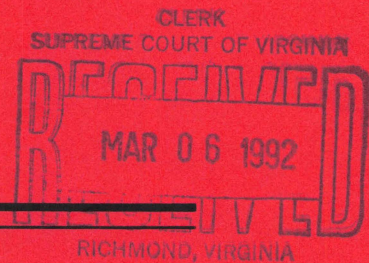


244 Va 304



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 911670

ARKANSAS BEST FREIGHT SYSTEM, INC.,

Appellant,

v.

H. H. MOORE, JR. TRUCKING COMPANY, INC.,

Appellee.

JOINT APPENDIX

Thomas C. Spencer
SPENCER & FILSON, P.C.
31 West Washington Street
Lexington, Virginia 24450
(703) 463-7138

Counsel for Appellant

Phillip V. Anderson
GENTRY LOCKE RAKES
& MOORE
800 Colonial Plaza
Post Office Box 1018
Roanoke, Virginia 24005
(703) 982-8000

Counsel for Appellee

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VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF APPOMATTOX

GAIL M. BRYANT, Administratrix of
the Estate of James Iverson Bryant,
Deceased

Plaintiff

vs.

ARKANSAS BEST FREIGHT SYSTEM, INC.
Serve: State Corporation Commission
Richmond, VA

H.H. MOORE, JR. TRUCKING COMPANY, INC.
c/o Thomas W. Lawson
Registered Agent
110 Court Street
Appomattox, VA

and

MARY KATHRYN BAILESS GOFF
Administratrix of the Estate of
Calvin Mack Bailess
Route 1, Box 183B
Big Island, VA

Defendants

MOTION FOR JUDGMENT

Comes now the plaintiff, Gail M. Bryant, Administratrix of the Estate of James Iverson Bryant, and moves for judgment against the defendants, Arkansas Best Freight System, Inc. (Arkansas), H.H. Moore, Jr. Trucking Company, Inc. (Moore) and Mary Kathryn Bailess Goff, Administratrix of the Estate of Calvin Mack Bailess (Bailess), pursuant to Section 8.01-50 of the Code of Virginia, 1950, on the grounds and in the amount as hereinafter set forth:

1. Plaintiff qualified and was duly appointed administratrix of the Estate of James Iverson Bryant by the Circuit Court of Campbell County, Virginia, on the 28th day of January, 1982, as evidenced by certificate of Henry E. Bennett, Clerk, dated January 28, 1982, and attached hereto as Exhibit A.

2. That on January 23, 1982, at approximately 10:10 A.M., plaintiff's decedent was a passenger in the 1977 Kenworth tractor trailer, a freight truck operated by the defendant, Arkansas, under trip lease with Moore, owner of the vehicle, dated January 22, 1982, a copy of which is attached hereto as Exhibit B. Under the terms of the aforesaid lease Arkansas, the lessee, assumed full responsibility for operation of the motor vehicle to the public.

3. The terms of the aforesaid lease whereby Arkansas assumes full responsibility to the public were intended to benefit the public and specifically the plaintiff, making the plaintiff a third party beneficiary under such contract.

4. That under the terms of the aforesaid lease, the lessor, Moore, agreed to pay the driver's salary and maintain workmen's compensation coverage and other necessary payroll items.

5. That the driver of the aforesaid vehicle at the time of the accident, Bailess, was an employee of the defendants hereto, jointly and severally, or was an employee of Arkansas or, in the alternative, Moore, at the time and place aforesaid and was acting within the scope of his employment.

6. At the said time and place, it was the duty of Bailess to operate said truck free from negligence and with due regard to the safety of his passenger.

7. That notwithstanding said duty, the defendants, acting by and through their employee, Bailess, and said defendant Bailess, did then and there so recklessly, carelessly and negligently, in a grossly negligent manner, in utter disregard of caution and complete neglect of the safety of the plaintiff's decedent, in a willful and wanton manner, with reckless
indifference to the consequences, operate said truck so that

the truck was caused to travel down a steep incline and around a curve wherein the speed limit was 55 M.P.H. at the excessively high rate of speed of approximately 80 M.P.H., causing the truck to overturn and crash. This crash was proximately due to the defendant's violation of his duties aforesaid.

8. Defendants, acting through their agent and employee, Bailless, and said Bailless, individually, were negligent, grossly negligent and acting with willful and wanton negligence in that he:

- (a) failed to keep proper lookout;
- (b) exceeded a reasonable speed under the circumstances and conditions then and there existing;
- (c) exceeded the registered, posted and regulated speed;
- (d) failed to apply his brakes or to slow the truck in time to avoid the accident;
- (e) failed to give full time and attention to proper operation and speed of the truck;
- (f) failed to keep the truck under proper control;
- (g) operated the truck in a reckless, grossly negligent, and willful and wanton manner.

9. As a result of the aforesaid crash the plaintiff's decedent received severe and violent injury which caused his death on January 23, 1982.

10. Plaintiff's decedent died intestate survived by the following statutory beneficiaries:

Gail M. Bryant	wife
Tonya Michelle Bryant	daughter
Cherie Kylene Bryant	daughter

Said beneficiaries have sustained financial and pecuniary loss as a result of the death of plaintiff's decedent and have suffered severe mental anguish at the loss of his company and counsel.

12. Plaintiff claims damages against the defendants, jointly and severely, in the amount of One Million Two Hundred Fifty-Three Thousand Seven Hundred Sixty-Nine and 20/100 (\$1,253,769.20) Dollars on behalf of said beneficiaries, as follows:

- (a) for funeral expenses of decedent \$ 3,769.20
- (b) for pecuniary and financial
loss suffered by statutory
beneficiaries 500,000.00
- (c) for mental anguish and loss of
decedent's company and counsel
suffered by statutory beneficiaries 750,000.00

WHEREFORE, your plaintiff demands judgment against the defendants, jointly and severely, in the amount of One Million Two Hundred Fifty-Three Thousand Seven Hundred Sixty-Nine and 20/100 (\$1,253,769.20) Dollars, and her costs in this behalf expended.

GAIL M. BRYANT, etc.

BY

A. David Hawkins
Of Counsel

A. DAVID HAWKINS
Overbey, Overbey & Hawkins
Attorneys at Law
Courthouse Square
Rustburg, Virginia 24588

March 25 19 83

Filed, filed and
process issued.

Fee \$ 25.00

Rec'd \$ 30.00

2nd Entry \$ 1.00

Shirley \$ 56.00

Barbara R. 2, 11/10/83
Clerk Circuit Court
Appomattox County, Va.

Lynne S. 7 Miles
Deputy Clerk

STATE OF VIRGINIA

Campbell County, To-Wit:

I, H. E. Bennett, Clerk of the Circuit Court for Campbell County, in the State of Virginia, do hereby certify that on the 28th day of JANUARY, 19 82, GAIL M. BRYANT duly qualified in said Court as ADMINISTRATRIX of JAMES IVERSON BRYANT, deceased and gave bond as such according to law; and that said qualification is still in full force and effect.



Given under my hand and the seal of said Court, this 28th day of January, 19 82, and in the 206th year of the Commonwealth.

Henry E. Bennett, Clerk.

EXHIBIT A

H H Moore Jr. Trucking Co. 134676 P.O. Box 477 Appomattox, Virginia 24522

(Operating Carrier) (Ce 118 No.) (Street) (City) (State) (Phone)
 SOCIAL SECURITY NO. (EXEMPT OWNER) 54-0550853 (Key. J. S.) S067-773971
 FEDERAL I.D. NO. DATE 1-22-82

hereinafter called the LESSOR, being the owner of, or LESSEE with right of re-lease to LESSEE herein, subject to the conditions hereof, including those printed on the reverse side hereof, the following described equipment:

TRACTOR	MAKE	YEAR	255170J	LICENSE NO. STATE	42-3339	TRIP LEASE NO.	DATE
TRAILER	Dorsey	77	125676	TRH67727 VA	5:00 PM	START AT:	DATE
					5:00 PM	TERMINATE AT:	DATE

For and in consideration of compensation to be paid to the LESSOR on the basis of 73% of ABF Revenue

DRIVER: [REDACTED]
 LESSOR: [REDACTED]
 LESSEE: [REDACTED]
 TRIP: [REDACTED]
 DATE: [REDACTED]
 TIME: [REDACTED]
 LOCATION: [REDACTED]
 COMMENTS: [REDACTED]

MANIFEST	ABF PRO	SHIPPER	CONSIGNEE	WEIGHT
	S067-773971	Armco, Inc.	Varco Pruden	
		Middletown, Ohio	Kernersville, North Carolina	
		Driver to call central dispatch	daily and when empty 1-800-643-2514, 15	
		5:00 PM	1-25-82	TOTAL

LESSOR hereby agrees to deliver this load to the Consignee by (A) (P) M on 1-25-82. If for any reason the load is not delivered on or before the above stated time, LESSOR will call Central Telephone 1-800-643-2514, 15 giving reason for delay and information as to when load will be offered for delivery. If for any reason the load is not delivered as above stated, and LESSOR fails to give notice as above stated, LESSOR'S revenue will be decreased by the following penalties: For the first 8 hours \$10.00; for the next 16 hours \$15.00; for the next 24 hours \$25.00. In addition, LESSOR'S revenue will be decreased in the amount of any expenses of ABF due to late delivery. LESSOR hereby acknowledges receipt of the following and agrees to a deduction of \$25.00 from the final settlement of the compensation for this lease if he fails to comply with the above agreement.

ROUTING: [REDACTED]
 HIGHWAY: [REDACTED]
 INTERLINE WITH: [REDACTED]
 CALVIN BAILLIE R 2 Box 107A Appomattox, Virginia 24522
 (Driver's Name) (Street) (City) (State) (Phone)

(Ce. Driver's Name if Not Carrier) (Street) (City) (State) (Phone)
 Harold Wayne Moore Same as Carrier

(Owner's Name if Not Carrier) (Street) (City) (State) (Phone)
 This certifies that the above leased vehicle to be used by LESSEE is one which has completed a movement of exempt commodities (as defined in Section 203 of the Interstate Commerce Act or by the Interstate Commerce Commission), and such vehicle is next to be used by LESSEE in a loaded movement in any direction, and for in one or more of a series of movements, loaded or empty, in the general direction of the general area in which the leased vehicle is based.

DATE OF ORIGINATING AT ICC MC 134676 DATE TIME
 TERMINATING AT DATE TIME

INSPECTION RECORD (396.2)

TRACTOR				TRAILER				DRIVER AND/OR AUTHORIZED AGENT OF LESSOR	
	Not Defective	Defective	Date Corrected		Not Defective	Defective	Date Corrected		
Air Compressor	/			Breakaway, Emergency	/			FIRST DRIVER TOT. HRS. <input type="text"/> 24 TO DAY <input type="text"/> 0 7 <input type="text"/> 0 8 <input type="text"/> 0 5 <input type="text"/> 8 4 <input type="text"/> 11 1/2 3 <input type="text"/> 11 1/2 2 <input type="text"/> 0 1 <input type="text"/> 0 ON DUTY HOURS LAST 8 DAYS	AVAILABLE HOURS TOT. HRS. <input type="text"/> TO DAY <input type="text"/> 7 <input type="text"/> 8 <input type="text"/> 5 <input type="text"/> 4 <input type="text"/> 3 <input type="text"/> 2 <input type="text"/> 1 <input type="text"/> ON DUTY HOURS LAST 8 DAYS
Brakes, Service	/			Brakes, Service	/				
Brakes, Parking	/			Brake Connections	/				
Breakaway Valve	/			Hoses, Air	/				
Clutch-Transmission	/			Identification	/				
Exhaust System	/			Landing Gear	/				
Fuel System	/			Lights & Reflectors	/				
Fifth Wheel	/			Mud Flaps	/				
Heat-Defroster	/			Pickup Plate	/				
Hoses-Air	/			Tires & Wheels	/				
Identification	/			Springs	/				
Indicator, Air	/			Undercarriage	/				
Lights-Reflectors	/			Other	/				
Licenses	/								
Mirrors	/								
Seat Belts	/								
Safety Equipment	/			Remarks:					
Speedometer	/								
Springs	/			I hereby certify that on the below date					
Steering	/			I carefully inspected the above and this					
Tires & Wheels	/			is a true and correct report of same.					
Wipers	/								
Warning System, Air	/								
Other	/								

I hereby certify that on the date stated above the person who made the inspection covered by this report was competent and qualified to make such inspection and was duly authorized to make such an inspection as a representative of this company.

Date 10 Signature Steve M. C. Official Title

1-22-82 Date Inspected

Steve M. C. Signature of Inspector

RECEIPT OF EQUIPMENT

The LESSEE hereby acknowledges that it has received the above described motor vehicle equipment from the LESSOR under the terms and conditions of the within lease on 1:00 PM A.M./P.M. on January 22, 1982

LESSOR ABF Freight System, Inc. (Authorized Agent-Driver) ABF FREIGHT SYSTEM, INC. BY Y. C. H. (Authorized Agent)

SETTLEMENT OF COMPENSATION

ADVANCE # 289171 \$ 200.00

ADVANCE # \$

NOT REPORTING DELIVERY

PERMITS

RELEASE OF EQUIPMENT

THE LESSOR HEREBY ACKNOWLEDGES THE RETURN FROM ABF FREIGHT SYSTEM, INC., of the above described equipment and the termination of this lease at (Destination)

at (Time) A.M./P.M. on (Date) 19

(Show Name of Authorized Carrier) LESSOR

(AUTHORIZED AGENT-DRIVER)

FORM SC 01

EXHIBIT B

DRIVER'S FILE COPY

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF APPOMATTOX

GAIL M. BRYANT, Administratrix of)
the Estate of James Iverson Bryant,)
Deceased,)
Plaintiff)

vs)

ARKANSAS BEST FREIGHT)
SYSTEM, INC.)

H. H. MOORE, JR. TRUCKING)
COMPANY, INC.)

and)

MARY KATHRYN BAILESS GOFF,)
Administratrix of the Estate)
of Calvin Mack Bailess,)
Defendants)

RESPONSE AND GROUNDS OF
DEFENSE OF THE DEFENDANT,
MARY KATHRYN BAILESS GOFF,
ADMINISTRATRIX OF THE ES-
TATE OF CALVIN MACK BAILESS

The defendant, Mary Kathryn Bailess Goff, Administra-
trix of the Estate of Calvin Mack Bailess, by counsel, for her
response to plaintiff's Motion for Judgment and for her grounds
of defense to this action, says:

1. That she neither admits nor denies the allegations
of numbered paragraphs 1., 2., 3., 4., and 5. of said Motion for
Judgment.

2. That she denies the allegations contained in
numbered paragraphs 6., 7., 8., and 9. of said Motion for Judgment
and calls for strict proof of each and every allegation therein.

3. That she neither admits nor denies the allegations
of numbered paragraph 10. of said Motion for Judgment.

4. That she denies the allegations of numbered para-
graph 12. of said Motion for Judgment.

5. The defendant specifically denies each and every allegation contained in plaintiff's Motion for Judgment except those specifically admitted herein.

MARY KATHRYN BAILLESS GOFF, ADMINIS-
TRATRIX OF THE ESTATE OF CALVIN
MACK BAILLESS

BY

Lacey E. Putney
LACEY E. PUTNEY, OF COUNSEL

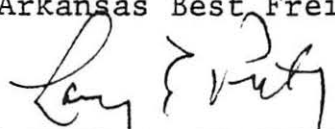
RECEIVED
and Filed
MAY 16 1983

APPOMATTOX COUNTY
CIRCUIT COURT

Barbara A. Williams
Archie Hill -31-

Lacey E. Putney, Esquire
PUTNEY AND PUTNEY, p.d.
P. O. Box 127
Bedford, Virginia 24523

I, Lacey E. Putney, Attorney for the defendant, Mary Kathryn Bailess Goff, Administratrix of the Estate of Calvin Mack Bailess, hereby certify that a copy of the foregoing response was mailed to A. David Hawkins, Esquire, Overbey, Overbey and Hawkins, Courthouse Square, Rustburg, Virginia 24588, counsel of record for the plaintiff; to Harry G. Lawson, Esquire, Post Office Box 807, Appomattox, Virginia 24522, counsel of record for the defendant, H. H. Moore, Jr. Trucking Company, Inc.; and to Thomas C. Spencer, P.C., 31 West Washington Street, Lexington, Virginia 24450, counsel of record for the defendant, Arkansas Best Freight System, Inc., on this 13th day of May, 1983.



Lacey E. Putney, Attorney for the
defendant, Mary Kathryn Bailess Goff,
Administratrix of the Estate of Calvin
Mack Bailess

June 1 1903
RECEIVED AND FILED
Barbara P. Williams
Clerk, Circuit Court
Approved: J. D. W. W. W.
C. J. Andie 3 Na 1904

GAIL M. BRYANT, Administratrix of
the Estate of James Iverson Bryant,
Deceased,

v.

RESPONSIVE
PLEADINGS
OF ARKANSAS
BEST FREIGHT
SYSTEM, INC.

and

Defendants.

The Defendant, Arkansas Best Freight System, Inc., moves the Court to Strike the Motion for Judgment on the grounds that it is insufficient in law to support any judgment against this Defendant. The Motion for Judgment alleges a contractual agreement (Trip Lease) between this Defendant and H. H. Moore Contracting Company and further alleges that this Defendant assumed full responsibility for operation of the motor vehicle to the public. The Plaintiff's allegation is that the Plaintiff's Decedent was a passenger in the vehicle which was under the Trip Lease and consequently is not a member of the public as intended to be protected under the terms of the Trip Lease. Plaintiff is not a third party beneficiary under any such contract if proven by the Plaintiff as a matter of law.

This Defendant further hereby Moves to Strike the Plaintiff's claim on the grounds that the Plaintiff alleges

that the Defendant, Bailess, acted intentionally and that this Defendant, Arkansas Best Freight Systems, Inc. cannot be held liable for the intentional act of the said Bailess under the allegations set forth in the Motion for Judgment.

GROUND OF DEFENSE

1. This Defendant denies any indebtedness to the Plaintiff for the amount alleged in the Motion for Judgment or for any other sum whatever.

2. This Defendant is not advised as to the truth or falsity of the allegation contained in Paragraph 1 of the Motion for Judgment and therefore calls for strict proof of it.

3. This Defendant admits that an accident occurred at approximately the time and date set forth in Paragraph 2 of the Motion for Judgment. This Defendant admits that it had a Trip Lease agreement with the Defendant Moore, owner of the vehicle, but denies that this Defendant was the operator of the vehicle. This Defendant had entered into a Trip Lease agreement with Moore for the movement of freight under the terms of a Trip Lease agreement, but the Defendant is unable to read the "Exhibit B" filed with the Motion for Judgment herein and, consequently, neither admits nor denies that the said "Exhibit B" is an accurate copy of the said Trip Lease agreement. This Defendant admits that the Trip Lease agreement that was entered into provided that this Defendant should meet its responsibilities to the public as provided by the Interstate Commerce Commission's regulations but denies that the Trip Lease agreement provides that this Defendant assumed full responsibility as to the Plaintiff or the Plaintiff's Decedent.

4. This Defendant denies that the Plaintiff or the Plaintiff's Decedent is a third party beneficiary under the said contract as set forth in Paragraph 3 of the Motion for Judgment.

5. This Defendant admits the allegations of Paragraph 4 of the said Motion for Judgment.

6. This Defendant denies that the Defendant Bailess was an employee of this Defendant but affirmatively alleges that the said Defendant Bailess was an employee of the Defendant Moore.

7. The allegation contained in Paragraph 6 of the Motion for Judgment is a conclusion of law and this Defendant neither admits nor denies the allegation contained therein but calls for strict authority for the said conclusion of law.

8. This Defendant denies the allegations of Paragraphs 7 and 8 of the Motion for Judgment and calls for strict proof thereof and further renews this Defendant's Motion to Strike previously set forth in this Responsive Pleading as to the allegations contained therein.

9. This Defendant denies that the accident occurred as set forth in the Motion for Judgment or that the Plaintiff or the Plaintiff's Decedent was injured and damaged to the extent and with the consequences alleged in the Motion for Judgment and, therefore, calls upon the Plaintiff for strict proof of such alleged damages.

10. This Defendant denies that it or any employee or agent of this Defendant was guilty of any act or negligence which approximately caused the accident in question.

11. This Defendant denies that this Defendant breached any legal duty owed to the Plaintiff or the Plaintiff's Decedent.

12. This Defendant alleges that the Plaintiff's Decedent, James Iverson Bryant, was guilty of negligence or assumption of the risk or both which will bar or limit the Plaintiff's recovery in this action.

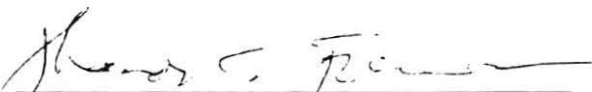
13. All allegations in the Motion for Judgment not expressly admitted herein are denied.

14. This Defendant will further rely on all proper defenses available to it based upon the evidence adduced through discovery and at trial and hereby reserves the right to amend its Responsive Pleadings for such purpose.

ARKANSAS BEST FREIGHT SYSTEM, INC.

By Counsel

Thomas C. Spencer, P.C., p.d.
31 West Washington Street
Lexington, Virginia 24450

By: 
Thomas C. Spencer

CERTIFICATE

I hereby certify that I have this 30th day of May, 1983, mailed a true copy of the foregoing Responsive Pleadings to A. David Hawkins, Esquire, Overbey, Overbey & Hawkins, Courthouse Square, Rustburg, Virginia 24588.


Thomas C. Spencer

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF APPOMATTOX

GAIL M. BRYANT, Administratrix of
the Estate of James Iverson Bryant,
Deceased,

Plaintiff,

v.

ARKANSAS BEST FREIGHT SYSTEM, INC.,

H. H. MOORE, JR. TRUCKING COMPANY, INC.,
C/o Thomas W. Lawson
Registered Agent
110 Court Street
Appomattox, Virginia

and

MARY KATHRYN BAILLESS GOFF,
Administratrix of the Estate of
Calvin Mack Bailless,
Route 1, Box 183B
Big Island, Virginia

Defendants.

June 1 1983
RECEIVED AND FILED
Barbara J. Williams
Clerk, Circuit Court
Appomattox County, Virginia
By: Thelma J. Waring, Deputy Clerk.

CROSS BILL OF DEFENDANT
ARKANSAS BEST FREIGHT SYSTEM, INC.

1. This Defendant, Arkansas Best Freight System, Inc. herein alleges that at the time and date of the accident alleged in the Motion for Judgment heretofore exhibited against this Defendant herein there existed a contract between this Defendant, Arkansas Best Freight System, Inc. and the Defendant H. H. Moore, Jr. Trucking Company, Inc., a copy of which agreement is attached to this Cross Bill and incorporated herein as if fully set forth in this Cross Bill.

2. Pursuant to the terms of the said agreement the Defendant H. H. Moore, Jr. Trucking Company, Inc. agreed to indemnify and hold harmless this Defendant as set forth in the agreement alleged in Paragraph 1 hereof.

3. This Defendant has been required to expend large sums of money for which the Defendant H. H. Moore, Jr. Trucking Company, Inc. is liable to it and further if this Defendant, Arkansas Best Freight Systems, Inc., should be held liable for any claims set forth in the Motion for Judgment in this case then it is entitled to receive indemnification from the Defendant H. H. Moore, Jr. Trucking Company, Inc. for such damages.

4. That the accident alleged in the Motion for Judgment occurred while the contract alleged in Paragraph 1 was in force and the accident involved the equipment which was the subject matter of the agreement alleged in Paragraph 1 and the agreement is applicable to the damages alleged in the Motion for Judgment and other expenses and damages which this Defendant has incurred which are recoverable pursuant to the terms of the agreement.

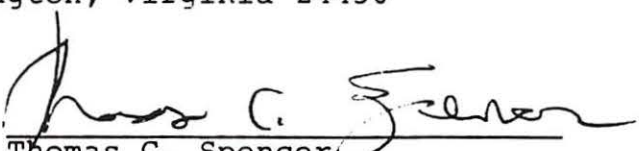
WHEREFORE, this Defendant Arkansas Best Freight System, Inc. prays for judgment against the Defendant H. H. Moore, Jr. Trucking Company, Inc. for such sums as are proven by the evidence in this cause to be due from H. H. Moore, Jr. Trucking Company, Inc. pursuant to the said agreement and for such other costs and attorney's fees as this Defendant is required to expend herein and pursuant to the said agreement.

ARKANSAS BEST FREIGHT SYSTEM, INC.

By Counsel

Thomas C. Spencer, P.C., p.d.
31 West Washington Street
Lexington, Virginia 24450

By:


Thomas C. Spencer

1-800-643-2514

H Moore Jr. Trucking Co. 676 O. Box 477 Appomattox, Virginia 24522

(Operating Carrier) (Certificate No) (Street) (City) (State) (Phone)

SECURITY NO (EXEMPT OWNER) (Key Pin #) S067-773971

DATE 1-22-82

consignor called the LESSOR, being the owner of, or LESSEE with right of re-lease to LESSEE herein, subject to the conditions hereof, including those printed on reverse side hereof, the following described equipment:

MAJOR MAKE 77H 5514PJ LICENSE NO 41641E VA TRIP LEASE NO 41641E VA START AT 1:00 PM DATE 1-22-82
 MAJOR MAKE Dorsey 77 125676 TRN67727 VA TERMINATE AT 5:00 PM DATE 1-25-82

and in consideration of compensation to be paid to the LESSOR on the basis of 73% of ABF Revenue

DRIVERS INSTRUCTIONS

ALL ACCIDENTS must be reported immediately-DO NOT LEAVE SCENE OF ACCIDENT call area code 501-785-6486 day or night. See your attached instructions for further details.

ALL CLAIMS must be reported immediately prior to leaving premises of consignor - call 1-800-643-2514 if outside AR or 1-800-542-1049 within AR. Talk with consignor on duty.

ALL LOADS must be loaded and unloaded in accordance with consignor's advice, and if not necessary, in accordance with the following instructions.

ALL DRIVERS must report to dispatch daily to meet delivery schedule. Phone 1-800-643-2514 if outside AR or 1-800-542-1049 within AR.

ALL DRIVERS must report when load was delivered 1-800-643-2514 if outside AR or 1-800-542-1049 within AR.

ALL DRIVERS must follow ABF authorized rules. See routing section of this manifest.

For following documents must be presented in General Office before payment can be made: properly signed Delivery Receipt, Bill of Lading or shipping documents, complete logs covering the trip, green copy of lease releasing equipment, and ABF authority pack and signs.

Failure to comply with any of the above instructions subjects you to the penalty clause of this agreement. Also you will be restricted from loading at any ABF terminals at any time.

MANIFEST	ABF PRO	SHIPPER	CONSIGNEE	WEIGHT
	S067-773971	Armco, Inc.	Varco Pruden	
		Middletown, Ohio	Kernersville, North Carolina	
		Driver to call central dispatch daily and when empty 1-800-643-2514, 15		
		5:00 PM	1-25-82	TOTAL

LESSOR hereby agrees to deliver this load to the Consignee by (A) (P) M on 1-25-82. If for any reason the load is not delivered on or before the above stated time, LESSOR will call Central Telephone # 1-800-643-2514, giving reason for delay and information as to when load will be offered for delivery. If for any reason the load is not delivered as above stated, and LESSOR fails to give notice as above stated, LESSOR'S revenue will be decreased by the following penalties: For the first 8 hours \$10.00; for the next 16 hours \$15.00; for the next 24 hours \$25.00. In addition, LESSOR'S revenue will be decreased in the amount of any expenses of ABF due to late delivery. LESSOR hereby acknowledges receipt of the following and agrees to a deduction of \$25.00 from the final settlement of the compensation for this lease if he fails to comply with the above agreement.

GENS # 2 - ICC OPERATING AUTHORITIES 1 PERMITS OTHER

BEGIN AT TAKE HIGHWAY # TO HIGHWAY # TO

HIGHWAY # TO HIGHWAY # TO 226-48-9321 VA TO Yes

INTERLINE WITH CHAUFFERS LICENSE NO. PHYS. CERT. (Attached)

Calvin Bailess R 2 Box 107A Appomattox, Virginia 24522

(Driver's Name) (Street) (City) (State) (Phone)

(Co-Driver's Name if Applicable) (Street) (City) (State) (Phone)

Harold Wayne Moore Same as Carrier

(Owner's Name if Not Carrier) (Street) (City) (State) (Phone)

This certifies that the above leased vehicle to be used by LESSEE is one which has completed a movement of exempt commodities (as defined in Section 203 of the Interstate Commerce Act or by the Interstate Commerce Commission), and such vehicle is next to be used by LESSEE in a loaded movement in any direction, and/or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which the leased vehicle is based.

HAULER Said load ORIGINATING AT ICC MC 134676 DATE TIME

TERMINATING AT DATE TIME

PROOF OF PRIOR EXEMPT HAUL MUST BE ATTACHED

SIGNED

INSPECTION RECORD (396.2)

TRACTOR	Not Defective	Defective	Date Corrected	TRAILER	Not Defective	Defective	Date Corrected	DRIVER AND/OR AUTHORIZED AGENT OF LESSOR			
Compressor	/			Breakaway, Emergency	/			<div style="display: flex; justify-content: space-between;"> <div> <p>FIRST DRIVER</p> <p>TOT. HRS</p> <p>TO DAY</p> <p>ON DUTY HOURS LAST 8 DAYS</p> </div> <div> <p>AVAILABLE HOURS</p> <p>TO DAY</p> <p>ON DUTY HOURS LAST 8 DAYS</p> </div> <div> <p>SECOND DRIVER</p> <p>TOT. HRS</p> <p>TO DAY</p> <p>ON DUTY HOURS LAST 8 DAYS</p> </div> <div> <p>AVAILABLE HOURS</p> <p>TO DAY</p> <p>ON DUTY HOURS LAST 8 DAYS</p> </div> </div>			
Brakes, Service	/			Brakes, Service	/						
Brakes, Parking	/			Brake Connections	/						
Breakaway Valve	/			Hoses, Air	/						
Clutch-Transmission	/			Identification	/						
Exhaust System	/			Landing Gear	/						
Fuel System	/			Lights & Reflectors	/						
Idle Wheel	/			Mud Flaps	/						
Heat-Defroster	/			Pickup Plate	/						
Hoses-Air	/			Tires & Wheels	/						
Identification	/			Springs	/						
Indicator, Air	/			Undercarriage	/						
Lights-Reflectors	/			Other	/						
Lenses	/										
Mirrors	/										
Seat Belts	/										
Safety Equipment	/										
Speedometer	/										
Springs	/										
Steering	/										
Tires & Wheels	/										
Wipers	/										
Warning System, Air	/										
Other	/										

Remarks: _____

I hereby certify that on the below date I carefully inspected the above and this is a true and correct report of same.

Date Inspected: 1-22-82

Signature of Inspector: *[Signature]*

I hereby certify that on the date stated above the person who made the inspection covered by this report was competent and qualified to make such inspection and was duly authorized to make such an inspection as a representative of this company.

Date: 19 _____ Signature: _____ Official Title: _____

RECEIPT OF EQUIPMENT

LESSEE hereby acknowledges that it has received the above described motor vehicle equipment from the LESSOR under the terms and conditions of the lease at 1:00 PM A.M./P.M. on January 22, 1982.

LESSOR: *[Signature]* ABF FREIGHT SYSTEM, INC. BY *[Signature]* (Authorized Agent)

SETTLEMENT OF COMPENSATION

ADVANCE # 289171 \$ 200.00

ADVANCE # _____ \$ _____

NOT REPORTING DELIVERY _____

PERMITS _____

RELEASE OF EQUIPMENT

THE LESSOR HEREBY ACKNOWLEDGES THE RETURN FROM ABF FREIGHT SYSTEM, INC., of the above described equipment and the termination of this lease at _____ (Destination) _____ (Date)

at _____ (Time) _____ A.M./P.M. on _____ (Date)

(Show Name of Authorized Carrier)

(AUTHORIZED AGENT-DRIVER)

FORM SC 01

JAN 26 1982

TERMS AND CONDITIONS OF TRIP LEASE

1. The LESSOR hereby leases to the LESSEE the above described motor vehicle equipment under the following terms and conditions and those set forth on this side hereof which are made a part hereof the same as if written below. It is understood that the leased equipment is in the exclusive possession, control, and use of the LESSEE, and that the LESSEE assumes full responsibility therefor to the public, the shippers and the Interstate Commerce Commission. LESSOR agrees that upon the termination of this lease, LESSOR will forthwith surrender and deliver to LESSEE all identification signs, license plates, permits certifications, bills, documents and other personal property of LESSEE; remove from equipment the name or vehicle markings of LESSEE, and will sign a receipt for return of equipment to him. It is further agreed that the term of this lease shall be for the duration of one single trip, commencing with the completion of the inspection of the equipment by the LESSEE and to be terminated upon, the LESSOR giving the LESSEE a receipt for the return of the above described equipment at the destination named above.

2. The Lessor agrees to deliver to the Lessee the above equipment in good running order and condition; maintain the same, at his expense, in good working condition, and in accordance with safety requirements of the Department of Transportation. In the event that leased equipment is not in proper mechanical condition or for any other reason is deemed inadequate to the Lessee, then the Lessee shall have the right to transfer freight from leased equipment to another vehicle. All charges such as delivery and storage incident to the rehandling of such freight shall be assessed against Lessor, and Lessee may deduct same from any money due to Lessor.

3. The Lessee shall not be liable for the loss of, or damage to, the leased equipment, however caused, while in use under the terms of this lease.

4. The Lessor shall pay driver's salary, maintain workmen compensation coverage, and pay all taxes, municipal, state or federal, based on payroll.

5. Lessor agrees to comply with and obey all federal, state and municipal laws, ordinances, regulations and requirements applicable or relating to said leased equipment and the operation and use thereof, and agrees to pay all fines due to overload, overlength, speeding or other traffic violations, lack of permits or plates or any other fines assessed against him or his driver for any cause, and further agrees that in the event such fines are paid by Lessee on behalf of his driver or him, the Lessor will reimburse the Lessee for such fines so paid.

6. It is agreed that in the event that Lessor or his driver shall operate said leased equipment and during the operation thereof shall be pulling a trailer owned by, leased or interchanged to the Lessee, and said trailer shall be damaged as a result of negligence of Lessor or his driver, then in that event Lessor agrees to reimburse and pay Lessee for such damages.

7. Lessor agrees to indemnify and hold Lessee harmless from any damage, loss or expenses to cargo transported on leased equipment resulting from negligence of Lessor or his driver; or from and against claims, demands, judgments, loss, damages and expenses arising from death or bodily injuries to third persons or to property of third persons resulting from negligent operation of leased equipment by Lessor or his driver; or against claims, demands, loss or action brought or asserted against Lessee by reason of any workmen compensation law or employers liability law arising out of use and operation of leased equipment under this lease.

8. For all purposes of this lease and the execution of all parts hereof on behalf of Lessor, the driver, or any other person in lawful possession of the equipment leased hereby, shall be deemed to be, and to have been duly authorized as, the agent of the Owner of, or Lessee with the right to re-lease to Lessee herein, the equipment hereby leased.

ADDITIONAL INSTRUCTIONS

1. Drivers must furnish a signed statement giving total on duty time for the immediately preceding seven (7) days and the time last relieved from duty prior to this trip. Enter all duty time for the entire day, name of each carrier served and the beginning and finishing time for each carrier.

2. Driver must report any arrest or written warning notice he receives while on duty for ABF Freight Systems, Inc., and submit same along with logs for the trip.

3. Drivers may be subjected to inspection by representatives of the Department of Transportation either for hours of service violation or mechanical condition of vehicle. Drivers may be declared "out of service" for excess hours on duty or the vehicle may be declared "out of service" until repairs are made to place it in safe operating condition.

a. In either of the above situations the driver must call the Fort Smith SCD office at once if he is on a trip for the special Commodities Division. Instructions will be given the driver as to the action he must take.

b. Driver must furnish the ABF Freight System, Inc., office, at which settlement is made, the vehicle inspection report given him by the DOT inspector or the copy of any out of service notice he received.

c. A report of repairs completed must be submitted to ABF Freight System, Inc., no later than fifteen (15) days from the date of the inspection.

d. Where a driver has exceeded the hours of service requirement he must furnish a written explanation of the reason for such violation.

CERTIFICATE

I hereby certify that I have this 30th day of May, 1983, mailed a true copy of the foregoing Cross Bill to A. David Hawkins, Esquire, Overbey, Overbey, & Hawkins, Courthouse Square, Rustburg, Virginia 24588.


Thomas C. Spencer

CROSS BILL

1. This Defendant Arkansas Best Freight System, Inc. herein alleges that at the time and date of the accident alleged in the Motion for Judgment heretofore exhibited against this Defendant herein Calvin Mack Bailess was the agent and employee of the Defendant H. H. Moore, Jr. Trucking Company, Inc.

2. That the accident complained of in the Motion for Judgment was not caused by the negligence of this Defendant Arkansas Best Freight System, Inc. and that if the allegations of the Motion for Judgment of the Plaintiff in this cause are true the accident was caused by the negligence of the Defendant H. H. Moore, Jr. Trucking Company, Inc. and its agent Calvin Mack Bailess.

3. That should this Defendant Arkansas Best Freight System, Inc. be held liable for the damages and on the grounds alleged in the Motion for Judgment herein that the Defendant H. H. Moore, Jr. Trucking Company, Inc. and the Defendant Mary Kathryn Bailess Goff, Administratrix of the Estate of Calvin Mack Bailess, are jointly and severally liable to this Defendant Arkansas Best Freight System, Inc. for any such sums which it may be required to pay to the Plaintiff in this

cause and for such expenses and attorney's fees as it is required to expend in this cause.


WHEREFORE, this Defendant Arkansas Best Freight System, Inc. hereby respectfully moves for judgment against the Defendant H. H. Moore, Jr. Trucking Company, Inc. and the Defendant Mary Kathryn Bailess Goff, jointly and severally, for all damages, costs and attorney's fees suffered by this Defendant as a result of the accident alleged in the Motion for Judgment herein.

ARKANSAS BEST FREIGHT SYSTEM, INC.

By Counsel

Thomas C. Spencer, P.C., p.d.
31 West Washington Street
Lexington, Virginia 24450

By:


Thomas C. Spencer

CERTIFICATE

I hereby certify that I have this 30th day of May, 1983, mailed a true copy of the foregoing Cross Bill to A. David Hawkins, Esquire, Overbey, Overbey, & Hawkins, Courthouse Square, Rustburg, Virginia 24588.


Thomas C. Spencer

whom is a third party beneficiary is a conclusion of law and this Defendant neither admits nor denies the allegation contained therein but calls for strict authority for the said conclusion of law.

5. This Defendant admits the allegations of Paragraph 4 of the said Motion for Judgment.

6. This Defendant denies that the Defendant Bailess was an employee of this Defendant but affirmatively alleges that the said Defendant Bailess was an employee of the Defendant Arkansas Best Freight System, Inc.

7. The allegation contained in Paragraph 6 of the Motion for Judgment is a conclusion of law and this Defendant neither admits nor denies the allegation contained therein but calls for strict authority for the said conclusion of law.

8. This Defendant denies the allegations of Paragraphs 7 and 8 of the Motion for Judgment and calls for strict proof thereof.

9. This Defendant denies that the accident occurred as set forth in the Motion for Judgment or that the Plaintiff or the Plaintiff's Decedent was injured and damaged to the extent and with the consequences alleged in the Motion for Judgment and, therefore, calls upon the Plaintiff for strict proof of such alleged damages.

10. This Defendant denies that it or any employee or agent of this Defendant was guilty of any act or negligence which approximately caused the accident in question.

11. This defendant denies that this Defendant breached any legal duty owed to the Plaintiff or the Plaintiff's Decedent.

12. This Defendant alleges that the Plaintiff's Decedent, James Iverson Bryant, was guilty of negligence or assumption of the risk or both which will bar or limit the Plaintiff's recovery in this action.

13. All allegations in the Motion for Judgment expressly admitted herein are denied.

14. This Defendant will further rely on all defenses available to it based upon the evidence adduced through discovery and at trial and hereby reserves the right to amend its Responsive Pleadings for such purpose.

H. H. MOORE, JR. TRUCKING COMPANY,

By Counsel

BY: Harry G. Lawson
Harry G. Lawson

CERTIFICATE OF MAILING

I hereby certify that I have this 16th day of March, 1984, mailed a true copy of the foregoing GROUNDS OF DEFENSE OF H. H. MOORE JR., TRUCKING COMPANY, to A. David Hawkins, Esquire, Overbey, Overbey & Hawkins Courthouse Square, Rustburg, Virginia 24588, and Thomas Spencer, Esquire, 31 West Washington Street, Lexington, 24450.

Harry G. Lawson
Harry G. Lawson

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF APPOMATTOX

* * * * *

GAIL M. BRYANT, Administratrix of
the Estate of James Iverson Bryant,
Deceased,

Plaintiff,

vs.

ARKANSAS BEST FREIGHT SYSTEM, INC.,

H. H. MOORE, JR. TRUCKING COMPANY, INC.,

and

MARY KATHRYN BAILESS GOFF
Administratrix of the Estate of
Calvin Mack Bailess,
Route 1, Box 183B
Big Island, Virginia

Defendants.

GROUND OF
DEFENSE OF
H. H. MOORE
JR., TRUCKING
COMPANY, INC.
TO CROSS BILL

March 16 19 84
RECEIVED AND FILED

Barbara R. Williams
Clerk, Circuit Court
Appomattox County, Virginia

By Budie Z. Harvey
Att. Gen.

GROUND OF DEFENSE

1. The Defendant, H. H. Moore Jr., Trucking Company, Inc., admits the allegations contained in Paragraph 1 of the Cross Bill.
2. The Defendant admits the allegations stated in Paragraph 2 of the alleged Cross Bill.
3. The Defendant denies the allegations in Paragraph 3 of the Cross Bill and demands strict proof thereof.
4. The Defendant admits that the accident alleged in the Motion for Judgment occurred while the contract alleged in Paragraph 1 was in force and the accident involved the equipment which was the subject matter of the agreement alleged in Paragraph 1 and denies the rest of the allegation contained in

Paragraph 4, because under the terms of the aforesaid lease, Arkansas Best Freight System, Inc., the Leasee, assumed full responsibility for operation of the motor vehicle to the public.

5. All allegations in the Cross Bill of Defendant Arkansas Best Freight System, Inc., not expressly admitted herein are denied.

6. This Defendant will further rely on all proper defenses available to it based upon the evidence adduced through discovery and at trial and hereby reserves the right to amend its Responsive Pleadings for such purpose.

H. H. MOORE, JR. TRUCKING COMPANY, INC.

By Counsel

BY:

Harry G. Lawson
Harry G. Lawson

CERTIFICATE OF MAILING

I hereby certify that I have this 14th day of March, 1984, mailed a true copy of the foregoing
GROUNDS OF DEFENSE OF H. H. MOORE JR., TRUCKING COMPANY, INC.
TO CROSS BILL to A. David Hawkins, Esquire, Overbey, Overbey &
Hawkins, Courthouse Square, Rustburg, Virginia 24588, and
Thomas C. Spencer, Esquire, 31 West Washington Street,
Lexington, Virginia 24450.

Harry G. Lawson
Harry G. Lawson

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF APPOMATTOX

GAIL M. BRYANT, Administratrix
of the Estate of James Iverson
Bryant, Deceased

*

*

Petitioner

*

vs.

*

NOTICE

ARKANSAS BEST FREIGHT SYSTEM
INC., et als

*

*

Respondents

*

TO: Harry G. Lawson, Esq.
P.O. Box 807
Appomattox, Virginia 24522

Thomas C. Spencer, Esq.
31 West Washington Street
Lexington, VA 24450

Lacey E. Putney, Esq.
P.O. Box 127
Bedford, VA 24523

Richard C. Rakes, Esq.
P.O. Box 1018
Roanoke, VA 24005

Laurence A. Mann, Esq.
31 West Washington Street
Lexington, VA 24450

William S. Kerr, Esq.
Appomattox, VA 24522

TAKE NOTE, that on the 7th day of September, 1984,
at 2:00 P.M. in the Circuit Court of Appomattox County, Virginia,
counsel will move for entry of the enclosed order approving
petition and compromise of the above case.

LAW OFFICES

OVERBEY, OVERBEY
& HAWKINS
RUSTBURG, VIRGINIA

GAIL M. BRYANT, etc.

BY

A David Harper
Of Counsel

26

September 4, 1984
Barbara Williams
Clerk, Circuit Court
Appomattox County, Virginia

A. DAVID HAWKINS
Overbey, Overbey & Hawkins
Attorneys at Law
Courthouse Square
P.O. Box 38
Rustburg, Virginia 24588

C E R T I F I C A T E

I hereby certify that a copy of the foregoing Notice was mailed to Harry G. Lawson, Esq., P.O. Box 807, Appomattox, VA 24522; Thomas C. Spencer, Esq., 31 West Washington Street, Lexington, VA 24450; Lacey E. Putney, Esq., P.O. Box 127, Bedford, VA 24523; Richard C. Rakes, Esq., P.O. Box 1018, Roanoke, VA 24005; Laurence A. Mann, Esq., 31 West Washington Street, Lexington, VA 24450; and William S. Kerr, Esq., Appomattox, VA 24522, all counsel in the above styled matter, this 31st day of August, 1984.


A. David Hawkins

ADH:rb
8/31/84

LAW OFFICES
OVERBEY, OVERBEY
& HAWKINS
RUSTBURG, VIRGINIA

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF APPOMATTOX

GAIL M. BRYANT, Administratrix *
of the Estate of James Iverson *
Bryant, deceased *

Petitioner *

vs. *

ORDER

ARKANSAS BEST FREIGHT SYSTEM, *
INC., et als *

Respondents *

On this 7 day of Sept, 1984, came Gail M. Bryant, Administratrix of the estate of James Iverson Bryant, deceased, and filed her petition for approval of a proposed compromise of the claim for damages for the injuries and death of James Iverson Bryant, deceased.

And it appearing to the Court that Tonya Michelle Bryant and Cherie' Kylene Bryant, daughters of James Iverson Bryant, deceased, are infants under the age of eighteen years, the Court doth appoint William S. Kerr, a discreet and competent attorney at law, as guardian ad litem for said Tonya Michelle Bryant and Cherie' Kylene Bryant, to represent the interests of Tonya Michelle Bryant and Cherie' Kylene Bryant in this proceeding.

WHEREUPON, William S. Kerr, guardian ad litem for Tonya Michelle Bryant and Cherie' Kylene Bryant, infant daughters of James Iverson Bryant, deceased, and defendant Arkansas Best Freight System, Inc., filed their answers to the petition herein.

UPON CONSIDERATION WHEREOF, it appearing to the Court that all parties necessary to be convened have been convened; and it further appearing that, while Arkansas Best Freight System, Inc., denies that it was in any way negligent in the operation of the tractor trailer truck in which James Iverson Braynt was a passenger, thereby causing his death on the 23rd day of Janaury, 1982, it, nevertheless, has offered the sum of Eighty Thousand Dollars (\$80,000.00), in full compromise settlement of all claims and damages against it arising from the death of James Iverson Bryant, together with the costs incident to this proceeding in the amount of \$85.00; and it further appearing to the Court that Gail M. Bryant who is the only competent beneficiary who would be entitled under Section 8.01-53 of the Code of Virginia, 1950, to the damages recoverable in any action against said defendant, Arkansas Best Freight System, Inc., and William S. Kerr, guardian ad litem for Tonya Michelle Bryant and Cherie' Kylene Bryant, infant beneficiaries, deeming it to be in the best interests of Tonya Michelle Bryant and Cherie' Kylene Bryant, having appeared and requested that the said compromise be approved; and the Court being of the opinion that said offer of settlement is a reasonable one and one that is advantageous to the beneficiaries inasmuch as the question of establishing negligence on the part of Arkansas Best Freight System, Inc., is involved in great uncertainty, doth approve said settlement and compromise to be in full settlement of any and all claims and damages

which may or can be made against Arkansas Best Freight System, Inc., arising from the death of James Iverson Bryant, and doth ORDER and ADJUDGE that petitioner recover said sum from defendant, Arkansas Best Freight System, Inc.

And it appearing to the Court that James Iverson Bryant left surviving him Gail M. Bryant, his widow, petitioner herein, and Tonya Michelle Bryant and Cherie' Kylene Bryant, infant daughters, and that said Gail M. Bryant, Tonya Michelle Bryant and Cherie' Kylene Bryant are the only persons entitled under Section 8.01-53 of the Code of Virginia, 1950, to share in the recovery hereinabove ordered; and it further appearing that Gail M. Bryant, the only competent beneficiary, and William S. Kerr, guardian ad litem for Tonya Michelle Bryant and Cherie' Kylene Bryant, the only incompetent beneficiaries, have appeared and consented thereto, the Court doth ORDER and ADJUDGE that the aforesaid recovery be paid to Gail M. Bryant, administratrix of the estate of James Iverson Bryant, deceased, and, after payment of the sum of One Hundred Dollars (\$100.00) to William S. Kerr, for his services as guardian ad litem to Tonya Michelle Bryant and Cherie' Kylene Bryant herein, which sum the Court determines to be a reasonable fee for said services, and payment of the sum of Twenty-Five Thousand Dollars (\$25,000.00) to A. David Hawkins, attorney for the administratrix, which sum the Court determines to be a reasonable fee for his services in connection with this settlement, and payment of the sum of Four Hundred Seventy-Eight and 50/100 (\$478.50) Dollars,

to A. David Hawkins, attorney for administratrix, for costs expended in this matter, with the balance then remaining to be paid as follows:

(1) Twelve Thousand Five Hundred Dollars (\$12,500.00) to be paid to Gail M. Bryant as guardian for Tonya Michelle Bryant. Said guardian shall hold said money in trust for the benefit of said child until said child reaches the age of 18, or may invest in an annuity with regular payments to said child payable until the child reaches the age of 25.

(2) Twelve Thousand Five Hundred Dollars (\$12,500.00) to be paid to Gail M. Bryant as guardian for Cherie' Kylene Bryant. Said guardian shall hold said money in trust for the benefit of said child until said child reaches the age of 18 or may invest in an annuity with regular payments to said child payable until the child reaches the age of 25.

(3) The balance of Twenty-Nine Thousand Five Hundred Twenty-One and 50/100 Dollars (\$29,421.50) to be paid directly to Gail M. Bryant. No surety shall be required on the bond of Gail M. Bryant but a personal bond of \$25,000.00 is required.

And it appearing to the Court that Gail M. Bryant has waived any claim to commissions on said fund, it is ORDERED that no commissions be paid to her thereon.

Thereupon, defendant Arkansas Best Freight System, Inc., by counsel, in open Court, paid the sum of Fifty-Five Thousand Dollars (\$55,000.00) to Gail M. Bryant, administratrix as aforesaid, in full settlement and satisfaction of all liability

now existing or which may hereafter be asserted against it for or on account of the death of James Iverson Bryant, except for the payment of \$25,000.00 to A. David Hawkins, attorney, which is the subject of a separate agreement between the parties to be paid on January 1, 1985, with interest at the rate of 12% per annum from August 20, 1984, and the Court doth ORDER that Arkansas Best Freight System, Inc., be and it hereby is forever discharged from any other claim or liability.

And the object of this proceeding having been accomplished, it is ORDERED that the same be stricken from the docket of this Court and the papers therein filed among the ended causes. *EXCEPT THAT THE CROSS-CLAIMS FILED BY ARKANSAS BEST FREIGHT SYSTEMS AGAINST H.H. MOORE, JR. TRUCKING CO., INC. IS CONTINUED.* ENTER: George Abbott, Jr.
Judge, Retired-Recalled
Sept 7th 1984

I ASK FOR THIS:

A. David Hawkins
A. David Hawkins, Attorney for
Gail M. Bryant

SEEN AND AGREED TO:

Harry G. Lawson, Attorney for
H.H. Moore, Jr. Trucking Company,
Inc.

Thomas C. Spencer
Thomas C. Spencer, Attorney for
Arkansas Best Freight System,
Inc.

William S. Kerr
William S. Kerr, Guardian ad
litem for Tonya Michelle Bryant
and Cherie' Kylene Bryant

Recorded in Law Order Bk 13
Pg 500

TRUE COPY, TESTE:

Clara
Clerk Court County of Appomattox, Virginia

32

2/90

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF APPOMATTOX

GAIL M. BRYANT, Administratrix of
the Estate of James Iverson Bryant,
Deceased,
Plaintiff,

v.

MOTION FOR SUMMARY JUDGMENT

ARKANSAS BEST FREIGHT SYSTEM, INC.,

H. H. MOORE, JR., TRUCKING
COMPANY, INC.
c/o H. H. Moore, Jr., Registered Agent
U. S. Route 460
Appomattox, Virginia 24422

and

MARY KATHRYN BAILESS GOFF,
Administratrix of the Estate of
Calvin Mack Bailess
Route 1, Box 188B
Big Island, Virginia,
Defendants.

COMES NOW Your Defendant ARKANSAS BEST FREIGHT SYSTEM, INC.,
by counsel, and moves for summary judgment on its Cross-Bill
pursuant to Rule 3:18 of the Rules of the Supreme Court of
Virginia. In support of same, Your Defendant would represent unto
the Court that the pleadings and other documents filed in this
action show that there is no genuine issue as to any material fact,
and that Your Defendant ARKANSAS BEST FREIGHT SYSTEM, INC., is
entitled to summary judgment as a matter of law. This record
reflects that:

(1) At the time and date of the accident alleged in the
Motion for Judgment heretofore exhibited against this Defendant,
there existed a contract between this Defendant, ARKANSAS BEST
FREIGHT SYSTEM, INC., and the Co-Defendant, H. H. MOORE, JR.,
TRUCKING COMPANY, INC., which agreement was binding upon each of

the parties thereto and in which agreement the Defendant H. H. MOORE, JR., TRUCKING COMPANY, INC., agreed to indemnify and hold harmless Your Defendant ARKANSAS BEST FREIGHT SYSTEM, INC., from any claims, demands, judgments, loss, damages and expenses arising from death or bodily injuries to third persons or to property of third persons resulting from negligent operation of leased equipment by H. H. MOORE, JR., TRUCKING COMPANY, INC., or its driver. A copy of this "trip lease" has been heretofore filed in this cause and the Defendant H. H. MOORE, JR., TRUCKING COMPANY, INC., has admitted in paragraph 3 of its Grounds of Defense and in its Grounds of Defense to the Cross-Bill, paragraph 1, heretofore filed in this cause, the trip lease agreement with the Defendant ARKANSAS BEST FREIGHT SYSTEM, INC., as set forth in the Motion for Judgment, paragraph two, and in paragraph 3 of the Grounds of Defense to Cross-Bill admit that H. H. Moore, Jr., Trucking Company, Inc., had agreed to indemnify and hold harmless Arkansas Best Freight System, Inc., for this claim.

(2) The Defendant ARKANSAS BEST FREIGHT SYSTEM, INC., while denying any negligence on its part, reached a compromise settlement with the Plaintiff, GAIL M. BRYANT, Administratrix of the Estate of James Iverson Bryant, Deceased, in the amount of EIGHTY THOUSAND and NO/100 (\$80,000.00) DOLLARS, together with costs, such compromise settlement having been approved by Order dated September 7, 1984. The Co-Defendants H. H. MOORE, JR., TRUCKING COMPANY, INC., and MARY KATHRYN BAILESS GOFF, Administratrix of the Estate of Calvin Mack Bailess, participated in the settlement negotiations

and approved the settlement reached by this Defendant, ARKANSAS BEST FREIGHT SYSTEM, INC., with the Plaintiff in this cause.

(3) The Defendant ARKANSAS BEST FREIGHT SYSTEM, INC., paid the sum of TWENTY-FIVE THOUSAND FOUR HUNDRED SEVENTY-EIGHT and 50/100 (\$25,478.50) DOLLARS to A. David Hawkins, attorney for the Plaintiff, for attorney's fees and costs, and paid into open Court the sum of FIFTY-FIVE THOUSAND and NO/100 (\$55,000.00) DOLLARS to GAIL M. BRYANT, Administratrix of the Estate of James Iverson Bryant, Deceased, in full settlement and satisfaction of all liability then existing or which might thereafter be asserted against it on account of the death of James Iverson Bryant, as set forth in the Order herein above described.

(4) In a declaratory judgment action brought by Carolina Casualty Insurance Company to determine its liability arising out of the accident alleged in the Motion for Judgment, the United States Court of Appeals for the Fourth Circuit, by Opinion dated August 13, 1986, found that Carolina Casualty had no liability under its policy as issued to H. H. MOORE, JR., TRUCKING COMPANY, INC., on the basis that "Carolina's liability if any arises from its coverage of Moore who is in turn answerable to ABF under the express terms of the trip lease. Carolina's policy with Moore, however, expressly excludes coverage for "liability assumed...under any contract or agreement."

Based upon the above, H. H. MOORE, JR., TRUCKING COMPANY, INC., is liable for the indemnification of Your Defendant ARKANSAS BEST FREIGHT SYSTEM, INC., in the settlement that was effected in

the action for death by wrongful act brought on behalf of the Bryant estate.

WHEREFORE Your Defendant ARKANSAS BEST FREIGHT SYSTEM, INC., respectfully asks for summary judgment on its Cross-Bill against the Defendant H. H. MOORE JR., TRUCKING COMPANY, INC., with an adjudication that H. H. MOORE, JR., TRUCKING COMPANY, INC., is solely responsible for the full settlement and satisfaction of all expenditures made by Your Defendant ARKANSAS BEST FREIGHT SYSTEM, INC., in the compromise settlement with the Bryant estate and litigation of this claim.

ARKANSAS BEST FREIGHT SYSTEM, INC.

By: 
Thomas C. Spencer

Thomas C. Spencer, Counsel for
ARKANSAS BEST FREIGHT SYSTEM, INC.
Spencer & Filson, P.C.
31 West Washington Street
Lexington, Virginia 24450

CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of April, 1991, mailed, postage prepaid a true copy of the foregoing Motion for Summary Judgment to A. David Hawkins, Esquire, Overbey, Overbey and Hawkins, Court House Square, Rustburg, Virginia 24588, Counsel of Record for the Plaintiff; Lacey E. Putney, Esquire, Putney and Putney, 305 Otey, P. O. Box 127, Bedford, Virginia 24523, Counsel of Record for the Defendant, Mary Kathryn Bailess Goff,

Administratrix of the Estate of Calvin Mack Bailess; the Honorable Harry G. Lawson, Judge, Juvenile & Domestic Relations District Court, Court House, Court Street, P. O. Box 672, Appomattox, Virginia 24522, former Counsel of Record for H. H. Moore, Jr., Trucking Company, Inc.

By: Thomas C. Spencer
Thomas C. Spencer

Thomas C. Spencer, Counsel for
ARKANSAS BEST FREIGHT SYSTEM, INC.
Spencer & Filson, P.C.
31 West Washington Street
Lexington, Virginia 24450

April 22 19 91
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process issued. (9:00 A.M.)
Tax \$ - 0 -
Fee \$ - 0 -
Other \$ - 0 -

Barbara R. Hillman
Clerk Circuit Court
Appomattox County, Va. / 34: Sarah P. Miller
Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF APPOMATTOX

GAIL M. BRYANT, Administratrix of,)
the Estate of James Iverson Bryant,)
Deceased,)

Plaintiff)

v.)

ARKANSAS BEST FREIGHT SYSTEM, INC.,)

H.H. MOORE, JR. TRUCKING COMPANY,)
INC.,)

and)

MARY KATHERINE BAILESS GOFF,)
Administratrix of the Estate of)
Calvin Mack Bailess)

Defendants.)

H. H. MOORE, JR.
TRUCKING, INC.'S
MOTION FOR SUMMARY
JUDGMENT
Law No. 2190

COMES NOW H. H. Moore Jr. Trucking, Inc. ("Moore Trucking"), by counsel, pursuant to Rule 3:18 of the Rules of the Supreme Court of Virginia and moves this Court for the entry of Summary Judgment on the Crossbill of Arkansas Best Freight Systems, Inc. ("ABF"), and in support thereof states as follows:

1. That ABF in its Crossbill seeks indemnity pursuant to an express indemnity provision in a trip lease entered into between Moore Trucking and ABF on January 22, 1982.

2. That the validity of this indemnity provision was litigated in a declaratory judgment action filed in the United States District Court for the Western District of Virginia,

LAW OFFICES

GENTRY LOCKE
RAKES & MOORE
ROANOKE, VIRGINIA

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BY Skid DEP. CLERK

Lynchburg Division, and by Order of that Court dated August 7, 1985, the indemnity provision was held to be unenforceable.

3. That the decision of the United States District Court for the Western District of Virginia was appealed to the United States Court of Appeals for the Fourth Circuit and such decision was affirmed.

4. That ABF's Motion for Summary Judgment on its Crossbill for indemnity is barred by the doctrine of res judicata in that the validity of the indemnity provision it seeks to enforce has been held to be invalid by two Courts of competent jurisdiction thereby barring this proceeding.

5. That this action for indemnity is also barred under the hold of Sherwood Trucking, Inc. v. Carolina Casualty Insurance Company, 552 F.2d 568 (4th Cir. 1977) which holds that an insurer may not seek indemnity from its own insured.

WHEREFORE, H. H. Moore, Jr. Trucking Company, Inc. moves this Court for entry of an Order granting Summary Judgment and further requests that this action be dismissed with prejudice from the active docket of this Court.

Respectfully submitted,

H. H. MOORE, JR. TRUCKING COMPANY

By: 
Of Counsel

Phillip V. Anderson
GENTRY LOCKE RAKES & MOORE
800 Crestar Plaza
P.O. Box 1018
Roanoke, VA 24005

LAW OFFICES

GENTRY LOCKE
RAKES & MOORE
ROANOKE, VIRGINIA

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of June
_____, 1991. I served a copy of the foregoing Motion upon
Thomas E. Spencer, Esquire, Spencer & Filson, P.C., 31 West
Washington Street, Lexington, Virginia 24450, counsel for
Arkansas Best Freight System, Inc.



Of Counsel

160/01313-001/001.mot

LAW OFFICES

GENTRY LOCKE
RAKES & MOORE
ROANOKE, VIRGINIA

Lail M. Bryant, Administratrix
of the Estate of James Emerson
Bryant, deceased,
Plaintiff

Law No.

2190

v.

Arkansas Best Freight System, Inc.
H. H. Moore, Jr. Trucking Company, Inc.
and
Mary Catherine Bailess Goff,
Administratrix of the Estate of
Calvin Mack Bailess,
Defendants

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF APPOMATTOX

GAIL M. BRYANT, Administratrix
of the Estate of James Iverson
Bryant, deceased,

Plaintiff,

v.

Law No. 2190

ARKANSAS BEST FREIGHT SYSTEM, INC.,

H. H. MOORE, JR. TRUCKING COMPANY,
INC.,

and

MARY KATHERINE BAILESS GOFF,
Administratrix of the Estate of
Calvin Mack Bailess,

Defendants.

H. H. MOORE, JR. TRUCKING COMPANY, INC.'S MEMORANDUM
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

This matter is before this Court on the Cross Motions for Summary Judgment of the defendants, Arkansas Best Freight System, Inc. ("ABF"), and H. H. Moore, Jr. Trucking Company, Inc. ("Moore Trucking"). This wrongful death action was filed on March 25, 1983 in this Court seeking damages for the death of plaintiff's decedent which occurred on January 23, 1982 as a result of an accident involving a vehicle owned by Moore Trucking and leased to ABF at the time of the accident. Following the initiation of this wrongful death action, ABF filed a Crossbill against Moore Trucking seeking indemnity for all claims and judgments secured against ABF in this action.

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LAW OFFICES
BENTLEY LOOKE
WILLIAMS & MOORE
MEMPHIS, TENNESSEE

On February 16, 1984, Carolina Casualty Insurance Company ("Carolina Casualty"), Moore Trucking's insurer, filed a complaint in the United States District Court for the Western District of Virginia, Lynchburg Division to adjudicate the liability of Moore Trucking to ABF on the Crossbill and also to adjudicate the existence of whether there was any liability coverage on the part of Carolina Casualty for the indemnity claims of ABF.

In addition to ABF, Insurance Company of North America (INA), an additional insurer for ABF, Aetna Insurance Company, the insurer for Moore Trucking, Gail M. Bryant and Moore Trucking were named as defendants in the declaratory judgment proceeding. While the Declaratory Judgment action was pending, the underlying wrongful death action was settled between the plaintiff and ABF for the total consideration of \$80,000. This settlement was court approved on September 7, 1984. The Crossclaim of ABF against Moore Trucking for indemnity was continued by Order of this Court dated September 7, 1984.

On August 7, 1985, a Memorandum Opinion and Order was entered in the Declaratory Judgment action holding that ABF was not entitled to indemnity from Moore Trucking and that Carolina Casualty did not have an obligation to provide liability coverage to Moore Trucking for any claims. (A copy of that Memorandum Opinion and Order is attached as Exhibit 1.) An appeal followed from the decision of the District

Court. On August 13, 1986, the United States Court of Appeals for the Fourth Circuit entered an opinion affirming the judgment of the District Court. (A copy of this opinion is attached hereto as Exhibit 2.) On April 19, 1991, ABF filed its Motion for Summary Judgment seeking to enforce its indemnity provisions against Moore Trucking. Moore Trucking filed its Motion for Summary Judgment on the basis that the decisions of the federal courts bar this indemnity claim on the basis of res judicata. Moore Trucking submits this memorandum in support of its Motion for Summary Judgment and in opposition to the Motion of Summary Judgment of ABF.

STATEMENT OF FACTS

Moore Trucking is a Virginia corporation with its principal place of business in Appomattox County, Virginia and is involved in long haul trucking. At the time the incident in question arose, Moore Trucking was insured by Carolina Casualty and Aetna. Carolina Casualty provided a standard General Liability-Automobile Policy to Moore Trucking which contained an exclusion for liability assumed by the insured under any contract or agreement.

On January 22, 1982, ABF, an I.C.C. certified motor freight carrier, entered into a single trip lease agreement with Moore Trucking, whereby one of Moore's trucks and a driver, Calvin Bailess, was to transport cargo on behalf of ABF from Middletown, Ohio to Kernersville, N.C. The leased vehicle was principally garaged in Virginia. The trip lease

placed Moore Trucking's equipment in the exclusive possession and control of ABF and contained an indemnity provision whereby the lessor, Moore Trucking, was to indemnify the lessee, ABF, from any damages arising from the operation of the leased equipment.

Pursuant to 49 U.S.C. § 10927, all licensed I.C.C. carriers are required to provide a certificate of insurance or other sufficient security to satisfy the I.C.C. that the public will be adequately protected in the case of an accident. ABF had procured such coverage with INA and had filed a certificate of insurance with the I.C.C. so as to allow the issuance of the I.C.C. permit. INA, a Pennsylvania corporation, was licensed to do business in Virginia and at the time INA purported to cover ANY AUTO under its liability policy.

On January 23, 1982, while operating pursuant to the trip lease, a Moore Trucking's vehicle was involved in an accident in West Virginia resulting in the deaths of both Moore Trucking's driver, Bailess, and a passenger, Bryant. Subsequently, Bryant's Estate brought this wrongful death action against ABF, Moore Trucking, and the Bailess Estate in this Court. ABF settled the wrongful death action in the amount of \$80,000 with the Estate of Bryant and now seeks to recover those sums from Moore Trucking under the express indemnity provision of the trip lease.

DISCUSSION OF AUTHORITY

- I. MOORE TRUCKING IS ENTITLED TO SUMMARY JUDGMENT ON THE GROUNDS THAT ABF'S CROSSBILL FOR INDEMNITY IS BARRED BY THE DOCTRINE OF RES JUDICATA.

It is a fundamental proposition of Virginia law that once an issue has been fully and finally litigated by a court of competent jurisdiction between the same parties, those same parties cannot seek to relitigate those issues in a separate action. Flora, Flora & Montague, Inc. v. Saunders, 235 Va. 306 (1988). The requisites for this doctrine merely require that a judgment or decree in the first suit be rendered by a court of competent jurisdiction between the same parties as in the second or their privies, and the matters in controversy must be the same in the former suit as in the latter and there actually have been a determination on the merits. When these requisites concur, the adjudication in the first suit acts as a bar not only to the points actually decided in the first action but to every other point which properly belonged to the particular matter in litigation and which the parties might have brought at that time. Michie's Jurisprudence, Vol. 8, Former Adjudication or Res Judicata, § 2.

In this case, there is absolutely no question but that the parties are the same. H. H. Moore Trucking and ABF were both defendants in the Declaratory Judgment action filed in the U. S. District Court. Both parties had the opportunity to

participate and file any pleadings required. ABF took an active role in the proceeding and filed an appeal which went to the U. S. Court of Appeals for the Fourth Circuit seeking to reverse the decision of the District Court.

Moreover, the controversy before this Court on ABF's Motion for Summary Judgment is precisely the same issue which was actually adjudicated in the Declaratory Judgment action. In ABF's motion the sole basis for indemnity against Moore Trucking is the provision in the trip lease wherein Moore Trucking agreed to indemnify and hold harmless ABF from any claims, demands, judgments, losses, damages and expenses arising from the death or bodily injuries to third persons or the property of third persons resulting from the negligent operation of leased equipment by Moore Trucking or its driver. This was the precise issue that was litigated in the Declaratory Judgment action in the U. S. District Court. In Judge Turk's Memorandum Opinion dated August 7, 1985 and attached hereto as Exhibit 1, part of his decision was directed solely to the validity of the indemnity provision in the trip lease. Relying upon the decision of Sherwood Trucking, Inc. v. Carolina Casualty Insurance Co., 552 F.2d 568 (4th Cir. 1977), Judge Turk held that:

This Court finds Sherwood controlling in this case. Therefore, the indemnity provision is unenforceable against Moore. In that it is unenforceable against Moore, there can be no liability on Carolina or Aetna. For this reason, summary judgment should be entered in favor of the plaintiff, Carolina Casualty Insurance Co. (emphasis added).

This decision was appealed and the judgment of the District Court was affirmed. It is equally well established that an affirmance of a lower court decision renders that judgment res judicata, meaning that it covers not only questions actually raised, but questions that might have been raised. Fed. Proc. Vol. 2, § 3:688, p. 637.

What ABF is attempting to do in its Motion for Summary Judgment on its Crossbill is to relitigate the validity of the indemnity provision of the trip lease which has already been decided on two occasions adverse to them. To permit ABF to relitigate this question again, in essence, provides them with a third bite at the apple. The District Court concluded that the indemnity provision in the trip lease was not valid on the basis of the Sherwood Trucking, supra and this decision was affirmed by the U. S. Court of Appeals. ABF now seeks to relitigate that question once again for the third time. Clearly this is contrary to the policy behind the doctrine of res judicata which is to promote judicial economy and preclude inconsistent results between courts of competent jurisdiction. Accordingly, ABF's Motion for Summary Judgment should be denied, and Moore Trucking's Motion for Summary Judgment should be granted.

II. THE EXPRESS INDEMNITY PROVISION OF THE TRIP
LEASE AGREEMENT IS UNENFORCEABLE BY ABF AGAINST
MOORE.

Notwithstanding the fact that this question has been adjudicated adverse to ABF by two courts of competent jurisdiction, Moore Trucking submits that the express indemnity provision in the trip lease is unenforceable and that Summary Judgment should be granted in favor of Moore Trucking.

The trip lease agreement between Moore and ABF states in paragraph 7 that the "Lessor [Moore] agrees to indemnify and hold Lessee [ABF] harmless . . . from and against any claims, demands, judgments, loss, damages and expenses arising from death or bodily injuries to third persons . . . resulting from negligent operation of leased equipment by Lessor or his driver." The central issue in this case is whether or not this express indemnity may be enforced by ABF against Moore. By virtue of the holding in Sherwood Trucking, Inc., supra, ABF may not obtain indemnity from Moore Trucking as the latter is an additional insured under the INA policy issued to ABF.

Sherwood Trucking, supra, involved a factual situation remarkably similar to this case. In fact the Court of Appeals noted in its opinion that Sherwood Trucking was factually indistinguishable. The lessee, entered into a standard trip lease agreement with John Lawson, Jr. as lessor. Under the agreement, Lawson agreed to lease a truck and provide a driver to Sherwood Trucking to haul freight from Indiana to Virginia.

Carolina Casualty Insurance Company insured Lawson, and Reserve Insurance Company provided coverage for Sherwood. Lawson's vehicle was involved in an accident with another vehicle while operating under the terms of the trip lease. This resulted in the death and serious injury of the driver and passenger of the second vehicle. Actions were filed against Sherwood, Lawson, and Lawson's driver. Reserve defended and ultimately settled the lawsuits. Sherwood then brought an action against Lawson in the U. S. District Court. Carolina Casualty declined to defend the action, and judgment was confessed by Lawson. The District Court entered judgment against Carolina Casualty in the face amount of the complaint.

On appeal, this Court of Appeals held that an insurer "may not in its own name or through any claimed subrogated right it may have in the name of [its insured] claim a duty of indemnity from its insured." Sherwood Trucking, supra at 573. The opinion stated further:

the rule that an insurer who has paid the loss resulting from a peril insured may be subrogated to all the claims which the insured may have against any person by whose negligence the injury was caused does not apply in a case where the injury was caused by the negligence of the insured himself.

Id., at 572 quoting Builders & Manufacturers Mutual Casualty Co. v. Preferred Insurance Co., 118 F.2d 118, 121 (6th Cir. 1941).

The Court reasoned that Lawson, the lessor, was insured under Sherwood Trucking's insurance policy with Reserve and would commonly be called "an additional insured."

Consequently, Reserve could not recover from its own insured, Lawson.

Applying the same reasoning followed in that case, Moore Trucking and its driver would qualify as additional insureds under ABF's policy with INA. This status would preclude ABF or INA from seeking indemnity from Moore Trucking. Moreover, the operation of the Moore Trucking vehicle at the time of the loss was with the express consent of ABF by virtue of the trip lease. The Virginia "omnibus statute" (Va. Code § 38.2-2204) would require INA to extend coverage to Moore, the lessor, as the person responsible, and to its driver, Bailless, as the one actually using the motor vehicle, and ABF has never contended otherwise.

In prior litigation, ABF sought to distinguish Sherwood Trucking, supra on the basis of the identity of the insurer. In Sherwood Trucking, supra, the party seeking indemnity was the actual insurer, Reserve. In this case, however, the insurance policy between INA and ABF included a \$400,000 deductible provision. As a result, ABF was solely responsible for the settlement of \$80,000 wrongful death claim. Thus, ABF, and not INA, is the party claiming indemnity. Based upon this difference, ABF has argued that the reasoning of Sherwood Trucking, supra is inapplicable. This position is incorrect for several reasons.

The first is that the I.C.C. requires insurance certification which ABF provided. This certification does not

reflect the presence of a deductible in the policy with INA. The fact that the insurance contract between ABF and INA carried a deductible does not in any way alter Moore Trucking's status as an additional insured. The presence of the deductible provision merely indicates that ABF agreed with INA to become self-insured to the extent of \$400,000. As a self-insurer, ABF cannot acquire more rights than those of the insurer, INA. See Carolina Casualty Insurance Co. v. Belford Trucking Co., 298 A.2d 288, 121 N.J. Sup. 583 (1972); U. S. Steel Corp. v. Transportation Indemnity Co., 50 Cal. Rptr. 576, 241 Cal. App. 2d 461 (1966); Aetna Casualty & Surety Co. v. Market Insurance Co., 296 S.2d 555 (Fla. App. 1974). A self-insurer has the same duty to insure as an insurer would have. Dixie Farms, Inc. v. Hertz Corp., 343 S.2d 633 (Fla. App. 1977). Thus, as a self-insurer, ABF stands in the exact same position as INA as an insurer. Under Sherwood Trucking, supra, INA would be precluded from seeking, either in its own name or the name of its named insured, indemnity from one of its additional insureds. ABF, as a self-insurer, with the same duties as INA, would likewise be precluded.

The second reason why we believe that the presence of the deductible provision does not alter the Sherwood Trucking analysis is that under the I.C.C. regulations and the phrasing of I.C.C. Form BMC 91, INA is listed as the party financially responsible for all injuries sustained in the operation of a

vehicle under the I.C.C. permit. Moreover, Endorsement 86 of the INA policy provides:

It is understood and agreed that no condition, provision, stipulation or limitation contained in this policy, this endorsement, or any other endorsement thereon, or a violation thereof, shall relieve the company from liability herein described, irrespective of the financial condition, insolvency or bankruptcy of insured.

It is evident from both the I.C.C. regulations and the terms of the insurance policy that INA was the party financially responsible for every dollar of loss incurred. The fact that ABF reached some side agreement with INA to indemnify INA up to \$400,000 is absolutely immaterial to the question of Moore Trucking's liability. The responsible party is INA, the insurer. This contractual agreement between INA and ABF has no effect on INA's liability to any other party. Since INA can claim no right of indemnity through ABF, neither can ABF claim any such right on its own.

CONCLUSION

Moore Trucking moves this Court for Summary Judgment on the grounds that ABF's Crossbill for indemnity under the express provisions of the trip lease is barred by the doctrine of res judicata. The validity of this express indemnity provision has been adjudicated by the U.S. District Court for the Western District of Virginia and decided adversely to ABF. An appeal to the U.S. Court of Appeals for the Fourth Circuit

JAN OFFICES
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RES & MOORE
MOORE VIRGINIA

on that issue resulted in an affirmance of the District Court's decision. This question has been litigated between the same parties on two occasions has been finally decided on the merits by courts of competent jurisdiction. As such, this matter should not be relitigated and should be barred.

Moreover, Moore Trucking moves this Court for entry of Summary Judgment on the grounds that ABF may not seek subrogation from its own insured under the doctrine and principles set forth in Sherwood Trucking v. Carolina Casualty, supra. Accordingly, H. H. Moore, Jr. Trucking Company, Inc. respectfully moves this Court for the entry of an Order granting Summary Judgment in its favor on the Crossbill of ABF and further moves that this action be dismissed with prejudice from the active docket of this Court.

Respectfully submitted,

H. H. MOORE, JR. TRUCKING
COMPANY, INC.

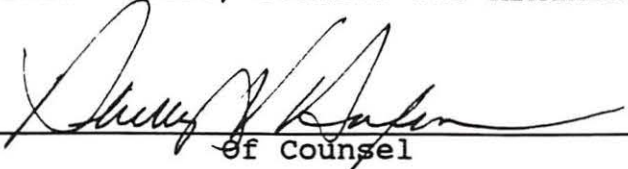
By: 

Of Counsel

Phillip V. Anderson
GENTRY LOCKE RAKES & MOORE
800 Crestar Plaza
P.O. Box 1018
Roanoke, Virginia 24005

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of June,
19__, I served the foregoing memorandum upon Thomas E.
Spencer, Esquire, Spencer & Filson, P.C., 31 West Washington
Street, Lexington, Virginia 24450, counsel for Arkansas Best
Freight System, Inc.



of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

Clerk's Office U.S. Dist. Court
AT LYNCHBURG, VA.

FILED

AUG 7 1985

JOYCE E. WITT, Clerk
By: *Deborah G. Turpin*
Deputy Clerk

CAROLINA CASUALTY INSURANCE
COMPANY,
Plaintiff,

v.

INSURANCE COMPANY OF NORTH
AMERICA,
AETNA INSURANCE COMPANY,
ARKANSAS BEST FREIGHT SYSTEM,
INC.,
GAYLE M. BRYANT, Administratrix
of the Estate of James Iverson
Bryant,
and
H. H. MOORE, JR., TRUCKING
COMPANY, INC.,
Defendants.

CIVIL ACTION NO. 84-0029-L

MEMORANDUM OPINION

By: James C. Turk
Chief U. S. District Judge

This declaratory judgment action is before the court on the motion for summary judgment filed by the plaintiff, Carolina Casualty Insurance Company ("Carolina"). The motion asks this court to rule that Carolina is not ultimately liable for payment of an eighty thousand dollar (\$80,000.00) settlement which has been paid by the defendant, Arkansas Best Freight System, Inc. ("ABF"). The parties have submitted briefs, the court has heard oral argument, and the motion is now ripe for a decision by this court.

FACTS

On January 22, 1982, Calvin Mac Bailess, as agent for H. H. Moore, Jr. Trucking Company, Inc. ("Moore"), entered into a trip lease with ABF which provided that ABF as lessee would have use of a truck owned by Moore, the lessor. Bailess was to be the

driver of the truck. ABF had as its liability insurer Insurance Company of North America ("INA") under a policy which contained a \$400,000.00 deductible. It was INA who provided the certification of insurance which was required to be filed with the Interstate Commerce Commission under 49 U.S.C. § 10927. Moore had two liability insurers, Carolina and Aetna Insurance Company ("Aetna").

On January 23, 1982, while James Iverson Bryant was riding as an unauthorized passenger, the truck was involved in a single vehicle accident which killed both Bailess and Bryant. A wrongful death action was brought by the Bryant estate against ABF, Moore, and the estate of Bailess, in the Circuit Court for the County of Appomattox. That proceeding was resolved by the entry of a settlement order wherein ABF agreed to pay \$80,000.00 to Bryant's estate. It is this \$80,000 settlement which is the subject of this declaratory judgment action.

INDEMNITY PROVISION OF TRIP LEASE

The trip lease between Moore and ABF contained an indemnity provision which stated, "lessor agrees to indemnify and hold lessee harmless . . . from and against claims, demands, judgments, loss, damage and expenses arising from death or bodily injuries to third persons . . . resulting from negligent operation of leased equipment by lessor or his driver . . ." See Trip Lease. Carolina maintains that this provision is unenforceable under Sherwood Trucking, Inc. v. Carolina Casualty Insurance Company, 552 F.2d 568 (4th Cir. 1977), which held that the lessee's insurer cannot, by way of subrogation, assert the

lessee's claim for indemnity against the lessor or the lessor's insurer under the indemnity provisions of a trip lease agreement where, as here, the lessor would qualify as an additional insured under the policy issued by the lessee's carrier. ABF argues that Sherwood is inapplicable because of the \$400,000.00 deductible contained in its policy with INA. This deductible, however, does not prevent the application of Sherwood. ABF, by electing a policy which contains a large deductible, has effectively become a self-insurer for the amount of the deductible and is treated as the "lessee's insurer" for purposes of a Sherwood analysis.

This court finds Sherwood controlling in this case. Therefore, the indemnity provision is unenforceable against Moore. In that it is unenforceable against Moore, there can be no liability on Carolina or Aetna. For this reason, summary judgment should be entered in favor of the plaintiff, Carolina Casualty Insurance Company.

EXCLUSION FOR LIABILITY ASSUMED BY CONTRACT

Even were this court to accept the argument that Sherwood is not controlling, the result would be the same as to Carolina because of the exclusion provision in its policy with Moore. That provision provides that "[t]his insurance does not apply . . . to liability assumed by the insured under any contract or agreement." Despite ABF's contention to the contrary, there is no independent basis for indemnity apart from the contractual provision in the trip lease. Therefore, were that indemnity provision to be enforced, the liability would be "assumed by the insured under [a] contract or agreement," and the exclusion would

become effective to preclude liability on the part of Carolina.¹ For this reason also, summary judgment would be entered in favor of the plaintiff.

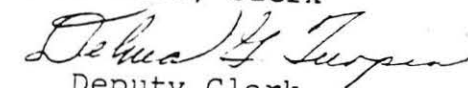
CONCLUSION

In accordance with the holding of Sherwood, there can be no liability on the part of Moore to ABF or INA.² As there can be no liability on the part of Moore, there can be no liability on the part of Carolina or Aetna. Therefore, the plaintiff's Motion for Summary Judgment should be GRANTED. An order consistent with this opinion shall be entered this date.

DATED: This 5th day of August, 1985.


Chief U. S. District Judge

A TRUE COPY, TESTE:
Joyce F. Witt, Clerk

By: 
Deputy Clerk

1. It should be noted that the Aetna policy contained the same exclusion. Therefore, the same reasoning would apply to preclude any liability on the part of Aetna.

2. By virtue of the settlement of the claim of Bryant's estate against Moore and ABF, Moore (and Carolina) would have no further liability to the estate of Bryant, a defendant in this action.

FILED

AUG 7 1985

JOYCE F. WITT, Clerk
By: *Delma G. Turpin*
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

O. B. #40, p. 27

CAROLINA CASUALTY INSURANCE)
COMPANY,)
Plaintiff,)

v.)

INSURANCE COMPANY OF NORTH)
AMERICA,)
AETNA INSURANCE COMPANY,)
ARKANSAS BEST FREIGHT SYSTEM,)
INC.,)
GAYLE M. BRYANT, Administratrix)
of the Estate of James Iverson)
Bryant,)
and)
H. H. MOORE, JR., TRUCKING)
COMPANY, INC.,)
Defendants.)

CIVIL ACTION NO. 84-0029-L

JUDGMENT AND ORDER

By: James C. Turk
Chief U. S. District Judge

In accordance with the Memorandum Opinion filed this day, it
is hereby

ADJUDGED AND ORDERED

that the plaintiff's Motion for Summary Judgment shall be and
hereby is GRANTED, the effect of which is to hold that Carolina
Casualty Insurance Company has no liability for payment of any
part of the eighty thousand dollar (\$80,000.00) settlement.

The Clerk of Court is directed to strike this case from the
court's active docket and to send certified copies of this order
and the accompanying memorandum opinion to all counsel of record.

ENTER: This 5th day of August, 1985.

A TRUE COPY, TESTE:
Joyce F. Witt, Clerk

By: *Delma G. Turpin*
Deputy Clerk

James C. Turk
Chief U. S. District Judge
60

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1909

Carolina Casualty Insurance Company,
a Florida Corporation,

Appellee,

versus

Insurance Company of North America,
and Aetna Insurance Company,

Defendants,

and

Arkansas Best Freight System, Inc.,

Appellant,

andGayle M. Bryant, Administratrix
of the Estate of James Iverson Bryant,
deceased,

Defendants

H. H. Moore, Jr., Trucking
Company, Inc.,

Appellee.

Appeal from the United States District Court for the Western
District of Virginia, at Lynchburg. James C. Turk, District
Judge. (C/A 84-0029)

Argued: January 9, 1986

Decided: August 13, 1986

Before MURNAGHAN and WILKINSON, Circuit Judges, and HAYNSWORTH,
Senior Circuit Judge

Thomas C. Spencer for Appellant; Richard C. Rakes (Philip V.
Anderson; Gentry, Locke, Rakes & Moore on brief) for Appellee.

- 2 -

PER CURIAM:

This is a declaratory judgment action brought by Carolina Casualty Insurance Co. to determine its liability arising out of a trucking accident. The district court found that Carolina had no liability, and we now affirm.

I.

Carolina, along with Aetna Insurance Co., insured H. H. Moore Trucking Co., a Virginia-based long-haul trucking company. This suit arises out of a trip lease agreement Moore entered with Arkansas Best Freight System, Inc. (ABF) in January 1982. ABF, a certified interstate motor freight carrier, was insured by Insurance Company of North America (INA) in compliance with the insurance requirements of the Interstate Commerce Commission. See 49 U.S.C. § 10927.

The trip lease provided that Moore would lease a truck and a driver to ABF to transport ABF's cargo from Ohio to North Carolina. The trip lease also rather carefully allocated the risks of the run between Moore and ABF. It first broadly placed the leased equipment "in the exclusive possession, control, and use of [ABF, for which ABF] assumes full responsibility . . . to the public." The agreement went on to carve out certain exceptions to this general assumption of liability. Most importantly, Moore agreed to "indemnify and hold [ABF] harmless. . .

from and against claims . . . arising from death or bodily injuries to third persons . . . resulting from negligent operation of leased equipment by [Moore] or his driver."

While on ABF's run, Moore's driver, Bailess, took on an unauthorized passenger, Bryant. Bailess' truck overturned in West Virginia and both men were killed. Bryant's estate brought a wrongful death action against ABF, Moore and the Bailess estate in a Virginia state court. ABF cross-claimed for indemnity against both Moore and the Bailess estate under the trip lease and on an allegation of negligence. ABF settled the wrongful death action for \$80,000, paying the entire sum itself because its deductible with INA was \$400,000. ABF's cross-claims have been continued pending our determination of Carolina's responsibilities.

II.

On Carolina's motion for summary judgment, the district court found that Carolina was not liable for any part of ABF's \$80,000 settlement. Carolina's liability, if any, arises from its coverage of Moore, who is in turn answerable to ABF under the express terms of the trip lease. Carolina's policy with Moore, however, expressly excludes coverage for "liability assumed . . . under any contract or agreement." On the basis of this clear exclusion, we agree with the ruling below.

We do not find persuasive ABF's arguments that Moore has a duty to indemnify it, apart from the duty imposed by the trip lease, under the rule announced in United States Fidelity & Guaranty Co. v. Virginia Engineering Co., Inc., 213 F.2d 109 (4th Cir. 1954). In Virginia Engineering a building contractor and a landowner were sued as a result of the negligence of the contractor. A judgment against both was entered which the landowner paid and then deducted from the moneys due the contractor under the construction contract. That contract also provided that the contractor should indemnify the landowner for claims of this type. The contractor then sued its insurer who defended on the ground that the reimbursement was in discharge of a liability assumed by contract and therefore not covered by the applicable policy. Id. at 110.

The district court found for the contractor and we affirmed, holding that the liability "was one imposed by law within the coverage of the policy and not merely one assumed under contract within the meaning of the exclusion clause." Id. at 111-12. This conclusion was based on the contractor's apparent primary liability for injuries resulting from its own negligence. This, we held, was precisely the risk against which the contractor insured, and the fact that the payment was routed through a secondarily liable party, which the contractor had also agreed to indemnify, was irrelevant. Id. at 112.

The instant case is not controlled by Virginia Engineering because, here, Moore had no obligation to indemnify ABF apart from its agreement in the trip lease. Moore and ABF agreed to place primary responsibility for mishaps on ABF's shoulders. Although Moore contracted to indemnify ABF in certain situations, the policy with Carolina clearly excluded contractual assumptions of liability. As in Sherwood Trucking Inc. v. Carolina Casualty Insurance Co., 552 F.2d 568, 572 (4th Cir. 1977), a case which for these purposes is factually indistinguishable from the present one, we can find no other basis for indemnity.

III.

It was intimated at oral argument that Carolina might be liable for having misrepresented the scope of the insurance coverage it gave Moore. Although on the present record we find little merit to such a claim, we do not hereby foreclose the question should it arise in the pending state proceedings. We decide no more than that Carolina is not liable under its policy as issued.

IV.

The judgment below is affirmed.

AFFIRMED.

July 8, 1991

Mr. Thomas C. Spencer
SPENCER & FILSON, P.C.
31 West Washington Street
Lexington, VA 24450

Mr. Phillip V. Anderson
GENTRY, LOCKE, RAKES & MOORE
10 Franklin Rd., S. E.
P. O. Box 1018
Roanoke, Va 24005

RE: MOTION FOR SUMMARY JUDGMENT BY ABF CORP.

Gentlemen:

I have considered the matters put forth by the argument of counsel in light of the contents of the case file, particularly the copies of the orders entered by both the Federal District Court, Judge Turk, and the U. S. Court of Appeals. I have reached the following conclusion:

I find that the issue of right of indemnity by ABF, based upon the contract stated in the Trip Lease Agreement, was clearly before the District Court and dealt with very explicitly in its memorandum opinion. "The Court finds Sherwood controlling in this case," (page 3). The Court found that the deductible agreement did not prevent the application of Sherwood. The opinion of the Court of Appeals affirmed the judgment of Judge Turk in its entirety.

It is my judgment therefore, that the doctrine of res judicata should apply to the Motion for Summary Judgment by ABF, and the Court so holds.

FILED 7/9 1991
9:01 O'CLOCK A.M.
BARBARA WILLIAMS CLERK
BY BRW DEP. CLERK

Thomas C. Spencer,
Phillip V. Anderson
July 8, 1991
Page - 2 -

I will ask Mr. Anderson to prepare an order consistent with this finding and send the same to Mr. Spencer for endorsement.

Yours truly,


Kenneth M. Covington

KMC/fcs

cc: Mrs. Barbara Williams, Clerk
Appomattox Circuit Court
Appomattox, VA 24522

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF APPOMATTOX

GAIL M. BRYANT, Administratrix of,)
the Estate of James Iverson Bryant,)
Deceased,)

Plaintiff)

v.)

ARKANSAS BEST FREIGHT SYSTEM, INC.,)

H.H. MOORE, JR. TRUCKING COMPANY,)
INC.,)

and)

MARY KATHERINE BAILESS GOFF,)
Administratrix of the Estate of)
Calvin Mack Bailess)

Defendants.)

O R D E R

On July 5, 1991, Arkansas Best Freight Systems, Inc. (ABF) and H. H. Moore, Jr. Trucking Company, Inc. (Moore) appeared before this Court, by counsel, on their respective Cross-Motions for Summary Judgment in this matter. Upon consideration of the arguments of counsel and the memoranda filed herein it is hereby ADJUDGED and ORDERED that for the reasons stated in this Court's letter opinion of July 8, 1991 that ABF's Motion for Summary Judgment is DENIED, and it is further ORDERED that Moore's Motion for Summary Judgment shall be GRANTED to which action the defendant ABF objects and excepts.

There appearing nothing further to be done in this matter, it is further ORDERED that this action be DISMISSED WITH PREJUDICE and stricken from the active docket of this

Court. The Clerk is directed forthwith to certify a copy of this Order to all counsel of record.

Enter this 1ST day of AUGUST, 1991.

ENTER:

Kenneth M. Covington
Kenneth M. Covington, Judge

We ask for and consent to the entry of this Order:

GENTRY LOCKE RAKES & MOORE

By:

Phillip H. Moore
Counsel for H.H. Moore, Jr.
Trucking Company, Inc.

Seen and objected to:

SPENCER & FILSON

By:

Thomas C. Filson
Counsel for Arkansas Best Freight
System, Inc.

Recorded in Law Order Bk 16 Pg 292

000/1313-1/005.order

LAW OFFICES

GENTRY LOCKE
RAKES & MOORE
ROANOKE, VIRGINIA

VIRGINIA: IN THE CIRCUIT COURT OF APPOMATTOX COUNTY

GAYLE M. BRYANT, Administratrix
of the Estate of James Iverson Bryant, deceased,

v.

ARKANSAS BEST FREIGHT SYSTEM, Inc. et al,

AT LAW CASE NO. 2190

NOTICE OF APPEAL

Comes now the Defendant and Cross-Complainant, Arkansas Best Freight System, Inc., and files this its Notice of Appeal of that certain Order entered by the Honorable Kenneth M. Covington, Judge, Circuit Court of Appomattox County on the first day of August, 1991, denying this Defendant and Cross-Complainant's Motion for Summary Judgment and granting the Motion for Summary Judgment in favor of H. H. Moore, Jr., Trucking Company, Inc.

Arkansas Best Freight System gives this Notice of Appeal on the grounds that the learned Judge erred in holding that the doctrine of res judicata barred this Defendant and Cross-Complainant's Motion for Summary Judgment.

A copy of the Complaint and Action for Declaratory Judgment, Motion for Summary Judgment, and the Opinion of the United States District Court and the Opinion of the Fourth Circuit Court of Appeals relied on by the trial Judge in granting Summary Judgment are enclosed herewith to be made part of the record herein.

Respectfully Submitted,

ARKANSAS BEST FREIGHT SYSTEM, INC.

By Counsel

RECEIVED AND FILED Aug 27 1991
AT 11:22 O'CLOCK A.M.
BARBARA R. WILLIAMS, CLERK
BY Cn DEP. CLERK

71

Thomas C. Spencer

Thomas C. Spencer
SPENCER & FILSON, P.C.
31 West Washington Street
Lexington, Virginia 24450

CERTIFICATE OF SERVICE

I hereby acknowledge that on the 26th day of August, 1991, a true copy of the foregoing Notice of Appeal was mailed to Philip V. Anderson, Esquire, Gentry, Locke, Rakes & Moore, 10 Franklin Road, S.E., P. O. Box 1018, Roanoke, Virginia 24005, Counsel for H. H. Moore, Jr., Trucking Company, the only other party in interest herein.

Thomas C. Spencer

Thomas C. Spencer

SPENCER & FILSON, P.C.
31 West Washington Street
Lexington, Virginia 24450

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

LYNCHBURG DIVISION

Clerk's Office U. S. Dist. Ct.
AT LYNCHBURG, VA.

FILED

FEB 16 1984

JOYCE F. WITT, Clerk
By: *[Signature]*
Deputy Clerk

CAROLINA CASUALTY INSURANCE
COMPANY, a Florida corporation,

Plaintiff,

v.

INSURANCE COMPANY OF NORTH
AMERICA, a Pennsylvania corporation,
c/o A. R. Bowles, III, R.A.
901 Mutual Building
Richmond, Virginia 23219

AETNA INSURANCE COMPANY, a
Connecticut corporation,
c/o A. R. Bowles, III, R.A.
901 Mutual Building
Richmond, Virginia 23219

ARKANSAS BEST FREIGHT SYSTEM, INC.,
an Arkansas corporation,
c/o Secretary of the Commonwealth
Richmond,
Virginia

GAYLE M. BRYANT, Administratrix
of the Estate of James Iverson Bryant,
deceased,
c/o A. David Hawkins, Esq.
Courthouse Square
Rustburg, Virginia 24588

and

H. H. MOORE, JR. TRUCKING COMPANY,
INC., a Virginia corporation,
c/o Thomas W. Lawson, R.A.
110 Court Street
Appomattox, Virginia 24522

Defendants.

Civil No. 82-1127-2

COMPLAINT
IN ACTION FOR
DECLARATORY JUDGMENT
UNDER RULE 57

RECEIVED AND FILED Aug 28 19 91
AT 11:35 O'CLOCK A.M.
BARBARA R. WILLIAMS, CLERK
BY [Signature] DEP. CLERK

73

L Plaintiff, Carolina Casualty Insurance Company (hereinafter referred
to as Carolina), is a citizen of the st Florida by virtue of its incorporation in

that state. Insurance Company of North America (hereinafter, INA), is a Pennsylvania corporation by virtue of its incorporation in that state. Aetna Insurance Company (hereinafter, Aetna), is a Connecticut corporation by virtue of its incorporation in that state. Arkansas Best Freight System (hereinafter, ABF), is an Arkansas corporation by virtue of its incorporation in that state. H. H. Moore, Jr. Trucking Company, Inc., (hereinafter, Moore), is a Virginia corporation by virtue of its incorporation in this state. Gayle M. Bryant, Administratrix of the Estate of James Iverson Bryant, deceased, is a citizen of the state of Virginia. The amount in controversy, exclusive of interest and costs, exceeds the sum of \$10,000.

2. On January 23, 1982, Bryant's decedent was riding as an unauthorized passenger in a 1977 Kenworth tractor owned by Moore and operated by its employee, Calvin Mack Bailess, when said tractor, which was then hauling freight pursuant to a Trip Lease with ABF, overturned in Mercer County, West Virginia, near the City of Princeton, resulting in the death of both Bryant and Bailess.

3. Subsequently, Gayle M. Bryant qualified as administratrix of Bryant's estate and then filed a wrongful death action in the Circuit Court of Appomattox County against ABF, Moore and the Bailess estate. A copy of the motion for judgment is attached hereto as Exhibit A.

4. ABF was insured by INA for personal injury arising out of its operations.

5. Moore was insured by Carolina under Policy No. GAL 02 41 57 which was in effect at the time of the aforesaid motor vehicle accident. A copy of said policy is attached hereto as Exhibit B.

6. Moore was likewise insured by Aetna under General-Automobile Liability Policy No. CG 18 74 77 for the period August 4, 1981 to August 4, 1982 issued by the A. W. Hargrove, Inc. Agency of Richmond, Virginia.

410-411
7. At the time of the accident in question, Moore was operating a Trip Lease with ABF to deliver a consignment of goods of Armco, Inc. from Middletown, Ohio, to a consignee in Kernersville, North Carolina. A copy of the Trip Lease is attached hereto as Exhibit C.

8. Although ABF, the lessee, by virtue of the specific terms of the Trip Lease and also pursuant to the regulations of the Interstate Commerce Commission under whose certificate it was operating, assumed full responsibility to the public, and the leased tractor and trailer was in its exclusive possession, control, and use, ABF has heretofore refused to negotiate with Bryant's counsel or to take over the defense of this action on behalf of Moore. Instead, ABF has asked Moore to take the responsibility of either negotiating a settlement or paying any judgment the Bryant estate might recover and, indeed, ABF has disclaimed any responsibility whatever to the Bryant estate.

9. Carolina's policy issued to Moore contains an exclusion for liability assumed under any contract or agreement.

10. Carolina understands that Moore contracted for insurance to cover liability assumed by contract through A. W. Hargrove Insurance Agency which issued the policy provided by Aetna.

11. Carolina's policy contains a Passenger Hazard exclusion and the motion for judgment filed by Bryant (Exhibit A) alleged that Bryant's decedent was a passenger at the time of the accident in question.

WHEREFORE, Carolina respectfully asks this Court to require INA and Aetna to file a complete copy of all policies, endorsements, riders, or any other attachments issued to ABF and Moore; that ABF file a complete copy of all insurance papers or other documents in any way pertaining to its obligations under ICC regulations at the time of this accident; that this Court construe the rights and obligations of all parties to this action, and that this Court adjudicate that Carolina has no obligation to the Bryant estate or to ABF under the facts of this case.

Carolina would respectfully ask further that a speedy hearing be ordered and that this matter be advanced on the calendar.

CAROLINA CASUALTY INSURANCE
COMPANY

By: _____


Of Counsel

Richard C. Rakes
GENTRY, LOCKE, RAKES & MOORE
800 Colonial Plaza
P. O. Box 1018
Roanoke, Virginia 24005

Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

LYNCHBURG DIVISION

CAROLINA CASUALTY INSURANCE COMPANY,)

Plaintiff,)

v.)

INSURANCE COMPANY OF NORTH AMERICA,)
et al,)

Defendants)

Civil No. 84-0029-L

MOTION FOR
SUMMARY JUDGMENT

Comes now the plaintiff, Carolina Casualty Insurance Company, by counsel, and moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. In support of same, Carolina files herewith an affidavit from H. H. Moore, Jr. Trucking Company, Inc. that the 1977 Kenworth Tractor owned by Moore and occupied by James Iverson Bryant, deceased, was principally garaged in Virginia at the time of the accident resulting in the death of Bryant.

In further support of its motion for summary judgment, Carolina attaches hereto a certified copy of the order entered on September 7, 1984, in the action of Gale M. Bryant, Administratrix of the Estate of James Iverson Bryant, deceased v. Arkansas Best Freight System, Inc., et al. pending in the Circuit Court of Appomattox County, Virginia, which reflects the court-approved settlement of the action for wrongful death brought by the personal representative of the said James Iverson Bryant, deceased.

The pleadings, the insurance policies filed in this action and the affidavit attached hereto show that there is no genuine issue as to any material fact, and that the plaintiff is entitled to summary judgment as a matter of law. This record reflects that:

1. James Iverson Bryant was not an employee of H. H. Moore, Jr. Trucking Company and hence was a member of the public entitled to protection under the Interstate Commerce Act and ICC regulations.

2. Arkansas Best Freight System, Inc. (ABF) was lessee, and H. H. Moore, Jr. Trucking Company, Inc. (Moore) was lessor under the ICC regulations at the time of Bryant's death.

3. Insurance Company of North America (INA) had in force policy number 1017 insuring ABF and had made the appropriate filings with the Interstate Commerce Commission.

4. The claim for wrongful death of Bryant was asserted against ABF and Moore based upon the alleged negligence of Moore's employee and driver, Bailless, and was settled for the sum of \$80,000.

5. ABF, as lessee, would be primarily responsible to Bryant, a member of the public, under the ICC regulations.

6. Under §38.1-381(a) of the Code of Virginia, as amended, the INA policy described above would have to afford coverage to Bailless and Moore because the Moore Tractor was principally garaged in Virginia and INA was licensed to do business in Virginia at the time of the accident.

7. Under the holding in Sherwood Trucking, Inc. v. Carolina Casualty Insurance Company, 552 F.2d 558 (C.A. 4th, 1977), INA cannot enforce the indemnity and hold harmless provisions of the trip lease between ABF and Moore.

Based upon the above, ABF, as lessee, and INA, its insurer, are solely liable for the defense of the Bryant claim and the settlement that was effected on the action for death by wrongful act brought on behalf of the Bryant estate.

WHEREFORE, the plaintiff, Carolina, respectfully asks for summary judgment against ABF and INA with an adjudication that as between Carolina, Moore and Aetna, on the one hand, and ABF and INA on the other, that ABF and INA are solely responsible for the defense and payment of all claims asserted on behalf of the Bryant estate.

CAROLINA CASUALTY INSURANCE
COMPANY

By: Richard C. Rakes

Of Counsel

Richard C. Rakes
GENTRY, LOCKE, RAKES & MOORE
800 Colonial Plaza
P. O. Box 1018
Roanoke, Virginia 24005

Counsel for Carolina Casualty
Insurance Company

CERTIFICATE

This is to certify that on October 22, 1984, I mailed a true copy of the foregoing Motion for Summary Judgment to Thomas C. Spencer, Esq. and James M. Phemister, Esq., 31 W. Washington Street, Lexington, Virginia 24450, counsel of record for Arkansas Best Freight System, Inc. and Insurance Company of North America; to Harry G. Lawson, Esq., P. O. Box 807, Appomattox, Virginia 24522, counsel of record for H. H. Moore, Jr. Trucking Company, Inc.; and to John R. Alford, Esq., Caskie, Frost, Hobbs, Thompson, Knakal & Alford, P. O. Box 1160, 2306 Atherholt Road, Lynchburg, Virginia 24505, counsel for Aetna Insurance Company.

Richard C. Rakes
Of Counsel

RECEIVED AND FILED Dec 28 1991
AT 11:25 O'CLOCK 4 M.
BARBARA R. WILLIAMS, CLERK
BY m DEP. CLERK

FILED

AUG 7 1985

JOYCE F. WITT, Clerk
By: *Delma F. Lutz*
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

Div. O. B. #40, p. 27

CAROLINA CASUALTY INSURANCE)
COMPANY,)
Plaintiff,)

v.)

INSURANCE COMPANY OF NORTH)
AMERICA,)
AETNA INSURANCE COMPANY,)
ARKANSAS BEST FREIGHT SYSTEM,)
INC.,)
GAYLE M. BRYANT, Administratrix)
of the Estate of James Iverson)
Bryant,)
and)
H. H. MOORE, JR., TRUCKING)
COMPANY, INC.,)
Defendants.)

CIVIL ACTION NO. 84-0029-L

JUDGMENT AND ORDER

By: James C. Turk
Chief U. S. District Judge

In accordance with the Memorandum Opinion filed this day, it
is hereby

ADJUDGED AND ORDERED

that the plaintiff's Motion for Summary Judgment shall be and
hereby is GRANTED, the effect of which is to hold that Carolina
Casualty Insurance Company has no liability for payment of any
part of the eighty thousand dollar (\$80,000.00) settlement.

The Clerk of Court is directed to strike this case from the
court's active docket and to send certified copies of this order
and the accompanying memorandum opinion to all counsel of record.

ENTER: This 5th day of August, 1985.

A TRUE COPY, TESTE:
Joyce F. Witt, Clerk

By: *Delma F. Lutz*
Deputy Clerk

80

James C. Turk
Chief U. S. District Judge

FILED

AUG 7 1985

JOYCE E. WITT, Clerk
By: *Deborah L. Turpin*
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

CAROLINA CASUALTY INSURANCE)
COMPANY,)
Plaintiff,)

v.)

INSURANCE COMPANY OF NORTH)
AMERICA,)
AETNA INSURANCE COMPANY,)
ARKANSAS BEST FREIGHT SYSTEM,)
INC.,)
GAYLE M. BRYANT, Administratrix)
of the Estate of James Iverson)
Bryant,)
and)
H. H. MOORE, JR., TRUCKING)
COMPANY, INC.,)
Defendants.)

CIVIL ACTION NO. 84-0029-L

MEMORANDUM OPINION

By: James C. Turk
Chief U. S. District Judge

This declaratory judgment action is before the court on the motion for summary judgment filed by the plaintiff, Carolina Casualty Insurance Company ("Carolina"). The motion asks this court to rule that Carolina is not ultimately liable for payment of an eighty thousand dollar (\$80,000.00) settlement which has been paid by the defendant, Arkansas Best Freight System, Inc. ("ABF"). The parties have submitted briefs, the court has heard oral argument, and the motion is now ripe for a decision by this court.

FACTS

On January 22, 1982, Calvin Mac Bailess, as agent for H. H. Moore, Jr. Trucking Company, Inc. ("Moore"), entered into a trip lease with ABF which provided that ABF as lessee would have use of a truck owned by Moore, the lessor. Bailess was to be the

driver of the truck. ABF had as its liability insurer Insurance Company of North America ("INA") under a policy which contained a \$400,000.00 deductible. It was INA who provided the certification of insurance which was required to be filed with the Interstate Commerce Commission under 49 U.S.C. § 10927. Moore had two liability insurers, Carolina and Aetna Insurance Company ("Aetna").

On January 23, 1982, while James Iverson Bryant was riding as an unauthorized passenger, the truck was involved in a single vehicle accident which killed both Bailess and Bryant. A wrongful death action was brought by the Bryant estate against ABF, Moore, and the estate of Bailess, in the Circuit Court for the County of Appomattox. That proceeding was resolved by the entry of a settlement order wherein ABF agreed to pay \$80,000.00 to Bryant's estate. It is this \$80,000 settlement which is the subject of this declaratory judgment action.

INDEMNITY PROVISION OF TRIP LEASE

The trip lease between Moore and ABF contained an indemnity provision which stated, "lessor agrees to indemnify and hold lessee harmless . . . from and against claims, demands, judgments, loss, damage and expenses arising from death or bodily injuries to third persons . . . resulting from negligent operation of leased equipment by lessor or his driver . . ." See Trip Lease. Carolina maintains that this provision is unenforceable under Sherwood Trucking, Inc. v. Carolina Casualty Insurance Company, 552 F.2d 568 (4th Cir. 1977), which held that the lessee's insurer cannot, by way of subrogation, assert the

lessee's claim for indemnity against the lessor or the lessor's insurer under the indemnity provisions of a trip lease agreement where, as here, the lessor would qualify as an additional insured under the policy issued by the lessee's carrier. ABF argues that Sherwood is inapplicable because of the \$400,000.00 deductible contained in its policy with INA. This deductible, however, does not prevent the application of Sherwood. ABF, by electing a policy which contains a large deductible, has effectively become a self-insurer for the amount of the deductible and is treated as the "lessee's insurer" for purposes of a Sherwood analysis.

This court finds Sherwood controlling in this case. Therefore, the indemnity provision is unenforceable against Moore. In that it is unenforceable against Moore, there can be no liability on Carolina or Aetna. For this reason, summary judgment should be entered in favor of the plaintiff, Carolina Casualty Insurance Company.

EXCLUSION FOR LIABILITY ASSUMED BY CONTRACT

Even were this court to accept the argument that Sherwood is not controlling, the result would be the same as to Carolina because of the exclusion provision in its policy with Moore. That provision provides that "[t]his insurance does not apply . . . to liability assumed by the insured under any contract or agreement." Despite ABF's contention to the contrary, there is no independent basis for indemnity apart from the contractual provision in the trip lease. Therefore, were that indemnity provision to be enforced, the liability would be "assumed by the insured under [a] contract or agreement," and the exclusion would

become effective to preclude liability on the part of Carolina.¹ For this reason also, summary judgment would be entered in favor of the plaintiff.

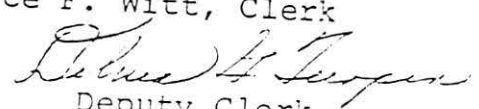
CONCLUSION

In accordance with the holding of Sherwood, there can be no liability on the part of Moore to ABF or INA.² As there can be no liability on the part of Moore, there can be no liability on the part of Carolina or Aetna. Therefore, the plaintiff's Motion for Summary Judgment should be GRANTED. An order consistent with this opinion shall be entered this date.

DATED: This 5th day of August, 1985.


Chief U. S. District Judge

A TRUE COPY, TESTE:
Joyce F. Witt, Clerk

By: 
Deputy Clerk

1. It should be noted that the Aetna policy contained the same exclusion. Therefore, the same reasoning would apply to preclude any liability on the part of Aetna.

2. By virtue of the settlement of the claim of Bryant's estate against Moore and ABF, Moore (and Carolina) would have no further liability to the estate of Bryant, a defendant in this action.

84 RECEIVED AND FILED Aug 28 1985
AT 11:55 O'CLOCK A.M.
BARBARA R. WILLIAMS, CLERK
BY n DEP. CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1909

Carolina Casualty Insurance Company,
a Florida Corporation,

Appellee,

versus

Insurance Company of North America,
and Aetna Insurance Company,

Defendants,

and

Arkansas Best Freight System, Inc.,

Appellant,

and

Gayle M. Bryant, Administratrix
of the Estate of James Iverson Bryant,
deceased,

Defendants

H. H. Moore, Jr., Trucking
Company, Inc.,

Appellee.

Appeal from the United States District Court for the Western
District of Virginia, at Lynchburg. James C. Turk, District
Judge. (C/A 84-0029)

Argued: January 9, 1986

Decided: August 13, 1986

RECEIVED AND FILED Aug 28 19 91
AT 11:35 O'CLOCK A M.
BARBARA R. WILLIAMS, CLERK
BY TW DEP. CLERK

Before MURNAGHAN and WILKINSON, Circuit Judges, and HAYNSWORTH,
Senior Circuit Judge

Thomas C. Spencer for Appellant; Richard C. Rakes (Philip V.
Anderson; Gentry, Locke, Rakes & Moore on brief) for Appellee.

PER CURIAM:

This is a declaratory judgment action brought by Carolina Casualty Insurance Co. to determine its liability arising out of a trucking accident. The district court found that Carolina had no liability, and we now affirm.

I.

Carolina, along with Aetna Insurance Co., insured H. H. Moore Trucking Co., a Virginia-based long-haul trucking company. This suit arises out of a trip lease agreement Moore entered with Arkansas Best Freight System, Inc. (ABF) in January 1982. ABF, a certified interstate motor freight carrier, was insured by Insurance Company of North America (INA) in compliance with the insurance requirements of the Interstate Commerce Commission. See 49 U.S.C. § 10927.

The trip lease provided that Moore would lease a truck and a driver to ABF to transport ABF's cargo from Ohio to North Carolina. The trip lease also rather carefully allocated the risks of the run between Moore and ABF. It first broadly placed the leased equipment "in the exclusive possession, control, and use of [ABF, for which ABF] assumes full responsibility . . . to the public." The agreement went on to carve out certain exceptions to this general assumption of liability. Most importantly, Moore agreed to "indemnify and hold [ABF] harmless. . .

from and against claims . . . arising from death or bodily injuries to third persons . . . resulting from negligent operation of leased equipment by [Moore] or his driver."

While on ABF's run, Moore's driver, Bailess, took on an unauthorized passenger, Bryant. Bailess' truck overturned in West Virginia and both men were killed. Bryant's estate brought a wrongful death action against ABF, Moore and the Bailess estate in a Virginia state court. ABF cross-claimed for indemnity against both Moore and the Bailess estate under the trip lease and on an allegation of negligence. ABF settled the wrongful death action for \$80,000, paying the entire sum itself because its deductible with INA was \$400,000. ABF's cross-claims have been continued pending our determination of Carolina's responsibilities.

II.

On Carolina's motion for summary judgment, the district court found that Carolina was not liable for any part of ABF's \$80,000 settlement. Carolina's liability, if any, arises from its coverage of Moore, who is in turn answerable to ABF under the express terms of the trip lease. Carolina's policy with Moore, however, expressly excludes coverage for "liability assumed . . . under any contract or agreement." On the basis of this clear exclusion, we agree with the ruling below.

We do not find persuasive ABF's arguments that Moore has a duty to indemnify it, apart from the duty imposed by the trip lease, under the rule announced in United States Fidelity & Guaranty Co. v. Virginia Engineering Co., Inc., 213 F.2d 109 (4th Cir. 1954). In Virginia Engineering a building contractor and a landowner were sued as a result of the negligence of the contractor. A judgment against both was entered which the landowner paid and then deducted from the moneys due the contractor under the construction contract. That contract also provided that the contractor should indemnify the landowner for claims of this type. The contractor then sued its insurer who defended on the ground that the reimbursement was in discharge of a liability assumed by contract and therefore not covered by the applicable policy. Id. at 110.

The district court found for the contractor and we affirmed, holding that the liability "was one imposed by law within the coverage of the policy and not merely one assumed under contract within the meaning of the exclusion clause." Id. at 111-12. This conclusion was based on the contractor's apparent primary liability for injuries resulting from its own negligence. This, we held, was precisely the risk against which the contractor insured, and the fact that the payment was routed through a secondarily liable party, which the contractor had also agreed to indemnify, was irrelevant. Id. at 112.

The instant case is not controlled by Virginia Engineering because, here, Moore had no obligation to indemnify ABF apart from its agreement in the trip lease. Moore and ABF agreed to place primary responsibility for mishaps on ABF's shoulders. Although Moore contracted to indemnify ABF in certain situations, the policy with Carolina clearly excluded contractual assumptions of liability. As in Sherwood Trucking Inc. v. Carolina Casualty Insurance Co., 552 F.2d 568, 572 (4th Cir. 1977), a case which for these purposes is factually indistinguishable from the present one, we can find no other basis for indemnity.

III.

It was intimated at oral argument that Carolina might be liable for having misrepresented the scope of the insurance coverage it gave Moore. Although on the present record we find little merit to such a claim, we do not hereby foreclose the question should it arise in the pending state proceedings. We decide no more than that Carolina is not liable under its policy as issued.

IV.

The judgment below is affirmed.

AFFIRMED.

VIRGINIA: IN THE CIRCUIT COURT OF APPOMATTOX COUNTY

GAYLE M. BRYANT, Administratrix
of the Estate of James Iverson Bryant, deceased,

v.

ARKANSAS BEST FREIGHT SYSTEM, Inc. et al,

AT LAW CASE NO. 2190

STIPULATION OF RECORD ON APPEAL

Comes now, Arkansas Best Freight System, Inc., and H. H. Moore, Jr. Trucking Company, Inc., by counsel, and hereby stipulate that the Motion for Declaratory Judgment and the Motion for Summary Judgment filed by Carolina Casualty Insurance Company in the United States District Court, the Opinion of the United States District Court and the Opinion of the United States Court of Appeals for the Fourth Circuit in that certain cause styled Carolina Casualty Insurance Company v. Insurance Company of North America, et al, are to be filed and included in the record on appeal of this cause.

ARKANSAS BEST FREIGHT SYSTEM, INC.

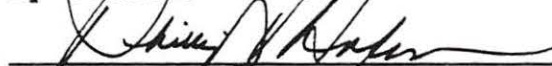
By Counsel



Thomas C. Spencer
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AND:

H. H. Moore, Jr., Trucking Company, Inc.
By Counsel



Phillip V. Anderson, Esquire
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Roanoke, Virginia 24005
Counsel for H. H. Moore, Jr. Trucking Company, Inc.

RECEIVED AND FILED Sept. 4 19 91
AT 9:03 O'CLOCK A.M.
BARBARA R. WILLIAMS, CLERK
BY cn DEP. CLERK

VIRGINIA: IN THE SUPREME COURT OF VIRGINIA

GAIL M. BRYANT, Administratrix of
the Estate of James Iverson Bryant,
Deceased,

Plaintiff,

v.

AT LAW CASE NO. 2190

ARKANSAS BEST FREIGHT SYSTEM, INC.

H. H. MOORE, JR. TRUCKING COMPANY, INC.

and

MARY KATHERINE BAILESS GOFF,
Administratrix of the Estate of
Calvin Mack Bailess
Defendants.

ASSIGNMENTS OF ERROR

Comes now Arkansas Best Freight System, Inc. pursuant to Rule 5:17 and files this Assignments of Error as part of its Petition for Appeal in this cause.

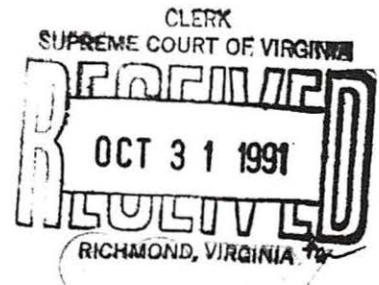
Arkansas Best Freight System, Inc, the Appellant herein hereby assigns as error the ruling of the Court that the Declaratory Judgment obtained by Carolina Casualty Insurance Company against Arkansas Best Freight System, Inc. in the Federal Court is res adjudicata as to Arkansas Best Freight System, Inc's, Cross-Claim against H. H. Moore, Jr. Trucking Company, Inc. in this cause.

Respectfully Submitted,

Arkansas Best Freight System, Inc.

By Counsel

By: Thomas C. Spencer
Thomas C. Spencer
SPENCER & FILSON, P.C.
31 West Washington Street
Lexington, Virginia 24450
Counsel for Arkansas Best Freight System, Inc.



CERTIFICATE PURSUANT TO RULE 5:26D

The undersigned, Thomas C. Spencer, hereby certifies that a copy of the foregoing Assignments of Error has been served on Phillip V. Anderson, Esquire, Gentry, Locke, Rakes & Moore, 10 Franklin Road, S.E., P. O. Box 1018, Roanoke, Virginia 24005, counsel for the Appellee, H. H. Moore, Jr. Trucking Company, Inc. the only other party in interest herein, by mailing a true copy thereof postage, pre-paid to the foregoing address this 29th day of October, 1991, in compliance with Rule 5:17(D).


Thomas C. Spencer

SPENCER & FILSON, P.C.
31 West Washington Street
Lexington, Virginia 24450

