.

21 I had a work boat actually in the second
22 slip in the covered shed in here. Rode the storm out.
23 And we cranked that up and went around and picked these
24 people off. Then I tried to start getting the large
25 pieces of dock that were floating around to keep them

1 from running into any more boats. Pulled those around
2 to the boat ramp so we could make some semblance of
3 getting everything straight without doing any more
4 damage.

5 Q So was the damage to the docks done in
6 daylight? That's my question.

7 A Yes. Sure.

8 MR. MARSHALL: Your Honor, at this point
9 in time, I think it would be appropriate to see the
10 famous video; the long version even that Mr. Owen wants
11 to show you. So I'll go ahead and show you the long
12 version so you don't have to see it again.

13 THE COURT: Thank you.

14 Mr. Winn, return to your seat.

15 So he doesn't have his back to it.

16 Does it have to be there?

17 (Discussion off the record.)

18 MR. PALAIS: Your Honor, just to confirm
19 with counsel, I personally haven't seen the video. I
20 thought the court might want to know it's an hour
21 long.

22 MR. MARSHALL: It's a fairly long video,
23 Your Honor.

24 THE COURT: Okay. Well, the court
25 reporter can take the time off, I think. We don't need

1 to record that.

2 MR. MARSHALL: Absolutely.

3 THE COURT: If it's going to be that
4 long, why don't we take a short break while you set it
5 up.

6 MR. MARSHALL: That's fine, Your
7 Honor.

8 (Break taken.)

9 MR. MARSHALL: Your Honor, just for --
10 although it will be self-evident in the tape, this is a
11 compilation of different tapes different people took
12 that night. Some of it is not in order. But it's
13 clear when it's day and clear when it's night. And
14 there's some conversation that you can figure along
15 about what time it is, if that's helpful.

16 THE COURT: And the reporter may
17 relax.

18 (Videotape played.)

19 MR. MARSHALL: Your Honor, I don't know
20 if Mr. Owen is interested in doing this or not, but I
21 think -- we have the unusual situation where you have
22 the picture of it all happening, and then I don't think
23 anybody is coming in and explaining any more than that
24 who is going to give you a better picture of what
25 happened than the video. And if Mr. Owen is interested

1 in it, I'd be willing to argue the application of the
2 exclusion at this point in time and maybe shorten this
3 thing up a whole lot.

4 MR. OWEN: Your Honor, the only -- I do
5 have a couple questions for Mr. Winn. The only thing I
6 would want to clarify, and I don't mind doing that, is
7 the fact that, as I understood from Mr. Winn, when he
8 got there around 11, 12 o'clock at night, that the high
9 tide was up and it was a high water episode and then it
10 went down and came back up again. And I think that's
11 what he testified.

12 With that -- and that's when most of the
13 stuff washed away is that first rush in through there.
14 But as long as that's clear from -- that's what I
15 understood from Mr. Winn's testimony, is that it was at
16 high tide around 11 when he first got there. It went
17 down, and then started going back up.

18 MR. WINN: It was the second one. When
19 all that water you saw --

20 THE COURT: Do you want to put Mr. Winn
21 back on the stand?

22 MR. MARSHALL: Yes. Please. If you
23 want to get that clarified, go ahead and do it.

24 THE COURT: I understand. We'll see
25 where that goes after he --

1 MR. PALAIS: Forgive me, Your Honor.
2 The only thing I would also want to point out to the
3 court is that on behalf of the agent and the agency, we
4 certainly have some cross-examination from Mr. Winn as
5 well.

6 THE COURT: Yours is different.

7 MR. PALAIS: Okay.

8 MR. MARSHALL: And I'm not saying Joe's
9 going to ask you questions and then --

10 MR. PALAIS: Okay. Thank you, Your
11 Honor.

12 MR. MARSHALL: I have some more
13 testimony from him too but relevant to what the policy
14 applies to that storm. That's where I am at this
15 point.

16 CROSS-EXAMINATION

17 BY MR. OWEN:

18 Q Mr. Winn, as I understood in your direct that
19 you -- that around 11 p.m. when you first got down
20 there was when the tide was at its worst? It was a
21 higher tide?

22 A It was high. It wasn't higher than the
23 second series of high tide.

24 Q But it was a high tide?

25 A Yes, sir.

1 Q And the water was up at the docks?

2 A Right.

3 Q And similar to what we saw in the video with
4 it pounding up underneath and moving the boats and they
5 were all bouncing and that type of thing?

6 A Yes. Right.

7 Q And as I understand too, the boat out here
8 that we saw sunk that was sticking straight up like
9 that, what happened was the water rolling through there
10 had gone over the back of it, filled it up with water,
11 and sank it?

12 A Right.

13 Q And also, as I understand from your
14 deposition, the waves or the wave action on the boat
15 did most of the damage to what occurred to the docks
16 and to the boat house?

17 A That was my opinion.

18 MR. OWEN: That's all I have.

19 MR. MARSHALL: Your Honor, if Mr. Owen
20 is willing to do it, I know this is sort of unorthodox,
21 but I think it's just appropriate at this point in time
22 to argue the exclusion issue.

23 MR. OWEN: Yes. I'm comfortable with
24 that, Judge. I was tempted to make a motion to strike
25 at the end of his opening but -- which is appropriate.

1 THE COURT: Well, and with the
2 understanding that we are excluding from this your
3 claim against Robins.

4 MR. MARSHALL: Absolutely, Your Honor.
5 This goes --

6 THE COURT: Is it -- so Mr. Ford and Mr.
7 Palais will relax, they won't be worried they're taken
8 along in this fight.

9 MR. MARSHALL: I don't think they have a
10 dog in this fight, this particular fight.

11 THE COURT: Not in this particular one.
12 I was trying to make them comfortable with what you
13 were proposing.

14 MR. PALAIS: And we appreciate it, Your
15 Honor.

16 MR. OWEN: Judge, and I'm not sure -- I
17 guess I'm the moving one since -- I don't know. I'm
18 not sure who --

19 THE COURT: Who goes first?

20 THE COURT: I think Mr. Winn can go back
21 to his seat.

22 MR. MARSHALL: I can go first. Your
23 Honor, I suppose -- and I hate to say this. I hate to
24 admit anything sometimes -- but I suppose technically,
25 at this point in time, we have made a claim for that

1 which is covered property. And Mr. Owen would stand up
2 and say here is why the exclusion applies, and then I
3 would rebut that. I think that's where we are.

4 THE COURT: I think so. And Mr. Owen
5 agrees. He's already said. So it's your go.

6 MR. OWEN: Yes, sir.

7 Your Honor, very rarely in a case do we
8 have a film of what was going on and what actually
9 caused the damage. And I don't think that anyone will
10 disagree. Mr. Winn even acknowledged that waves and
11 wave action on the boats caused the damage to his
12 marina.

13 Well, assuming that -- and we saw the
14 video. The video was -- it couldn't have been
15 clearer. We see the -- you could see the waves beating
16 up underneath the docks. You could see -- in fact,
17 there's one shot in there where you can see where the
18 boards had been knocked up as the wave action is coming
19 up underneath. You could see the action on the boats
20 beating them back and forth, raising them up to the
21 ceiling.

22 Even the incident where the walkway was
23 pulled and the outer boat, it was because the water had
24 flooded into this boat and sank it, pulling it down,
25 putting the pressure on it.

1 The -- there couldn't be any clearer
2 evidence that what occurred and what caused the damage
3 was waves, surface water, flood, the tides. And then
4 the exclusion is very clear of any body of water, all
5 weather driven by wind or not.

6 Now, the wind was making these waves and
7 making this whole process a lot worse and causing the
8 water to be higher. But the way this exclusion is
9 written, and it was acknowledged by Mr. Marshall in his
10 opening that it is a very standard exclusion, and the
11 -- it's not unusual for it to be in the policies. And
12 what we see is this exclusion exactly fits clearly what
13 occurred and what caused the damage.

14 I can't imagine it being any clearer
15 than we saw in the video, Mr. Winn's testimony, and the
16 words right here -- there's no ambiguity here -- this
17 is -- we will not pay for a loss caused directly or
18 indirectly by any of the following. It's excluded
19 regardless of any other cause or event that contributes
20 concurrently or in any sequence of the loss. That's
21 right under B1. That's the preamble for this. Very,
22 very clear.

23 Then we have the combination, basically,
24 of the wave action, certainly driven by the wind, that
25 acted on these docks and on the boats so that it was

1 causing them to move and batter this around.

2 Your Honor, I don't see how it could get
3 any clearer than that. And I would submit to the court
4 that this exclusion is not ambiguous. It is clear and
5 directly, and the fact that the damages that were
6 suffered there at the marina were caused by the
7 excluded -- by the excluded event. In fact, that one
8 fellow was talking about the piers being washed away
9 and the docks washed away. Well, that's a flood.
10 That's what happened. The waves took them out.

11 And so I think it's excluded clearly
12 under the policy. And we submit that.

13 THE COURT: Mr. Marshall.

14 MR. MARSHALL: Your Honor, in all
15 deference to Mr. Owen, I don't think it's clear at
16 all. Not a surprise.

17 Your Honor, the way you have to look at
18 this policy -- and I think for purpose of this
19 argument, and I think Mr. Owen can concede -- all the
20 damages that were claimed, or a great part of them,
21 rise and fall on this particular rider. Some of them
22 are -- some of them specifically talked about in this
23 rider such as item 1C, covers all the electrical wiring
24 and plumbing that were fixed to the docks. Item B,
25 debris removal. Those things are the elements of

1 damages we're talking about.

2 But let's go back and look at this rider
3 in its entirety, Your Honor, because that's where I
4 think this case comes from. First of all, you start in
5 the beginning. Mr. Owen didn't want to start in the
6 beginning. He wanted to go right to the exclusion.
7 But what is it excluding?

8 Paragraph A says we will pay for loss to
9 covered property from any of the covered causes of
10 loss. We will pay -- and loss is defined on the very
11 last page as accidental damage -- accidental loss or
12 damage. What we have here is accidental loss or
13 damage. Two, floating or fixed piers, wharves, and
14 docks. That is covered property. So you start off
15 with the proposition before anything else, covered
16 property, that that has been damaged. So at that point
17 in time, you're not into any exclusions. You have this
18 is a covered loss.

19 Now, go to item A2, property not
20 covered. And in the property not covered, there's
21 seawalls and breakers. And we're not making a claim
22 for seawalls or breakers. That's not part of the
23 claim.

24 Item number 3, Your Honor, covered
25 causes of loss means risks of direct physical loss to

1 covered property. This is direct physical loss to
2 covered property. This is damage to the piers,
3 wharves, and docks. Then you go a step further. You
4 go to paragraph 4A.

5 Paragraph 4A talks about in addition to
6 direct loss, we will pay the direct loss caused by or
7 resulting from risk of direct physical loss involving
8 collapse of all or part of a building or structure
9 caused by one of the following. Subparagraph one, we
10 will pay for direct loss caused by or resulting from
11 risk of direct physical loss involving collapse of all
12 or part of a building or structure caused by one or
13 more of the following. And in the one or more of the
14 following, they talk about windstorms and they talk
15 about water damage.

16 Now, Your Honor, this loss was not a
17 tidal wave coming through and knocking everything out.
18 This loss was those structures being subjected to a
19 series of forces, waves, boats, wind, other debris --
20 full house -- yanking and pulling. And I submit to
21 Your Honor this is either direct loss caused by that
22 storm or it is collapse of the structures caused by a
23 windstorm. That's what Hurricane Fran was. It was a
24 windstorm.

25 So, Your Honor, we think if the policy

1 -- we know. The law is if the policy gives you the
2 loss, it says you're covered. You can't undo it. And
3 his attempt to undo it, his company's attempt to undo
4 it, is applicable because that is damages caused by a
5 flood.

6 Your Honor, there is -- a flood is
7 overflowing of a body of water out of its banks causing
8 damage. These things were not damaged by a flood.
9 These things were damaged by a windstorm. These things
10 were damaged by waves and boats and all these things
11 going on at one time. And that provision, that
12 provision on which Mr. Owen and his client rely, would
13 apply if we were making a claim for the store, which is
14 on dry land, being affected by a flood. But we're not
15 making that claim. That -- and that's what those cases
16 are about.

17 The cases that talk about the flood
18 insurance provision -- and that's what this is -- talks
19 about -- they talk about what happens when the body of
20 water overflows and causes damage; overflows from its
21 banks.

22 Now, Mr. Winn said that he didn't need
23 flood insurance. And, indeed, he didn't need flood
24 insurance because flood insurance wouldn't have covered
25 this either. Flood insurance would say that was a

1 windstorm. That's not what we paid for. The loss that
2 Jordan Point suffered was a direct physical loss from a
3 windstorm or the collapse of the structures by the
4 multiple forces, including the multiple forces of
5 windstorm and water -- it said it in that covered
6 provision -- that pulled this place apart. And that's
7 the issue we're here about today, Your Honor. And
8 that's the coverage that we're afforded.

9 And, Your Honor, if you would -- you do
10 have a copy of the proposal in front of you. But if
11 you look on the summary of premiums in the proposal,
12 the second single largest coverage -- the second single
13 largest coverage -- and it's about 4 pages from the
14 back -- see where it says summary of premiums?

15 THE COURT: I have one. I'm just
16 looking for one that's not nailed into the -- I have
17 that.

18 MR. OWEN: I believe it's on the witness
19 stand, Judge.

20 THE COURT: Yes. Hand me that one,
21 please. Thank you.

22 MR. MARSHALL: I'm talking about 4 pages
23 from the back, Your Honor, it says summary of premiums
24 at the top.

25 THE COURT: I have it. Go ahead.

1 MR. MARSHALL: Look down there about the
2 fourth line; piers, wharves, and docks, and slip rent.
3 If you look at that, there's \$4,231 of a total premium
4 of \$16,837 for piers, wharves, and docks. I submit to
5 you, Your Honor, I find it incredulous, absolutely
6 incredulous, that somehow or other flood insurance
7 would have anything to do with piers, wharves, and
8 docks sitting out in the water in the first place. But
9 that's what they're arguing. And I don't think it's
10 appropriate. And I think this is a covered loss, and
11 it's clear under the policy it's a covered loss.

12 And if it's not crystal clear under the
13 policy it's a covered loss, at least there's an
14 ambiguity in the policy. And the ambiguity -- their
15 policy -- the ambiguity provides coverage for my
16 client. I submit to you that's our position and I
17 think that's what the evidence is.

18 MR. OWEN: I want to respond just very
19 briefly to that. Number one. Number one has -- I
20 don't know who the fellow was -- but one of the boat
21 owners said it was the highest water he's ever seen.
22 They had been there 4 or 5 years. And that flood just
23 washed those docks away. It wasn't a collapse. It was
24 washed away by the flood.

25 And this exclusion is so clear that it

1 says that it doesn't -- it's any one of these or all of
2 these under B1E4. It's either flood, surface water,
3 waves, tides, tidal waves, overflowing of any body of
4 water that's sprayed, all weather driven by wind or
5 not.

6 I don't see how the language could be
7 any clearer. I don't see how it could be any clearer,
8 after looking at the videotape, what occurred. I just
9 think that this damage is excluded and would submit to
10 the court that there is no claim under the policy based
11 on the evidence now before the court.

12 THE COURT: Let's break for lunch and
13 let me reflect on this and rule on it when we get
14 back. And it's 5 to 12. Why don't we break until
15 one. Court is in recess.

16 (Break taken.)

17 THE COURT: We are at a point where the
18 court is asked to make a ruling on this policy as to
19 whether the exclusions apply under the piers, wharves,
20 and docks rider.

21 The beginning of the rider under
22 coverage, it says we'll pay for loss of covered
23 property. For many of the covered causes, under
24 covered causes, we find subsection A to be floating or
25 fixed piers, wharves, and docks.

1 In section 4 under A dealing with
2 coverages, we get specific as to collapse, and it
3 talked about direct loss caused by or resulting from a
4 risk of direct physical loss, involving collapse of all
5 or part of a building or structure caused by one or
6 more of the following: And it lists several things; 2
7 of which are windstorm and water damage.

8 That gets us to the exclusions section.
9 In number one under exclusions, it says we will not pay
10 for a loss caused directly or indirectly by any of the
11 following: Subsection E there says water.

12 And that gets us to the crux of this
13 matter where under E4, it excludes flood, surface
14 water, waves, tides, tidal waves overflowing of any
15 body of water, or their spray, all weather driven by
16 wind or not. The first word there is flood.

17 Black's Law Dictionary defines flood as
18 an inundation of water over land not usually covered by
19 it. And flood water is defined as water which escapes
20 from a stream or other body and overflows adjacent
21 territory.

22 By definition, this ain't a flood.
23 Because the damage is over water where water not only
24 flows, over the stream. In this case, the stream is
25 rather large. It's the James River.

1 Then we get to waves and tides
2 overflowing of any body of water. Turning to Black's
3 again, overflow, the dictionary says, is to flow or
4 spread beyond the limits. These piers and docks and
5 wharves were not beyond the limits of the river. They
6 were in the river. It can't be a flood. Its waves and
7 tides were not beyond the limit; not up on the beach
8 somewhere. It's in the river.

9 So if I were to take waves and tides,
10 it's not those overflowing of the body of water.

11 The court rules that the exclusion does
12 not apply.

13 MR. OWEN: Judge, may I make a statement
14 about this idea of waves and respectfully disagree with
15 the court's analysis on that at this point?

16 THE COURT: Yes, sir.

17 MR. OWEN: If you look at each -- these
18 are each a separate, distinct thing. The overflowing
19 of any body of water is not -- does not define where
20 the waves would occur.

21 And I would submit to you that the
22 evidence before this court and the direct evidence and
23 the direct testimony of Mr. Winn was that waves were a
24 factor in that they knocked the docks up and that the
25 boats driven by the waves caused damage. And that's

1 whether indirectly or not.

2 And this provision, the way the commas
3 are situated, each is a separate occurrence. The
4 flood, I can understand the court when you say it's a
5 flood over the boundaries, overflowing of any body of
6 water over the boundaries. But the way this is
7 written, it is -- if it's a flood, separate, or if it
8 is surface water, separate, or if it is a wave.

9 Now, that is not -- that is not limited
10 to waves that overflow. These are waves; period. Same
11 with the tides, tidal waves, all weather driven by wind
12 or not. And I would submit to the court that that --
13 the overflow is not a requirement for the wave to be
14 excluded, under the clear language of this policy.

15 And I don't know if this is the
16 appropriate time or not, but rather than be left with
17 the ruling at that stage in that way, I would like the
18 opportunity to brief it. Because I just think that
19 that interpretation is an incorrect one.

20 THE COURT: Do you all remain quiet?

21 MR. MARSHALL: Your Honor, I'm always
22 afraid to remain quiet. But I adopt what the court
23 said. I think that's a fair interpretation of it, and
24 I don't think a briefing by Mr. Owen is going to change
25 the court's reading as far as that particular

1 phraseology is concerned.

2 I mean what Mr. Owen doesn't address is
3 that which the court picked up on earlier on, and we
4 are entitled to damages from a windstorm. And he wants
5 to ignore that in a windstorm, at a marina with piers,
6 wharves, and docks, it's going to have water and it's
7 going to have water damage. And I just don't know
8 where he's going. So I don't see he can better his
9 hand by briefing it. He's argued. So I accept the
10 court's ruling.

11 THE COURT: Mr. Owen, I don't see where
12 anything is going to be gained by briefing it. This
13 thing is written with each one of these: Flood,
14 surface, waves, tides, tidal waves. Comma after each
15 one. And then saying overflowing of any body of
16 water.

17 MR. OWEN: That is a separate thing,
18 Judge. That does not define the rest of it.

19 THE COURT: I disagree with you. And I
20 see no point in briefing it. That thing just doesn't
21 stand by itself. That's all. If you look at it in the
22 first place, it doesn't make any sense, is the way I
23 see it.

24 MR. OWEN: The reason I say that, Judge,
25 the reason I say it's separate, where it has all

1 weather driven by wind or not, that's referring to each
2 separate item of that.

3 THE COURT: I don't wish to get into a
4 debate.

5 MR. OWEN: Yes, sir. I'm just making
6 myself clear for the record, Your Honor, please.

7 THE COURT: Yes, sir. I understand
8 that. That's all. But, as I said, I don't see where
9 it's going to change. I don't see any reason for you
10 to brief it. My ruling stands.

11 MR. OWEN: Yes, sir.

12 MR. MARSHALL: I don't want to interrupt
13 you, Joe.

14 MR. OWEN: I'm not -- no.

15 MR. MARSHALL: Your Honor, I don't think
16 we have a further cause of action against the agency
17 based on that ruling, and I suggest that they be
18 allowed to leave. If the court's ruling is that the
19 coverage applies, then our allegation to the agency
20 should have told us it didn't. It's been decided by
21 the court's opinion.

22 THE COURT: The court is of that
23 opinion. I anticipated that ruling.

24 MR. PALAIS: Thank you, Your Honor.
25 Your Honor, may we be excused from the remainder of the

1 proceedings?

2 THE COURT: Yes, sir.

3 MR. PALAIS: Thank you.

4 THE COURT: If you want a recess, you
5 certainly can have that.

6 MR. OWEN: Yes. I think so.

7 THE COURT: You want that?

8 MR. MARSHALL: Yes.

9 THE COURT: Court is in recess. You go
10 ahead. We're going to break.

11 (Break taken.)

12 MR. MARSHALL: This stipulation is for
13 the record without the judge, with the judge's
14 knowledge.

15 MR. OWEN: And agreement.

16 MR. MARSHALL: And agreement -- with the
17 judge's agreement -- that this matter is going to be
18 continued for a period until Friday a week, which is
19 May 12. At which time, we trust there will be a final
20 order in this matter.

21 MR. OWEN: And where the judge's -- that
22 incorporates the judge's rulings on the application of
23 the exclusion clause and with a stipulation as to the
24 amount of damages -- a stipulated damage amount for a
25 final order.

1 MR. MARSHALL: That's correct.

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3 (The trial concluded at 1:54 p.m.)
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C E R T I F I C A T E

COMMONWEALTH OF VIRGINIA:

CITY OF RICHMOND:

I, Terri L. Dolinger, RPR, a Notary Public in and for the Commonwealth of Virginia at Large, do hereby certify that the foregoing was reported by Stenographic means, which matter was held on the date, and at the time and place set forth on the title page hereof, and that the foregoing transcript constitutes a true and accurate transcript of same to the best of my ability.

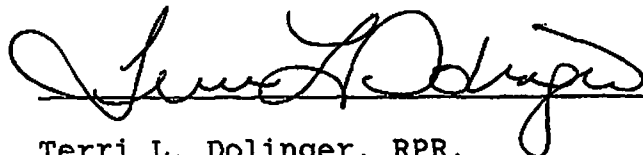
I further certify that I am not related to any of the parties, nor am I an employee of or related to any of the attorneys representing the parties, and I have no financial interest in the outcome of this matter.

GIVEN under my hand and seal this

17th day of May, 2000.

My commission expires:

July 31, 2001



Terri L. Dolinger, RPR,

Notary Public

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF PRINCE GEORGE

FILED

00 MAY -8 PM 4:03

RBMW, INC.,
t/a JORDAN POINT YACHT HAVEN,

Plaintiff,

v.

ROBINS INSURANCE AGENCY, INC.,
WILLIAM RALEIGH ROBINS, et al.,

Defendants.

CIRCUIT COURT CLERK'S OFFICE
PRINCE GEORGE COUNTY, VA.
BISHOP KNOTT, JR., CLERK
BY *Belmont* D.C.

Case No. CL98-050

MOTION FOR ENTRY OF DISMISSAL ORDER

COME NOW Defendants Robins Insurance Agency, Inc. ("Robins Insurance") and William Raleigh Robins ("Robins"), by counsel, and for their Motion for Entry of Dismissal Order state as follows:

1. Plaintiff RBMW, Inc., t/a/ Jordan Point Yacht Haven ("Jordan Point") has improperly attempted to obtain a nonsuit after this Court has made a determination of the case on the merits.

2. On May 8, 2000 counsel for Robins Insurance and Robins received a nonsuit Order that had not been endorsed by all counsel of record as required by Rule 1:13 of the Rules of the Supreme Court of Virginia.

3. Va. Code § 8.01-380(A), (1950), as amended, in pertinent part, provides that:

A party shall not be allowed to suffer a nonsuit as to any cause of action or claim, or any other party to the proceeding, unless he does so before a motion to strike the evidence has been sustained or before the jury retires from the bar or before the action has been submitted to the court for decision.

4. An action is deemed to have been submitted to the court for decision when the parties have "yielded the issues to the court for consideration and decision," which can be

accomplished by “oral or written argument, formal notice and motion, or by tendering a jointly endorsed sketch for a decree.” Moore v. Moore, 218 Va. 790, 795-96 240 S.E.2d 535, 538 (1978).

5. Plaintiff Jordan Point cannot attempt to obtain a nonsuit after their action has been decided by the court. As the Supreme Court stated in Khanna v. Dominion Bank, 237 Va. 242,245, 377 S.E.2d 378, 380 (1989), “[i]t would be absurd to hold that a claimant could suffer a nonsuit as a matter of right after a court had decided the claim.”

6. A copy of the relevant excerpts from the transcript of the May 1, 2000 trial on this issue have been filed contemporaneously with this Motion. It is plainly apparent that Plaintiff Jordan Point’s attempt to obtain a nonsuit comes too late - after the Court had announced its decision. The relevant discussions between counsel for Jordan Point and the Court were as follows:

Mr. Marshall: Your Honor, I don’t think we have a further cause of action against the agency based on that ruling, and I suggest that they be allowed to leave. If the court’s ruling is that the coverage applies, then our allegation to the agency should have told us it didn’t. It’s been decided by the court’s opinion.

The Court: The court is of that opinion. I anticipated that ruling.

See Page 8 of Trial Transcript Excerpt.

7. Given the Court’s final determination that the exclusion in the insurance contract does not apply, it is appropriate that the attached Order (Exhibit A) dismissing Robins Insurance and Robins be entered.

WHEREFORE, Robins Insurance and Robins respectfully request that the Court enter the attached Order dismissing Plaintiff Jordan Point’s Motion for Judgment with prejudice as against them.

Respectfully submitted,

ROBINS INSURANCE AGENCY, INC.
WILLIAM RALEIGH ROBINS



Douglas M. Palais, VSB #19460
Scott C. Ford, VSB #39078
MEZZULLO & McCANDLISH, P.C.
1111 East Main Street, Suite 1500
P. O. Box 796
Richmond, Virginia 23218
(804) 775-3885 (telephone)
(804) 775-3816 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that, this 8th day of May, 2000, I delivered by facsimile and first class mail, postage prepaid, a true and correct copy of the foregoing to:

Bruce M. Marshall, Esq.
Durette, Irvin & Bradshaw, P.C.
Main Street Centre
600 East Main Street
Richmond, VA 23219

W. Joseph Owen, III, Esq.
Cowan & Owen, P.C.
P. O. Box 35655
Richmond, VA 23235-0655



VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF PRINCE GEORGE

RBMW, INC.,)	
t/a JORDAN POINT YACHT HAVEN,)	
)	
Plaintiff,)	
)	
v.)	Case No. CL98-050
)	
ROBINS INSURANCE AGENCY, INC.,)	
WILLIAM RALEIGH ROBINS, et al.,)	
)	
Defendants.)	

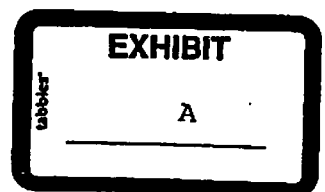
ORDER

This action came for trial before the Court sitting without a jury on May 1, 2000. Evidence was presented by the Plaintiff RBMW, Inc. t/a Jordan Point Yacht Haven ("Jordan Point").

Upon motion made by Plaintiff Jordan Point, the court was requested to rule upon whether the exclusion in the insurance contract applied. Upon hearing arguments by counsel for Plaintiff Jordan Point and Defendant Transcontinental Insurance Company, the court ruled that the exclusion did not apply. Having determined that the exclusion in the insurance contract does not apply, it is hereby ADJUDGED, ORDERED, DECREED AND DECLARED that:

Plaintiff Jordan Point's Motion for Judgment against only defendants Robins Insurance Agency, Inc. and Raleigh Robins is hereby dismissed with prejudice.


The Clerk is directed to mail a certified copy of this Order to all counsel of record.



Entered: / /

James A. Luke, Judge

I ask for this:



Douglas M. Palais, VSB #19460
Scott C. Ford, VSB #39078
McCANDLISH KAINE & GRANT
1111 East Main Street, Suite 1500
P. O. Box 796
Richmond, Virginia 23218
(804) 775-3885 (telephone)
(804) 775-3816 (facsimile)

Counsel for Defendants Robins Insurance Agency, Inc.
and William Raleigh Robins

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF PRINCE GEORGE

FILED

00 MAY 10 PM 2:47

RBMW, INC.,)
t/a JORDAN POINT YACHT HAVEN,)

Plaintiff,)

v.)

ROBINS INSURANCE AGENCY, INC.,)
WILLIAM RALEIGH ROBINS, et al.,)

Defendants.)

CIRCUIT COURT CLERK'S OFFICE
PRINCE GEORGE COUNTY, VA.
BISHOP KNOTT, JR., CLERK
BY LSmitt D.C.

Case No. CL98-050

NOTICE OF HEARING

PLEASE TAKE NOTICE that the defendants, Robins Insurance Agency, Inc. and William Raleigh Robins, by counsel, beginning at 9:30 a.m., or as soon thereafter as counsel may be heard, on May 22, 2000, will bring on for hearing before the Honorable J. A. Luke their previously filed Motion for Entry of Dismissal Order.

Respectfully submitted,

ROBINS INSURANCE AGENCY, INC.
WILLIAM RALEIGH ROBINS



Douglas M. Palais, VSB #19460
Scott C. Ford, VSB #39078
McCANDLISH KAINE & GRANT
1111 East Main Street, Suite 1500
P. O. Box 796
Richmond, Virginia 23218
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(804) 775-3816 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that, this 9th day of May, 2000, I delivered by facsimile and first class mail, postage prepaid, a true and correct copy of the foregoing to:

Bruce M. Marshall, Esq.
Durette, Irvin & Bradshaw, P.C.
Main Street Centre
600 East Main Street
Richmond, VA 23219

W. Joseph Owen, III, Esq.
Cowan & Owen, P.C.
P. O. Box 35655
Richmond, VA 23235-0655



VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF PRINCE GEORGE

RBMW, INC.,
t/a JORDAN POINT YACHT HAVEN,

Plaintiff,

v.

ROBINS INSURANCE AGENCY, INC.,
WILLIAM RALEIGH ROBINS, et al.

Defendants.

Case No. CL98-050

NOTICE

To: Douglas M. Palais, Esquire
Scott C. Ford, Esquire
Mezullo & McCandlish
1111 East Main Street
P.O. Box 796
Richmond, Virginia 23218
Counsel for Defendants

W. Joseph Owen, III
COWAN & OWEN, P.C.
1930 Huguenot Road
P.O. Box 35655
Richmond, Virginia 23235-0655
Counsel for Defendants

FILED
00 MAY 18 PM 3:15
CIRCUIT COURT CLERK'S OFFICE
PRINCE GEORGE COUNTY, VA.
BRIAN RHOOT, JR., CLERK
BY W. J. Owen D.C.

Please take notice that on May 22, 2000, at 9:30 a.m., or there soon after, the plaintiff RBMW, Inc., t/a Jordan Point Yacht Haven, by counsel, will move for the Court to enter the nonsuit order solely as to the defendants, Robins Insurance Company and William Raleigh Robins, et al., as previous tendered to the Court.

RBMW, INC., t/a
JORDAN POINT YACHT HAVEN

By 
Of Counsel

Bruce M. Marshall
(VSB No. 18093)
DURRETTE, IRVIN & BRADSHAW, P.C.
600 East Main Street, 20th Floor
Richmond, Virginia 23219
(804) 775-6900

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice was sent via facsimile and mailed, first class, postage prepaid. to:

Douglas M Palais, Esq.
Scott C. Ford, Esq.
Mezullo & McCandlish
1111 East Main Street
P.O. Box 796
Richmond, Virginia 23218

W. Joseph Owen, III
COWAN & OWEN, P.C.
1930 Huguenot Road
P.O. Box 35655
Richmond, Virginia 23235-0655

On this 17th day of May 2000.


Bruce M. Marshall

VIRGINIA:

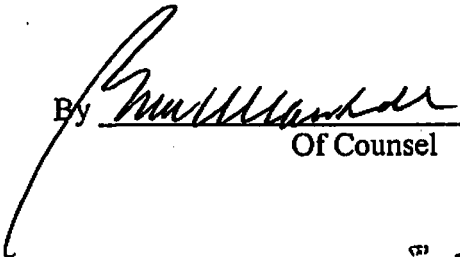
IN THE CIRCUIT COURT FOR THE COUNTY OF PRINCE GEORGE

RBMW, INC.,)	
t/a JORDAN POINT YACHT HAVEN,)	
)	
Plaintiff,)	
)	
v.)	Case No. CL98-050
)	
ROBINS INSURANCE AGENCY, INC.,)	
WILLIAM RALEIGH ROBINS, <u>et al.</u>)	
)	
Defendants.)	

**Plaintiff's Response in Opposition to
Defendant's Motion for Entry of Dismissal Order**


COMES NOW, RBMW, t/a Jordan Point Yacht Haven and for its Response in Opposition to Defendant's Motion for Entry of Dismissal Order, moves that the Court deny Defendant's Motion, and further that the Court enter the nonsuit order previously tendered to the Court, both for the reasons set out in the following Memorandum of Law.

RBMW, INC., t/a
JORDAN POINT YACHT HAVEN

By 
Of Counsel

Bruce M. Marshall
(VSB No. 18093)
DURRETTE, IRVIN & BRADSHAW, P. C.
600 East Main Street, 20th Floor
Richmond, Virginia 23219
(804) 775-6900

Attorney for Plaintiff

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CLERK'S OFFICE
PRINCE GEORGE COUNTY, VA.
BISHOP HODD, JR., CLERK
BY  D.C.

**Memorandum in Support of Plaintiff's Response
in Opposition to Motion for Entry of Dismissal Order**

COMES NOW, RBMW, Inc., t/a Jordan Point Yacht Haven and for its Memorandum in Support of its Response in Opposition the Motion for Entry of Dismissal Order by Defendants Robins Insurance Agency, Inc., and William Raleigh Robins (collectively referred to as "Robins") and states as follows:

The purpose of RBMW's suffering a nonsuit order as to Robins is to allow RBMW to maintain the status quo and preserve its cause of action against Robins, should and if the final judgment order against the defendant, Transcontinental Insurance Company ("Transcontinental"), be successfully appealed to the Supreme Court of Virginia, and thereafter reversed, or remanded for a new trial. Were that to occur, RIBW should not be denied its right to litigate its claims as to Robins.

Robins suggests that the nonsuit order submitted by RBMW is improper as it did not contain the endorsement of counsel for Robins. RBMW is entitled to suffer a nonsuit as a matter of right and does not need counsel for Robins to consent or agree or disagree to RBMW's suffering a nonsuit, §8.01-380(B & C) Code of Virginia (1950, as amended), as Robins filed no counterclaim, cross claim or third-party claim.

Robins challenges RIBW's right to suffer a nonsuit at this point in the proceeding based in part on Robin's contention that the parties have yielded the issues to the Court for consideration and decision (§ 4), citing the case of Moore v. Moore, 218 Va. 790, 240 S.E. 2d 535 (1978). In Moore, supra, the Supreme Court of Virginia discussed when a voluntary dismissal could be suffered in an equity action (a divorce). In that case following the referral to a commissioner in chancery and after the commissioner's report was filed with the trial court, the suit remained dormant for some six months. The defendant's (husbands) attorney then wrote the

chancellor requesting that a final decree be issued, asserting that during that six month period, opposing counsel had refused to respond to any letters and calls. Enclosed in this request to the chancellor was a draft decree, signed only by defendant's counsel providing for a absolute and final divorce decree. Within a week thereafter counsel for plaintiff (wife) filed a nonsuit order. The defendant's attorney challenged the timing of such order, claiming that the divorce suit had been "submitted" for decision; within the meaning of §8.01-380 Code of Virginia (1950, as amended). The Supreme Court disagreed stating:

For 'submission' to have occurred...it was necessary for the parties, by counsel, to have both yielded the issues to the court for consideration and decision, Id at 795.

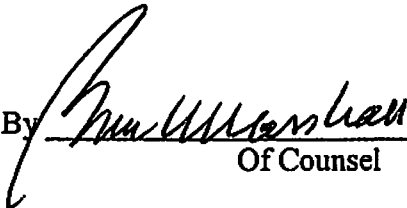
In this case, counsel for Robins did not submit anything, nor did it yield the issues to the trial court for consideration. The issue decided by the Court was between Transcontinental and RIBW. Certainly, Robins was and is the direct beneficiary of the outcome of the Court's decision that the exclusion relied upon by Transcontinental did not apply to the losses suffered by RIBW, but to suggest that it yielded the issue to the Court is simply incorrect.

Robins also challenges RIBW's suffering a nonsuit as being "after their action has been decided by the court", citing Khanna v. Dominion Bank, 237 Va. 242, 377 S.E. 2d 378 (1989) (¶ 5). In Khanna, supra, the defendant attempted to suffer a nonsuit after the trial court had instructed plaintiff's attorney to draft an order as the court had decided to grant summary judgment in plaintiff's favor on a counterclaim filed by defendant. Upon hearing that the court had decided the issue, counsel for defendant attempted to nonsuit the counterclaim, before the order being drafted by plaintiff's counsel was endorsed. The Supreme Court, affirming the trial court's decision that the nonsuit was untimely, not only determined that the matter had been both submitted and yielded to the court at or after the time that plaintiffs supplemental brief had been

filed, but furthermore found that the action had already been decided by the trial court, and the final order was nothing more than the clerical exercise to document that fact.

The fact that Robins was the beneficiary of the Court's ruling is not the same as a motion to strike the action having been sustained, or before the jury retired from the bar §8.01-380(A) Code of Virginia (1950, as amended). Procedurally the trial was not at that point, nor had counsel for Robins made any such motion. Finally, RIBW should not be denied its absolute right to the nonsuit, so as to preserve its potential causes of action against Robins, should the threatened appeal by Transcontinental result in the case being remanded or reversed.

RBMW, INC., t/a
JORDAN POINT YACHT HAVEN

By _____
Of Counsel

Bruce M. Marshall
(VSB No. 18093)
DURRETTE, IRVIN & BRADSHAW, P.C.
600 East Main Street, 20th Floor
Richmond, Virginia 23219
(804) 775-6900

Attorney for Plaintiff

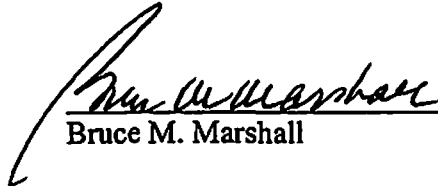
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Response in Opposition to Defendant's Motion for Entry of Dismissal Order and Memorandum in Support of Plaintiff's Response in Opposition to Motion for Entry of Dismissal Order was sent via facsimile and mailed, first class, postage prepaid. to:

Douglas M Palais, Esq.
Scott C. Ford, Esq.
Mezullo & McCandlish
1111 East Main Street
P.O. Box 796
Richmond, Virginia 23218

W. Joseph Owen, III
COWAN & OWEN, P.C.
1930 Huguenot Road
P.O. Box 35655
Richmond, Virginia 23235-0655

On this 17th day of May 2000.


Bruce M. Marshall

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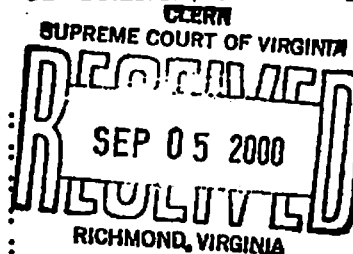
1 VIRGINIA:

2 IN THE CIRCUIT COURT OF THE COUNTY OF PRINCE GEORGE

3
4 -----
5 RBMW, INC.,
6 t/a JORDAN POINT YACHT HAVEN

7 vs.

8 ROBINS INSURANCE AGENCY, INC.,
9 WILLIAM RALEIGH ROBBINS,
10 TRANSCONTINENTAL INSURANCE CO., et al.:
11 -----



12 May 22, 2000

13 Chesterfield, Virginia

14 Complete transcript of the hearing and other
15 incidents in the above, when heard before The Honorable
16 James A. Luke, Judge.

17
18 HALASZ REPORTING
19 Post Office Box 1644
20 Richmond, Virginia 23218-1644
21 (804) 741-5215
22 Reported by: Cynthia G. Shortlidge, RPR

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25
CIRCUIT COURT CLERK'S OFFICE
PRINCE GEORGE COUNTY, VA.
BISHOP JUDITH, JR., CLERK
BY *JS* D.C.

00 AUG -2 AM 11:36

FILED

HALASZ REPORTING

1 APPEARANCES:

2
3 Bruce M. Marshall, Esquire
4 Durette, Irvin & Bradshaw
5 600 East Main Street
6 Richmond, Virginia 23219
7 Counsel for the plaintiff

8 Scott C. Ford, Esquire
9 Mezzullo & McCandlish
10 1111 East Main Street
11 Richmond, Virginia 23219
12 Counsel for the Defendants
13
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25

HALASZ REPORTING

1
2 MR. FORD: Judge Luke, Judge, as you know, I'm
3 Scott Ford and I'm representing Robins Insurance and Raleigh
4 Robins. We're here on dual motions, our motion requesting
5 that a dismissal order be entered with respect to William
6 Raleigh Robins and Robins Insurance. Mr. Marshall has his
7 own motion asking that the Court enter a nonsuit.

8 Judge, it's our position that a nonsuit is
9 inappropriate in this case and that dismissal order should
10 be entered against Robins Insurance and Raleigh Robins.

11 As this Court knows, this case was tried on May
12 1st, and at that time, Judge, you held that the exclusion in
13 the policy did not apply. The other defendant in this case
14 Mr. Owen represented, they're not present here today, but on
15 May 1st, Judge, you decided that since the exclusion did not
16 apply that there was coverage.

17 And this was a two count cause of action, one a
18 breach of contract as against the insurance company, then a
19 fraud case as against the insured and the agency. And it's
20 our position, Judge, that the case was submitted to Your
21 Honor on May first, that a decision was made and as a result
22 both sides submitted the case to Your Honor.

23 A decision was made that the exclusion did not
24 apply, and that necessarily resolved the matter as against
25 the agency and the agent, because it was a fraud cause of

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1 action against the agency and the agent.

2 And specifically, Judge, we rely upon 8.013-805,
3 it's the dismissal statute, Section A, does limit --
4 plaintiff can take a nonsuit, and it says "A party shall not
5 be allowed to take a nonsuit unless he does so before the
6 action has been submitted to the Court for decision." And
7 in this case clearly it was submitted to the Court for
8 decision.

9 In fact Judge, on May 1st Mr. Marshall himself
10 acknowledged that, and we did submit that portion of the
11 trial transcript previously submitted that to the Court and
12 it is part of the file. Specifically page eight when Mr.
13 Marshall, after the court announced its ruling, stated "I
14 don't think we have a further cause of action against the
15 agency."

16 Further in the statement he said "It's been
17 decided by the Court's opinion", and that's precisely the
18 case here, Your Honor. We have noted two cases which are
19 helpful on this issue on our motion, one is Kotta and the
20 second case is Moore, and I have those complete opinions,
21 Judge, if you would like me to tender those to the Court.

22 But very briefly, the Kotta decision basically
23 stands for the proposition that a defendant cannot ask for a
24 nonsuit after the Court has announced its ruling.

25 The Moore decision, Judge, also cited in our

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1 motion, 218 Virginia 780 talks about -- the Supreme Court
2 talked about 8.01380A and the definition of what is
3 submitted, and in that decision the Court held that a case
4 has been submitted when the parties have yielded the issues
5 to the Court for consideration and decision.

6 And one of the ways in which you can tender or
7 yield the issues to the Court is by oral argument. Judge,
8 we had a trial. The case, as you recall, Mr. Marshall stood
9 up and asked that the Court decide the issue on coverage.
10 The Court came back, announced his ruling. That necessarily
11 dispensed with the matter. The case was argued, the matter
12 was yielded and a decision was given.

13 The only other case that I would reference the
14 Court to, Judge, that was not cited in our motion is the
15 Wells case, again I have a copy of that order, but since
16 it's not in the motion it's 24 VA 247.

17 Very briefly, Judge, in that case the Supreme
18 Court held that the trial Court had erred in permitting a
19 nonsuit which had been requested by a defendant after there
20 had been oral argument on a plea in bar, a demurrer and a
21 motion to dismiss. And in that case the Court said that
22 since it had been submitted to the Court, even though the
23 decision had not been rendered in the Wells case, that since
24 any of those matters were case dispositive, that a nonsuit
25 came too late.

HALASZ REPORTING

1 And simply that is our position, Judge, the
2 nonsuit is too late in this case. A nonsuit should have
3 been requested before you made a decision, which necessarily
4 dispensed with the cause of action against Mr. Robins and
5 Robins Insurance Agency. That's our position, Judge.

6 And I have these cases if you would like me to
7 tender them to you at this point, Judge.

8 THE COURT: Yes, I would like that.

9 MR. FORD: And I have a Virginia code here too,
10 Judge.

11 THE COURT: The Wells case?

12 MR. FORD: The Virginia code as well, Judge.

13 THE COURT: 8.01380?

14 MR. FORD: Yes, sir.

15 And that's all I have, Judge, unless you have
16 any questions of me.

17 THE COURT: Not until I hear Mr. Marshall.

18 MR. MARSHALL: Your Honor, I disagree with the
19 argument, obviously. I think that the posture of this case
20 was that Mr. Owen and I were arguing a question as far as
21 whether the exclusion of the policy applied or didn't apply.
22 Robins was not a part of that argument. They didn't
23 participate in that argument. They asked before that
24 argument that they be allowed to ask the witness who was on
25 the witness stand further questions. I submitted to him

 HALASZ REPORTING

1 that they were certainly welcome to do that.

2 And when the Court made the ruling it made, at
3 that point in time I said what the record said I said. I
4 don't dispute that. I think, Your Honor, the question is am
5 I entitled, the question, the matter of fact, am I entitled
6 to a nonsuit as a matter of right so long as certain things
7 have not happened. And those certain things are set in the
8 statute.

9 The case has been submitted. Robins didn't
10 submit anything. The case has been decided. Robins was a
11 beneficiary of the decision the Court made on that day, but
12 the case had not been decided as to Robins.

13 I submit to Your Honor what we're trying to do,
14 as I said in my brief, is preserve our position as far as
15 Robins is concerned. The Transcontinental has said they're
16 going to appeal the case to the Supreme Court. Whether they
17 are or not is to be seen. But I don't think that I can be
18 denied my right to preserve my position as to Robins simply
19 on that basis.

20 If the Supreme Court reverses it, remands it,
21 sends it back, I think I am entitled to have my day in court
22 against Robins if they do so. And that's what I'm asking
23 the Court to do. I don't think the case has gotten far
24 enough along that I am denied my right to a nonsuit, and
25 that's what I'm asking the Court to do, enter a nonsuit.

HALASZ REPORTING

1 The Moore case that Mr. Ford cited talked about
2 when the case is submitted. The case was not submitted,
3 submitted by both parties. This case was not submitted by
4 Robins. Robins sat aside while we were arguing the case.

5 The Kotta case, in that case the Court already
6 announced to one of the counsel I decide on this issue, go
7 ahead and draft the order at which time the other side
8 attempted to take a nonsuit. And that was the final
9 decision on the case as far as the summary judgment was
10 concerned.

11 Again, that's not what we have in front of us,
12 and I think I'm entitled to reserve my cause of action if in
13 fact this thing does go to the Supreme Court and not be
14 thrown out of court. I think that's what the nonsuit
15 allows me to do.

16 THE COURT: Yes?

17 MR. FORD: Very briefly in response, Judge, it
18 would be our position that the time for the plaintiff to
19 preserve his position would have been before he made the
20 decision to ask the Court to decide the case.

21 Judge, in Konnoe the Supreme Court, I quote, it
22 said "It will be absurd to hold that a claimant could suffer
23 a nonsuit as a matter of right after a court had decided a
24 claim."

25 It would be our position that that's precisely

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1 what has happened here. As a matter of law, when the Court
2 announced that this exclusion does not apply and as a matter
3 of law there's no cause of action because the cause of
4 action as pled in this case was fraud. And if there is no
5 coverage against the insurance company, then you erred, you
6 committed fraud by telling us that there would be coverage.

7 In fact, Judge, Mr. Marshall acknowledged at the
8 time of trial that it's been decided by the Court's opinion,
9 and that's our position.

10 THE COURT: We're dealing with a technical
11 legal issue. I think all of us clearly understand exactly
12 what happened and how it went. My inclination is that I
13 agree with Mr. Marshall that you, Mr. Ford, really were a
14 bystander at this point and not considered.

15 Now, whether really legally you're correct I'm
16 not at all certain, and certainly I'll have to take a look
17 at the statute and the cases to determine that. My
18 inclination is that Mr. Marshall is correct and should be
19 entitled to take a nonsuit. But I'm not going to rule that
20 way from the hip this morning until I have had a chance to
21 look.

22 I haven't looked at your briefs. We were in
23 conference all last week and I came in and that's all.

24 MR. FORD: Judge, we had submitted a motion. If
25 it would be helpful to the Court we will submit a memorandum

HALASZ REPORTING

1 of law as well.

2 THE COURT: I think you understand my point.
3 If Transcontinental takes this to the Supreme Court and the
4 Court reverses, then it doesn't seem to me that he should be
5 able to go forward with the other case if it was never
6 really put on.

7 MR. FORD: May I respond, Judge?

8 Judge, it's our position that the plaintiff's
9 decision to have pled the suit like they did was the
10 plaintiff's decision to sue the plaintiff, both plaintiffs
11 like he did, and I would ask Your Honor when you make your
12 decision to look specifically at the pleadings again. When
13 you look at the pleadings it's an either or proposition, and
14 that's our position. I have explained it before. I won't
15 again.

16 But because of the nature of the way this case
17 was pled, I think it's particularly clear that this case
18 when it was decided was decided against all defendants.

19 MR. MARSHALL: Your Honor, I will reply briefly
20 to that. Under Mr. Ford's theory of how you're supposed to
21 practice law, you have got to read what the Court's going to
22 do and take a nonsuit against the party you think the Court
23 might or might not rule, and I don't think there's any law
24 that says you have to do that.

25 So I submit what I said before. And Your Honor,

HALASZ REPORTING

1 I do want to represent Mr. Owen was not going to be here
2 today. He told me he wasn't going to be here today, and I
3 told him I would represent to the Court he doesn't have a
4 particular dog in this fight, so to speak.

5 And we're going to issue a final order to the
6 Court as soon as this matter -- we think this matter needs
7 to be taken care of as a matter of housekeeping, and we have
8 got an agreement as to what we're going to do.

9 THE COURT: You said you would like to submit a
10 memorandum?

11 MR. FORD: I will. Judge, would ten days be --

12 THE COURT: That's fine.

13 MR. MARSHALL: I don't know what else I can
14 possibly say.

15 THE COURT: I know you have submitted something,
16 but I haven't read it.

17 MR. MARSHALL: I have, Your Honor.

18 THE COURT: It's a legal issue as to whether
19 you're too late or not too late.

20 MR. MARSHALL: I understand.

21 THE COURT: When I get the memorandum I will
22 try to get your decision shortly.

23 MR. FORD: Thank you, Judge.
24
25

HALASZ REPORTING

CERTIFICATE OF COURT REPORTER

I, Cynthia G. Shortlidge, hereby certify that I was the Court Reporter on May 22, 2000 at the time of the hearing herein; further, that the foregoing is a true and accurate record of the testimony and other incidents of the hearing herein.

Given under my hand this 15th day of

June, 2000.

Cynthia Shortlidge
Cynthia G. Shortlidge, RPR

HALASZ REPORTING

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF PRINCE GEORGE

RBMW, INC.,)
t/a JORDAN POINT YACHT HAVEN,)
)
Plaintiff,)
)
v.) Case No. CL98-050
)
ROBINS INSURANCE AGENCY, INC.,)
WILLIAM RALEIGH ROBINS, et al.,)
)
Defendants.)

FILED
00 JUN - 1 PM 2:02
CIRCUIT COURT OF CLERK'S OFFICE
PRINCE GEORGE COUNTY, VA.
BISHOP KNOTT, JR., CLERK
BY: [Signature] n.c.

**MEMORANDUM IN SUPPORT OF ROBINS INSURANCE AGENCY, INC. AND
WILLIAM RALEIGH ROBIN'S
MOTION FOR ENTRY OF DISMISSAL ORDER AND IN OPPOSITION TO
PLAINTIFF'S MOTION FOR ENTRY OF NONSUIT**

Defendants Robins Insurance Agency, Inc. ("Robins Insurance" or the "Agency")
and William Raleigh Robins ("Robins" or the "Agent"), by counsel, for their
Memorandum in Support of their Motion for Entry of Dismissal Order and in Opposition
to Plaintiff's Motion for Entry of Nonsuit, state as follows:

INTRODUCTION

RBMW, Inc. t/a Jordan Point Yacht Haven ("Jordan Point") sustained damages to
their marina as a result of Hurricane Fran on September 6, 1996. The claim was denied
by defendant Transcontinental Insurance Company ("Transcontinental"), the insurance
company that issued the policy to Jordan Point, and this suit followed.

Jordan Point filed a breach of contract cause of action against defendant
Transcontinental. Jordan Point alleged that the policy provided coverage for the loss and
Transcontinental had, therefore, breached the insurance contract. See ¶¶ 30-33 of Motion
for Judgment. As to defendants Robins, the insurance agent, and Robins Insurance, the

insurance agency, Jordan Point pled a cause of action for fraud. Jordan Point pled that Mr. Robins did not inform them that the type loss that they suffered on September 6, 1996 was excluded under the insurance policy to be provided by Transcontinental. See ¶¶ 34-39 of Motion for Judgment. In sum, Jordan Point pled that either Transcontinental was liable (under a breach of contract theory) or Robins and Robins Insurance were liable (under a theory of fraud).

As this Court is aware, the case was tried on May 1, 2000. The Court held that Transcontinental had indeed breached the insurance policy, and that the exclusion relied upon by Transcontinental did not apply.

On May 8, 2000 counsel for Robins Insurance and Robins received a nonsuit Order that had not been endorsed all counsel of record as required by Rule 1:12 of the Rules of the Supreme Court of Virginia.

As this Memorandum will demonstrate, Jordan Point should not be permitted to suffer a nonsuit after the Court ruled that coverage existed under the policy and the Motion for Judgment against Robins Insurance and Robins should be dismissed with prejudice.

ARGUMENT

Jordan Point's Attempt to Nonsuit Robins Insurance and Robins Comes Too Late.

A party's right to suffer a nonsuit is strictly limited by Va. Code § 8.01-380(A). That statute, in part, provides:

A party shall not be allowed to suffer a nonsuit as to any cause of action or claim... unless he does so before... the action has been submitted to the court for decision.

(Emphasis added).

Va. Code § 8.01-380(A) was enacted to provide conditions to balance and limit the right of a plaintiff to exercise a nonsuit. Trout v. Commonwealth Transp. Comm'r, 241 Va. 69, 400 S.E.2d 172 (1991).

An action is deemed to have been *submitted to the court for decision* when the parties have "...yielded the issues to the court for consideration and decision," which can be accomplished by "...oral or written argument, formal notice and motion, or by tendering a jointly endorsed sketch for a decree..." Moore v. Moore, 218 Va. 790, 795-96, 240 S.E.2d 535, 538 (1978). Jordan Point submitted the matter to the Court when it sought a ruling on whether coverage existed under the policy. The Court's ruling that coverage existed necessarily resolved the question of alleged fraud by the Agency and Robins. It is quite clear that a cause of action for fraud could not stand against the Agency and the Agent for delivering a policy which included coverage for the loss suffered.

The Supreme Court interpreted Va. Code § 8.01-380(A) in Khanna v. Dominion Bank, 237 Va. 242, 377 S.E.2d 378 (1989). In Khanna the Court heard argument on plaintiff's counterclaim dismissal motion and granted plaintiff's counsel leave to file a supplemental brief. The trial judge later telephoned counsel for the plaintiff announcing his decision to grant plaintiff's motion for summary judgment on the counterclaim. The attorney for the defendant then attempted to suffer a nonsuit. The Supreme Court, affirming the trial court, held that the nonsuit request came too late since the matter had already been decided by the court. The Supreme Court in Khanna rejected defendant's contention that both parties had not yielded the issues to the court, and found that "it would be absurd to hold that a claimant could suffer a nonsuit as a matter of right after a

court had decided the claim.” Khanna, 237 Va. at 245, 377 S.E.2d at 380.

Similarly, in the case at hand, it would be absurd to permit Jordan Point to in essence revive the issue of liability already determined by the Court in its ruling.

The Supreme Court recently determined whether a plaintiff may take a nonsuit of claims and parties that have been dismissed with prejudice or otherwise eliminated from the case before a nonsuit order was entered in Dalloul v. Agbey, 255 Va. 522, 499 S.E.2d 263. The plaintiff in Dalloul filed a seven-count suit against seven defendants. The trial court subsequently dismissed five of the seven counts. Later, the court permitted entry of a nonsuit as to all seven counts. The Supreme Court reversed and remanded to the trial court for entry of an order of nonsuit limited to the two remaining counts only. The Supreme Court stated:

Manifestly, once a trial court has decided a particular claim, that portion of the action has been “submitted to the court for decision” and the plaintiff may no longer suffer a nonsuit of that claim as a matter of right. Therefore, when the trial court has reached a final determination in a proceeding regarding any claims or parties to claims, those claims and parties are excluded by operation of law from any nonsuit request.

Dalloul, 255 Va. at 514, 499 S.E.2d at 263. The language used by the court in Dalloul is instructive here. The Court’s finding that coverage existed under the policy represented a final determination regarding Jordan Point’s claim of liability for the damages suffered as a result of Hurricane Fran.

Friend’s Virginia Pleading and Practice provides that a matter has been “submitted for decision” when the ruling of the court involves a final determination of the case. Friend’s Virginia Pleading and Practice §12-9 (Lexis Law Publishing, 1998). This treatise describes that “in this context, ‘decision’

means a determination dispositive of the case, e.g., a finding of liability or nonliability.” Id.

The Supreme Court again addressed the limits of Va. Code § 8.01-380(A) in Wells v. Lorcom House Condominiums’ Council of Co-Owners, 237 Va. 247, 377 S.E.2d 381 (1989). In Wells the parties appeared before the court on argument on a plea in bar, demurrer and motion to dismiss filed by defendant in response to plaintiff’s Amended Motion for Judgment. Before the Court announced its ruling, the plaintiff was granted a nonsuit. The Supreme Court held that the trial court erred in permitting the nonsuit, finding that the matter had been submitted to the court for decision. The Supreme Court stated that since any one of the pleadings filed by defendant “were case dispositive if the court ruled in favor of the defendant” that the matter had been submitted to the court for decision. Wells, 237 Va. at 250, 377 S.E.2d at 383; see also Bremer v. Doctor’s Building Partnership, 251 Va. 74, 465 S.E.2d 787 (1996) (a nonsuit comes too late if made after a ruling that resolves any issue of liability).

Similarly, in the case at hand, the Court’s ruling that coverage existed under the policy was case dispositive as to the allegation that the insurance agent fraudulently sold a policy with no coverage. Indeed, counsel for the Robins agreed at the trial when he made the following request:

Mr. Marshall: Your Honor, I don’t think we have a further cause of action against the agency based on that ruling, and I suggest that they be allowed to leave. If the court’s ruling is that coverage applies, then our allegation to the agency should have told us it didn’t. It’s been decided by the court’s opinion.

The Court: The court is of that opinion. I anticipated that ruling.

CONCLUSION

Jordan Point's nonsuit request made after the Court heard argument at trial and announced its ruling that coverage existed under the insurance contract comes too late. Permitting Jordan Point to suffer a nonsuit at this late date would violate the limitation set forth in Va. Code § 8.01-380(A) prohibiting a nonsuit after a matter has been submitted to the court for decision and bring an uncertainty for litigants in the future as to the true end of litigation. Jordan Point asserted a claim that they were entitled to compensation from either Transcontinental or Robins Insurance and Robins. That claim was submitted to the Court for decision and decided in favor of Jordan Point. Va. Code § 8.01-380(A) unequivocally provides that once a claim has been submitted to the court, a nonsuit is no longer available. Based upon the foregoing and the arguments made by counsel at the May 22, 2000 hearing, Robins Insurance and Robins respectfully request that Jordan Point's Motion for Judgment against them be dismissed with prejudice and Jordan Point's request for nonsuit be denied.

Respectfully submitted,

ROBINS INSURANCE AGENCY, INC. and
WILLIAM RALEIGH ROBINS

By: _____



¹ Robins Insurance and Robins filed a portion of the trial transcript with the Court on or about May 8, 2000.

Douglas M. Palais (VSB No. 19460)
Scott C. Ford (VSB No. 39078)
McCANDLISH KAINÉ & GRANT
A Professional Corporation
1111 East Main Street
P.O. Box 796
Richmond, Virginia 23218
(804) 775-3885

CERTIFICATE OF SERVICE

I hereby certify that, this 31st day of May, 2000, I delivered by facsimile and First Class Mail, postage prepaid, a true and correct copy of the foregoing to:

Bruce M. Marshall, Esq.
Durette, Irvin & Bradshaw, P.C.
Main Street Centre
600 East Main Street
Richmond, VA 23219

W. Joseph Owen, III, Esq.
Cowan & Owen, P.C.
P. O. Box 35655
Richmond, VA 23235-0655

A handwritten signature in black ink, appearing to be 'WJ', is written above a horizontal line.

SIXTH JUDICIAL CIRCUIT



JAMES A. LUKE, JUDGE
PRINCE GEORGE COUNTY COURTHOUSE
P.O. BOX 290
PRINCE GEORGE, VIRGINIA 23875
(804) 733-2623

CIRCUIT COURT OF CITY OF HOPEWELL
CIRCUIT COURT OF BALTIMORE COUNTY
CIRCUIT COURT OF GREENSVILLE COUNTY/CITY OF EMPORIA
CIRCUIT COURT OF PRINCE GEORGE COUNTY
CIRCUIT COURT OF SURRY COUNTY
CIRCUIT COURT OF SUSSEX COUNTY

COMMONWEALTH OF VIRGINIA

June 30, 2000

Bruce M. Marshall, Esquire
Durette, Irvin & Bradshaw, P.C.
600 E. Main Street, 20th Floor
Richmond, Virginia 23219

Scott C. Ford, Esquire
McCandlish, Kaine & Grant
Post Office Box 796
Richmond, Virginia 23218

W. Joseph Owen, III, Esquire
Cowan & Owen
Post Office Box 35655
Richmond, Virginia 23235-0655

Re: BMW, Inc., t/a Jordan Point Yacht Haven v. Robins Insurance
Agency, Inc., et al
Prince George Law Action (CL98-50)

Gentlemen:

Section 8.01-380 of the Code of Virginia says, in relevant part:

A party shall not be allowed to suffer a nonsuit as to any cause of action or claim, or any other party to the proceeding, unless he does so before a motion to strike the evidence has been sustained or before the jury retires from the bar or before the action has been submitted to the court for decision.

This suit has one plaintiff and two defendants with two distinct causes of action; one rising in contract, the other in fraud. The question is whether, when the Court ruled that the defendant in the contracts cause was liable, this barred the plaintiff from taking a nonsuit as to the defendants in the fraud case.

At the trial, evidence was presented and the contract issue was presented to the Court. On this issue the Court ruled that the defendant was liable on the contract, which is a final decision.

Page Two

Re: BMW, Inc., t/a Jordan Point Yacht Haven v. Robins Insurance
Agency, Inc., et al

Prince George Law Action (CL98-50)

June 30, 2000

The two counts in this suit are pled in the alternative. Since the Court has ruled for the plaintiff in Count One, there is no reason to proceed with Count Two at this time, but Count Two has not been presented to the Court for decision.

For the above reasons, the Court will permit the plaintiff to nonsuit the defendants Robins Insurance Agency, Inc. and William Raleigh Robins.

Since the Court is of the opinion that this will constitute an appealable order, Mr. Marshall should prepare and circulate same.

Sincerely,

JAL/ssn

James A. Luke
Judge

cc: ✓ Mr. C. Bishop Knott, Jr., Clerk, Prince George Circuit Court

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE GEORGE COUNTY

RBMW, INC.,
t/a JORDAN POINT YACHT HAVEN,

Plaintiff,

v.

ROBINS INSURANCE AGENCY, INC.,
et al.,

Defendants.

CASE NO. CL98-050

ORDER

On the 22nd day of May, 2000, the plaintiff, RBMW, Inc., t/a Jordan Point Yacht Haven, by counsel, and was heard on its motion for a nonsuit in this case, only as to the defendants Robins Insurance Agency, Inc., and William Raleigh Robins, to which Robins Insurance Agency, Inc. and William Raleigh Robins, by counsel, objected both by brief and on oral argument.

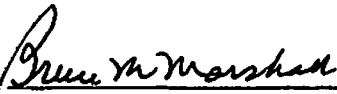
UPON CONSIDERATION WHEREOF, the Court for reasons set out in its opinion letter dated June 30, 2000, doth sustain plaintiff's motion and doth ORDER that its motion for nonsuit is granted, and this case be, and is hereby dismissed only as to defendants Robins Insurance Agency, Inc. and William Raleigh Robins without prejudice.

Furthermore, the Clerk is hereby directed to send attested copies of this Order once entered to all counsel of record.

ENTER: 07-26-00


Judge

I ASK FOR THIS:



Bruce M. Marshall, Esquire, VSB #18093
DURRETTE, IRVIN & BRADSHAW, P.C.
Main Street Centre, 20th Floor
600 East Main Street
Richmond, Virginia 23219
(804) 775-6900
(804) 775-6911 Fax #

Counsel for Plaintiff

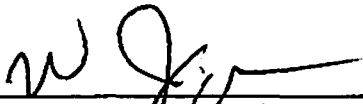
SEEN AND OBJECTED TO:

SEE ATTACHED

Douglas M. Palais, Esquire
Scott C. Ford, Esquire
MEZZULLO & MCCANDLISH
Post Office Box 796
Richmond, Virginia 23218
(804) 775-3100
(804) 775-3800 Fax #

*Counsel for Robins Insurance Agency, Inc. and
William Raleigh Robins*

SEEN:



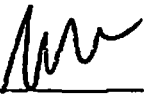
W. Joseph Owen, III, VSB# 15963
COWAN & OWEN, P.C.
1930 Huguenot Road
P.O. Box 35655
Richmond, Virginia 23235-0655
(804) 320-9100
(804) 330-3140 Fax #

Counsel for Transcontinental Insurance Company

F:\BMM\Jordan Point\Pleadings\Nonsuit Order.doc

Seen and Objected to on the behalf of Robins Insurance Agency, Inc. ("Robins Insurance") and William Raleigh Robins ("Robins") for all of the reasons stated in Robins Insurance and Robin's Motion for Entry of Dismissal Order and Memorandum in Support of Motion for Entry of Dismissal Order and In Opposition to Plaintiff's Motion for Entry of Nonsuit and for those reasons stated at the May 22, 2000 hearing including, but not limited to, the following reasons:

1. Plaintiff's attempt to nonsuit Robins Insurance and Robins is in violation of Virginia Code § 8.01-380(A);
2. Plaintiff's attempt to nonsuit Robins Insurance and Robins is untimely and made after the Court reached a determination of the case on the merits;
3. Plaintiff's attempt to nonsuit Robins Insurance and Robins was untimely as plaintiff had already yielded the issues to the Court for consideration and decision.



Douglas M. Palais (VSB No. 19460)
Scott C. Ford (VSB No. 39078)
McCANDLISH KAINE & GRANT
1111 East Main Street
P.O. Box 796
Richmond, Virginia 23218
Telephone: (804) 775-3885
Facsimile: (804) 775-3816

July 27, 2000

Bruce M. Marshall, Esquire
Durrette, Irvin & Bradshaw, P.C.
Main Street Centre, 20th Floor
600 East Main Street
Richmond, Virginia 23219

Scott C. Ford, Esquire
Mezzullo & McCandlish
Post Office Box 796
Richmond, Virginia 23218

W. Joseph Owen, III, Esquire
Cowan & Owen, P.C.
Post Office Box 35655
Richmond, Virginia 23235-0655

IN RE: RBMW, INC., T/A
VS.) #98-50
ROBINS INSURANCE AGENCY, INC.

To Whom It May Concern:

Enclosed please find a certified copy of the order entered in the above styled case on July 26, 2000.

Sincerely,

Bishop Knott, Jr., Clerk

BK/lr

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF PRINCE GEORGE

RBMW, INC., t/a JORDAN POINT
YACHT HAVEN,

Plaintiff,

v.

ROBINS INSURANCE AGENCY, INC.,
et al.,

Defendants.

Case No. CL98-050

NOTICE OF APPEAL

Robins Insurance Agency, Inc. and William Raleigh Robins, by counsel, hereby appeal to the Supreme Court of Virginia from the Order of this Court entered on July 26, 2000.

The transcript of the May 1, 2000 trial and the May 22, 2000 hearing before this Court has been filed with the Clerk.

CERTIFICATE

The undersigned certifies as follows:

A copy of this Notice of Appeal has been mailed or delivered to opposing counsel this 1st day of August 2000. The copy was mailed to:

Bruce M. Marshall, Esquire
DURRETTE, IRVIN & BRADSHAW, P.C.
600 East Main Street
20th Floor
Richmond, Virginia 23219

and

W. Joseph Owen, III, Esquire
COWAN & OWEN
Post Office Box 35655
Richmond, Virginia 23235

RECEIVED
CLERK'S OFFICE
PRINCE GEORGE COUNTY, VA.
BISHOP, KNOTT, JR., CLERK
BY *[Signature]* D.C.

00 AUG -2 AM 11:36

FILED

ROBINS INSURANCE AGENCY, INC.
AND
WILLIAM RALEIGH ROBINS

By:  _____
Counsel

Douglas M. Palais (VSB #19460)
Scott C. Ford (VSB #39078)
McCandlish, Kaine & Grant
1111 East Main Street
Suite 1500
Richmond, Virginia 23219
(804) 775-3100 (telephone)
(804) 782-9630 (facsimile)

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF PRINCE GEORGE

BMW, INC., t/a JORDAN POINT,
YACHT HAVEN,

Plaintiff,

v.

ROBINS INSURANCE AGENCY, INC.,
et al.,

Defendants.

Case No. CL98-050

NOTICE OF FILING TRANSCRIPT

PLEASE TAKE NOTICE that pursuant to Rule 5:11 of the Rules of the Supreme Court of Virginia, Robins Insurance Agency, Inc. and William Raleigh Robins, by counsel, on August 1, 2000, sent by UPS Overnight delivery, for filing on August 2, 2000 with the Clerk of this Court the transcript of the May 1, 2000 trial and the May 22, 2000 hearing that took place in this matter.

ROBINS INSURANCE AGENCY, INC.
AND
WILLIAM RALEIGH ROBINS

By: _____

Counsel

Douglas M. Palais (VSB #19460)
Scott C. Ford (VSB #39078)
McCandlish Kaine & Grant
1111 East Main Street
Suite 1500
Richmond, Virginia 23219
(804) 775-3100 (telephone)
(804) 782-9630 (facsimile)

FILED
00 AUG -2 AM 11:36
CIRCUIT COURT OF CLERK
PRINCE GEORGE COUNTY, VA.
BISHOP KNOTT, JR., CLERK
BY *[Signature]* D.C.

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Notice of Filing
Transcript was sent first class mail, postage prepaid, this 1st day of August 2000 to:

Bruce M. Marshall, Esquire
DURRETTE, IRVIN & BRADSHAW, P.C.
600 East Main Street
20th Floor
Richmond, Virginia 23219

and

W. Joseph Owen, III, Esquire
COWAN & OWEN
Post Office Box 35655
Richmond, Virginia 23235

A handwritten signature in black ink, appearing to be 'WJO', is written above a horizontal line.

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF PRINCE GEORGE

RBMW, INC.,)	
t/a JORDAN POINT YACHT HAVEN,)	
)	
Plaintiff,)	
)	
v.)	Case No. CL98-050
)	
ROBINS INSURANCE AGENCY, INC.,)	
WILLIAM RALEIGH ROBINS, <u>et al.</u>)	
)	
Defendants.)	

JUDGMENT ORDER

THIS CAUSE CAME on May 1, 2000, and came the plaintiff, **RBMW, INC., t/a Jordan Point Yacht Haven ("RBMW")**, in person and by counsel and came the defendants, **ROBINS INSURANCE AGENCY, INC., WILLIAM RALEIGH ROBINS ("Robins")**, and **TRANSCONTINENTAL INSURANCE COMPANY ("Transcontinental")**, in person and by counsel, on Plaintiff's Motion for Judgment, and none of the parties demanded a jury for the trial of this matter, but agreeing all matters of law and fact might be heard and determined by the Court.

This case concerned storm damage to a marina owned by RBMW occurring on September 6, 1996, during Hurricane Fran. RBMW submitted a claim for this damage to its insurer, Transcontinental, which denied portions of the claim maintaining that a policy exclusion voided coverage for certain damages suffered by RBMW.

WHEREUPON a portion of plaintiff's case was presented. After this presentation of evidence counsel for RBMW and Transcontinental agreed to submit to the Judge the question of whether or not the exclusion on which Transcontinental relied in denying the claims of plaintiff

applied to this case. The evidence presented consisted of the policy of insurance in question, testimony by the president of RJBW, and a videotape showing the effects of the storm on the marina taken during the storm.

The Court has previously ruled following a hearing on May 22, 2000, that RBMW be allowed to suffer a nonsuit as to its action against WILLIAM RALEIGH ROBINS and ROBINS INSURANCE AGENCY, INC., to which WILLIAM RALEIGH ROBINS and ROBINS INSURANCE AGENCY, INC., by counsel, objected both by brief and oral argument.

UPON CONSIDERATION OF SAME for reasons set out in the record the Court finds that the exclusion relied upon by Transcontinental in its policy did not apply. The defendant, TRANSCONTINENTAL, excepted to this ruling of the Court.

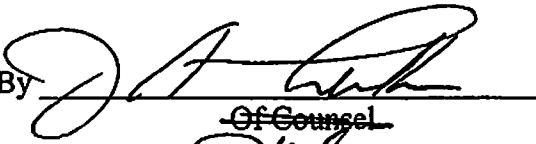
It is stipulated by RBMW and Transcontinental that the amount of damage sustained by the marina in the storm that had not been previously paid for by the defendant Transcontinental was \$111,597.55, and that is the proper judgment amount to be entered if coverage applies as the Court has ruled.

ACCORDINGLY, for all reasons stated in the record the Court finds that the exclusion contained in the Piers, Docks and Wharfs endorsement of the Transcontinental Insurance Company's policy does not apply to the damage done to Plaintiff's marina by the storm on September 6, 1996, and that the damage sustained by the plaintiff is covered by the insurance policy. The damages thereby awarded to Plaintiff are in the amount of \$111,597.55, with interest to be computed at the rate of 9% per annum from the August 1, 1998 until paid and the costs, if any, about this suit on its behalf expended.


A copy of this Order is this day mailed to counsel of record.

And nothing further remaining to be done herein is ORDERED that this cause be stricken from the docket and filed among the ended causes with this Court.

ENTER: *Sent 11, 2000*

By 
~~Of Counsel~~
Judge

I ASK FOR THIS:


Bruce M. Marshall, Esquire (VSB# 18093)
DURRETTE, IRVIN & BRADSHAW, P.L.C.
Twentieth Floor, Main Street Centre
600 East Main Street, 20th Floor
Richmond, Virginia 23219
(804) 775-6900
(804) 775-6911 (Facsimile)

SEEN AND OBJECTED TO:

See Attached

Douglas M. Palais, Esquire (VSB# 19460)
Scott C. Ford, Esquire (VSB# 39078)
MCCANDLISH KAINE & GRANT
Post Office Box 796
Richmond, Virginia 23218
(804) 775-7202
(804) 775-3816 (Facsimile)

Seen and Objected to on the behalf of Robins Insurance Agency, Inc. ("Robins Insurance") and William Raleigh Robins ("Robins") as to the Court's permitting a nonsuit as to Robins Insurance and Robins for all of the reasons stated in Robins Insurance and Robin's Motion for Entry of Dismissal Order and Memorandum in Support of Motion for Entry of Dismissal Order and In Opposition to Plaintiff's Motion for Entry of Nonsuit and for those reasons stated at the May 22, 2000 hearing including, but not limited to, the following reasons:

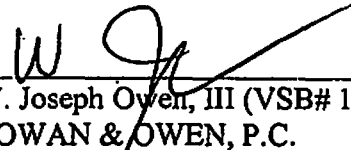
1. Plaintiff's attempt to nonsuit Robins Insurance and Robins is in violation of Virginia Code § 8.01-380(A);
2. Plaintiff's attempt to nonsuit Robins Insurance and Robins is untimely and made after the Court reached a determination of the case on the merits;
3. Plaintiff's attempt to nonsuit Robins Insurance and Robins was untimely as plaintiff had already yielded the issues to the Court for consideration and decision.



Douglas M. Palais (VSB No. 19460)
Scott C. Ford (VSB No. 39078)
McCANDLISH KAINE & GRANT
1111 East Main Street
P.O. Box 796
Richmond, Virginia 23218
Telephone: (804) 775-3885
Facsimile: (804) 775-3816

SEEN AND OBJECTED TO BECAUSE:

The Court was in error in ruling that the exclusion for waves, whether driven by wind or not, does not apply because the wave damage must occur at a place outside the normal boundary of the body of water. The defendant asserted that waves are excluded whether within the normal boundaries of the body of water or outside the boundaries of water and that the wave exclusion applies. The Court's ruling have been fully set forth in the record as well as the defendant's objection, all of which are incorporated into this objection, to the Court's ruling by this specific reference.



W. Joseph Owen, III (VSB# 15963)
COWAN & OWEN, P.C.
1930 Huguenot Road
Post Office Box 35655
Richmond, Virginia 23235-0655
(804) 320-9100
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VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF PRINCE GEORGE

RBMW, INC.,
t/a Jordan Point Yacht Haven,

Plaintiff,

v.

Case No. CL98-050

ROBINS INSURANCE AGENCY, INC., et al,

Defendants.

NOTICE OF FILING APPEAL AND FILING TRANSCRIPT

PLEASE TAKE NOTICE, that pursuant to Rule 5:9 of the Rules of the Virginia Supreme Court, Transcontinental Insurance Company, by counsel, does hereby give its Notice of appealing the judgment Order of the Court entered September 11, 2000.


Pursuant to Rule 5:11 Transcontinental Insurance Company, by counsel, does give further notice that on September 25, 2000, the original transcript of the trial was filed with the clerk of this Court the transcript of the trial that took place on May 1, 2000.

TRANSCONTINENTAL INSURANCE COMPANY

BY: 

Of Counsel

W. Joseph Owen, III
VSB# 15963
COWAN & OWEN, P.C.
Post Office Box 35655
1930 Huguenot Road
Richmond, Virginia 23235
(804) 320-9100
(804) 330-3140 (facsimile)


CIRCUIT COURT CLERK'S OFFICE
PRINCE GEORGE COUNTY, VA.
GISHOP KNOLL, JR., CLERK
BY  D.C.

00 SEP 25 PM 4:11

FILED

CERTIFICATE

I hereby certify that on the 25 day of September, 2000, a copy of the foregoing Notice of Filing Transcript was mailed, first class mail, postage prepared to Bruce M. Marshall, Esquire, DURRETTE, IRVIN & BRADSHAW, Twentieth Floor, Main Street Centre, 600 East Main Street, Richmond, Virginia 23219, counsel for the plaintiffs, and Scott C. Ford, Esquire MEZZULO & McCANDLISH, P. O. Box 796, Richmond, Virginia 23218, counsel for ROBINS INSURANCE AGENCY, INC. and William Raleigh Robins.



W. Joseph Owen, III

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT PERMITTED PLAINTIFF TO SUFFER A NON-SUIT AS TO DEFENDANTS ROBINS INSURANCE AND ROBINS AFTER THE MATTER HAD BEEN SUBMITTED TO THE COURT FOR DECISION AND AFTER A SUBSTANTIVE RULING HAD BEEN MADE BY THE TRIAL COURT.