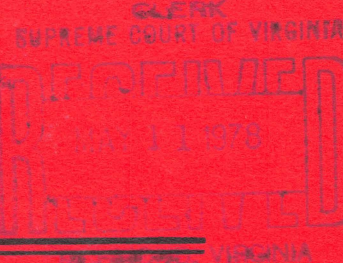


220 Va 397



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 771567

NORTH AMERICAN LIFE AND CASUALTY COMPANY,

.....Appellant

v.

KETTI M. TYREE,

.....Appellee

JOINT APPENDIX

John J. Wicker, Jr., Esq.
E. Brodnax Haskins, Esq.
WICKER, HASKINS & HUTCHENS
Suite 706-Mutual Building
Richmond, Virginia 23219

Floyd C. Bagley, Esq.
Post Office Box 69
Dumfries, Virginia 22026

Counsel for Appellant

Daniel H. Borinsky, Esq.
Robert J. Zelnick, Esq.
NAGEOTTE, BORINSKY & ZELNICK
14908 Jefferson Davis Hwy.
Woodbridge, Virginia

Counsel for Appellee

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MOTION FOR JUDGMENT

COMES NOW the plaintiff, by counsel, and as and for her Motion for Judgment, respectfully represents to the court as follows:

(1) That G. David Tyree, Jr., the insured in the hereafter described life insurance policy resided at the date of his death and at the date of the issuance of the said policy in Prince William County, therefore, pursuant to 8-38 (3) of the Code of Virginia, venue lies with this court.

(2) On March 1, 1975, the defendant issued group life insurance policy number 4084-479 insuring the life of, among others, G. David Tyree, Jr.

(3) On May 1, 1975, after the aforesaid G. David Tyree, Jr. made request for a conversion policy, the defendant issued conversion policy number L-1126840 in consideration of the sum of \$148.60 premium paid by the decedent, G. David Tyree, Jr.

(4) Both of the aforesaid policies named the plaintiff as beneficiary in the event of the death of the said G. David Tyree, Jr.

(5) Under the terms of the aforesaid policies defendant promised to pay the sum of \$10,000.00 to plaintiff upon due proof of the death of G. David Tyree, Jr. during the term of the policy.

(6) On May 29, 1975 while the said policy L-1126840 was in full force and effect, the insured died, which death rendered the defendant liable to pay to plaintiff, as beneficiary, the sum of \$10,000.00.

(7) On June 6, 1975 plaintiff gave defendant due notice and proof of the death of the decedent and performed all other terms and conditions precedent to establish her entitlement to the said \$10,000.00 and plaintiff has demanded payment of the sum of \$10,000.00 due and unpaid, but the defendant has refused and still refuses to pay that sum or any part thereof.

WHEREFORE, your plaintiff prays that the court award the plaintiff the sum of Ten Thousand and No/100 Dollars (\$10,000.00), plus interest from the date of the death of G. David Tyree, Jr., May 29, 1975, and her costs

expended herein.

KETTI M. TYREE

By Counsel

DANIEL H. BORINSKY

Nageotte, Borinsky & Zelnick

Attorneys at Law

14908 Jefferson Davis Highway

Woodbridge, Virginia 22191

Counsel for Plaintiff

GROUND OF DEFENSE

Comes now the defendant, North American Life and Casualty Company, a Minnesota Corporation, by counsel, and for its Grounds of Defense states the following:

I. The defendant admits the allegations of paragraphs (1), (2), (3) and (4) of the plaintiff's Motion for Judgment;

II. Responding to paragraph (5) of the plaintiff's Motion for Judgment, the defendant admits that said policies were in the amount of TEN THOUSAND DOLLARS (\$10,000.00) and that the plaintiff was named therein as beneficiary thereof. However, the defendant denies that said policies were valid, because the named insured was not eligible for coverage in accordance with the plain provisions of the policy, to-wit: that the named insured was not a "full time employee" of a member of the insured group nor in "active service at his customary place of employment";

III. Responding to paragraph (6), the defendant admits that the named insured died on May 29, 1975, but denies that there was any valid insurance policy issued by this defendant in effect at that time;

IV. The defendant admits the receipt of notice and proof of the death of the decedent, but denies that the proof of death entitled the plaintiff to any payment under the policies that had been issued to the named insured because said named insured was not eligible for such insurance due to the fact that

he was not a "full time employee" of any member of the insured group, and was not in "active service" and was not otherwise eligible for such insurance.

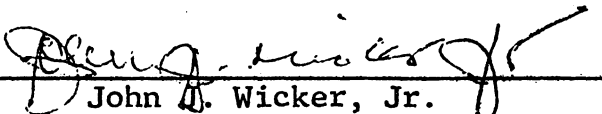
V. When said policies were issued, the plaintiff's decedent (named insured) was receiving payments from other insurers on the basis of total disability.

VI. Accordingly, defendant denies that it is liable to the plaintiff in this action or is obligated to make any payment whatever to the plaintiff, and therefore asks that this action be dismissed.

VII. The defendant reserves the right to file such other and further defensive pleadings as they may be advised hereafter to be appropriate.

NORTH AMERICAN LIFE AND CASUALTY COMPANY

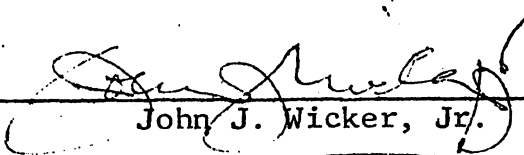
By


John J. Wicker, Jr.

John J. Wicker, Jr., Esquire
John J. Wicker, Jr. & Associates
706 Mutual Building
Richmond, VA 23219

CERTIFICATE

I hereby certify that a true copy of the foregoing "Grounds of Defense" has been mailed to Daniel H. Borinsky, 14908 Jefferson Davis Highway, Woodbridge, Virginia 22191, counsel for plaintiff, on this 28th day of January, 1976.


John J. Wicker, Jr.

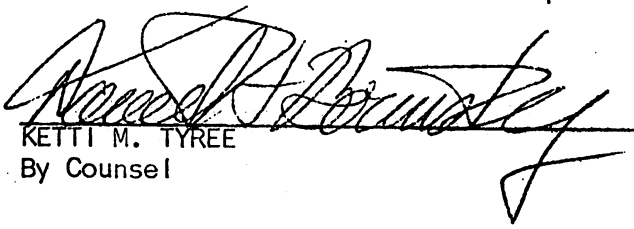
REQUEST FOR ADMISSIONS

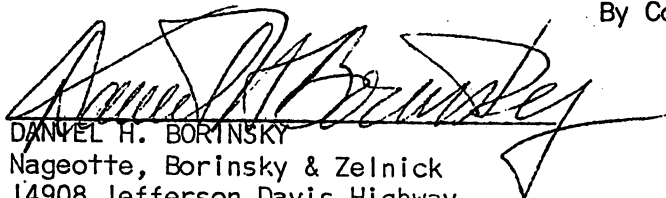
COMES NOW the Plaintiff, by counsel, and pursuant to Rule 4:11 of the Rules of the Supreme Court of Virginia and requests the Defendant to admit the truth of the genuineness of the documents referred hereafter.

1. ^{1st time} The insurance policy attached hereto and made a part hereof, marked as Exhibit "A", is a complete, true and accurate copy of insurance policy #L-1126840, issued by the Defendant to George David Tyree, Jr., and is the same insurance policy referred to in paragraph three of the plaintiff's Motion For Judgment.herein.

2. That the group insurance policy, attached hereto and made a part hereof, identified as Exhibit "B" is a complete true and accurate copy of the group life insurance policy #4084-479 issued by the defendant and is the same policy referred to in paragraph two of the plaintiff's Motion For Judgment herein.

3. That there are no other insurance policies, agreements, or other documents which modify the terms of the hereinabove described insurance policies.


KETTI M. TYREE
By Counsel


DANIEL H. BORINSKY
Nageotte, Borinsky & Zelnick
14908 Jefferson Davis Highway
Woodbridge, Virginia
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of November, 1976, mailed, postage prepaid, a copy of the foregoing Request For Admissions to John J. Wicker, Jr. and E. Brodnax Haskins, Wicker, Haskins & Hutchens, Attorneys at Law, Suite 706, Mutual Building, Richmond, Virginia, and Floyd C. Bagley, P.O. Box 68, Dumfries, Virginia Counsel for Defendant.

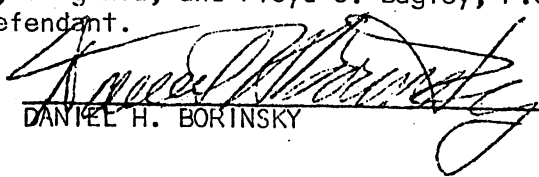

DANIEL H. BORINSKY

EXHIBIT # "A"



NORTH AMERICAN *Life and Casualty Company*

A STOCK COMPANY • HOME OFFICE • MINNEAPOLIS, MINNESOTA 55403

Agrees to Pay

to the Beneficiary the Sum Insured upon receipt of due proof of the Insured's death. The Policy is issued in consideration of the application and the payment of the premiums.

The Policy Schedule indicates the Supplemental Benefits, if any, and contains dates and amounts referred to herein. The printed or written matter supplied by the Company on the following pages is also a part of this Policy.

L. Liepert
Countersigned

John H. Howe
Vice President and Secretary

Harold C. Bernick
President

Not valid unless countersigned by
authorized Company Representative.

WHOLE LIFE POLICY

Proceeds Payable at Death—Premiums Payable for Life
Nonparticipating

Life 3124 (11-66)

conditions as this Policy.

the Table will be furnished on request.

POLICY SCHEDULE

FORM NO.	BENEFITS	ANNUAL PREMIUM	YEARS PAYABLE
3124	THE BASE POLICY	\$145.30	FUR LIFE

SUPPLEMENTAL BENEFITS

NONE

LIFE 3100 (11-66) 3101 3102 4112-31 LS-350

INSURED	G DAVID TYREE JR	AGE 31	POLICY NUMBER L-1126840
OWNER	THE INSURED		PREMIUM CLASS STANDARD
			POLICY DATE MAY 1, 1975
SUM INSURED	\$10,000.00	RECEIVED CLAIM DEPT.	ISSUE DATE APR. 21, 1975
<p>JUN 11 1975</p> <p>NORTH AMERICAN LIFE AND CASUALTY CO.</p> <p>PREMIUM \$145.30 PAYABLE EVERY 12 MONTHS FROM POLICY DATE FOR YEARS PAYABLE OR UNTIL PRIOR DEATH OF THE INSURED.</p>			

Policy apply to North American Life & Casualty Company, Minneapolis, Minnesota, for a policy of Life Insurance
 accordance with the provisions of: Group Policy No. 64084-47 Certificate No. 4330 or Employees' Policy
 insuring my life as an Employee of Magette, Types & Business

1a. Name (Print in full.)

G. David Tyree, Jr.

1b. Residence

Street and No. or R. F. D. 12416 Hatchway Ct
 Town Woodbridge County A. Wm State VA

1c. Business Address

Street and No. or R. F. D. 14908 Jeff Davis Hwy
 Town Woodbridge VA State VA

1d. Date of Birth

Month April Day 9 Year 1943 Age at Last Birthday 31

1e. Place of Birth

City Memphis, Tenn. State Tenn.

2a. On what date was employ-
ment terminated with above
Company?

Month 3 Day 31 Year 75

2b. Occupation when employment terminated. Give exact duties in full

Attorney

2c. Present occupation. Give exact duties in full

none

2d. Name of present employer

n/a

2e. If unemployed, what are your intentions regarding future employment

none presently

3. Have you made or do you contemplate making any aircraft flights or ascensions? If so, give full details.

no

4a. Plan of Policy desired

Whole Life

4b. Amount

\$ 10,000

4c. Premium Payable

☒ Annually ☐ Quarterly

☐ Semi-annually ☐ Monthly

Mark with 'X' which desired

5a. Address for Premium No-
tices.

☐ Business ☒ Residence

5b. Do you desire premium loan privilege
to be Automatic?

Yes ☒ No ☐

6a. Beneficiary

Kelli M. Tyree

6b. Relationship of bene-
ficiary

wife

6c. Date of birth of beneficiary.

Month	Day	Year	Age
<u>Aug</u>	<u>10</u>	<u>1945</u>	<u>29</u>

6d. Address of beneficiary

12416 Hatchway Ct
Woodbridge, Va 22192

6e. Do you reserve the right to change the beneficiary.

Yes ☒ No ☐

7a. Mail Policy to

☐ Business ☒ Residence

7b. Amount of Premium remitted with this
Application

\$ 100.90

Certificate

I hereby surrender said ~~Certificate Policy~~ (Cross out One) and in consideration of the issuance by North American Life and Casualty Company, Minneapolis, Minnesota, of the policy herein applied for, I do hereby relinquish all rights to privileges or benefits under said Group Policy or Employees' Policy, and do hereby release said North American Life and Casualty Company, its successors and assigns, from all liability under said Group Policy or Employees' Policy. I hereby declare that the statements and answers as written or printed herein are full, complete and true, whether written by my own hand or otherwise, and agree that every such statement and answer is material to the risk.

Dated at Woodbridge, Va this 3rd day of April 1975.

Witness:

[Signature]

G. David Tyree, Jr.

(Signature of Applicant for Insurance)

(Write name in full)

ENDORSEMENT MODIFYING "CASH LOAN" AND "AUTOMATIC PREMIUM LOAN" PROVISIONS

The provisions in this Policy entitled "Cash Loan" and "Automatic Premium Loan" are hereby deleted and the following substituted therefor:

Cash Loan. After this Policy has a cash value and while it is in force other than as extended term insurance, the Company will lend, on the sole security of this Policy properly assigned, any amount which does not exceed the cash value as of the date to which premiums have been paid, or as of the next policy anniversary date, if earlier, or if no further premiums are payable. From the amount of such loan there shall be deducted (1) interest in advance at the rate of 5.7% per annum on such loan to the next policy anniversary and (2) any existing indebtedness. Thereafter interest in advance at the same rate shall be payable annually at the beginning of each policy year and if not paid when due, shall be added to the existing indebtedness and shall bear interest at the same rate.

Any loan may be repaid in whole or in part while this Policy is in force, unless meanwhile a non-forfeiture benefit shall have become effective. If the total indebtedness equals or exceeds the cash value at any time, this Policy shall

terminate 31 days after a notice has been mailed to the last known address of the Owner and of any Assignee of Record.

Automatic Premium Loan. Upon written request prior to the expiration of the grace period of any unpaid premium, the Company will automatically charge as a loan against this Policy the amount which, after deduction of interest at the rate of 5.7% per annum to the next anniversary of this Policy, will be sufficient to pay any unpaid premium, provided that such loan plus other indebtedness does not exceed the cash value at the next premium due date. If such loan plus any other indebtedness exceeds the cash value, a loan will be made for that fraction of the premium which will maintain this Policy in force to the date on which the total indebtedness equals the cash value. This provision may be revoked at the Owner's written request.

Any loan under this provision will be subject to the terms and conditions stated under "Cash Loan".

This endorsement is attached to and made a part of this Policy.

NORTH AMERICAN LIFE AND CASUALTY COMPANY



Secretary


Countersigned

CONTROL OF POLICY

Ownership. The Insured shall be the Owner of this Policy, unless otherwise provided. With the exception of any benefit payable to the Beneficiary, the Owner, subject to the rights of any assignee, shall have all rights, privileges and benefits contained in this Policy.

Beneficiary. The Beneficiary shall be as designated in the application of this Policy unless otherwise provided. Any primary Beneficiary shall have an interest superior to any contingent Beneficiary. The interest of any Beneficiary who dies before the Insured or in a common disaster with the Insured shall terminate at the death of any such Beneficiary. If no other Beneficiary is living at the death of the Insured, the proceeds will then be paid to the then Owner of this Policy, if living, otherwise to the executor or administrator of the Owner's Estate.

The right to change the Beneficiary in this Policy has been reserved to the Owner unless otherwise provided in a

written statement filed with the Company at its Home Office. Subject to the rights of any assignee or irrevocable Beneficiary on record with the Company, a new Beneficiary may be designated by filing at the Home Office of the Company a written request in a form satisfactory to the Company, and signed by the Owner. A change of Beneficiary will take effect when it has been recorded at the Home Office of the Company; but once recorded, whether the Insured is living or not, the change of Beneficiary shall relate back and take effect as of its date of execution, except with respect to any payment made, or action taken, by the Company before the recording.

Assignment. An assignment of this Policy shall not be binding until the Home Office of the Company has received and has recorded a written instrument to that effect. The Company assumes no responsibility for the validity or sufficiency of an assignment.

GENERAL PROVISIONS

The Entire Contract. This Policy includes all pages and any Supplements and the application, a copy of which is attached, and this constitutes the Entire Contract. In the absence of fraud, all statements made by the Insured shall be deemed representations and not warranties and no such statement shall be used in defense of a claim under the Policy unless it is contained in the written application and a copy of the application is attached hereto when the Policy is issued.

Only the President, a Vice-President, the Treasurer, or the Secretary of the Company shall have the power on behalf of the Company to modify or waive any of the provisions of this Policy, and then only in writing.

Payments By The Company. All benefits under this Policy are payable at the Home Office in Minneapolis, Minnesota. At the time of such payment the Company may require the surrender of this Policy. Any indebtedness or premium due and unpaid will be deducted from such payment. On any Policy providing for them, the Company may defer the granting of a Cash Surrender Value or of a Cash Loan, except to pay premiums on policies of this Company, for the period permitted by law but not exceeding 6 months after receipt of the application therefor.

Incontestability. This Policy shall be incontestable after it has been in force during the lifetime of the Insured for a period of 2 years from its Date of Issue, except for:

- (1) the nonpayment of premium;
- (2) any provisions relating to benefits in event of total and permanent disability;
- (3) any provisions relating to additional insurance benefits in event of death by accidental means.

Suicide. If, within 2 years from the Date of Issue, the death of the Insured occurs by suicide, while sane or insane, the liability of the Company hereunder shall be limited to the return of an amount equal to the premiums paid, less any indebtedness to the Company on account of or secured by this Policy.

Policy Months and Policy Years. Policy months, years and anniversaries shall be determined from the Policy Date.

Indebtedness. The term indebtedness as used herein shall refer to indebtedness secured by this Policy.

SETTLEMENT OPTIONS

Instead of having the proceeds payable in one sum in the event of death or, with the consent of the Company, in the event of any other final settlement, the Owner may elect one of the Options by written notice to the Company at any time before the occurrence of the event upon which the proceeds become payable. If no election has been made by the Owner, the Payee may make an election by written notice within 6 months after such event of death or, with the consent of the Company, within 2 months after final proceeds otherwise become payable. These Options are available only if payments are to be made to the person whose life is insured or to a living primary Beneficiary and then only if each payment provided for is at least \$20.00. These Options are not available if payments would be made to an executor, administrator, trustee, corporation, partnership, association or assignee.

Option 1—Proceeds At Interest. Interest payments at the rate of 2½ per cent per year to be made by the Company on any proceeds held on deposit.

Option 2—Payments for a Definite Period. The proceeds will be paid in equal monthly installments for the number of years selected as set forth in the Table.

Option 3—Life Annuity with Guaranty for Minimum Period. The Company will pay equal monthly installments

during the life of the Payee, but at least for the minimum period shown in the Table. The amount of each monthly payment per \$1,000 of proceeds depends on the age and sex of the Payee when the first payment is made and on the guaranteed period chosen. If the Payee dies within the guaranteed period, the discounted value of the remaining guaranteed payments, computed on the basis of interest at the rate of 2½ per cent per annum, compounded annually, will be paid by the Company as a final payment.

Option 4—Payments of Designated Amount. The proceeds will be paid in installments of selected amount with payments totalling not less than 5 per cent of the proceeds each year. Payments will be made until the proceeds, with interest credited at the rate of 2½ per cent per annum, are exhausted.

Option 5—Life Annuity with Cash Refund. The Company will pay equal monthly installments during the life of the Payee, and upon the death of the Payee after installments have commenced, the Company will pay in one sum any excess of the amount of the proceeds applied under this Option over the total payments made under this Option. The amount of each monthly payment per \$1,000 of proceeds depends on the age and sex of the Payee when the first payment is made.

Monthly Payments Per \$1,000 of Proceeds											
APPLIED UNDER OPTION 2		APPLIED UNDER OPTIONS 3 AND 5									
Designated Period	Monthly Installment	Age of Payee Nearest Birthday When First Payment Is Made		OPTION 3		OPTION 5	Age of Payee Nearest Birthday When First Payment Is Made		OPTION 3		OPTION 5
		Male	Female	10 Years Minimum	20 Years Minimum		Male	Female	10 Years Minimum	20 Years Minimum	
1 yr.	\$84.28										
2 yrs.	42.66										
3 "	28.79										
4 "	21.86										
5 "	17.70										
6 "	14.93										
7 "	12.95										
8 "	11.47										
9 "	10.32										
10 "	9.39										
11 "	8.64										
12 "	8.02										
13 "	7.49										
14 "	7.03										
15 "	6.64										
16 "	6.30										
17 "	6.00										
18 "	5.73										
19 "	5.49										
20 "	5.27										
21 "	5.08										
22 "	4.90										
23 "	4.74										
24 "	4.60										
25 "	4.46										
26 "	4.34										
27 "	4.22										
28 "	4.12										
29 "	4.02										
30 "	3.93										
		Male	Female				Male	Female			
		11 & under	11 & under	\$2.63	\$2.61	\$2.59	46	51	\$4.09	\$3.90	\$3.80
		12	12	2.64	2.63	2.60	47	52	4.17	3.95	3.86
		13	13	2.66	2.65	2.62	48	53	4.25	4.01	3.92
		14	14	2.67	2.66	2.63	49	54	4.33	4.07	3.98
		15	15	2.69	2.68	2.65	50	55	4.42	4.12	4.04
		10 & under									
		11	16	2.71	2.70	2.67	51	56	4.50	4.18	4.11
		12	17	2.73	2.71	2.68	52	57	4.60	4.24	4.18
		13	18	2.74	2.73	2.70	53	58	4.69	4.30	4.25
		14	19	2.76	2.75	2.72	54	59	4.79	4.36	4.33
		15	20	2.78	2.77	2.74	55	60	4.90	4.41	4.40
		16	21	2.81	2.79	2.76	56	61	5.01	4.47	4.49
		17	22	2.83	2.81	2.78	57	62	5.12	4.53	4.57
		18	23	2.85	2.84	2.80	58	63	5.23	4.59	4.66
		19	24	2.88	2.86	2.82	59	64	5.35	4.64	4.75
		20	25	2.90	2.88	2.84	60	65	5.48	4.70	4.85
		21	26	2.93	2.91	2.87	61	66	5.61	4.75	4.95
		22	27	2.95	2.93	2.89	62	67	5.74	4.80	5.05
		23	28	2.98	2.96	2.92	63	68	5.87	4.85	5.16
		24	29	3.01	2.99	2.94	64	69	6.01	4.90	5.27
		25	30	3.04	3.02	2.97	65	70	6.16	4.94	5.39
		26	31	3.08	3.05	3.00	66	71	6.30	4.98	5.52
		27	32	3.11	3.08	3.02	67	72	6.45	5.02	5.65
		28	33	3.14	3.11	3.05	68	73	6.60	5.05	5.78
		29	34	3.18	3.15	3.08	69	74	6.76	5.09	5.92
		30	35	3.22	3.18	3.11	70	75	6.91	5.12	6.07
		31	36	3.26	3.22	3.15	71	76	7.07	5.14	6.23
		32	37	3.30	3.25	3.18	72	77	7.23	5.17	6.39
		33	38	3.34	3.29	3.22	73	78	7.38	5.19	6.56
		34	39	3.39	3.33	3.25	74	79	7.54	5.20	6.74
		35	40	3.43	3.37	3.29	75	80	7.69	5.22	6.92
		36	41	3.48	3.41	3.33	76	81	7.84	5.23	7.12
		37	42	3.53	3.45	3.37	77	82	7.98	5.24	7.33
		38	43	3.59	3.50	3.41	78	83	8.13	5.25	7.55
		39	44	3.64	3.54	3.45	79	84	8.26	5.26	7.78
		40	45	3.70	3.59	3.50	80	85 & over	8.39	5.26	8.02
		41	46	3.76	3.64	3.54	81		8.51	5.26	8.27
		42	47	3.82	3.69	3.59	82		8.63	5.26	8.54
		43	48	3.88	3.74	3.64	83		8.73	5.26	8.83
		44	49	3.95	3.79	3.69	84		8.83	5.26	9.12
		45	50	4.02	3.84	3.74	85 & over		8.92	5.26	9.43

If the Owner elects Option 3 or 5 to become operative automatically for the Beneficiary, the amount of payment per \$1,000 of proceeds applied under such Option will be increased to that shown in the Table for a Payee of the

same sex but 3 years older than such Payee.

Any moneys unpaid at the death of a Payee will be paid to the estate of such Payee unless otherwise provided.

PREMIUMS AND REINSTATEMENT

Payment of Premiums. All premiums are payable on or before their due dates at the Home Office, or to an authorized agent, in exchange for an official receipt signed by the Treasurer and countersigned by such agent.

Premiums may be paid at annual, semiannual, quarterly or monthly intervals at the rates of the Company in effect on the Policy Date. Intervals of payments shall be measured in months from the Policy Date and each premium after the first is due on the expiration of the period for which the preceding premium was paid. On any due date the interval of payment may be changed, but the Company may refuse to permit a change to a shorter interval of payment if the amount of premium for such shorter interval is less than that then acceptable by the Company.

Grace Period. A grace period of 31 days will be allowed for the payment of every premium after the first. This Policy shall continue in force during the grace period. If the Insured dies during the grace period, the unpaid premium

shall be deducted from the proceeds of this Policy.

Age Adjustment. If there has been any error or inaccuracy in stating the age of the Insured, the amount payable hereunder shall be that which the premium paid would have purchased at the correct age, according to the Company's published rates at Date of Issue.

Reinstatement. If this Policy shall lapse because of default in the payment of any premium, it may, upon properly signed written request to the Company, be reinstated at any time during the lifetime of the Insured within 5 years of the date of such default upon the production of evidence of insurability, including good health, satisfactory to the Company and the payment of all due and unpaid premiums with interest at 6 per cent per annum, compounded annually, to date of reinstatement. Any indebtedness at the date of default, together with interest thereon at 6 per cent per annum, compounded annually, shall be repaid in cash or, if not in excess of the Loan Value at date of reinstatement, continued as an indebtedness against this Policy.

LOANS

Cash Loan. After this Policy has a cash value and while it is in force other than as extended term insurance, the Company will lend, on the sole security of this Policy properly assigned, any amount which does not exceed the cash value as of the date to which premiums have been paid, or as of the next policy anniversary date, if earlier, or if no further premiums are payable. From the amount of such loan there shall be deducted (1) interest in advance at the rate of 6 per cent per annum on such loan to the next policy anniversary and (2) any existing indebtedness. Thereafter interest in advance at the same rate shall be payable annually at the beginning of each policy year and if not paid when due, shall be added to the existing indebtedness and shall bear interest at the same rate.

Any loan may be repaid in whole or in part while this Policy is in force, unless meanwhile a non-forfeiture benefit shall have become effective. If the total indebtedness equals or exceeds the cash value at any time, this Policy shall terminate

31 days after a notice has been mailed to the last known address of the Owner and of any Assignee of Record.

Automatic Premium Loan. Upon written request prior to the expiration of the grace period of any unpaid premium, the Company will automatically charge as a loan against this Policy the amount which, after deduction of interest at the rate of 6 per cent per annum to the next anniversary of this Policy, will be sufficient to pay any unpaid premium, provided that such loan plus other indebtedness does not exceed the cash value at the next premium due date. If such loan plus any other indebtedness exceeds the cash value, a loan will be made for that fraction of the premium which will maintain this Policy in force to the date on which the total indebtedness equals the cash value. This provision may be revoked at the Owner's written request.

Any loan under this provision will be subject to the terms and conditions stated under "Cash Loan."

POLICY CHANGE

With the consent of the Company this Policy may be exchanged for a corresponding policy on another plan of insurance or a policy of lesser amount. The exchange will

be subject to such conditions and payment, if any, as the Company may require.

End of Policy Year	Cash Value	Paid Up Ins.	Extended Insurance* Yrs. Days	Cash Value	Paid Up Ins.	Extended Insurance* Yrs. Days	Cash Value	Paid Up Ins.	Extended Insurance* Yrs. Days	Cash Value	Paid Up Ins.	Extended Insurance* Yrs. Days	Cash Value	Paid Up Ins.	Extended Insurance* Yrs. Days	End of Policy Year
	ISSUE AGE 30			ISSUE AGE 31			ISSUE AGE 32			ISSUE AGE 33			ISSUE AGE 34			
1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
3	6	21	2	7	24	2	8	26	2	9	28	2	11	34	2	3
4	18	60	5	20	65	5	22	69	5	23	70	5	25	74	5	4
5	31	100	8	33	103	8	35	106	8	37	109	8	40	115	8	5
6	44	137	10	46	140	10	49	144	10	52	149	9	55	153	9	6
7	57	173	12	60	177	11	63	180	11	67	186	11	70	189	11	7
8	71	209	13	74	212	13	78	217	12	82	222	12	85	223	12	8
9	85	243	14	89	247	14	93	251	13	97	255	13	101	258	12	9
10	99	275	15	103	278	14	108	284	14	113	289	14	117	291	13	10
11	113	305	15	118	310	15	123	314	15	129	321	14	134	324	14	11
12	128	336	16	134	342	15	139	345	15	145	351	15	150	353	14	12
13	143	365	16	149	370	16	155	375	15	161	379	15	167	383	14	13
14	159	395	17	165	399	16	171	403	16	178	408	15	185	413	15	14
15	174	421	17	181	426	16	188	431	16	195	435	15	202	439	15	15
16	190	447	17	197	452	16	205	458	16	212	461	15	220	467	15	16
17	206	472	17	214	478	16	222	483	16	229	486	15	237	490	15	17
18	223	498	17	231	502	16	239	507	16	247	511	15	255	514	15	18
19	239	520	17	248	526	16	256	529	16	265	534	15	272	537	15	19
20	256	543	17	265	548	16	274	553	16	283	557	15	292	561	15	20
At Age 65	518	788	13	513	780	13	507	771	13	501	762	12	494	751	12	At Age 65
Non-Forfeiture Factor	13.867			14.405			14.973			15.573			16.208			Non-Forfeiture Factor
	ISSUE AGE 35			ISSUE AGE 36			ISSUE AGE 37			ISSUE AGE 38			ISSUE AGE 39			
1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
3	12	36	2	13	38	2	14	39	2	15	41	2	17	45	2	3
4	27	78	5	28	78	5	30	81	5	32	84	5	34	87	5	4
5	42	117	7	44	119	7	46	121	7	49	125	7	51	127	6	5
6	57	154	9	60	158	9	63	161	8	66	164	8	69	167	8	6
7	73	192	10	76	194	10	80	199	10	83	201	9	87	205	9	7
8	89	228	11	93	231	11	97	235	10	101	238	10	105	241	10	8
9	105	261	12	110	266	12	114	269	11	119	273	11	123	275	10	9
10	122	295	13	127	299	12	132	303	12	137	306	11	142	309	11	10
11	139	327	13	144	330	13	150	335	12	155	337	12	161	342	11	11
12	156	358	14	162	362	13	168	366	13	174	369	12	180	372	12	12
13	174	389	14	180	392	13	186	394	13	193	399	12	199	402	12	13
14	191	416	14	198	420	14	205	424	13	212	428	13	219	431	12	14
15	209	443	14	216	447	14	224	452	13	231	455	13	238	457	12	15
16	227	469	14	235	474	14	242	476	13	250	480	13	258	484	12	16
17	245	494	14	253	498	14	262	504	13	270	507	13	278	510	12	17
18	264	520	14	272	523	14	281	527	13	289	530	13	298	534	12	18
19	282	542	14	291	546	14	300	550	13	309	554	13	318	558	12	19
20	301	565	14	310	569	13	319	572	13	329	577	12	338	580	12	20
At Age 65	488	742	12	481	732	12	473	719	11	465	707	11	456	694	11	At Age 65
Non-Forfeiture Factor	16.879			17.588			18.337			19.128			19.962			Non-Forfeiture Factor
	ISSUE AGE 40			ISSUE AGE 41			ISSUE AGE 42			ISSUE AGE 43			ISSUE AGE 44			
1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
2	1	3	0	1	3	0	2	5	0	3	8	0	3	8	0	2
3	18	46	2	19	48	2	20	49	2	22	52	2	23	53	2	3
4	35	87	4	37	90	4	39	92	4	41	94	4	43	96	4	4
5	53	129	6	56	132	6	58	133	6	61	137	5	64	140	5	5
6	72	170	7	75	172	7	78	174	7	81	177	7	84	178	6	6
7	90	207	8	94	210	8	98	213	8	101	214	7	105	217	7	7
8	109	244	9	113	246	9	117	248	9	122	253	8	126	254	8	8
9	128	279	10	133	282	10	138	286	9	143	289	9	147	290	8	9
10	147	312	10	153	317	10	158	319	10	163	321	9	169	325	9	10
11	167	345	11	172	347	10	178	351	10	184	354	10	190	357	9	11
12	186	375	11	193	380	11	199	383	10	206	387	10	212	389	9	12
13	206	406	11	213	409	11	220	413	10	227	416	10	234	420	10	13
14	226	424	12	233	437	11	241	442	11	248	445	10	256	449	10	14
15	246	462	12	254	466	11	262	470	11	270	473	10	277	475	10	15
16	266	488	12	274	491	11	283	496	11	291	499	10	299	502	10	16
17	287	513	12	295	517	11	304	522	11	312	524	10	321	528	10	17
18	307	538	12	316	542	11	325	546	11	334	549	10	343	553	10	18
19	327	561	12	336	564	11	346	569	11	355	572	10	364	575	10	19
20	347	583	11	357	587	11	367	592	10	376	594	10	386	598	10	20
At Age 65	448	681	11	438	666	10	428	651	10	418	636	10	407	619	9	At Age 65
Non-Forfeiture Factor	20.842			21.769			22.748			23.781			24.873			Non-Forfeiture Factor

NORTH AMERICAN LIFE and CASUALTY Co.
Life 4112 EX25 (11-66)

*Extended Insurance is not available if the Policy is in a Special Premium Class.

TABLE OF NON-FORFEITURE VALUES

End of Policy Year	Cash Value	Paid Up Ins.	Extended Insurance* Yrs. Days	Cash Value	Paid Up Ins.	Extended Insurance* Yrs. Days	Cash Value	Paid Up Ins.	Extended Insurance* Yrs. Days	Cash Value	Paid Up Ins.	Extended Insurance* Yrs. Days	Cash Value	Paid Up Ins.	Extended Insurance* Yrs. Days	End of Policy Year
	ISSUE AGE 45			ISSUE AGE 46			ISSUE AGE 47			ISSUE AGE 48			ISSUE AGE 49			
1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
2	4	10	0	4	9	0	5	11	0	6	13	0	6	13	0	2
3	24	54	2	26	57	2	27	58	2	28	58	2	30	61	2	3
4	45	98	4	47	100	4	49	102	3	51	103	3	53	105	3	4
5	66	140	5	69	143	5	72	146	5	74	146	4	77	148	4	5
6	88	182	6	91	184	6	94	185	5	98	189	5	101	190	5	6
7	109	220	7	113	223	7	117	225	6	121	227	6	125	230	6	7
8	131	258	8	135	260	7	140	263	7	144	264	6	149	267	6	8
9	153	294	8	158	297	8	163	299	7	168	301	7	173	304	7	9
10	175	329	8	180	330	8	186	334	8	192	337	7	198	340	7	10
11	197	361	9	203	364	8	209	367	8	215	369	8	222	373	7	11
12	219	393	9	226	396	9	232	398	8	239	402	8	246	405	7	12
13	241	423	9	248	426	9	255	428	8	263	433	8	270	435	8	13
14	263	451	9	271	455	9	279	459	8	286	461	8	294	465	8	14
15	285	479	9	294	484	9	302	487	8	310	490	8	318	493	8	15
16	308	507	9	316	509	9	324	512	8	333	516	8	341	519	8	16
17	330	532	9	338	534	9	347	538	8	356	542	8	364	544	8	17
18	352	556	9	361	560	9	370	563	8	379	566	8	387	568	8	18
19	374	580	9	383	583	9	392	586	8	401	589	8	410	592	8	19
20	395	601	9	405	605	9	414	608	8	423	610	8	432	613	8	20
At Age 65	395	601	9	383	583	9	370	563	8	356	542	8	341	519	8	At Age 65
Non-Forfeiture Factor	26.028			27.249			28.541			29.909			31.357			Non-Forfeiture Factor
	ISSUE AGE 50			ISSUE AGE 51			ISSUE AGE 52			ISSUE AGE 53			ISSUE AGE 54			
1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
2	7	15	0	7	14	0	8	16	0	8	16	0	9	17	0	2
3	31	61	2	32	62	2	34	64	1	35	65	1	36	65	1	3
4	55	106	3	57	107	3	59	109	3	62	112	2	64	113	2	4
5	80	151	4	83	153	4	85	153	3	88	155	3	91	156	3	5
6	104	191	5	108	194	4	111	195	4	115	198	4	119	200	4	6
7	129	232	5	133	233	5	137	235	5	142	239	5	146	240	4	7
8	154	270	6	159	273	6	164	276	5	168	277	5	173	279	5	8
9	179	307	6	184	309	6	189	311	6	195	315	5	200	316	5	9
10	203	341	7	209	344	6	215	347	6	221	349	6	227	352	5	10
11	228	375	7	235	379	7	241	381	6	247	383	6	254	387	6	11
12	253	408	7	260	411	7	267	414	6	273	415	6	280	418	6	12
13	277	438	7	285	442	7	292	444	6	299	447	6	306	449	6	13
14	302	468	7	309	470	7	317	474	7	324	476	6	331	478	6	14
15	326	496	7	334	497	7	341	501	7	349	504	6	356	506	6	15
16	350	523	7	358	526	7	366	528	7	373	530	6	381	533	6	16
17	373	548	7	381	550	7	389	552	7	397	555	6	404	556	6	17
18	396	571	7	404	574	7	412	576	7	420	578	6	428	581	6	18
19	418	593	7	427	597	7	435	599	7	443	601	6	451	603	6	19
20	440	615	7	449	618	7	457	620	6	465	622	6	473	624	6	20
At Age 65	326	496	7	309	470	7	292	444	6	273	415	6	254	387	6	At Age 65
Non-Forfeiture Factor	32.891			34.516			36.238			38.065			40.005			Non-Forfeiture Factor
	ISSUE AGE 55			ISSUE AGE 56			ISSUE AGE 57			ISSUE AGE 58			ISSUE AGE 59			
1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
2	11	20	0	12	22	0	14	24	0	16	27	0	17	28	0	2
3	39	69	1	41	71	1	44	74	1	46	76	1	49	79	1	3
4	67	115	2	70	118	2	73	120	2	77	124	2	80	127	2	4
5	95	160	3	99	163	3	103	166	3	107	169	3	111	172	2	5
6	123	203	4	128	207	3	132	209	3	137	213	3	142	216	3	6
7	151	244	4	156	247	4	162	251	4	167	254	3	172	257	3	7
8	179	283	4	185	287	4	190	289	4	196	293	4	202	297	4	8
9	207	321	5	213	324	5	219	327	4	225	330	4	231	334	4	9
10	234	356	5	241	360	5	247	363	4	254	367	4	260	369	4	10
11	261	390	5	268	394	5	275	397	5	281	399	4	288	403	4	11
12	288	423	5	295	426	5	302	429	5	308	431	5	315	434	4	12
13	314	453	5	321	456	5	328	459	5	335	461	5	342	464	4	13
14	339	481	6	347	485	5	354	487	5	361	490	5	368	492	4	14
15	364	509	6	372	512	5	379	515	5	387	518	5	394	520	5	15
16	389	536	6	396	537	5	404	541	5	412	544	5	420	547	5	16
17	413	560	6	420	562	5	428	565	5	437	569	5	445	572	4	17
18	436	583	6	444	586	5	453	590	5	461	593	5	470	597	4	18
19	459	606	6	468	609	5	476	612	5	485	616	5	494	619	4	19
20	482	628	5	491	631	5	500	635	5	508	637	5	517	641	4	20
At Age 65	234	356	5	213	324	5	190	289	4	167	254	3	142	216	3	At Age 65
Non-Forfeiture Factor	41.969			44.052			46.262			48.605			51.092			Non-Forfeiture Factor

NON-FORFEITURE BENEFITS

Cash Surrender Value. The Owner may surrender this Policy at any time for its Cash Surrender Value, which will be the cash value under the Policy less any indebtedness. Values at interim points in a policy year will be calculated with due allowance for fractional premiums paid and time elapsed since the last anniversary, provided, however, that the cash value within 60 days of the due date of an unpaid premium shall be the same as on such due date.

Any paid-up insurance or extended term insurance under which this Policy is continued may be surrendered at any time for an amount equal to the net single premium at the attained age of the Insured for the remaining benefits under such insurance, less any indebtedness, provided; however, that within 30 days after any policy anniversary such amount shall be not less than the amount on such anniversary.

Paid-up Non-forfeiture Benefits. After this Policy has a value, if any premium remains unpaid at the end of its grace period, this Policy will be continued in force from the due date of such premium as paid-up insurance without supplemental benefits as follows:

EXTENDED TERM INSURANCE. Unless this Policy is in a Special Premium Class as set forth in the Policy Schedule, it will be continued as paid-up extended term insurance for the Sum Insured less any indebtedness, provided, however, that the Owner shall have the right, by written notice to the Company during the lifetime of the Insured and before the expiration of 60 days after the due date of the unpaid premium, to elect reduced paid-up life insurance, as provided below, in lieu of extended term insurance.

REDUCED PAID-UP LIFE INSURANCE. If this Policy is in a Special Premium Class as set forth in the Policy Schedule, it will be continued as paid-up life insurance for a reduced amount payable at the same time and subject to the same conditions as this Policy.

The period of extended term insurance or the amount of reduced paid-up life insurance will be such as the Cash Surrender Value will purchase when applied as a net single premium at the then attained age of the Insured.

Basis of Values. Non-forfeiture Values for this Policy are based on the Commissioners' 1958 Standard Ordinary Mortality Table with interest at 3½% assuming deaths occur at the end of policy years and taking into account that this Policy is issued on the basis of age last birthday, except that the net single premiums for extended term insurance are based on the Commissioners' 1958 Extended Term Insurance Table.

The cash value at the end of any policy year is equal to the excess, if any, of the then present value of future benefits over the then present value of the Non-forfeiture Factors shown in the Table of Non-forfeiture Values applied to the remaining policy years for which premiums are payable, taking the result to the higher dollar. These values are greater than or equal to those required by the laws of the state in which this Policy is delivered and a detailed statement of the method of computation of the values has been filed with the insurance supervisory official of such state.

Table of Non-forfeiture Values. Cash Values, Paid-up Insurance Values, and Non-forfeiture Factors shown in the Table of Non-forfeiture Values are for each \$1,000 of Sum Insured under this Policy; Extended Term Insurance values are the same for any Sum Insured. All values in this Table are based on the assumption that premiums have been paid to the end of the policy year and that this Policy is free from indebtedness. The values applicable to this Policy are shown for the Age corresponding to the Age at Issue set forth in the Policy Schedule. Any values not contained in the Table will be furnished on request.

MOTION FOR SUMMARY JUDGMENT

COMES NOW the plaintiff, by counsel, and as and for her Motion For Summary Judgment respectfully represents to the Court as follows:

That the defendant has admitted in his pleadings or in his response to a request for admissions previously filed the following facts:

1. That on March 1, 1975, the defendant issued a group life insurance policy number 4084-479 insuring the life of, among others, George David Tyree, Jr.

2. On May 1, 1975, the defendant issued a life insurance policy number L-1126840 in consideration of the sum of \$148.68 premium paid by the decedent, George David Tyree, Jr., a true, complete and accurate copy of which policy has been admitted by the defendant in this case.

3. That the said policy number L-1126840 names the plaintiff herein as beneficiary in the event of the death of the insured.

4. That the defendant has admitted receipt of due notice and proof of death of the decedent and further admitted that plaintiff has performed all other terms and conditions required by her to establish her entitlement to the proceeds of the said policy L-1126840.

5. That the sole defense exhibited to this Court for defendant's non-payment of the proceeds of the policy L-1126840 is "that the named insured [G. David Tyree] was not a 'full time employee' of [sic] a member of the insured group nor in 'active service' at his customary place of employment," and, that the insured "was not a 'full time employee' of any member of the insured group, and was not in 'active service' and was not otherwise eligible for such insurance. [group policy 4084-79]." (quotes from defendant's grounds of defense).

6. That these defenses above stated relate to defendant's coverage of G. David Tyree as a member of the group life insurance policy number 4084-479, a complete true and accurate copy of which has been previously admitted in

this case by defendant.

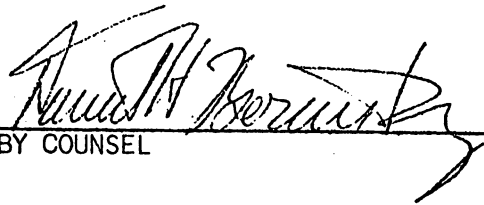
7. Pursuant to the laws and decisions of the state of Virginia, the applicable policy in this case is policy number L-1126840.

8. That defendant is barred by the statutes and decisions of the State of Virginia from raising these defenses in defense of this action brought pursuant to policy L-1126840.

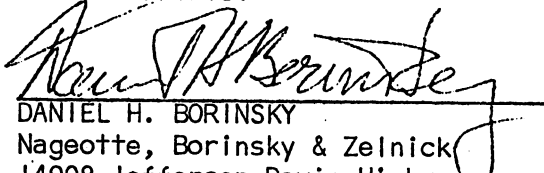
9. That the defendant has admitted as undisputed sufficient facts to establish plaintiff's entitlement to the relief prayed for herein and that further, defendant, as a matter of law, is barred from raising ~~and~~ all of the defenses which have been disclosed to this Court.

WHEREFORE, plaintiff herein respectfully requests that this Court, pursuant to Rule 3:18 of the Rules of the Supreme Court of Virginia, enter summary judgment in favor of the plaintiff for the relief requested in her Motion For Judgment.

KETTI M. TYREE


BY COUNSEL

I ask for this:


DANIEL H. BORINSKY
Nageotte, Borinsky & Zelnick
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191
Counsel for Plaintiff

AMPLIFIED ANSWER TO
REQUEST FOR ADMISSIONS OF PLAINTIFF
DATED NOVEMBER 11, 1976

The defendant, North American Life and Casualty Company, while not attempting to change its answers, filed herein on the 10th day of December, 1976, states the following in clarification thereof.

1. The defendant admits the correctness of the photocopy of the policy on the life of G. David Tyree, Jr.
2. The defendant admits the photocopy of the group contract ("Exhibit B") to be a specimen copy only. Although it contains all contractual provisions, the policy actually issued contains the dates and beneficiaries as stated in the attached photocopies.
3. The defendant modifies no other answers.

NORTH AMERICAN LIFE AND
CASUALTY COMPANY

By

E. Brodnax Haskins
Counsel

E. Brodnax Haskins, p.d.
Wicker, Haskins & Hutchens
706 Mutual Building
Richmond, Virginia 23219

CERTIFICATE

I hereby certify that a true copy of the foregoing AMPLIFIED ANSWER TO REQUEST FOR ADMISSIONS OF PLAINTIFF DATED NOVEMBER 11, 1976 was mailed this 12th day of December, 1976, to Daniel H. Borinsky, Nageotte, Borinsky & Zeinick, 14908 Jefferson Davis Highway, Woodbridge, Virginia, counsel for the plaintiff, and to Floyd C. Bagley, Tayloe Building, Dumfries, Virginia 22206, Virginia counsel for defendant.


E. BRODNAX HASKINS

January 3, 1977

Mr. Daniel H. Borinsky, Esq.
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191

Mr. F. Caldwell Bagley, Esq.
P. O. Box 68
Dumfries, Virginia 22026

Mr. E. Brodnax Haskins, Esq.
Suite 706 - Mutual Building
Richmond, Virginia 23219

Re: Tyree v. North American Life & Casualty Co.
Law No. 7560 - Prince William County

Gentlemen:

The Court has reviewed the file, arguments of counsel, memoranda submitted and authorities cited in connection with the Motion for Summary Judgment filed on behalf of the plaintiff.

It is the opinion of the Court that the Motion for Summary Judgment is premature and that it should be denied at this time.

Very truly yours,

Thomas J. Middleton

TJM/nlo

LAW OFFICES
WICKER, HASKINS & HUTCHENS
SUITE 706 - MUTUAL BUILDING
RICHMOND, VIRGINIA 23219

JOHN J. WICKER, JR.
E. BRODNAX HASKINS
WILLIS FRANKLIN HUTCHENS

STERLING H. MOORE

TELEPHONE (804) 643-3506

January 21, 1977

VIRGINIA: IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

TYREE (BENEFICIARY) vs. NORTH AMERICAN LIFE & CASUALTY CO.

MEMORANDUM BRIEF BY DEFENDANT'S COUNSEL

ISSUE PRESENTED: IS THE INSURER WHICH WROTE THE MASTER GROUP POLICY AND THEREAFTER ISSUED THE INDIVIDUAL CONVERTED LIFE INSURANCE POLICY PRECLUDED FROM PROVING THAT PLAINTIFF'S DECEDENT WAS NOT ELIGIBLE FOR PARTICIPATION IN THE GROUP POLICY?

THE PLAINTIFF CONTENDS that the issuance of the converted individual policy precluded consideration of any provision of the preceding group policy.

THE DEFENDANT CONTENDS that the only way the plaintiff's decedent ever obtained the individual (converted) life policy was based upon a provision in the group policy requiring the insurance company thereafter to issue, without any medical examination, an individual policy upon termination of decedent's employment (membership) in the originally insured group.

Obviously, eligibility for participation in the group policy was a pertinent requirement for issuance of the subsequent individual converted policy.

Defendant can prove, by written admissions of decedent, and his physician, that decedent was not working 30 hours a week at his law office or at any other location where his lawyer duties required him (this being a specific requirement for participation membership in the group policy).

Since he was not eligible for participation in the group policy, decedent was not eligible for issuance of the converted individual life policy, on the basis of the group policy.

The attention of the Court is further invited to the fact that in the decedent's application for conversion into the individual life insurance policy, decedent's application was made:

"IN ACCORDANCE WITH THE PROVISIONS OF GROUP POLICY NUMBER E-4804-479, CERTIFICATE NUMBER 4330"

Accordingly, this defense is not foreclosed by the parenthetical language in the individual converted policy stating that the provisions thereof and the application therefor were the "entire contract".

Furthermore, the plaintiff's Motion for Judgment, -signed and filed herein by plaintiff's counsel, -expressly bases plaintiff's claim not only on the subsequent converted individual policy but also on the group policy.

LEGAL PROPOSITION REGARDING THE GROUP CONTRACT:

The group policy contains undertakings of the insurer to insure the lives of members of the insured group, but this undertaking applied only to persons falling within its unambiguous eligibility provisions.

The plaintiff asserts the "entire contract" provisions of the individual policy constitute an insulating wall to prevent any defense which considers the provisions of the group policy requiring full time employment (30 hours per week, etc.).

UNCONTESTED FACTS:

The attention of the Court is invited to the uncontested facts that within ninety days (Mch 1 - May 29) decedent had:

1. availed himself of participation in the group policy;
2. stated that he had terminated his employment in the group;
3. obtained an individual life policy by conversion on the basis of the group policy;
4. died from the same cancer disability which had prevented decedent from working 30 hours per week at his law office, which fact made decedent ineligible for participation in the group policy;
5. When the insurer learned that decedent had been totally disabled and thus ineligible for participation in the group policy, it rescinded the contract and made full refund to the plaintiff (which she accepted).

The defendant believes that this "entire contract" assertion is identical in effect to the same insulating wall of "incontestability" provided in the group policies when the defense of ineligibility, existing at the beginning of a group policy, arises after the contestable period has elapsed.

The undersigned has carefully examined the authorities and while no case has been found directly in point with the issue here, we submit that the legal principles treated in the attached photocopy of Fisher v. United States Life Insurance Company, 249 F.2d 879,

(U.S. CCA - 4th Circuit) applied with equal force and effect to the issue in the instant case, namely, that an insurer is always permitted to show that the alleged insured was outside the class of persons insured and perforce coverage did not include the allegedly insured decedent.

This principle is essentially similar to that in our case.

Attention of the Court is especially invited to the opinion rendered by Judge Haynesworth (page 882) (concurring in by Chief Judge Parker and Judge Sobeloff).

"It" [the incontestable clause] "was never intended to enlarge the coverage of the policy to compel the insurance company to insure lives it never intended to insure or to accept risks or hazards clearly excluded by the terms of its policy" [brackets and words therein supplied].

THE EVIDENTIARY REQUIREMENT:

The defendant urges that the issue of ineligibility of the plaintiff's decedent for coverage under the master policy was plainly stated in its Grounds of Defense. Since that issue was raised with the filing of the Grounds of Defense, the burden of proof on the issue of full time employment is clearly upon the plaintiff. Our authority for this requirement is Washington National Life Insurance Company v. Burch, 270 F.2d 300 (at page 304) (U.S. CCA - 5th Circuit). That opinion is also attached hereto.

CONCLUSION:

Based upon the above reasons and authorities, the defendant believes and therefore submits that summary judgment should not be considered by this Court and that judgment should be entered only when

the entire facts and circumstances regarding the employment status of the decedent, George David Tyree, Jr., have been fully developed and considered by Court and jury.

NORTH AMERICAN LIFE and CASUALTY COMPANY

By: John J. Wicker, Jr.
JOHN J. WICKER, JR.

E. Brodnax Haskins
E. BRODNAX HASKINS

WICKER, HASKINS & HUTCHENS
Attorneys-at-Law
Suite 706 Mutual Building
Richmond, Va. 23219
Phone (804) 643-3506

CERTIFICATE

I hereby certify that a true copy of the foregoing Memorandum Brief by Defendant's Counsel was mailed on this 4th day of February, 1977, to Daniel H. Borinsky, Esq., 14908 Jefferson Davis Highway, Woodbridge, Virginia 22191.

John J. Wicker, Jr.
JOHN J. WICKER, JR.

SUPPLEMENTAL MEMORANDUM OF LAW

IN SUPPORT OF PLAINTIFF'S

MOTION FOR SUMMARY JUDGMENT

ISSUE

Is the defense of decedent's ineligibility for group coverage available to the defendant insurance company where the insurance company issues a subsequent policy in exchange for the decedent's surrender of his coverage under the predecessor group policy certificate?

STATEMENT OF FACTS

This memorandum supplements plaintiff's previously submitted memorandum in support of her motion for summary judgment. Accordingly, the previous statement of facts is adopted for this memorandum.

ARGUMENT

I. DEFENDANT'S OPTIONAL INCLUSION OF LANGUAGE OF INTEGRATION IN THE EXCHANGE POLICY CONSTITUTES A WAIVER OF HIS RIGHT TO RELY ON DEFENSES APPLICABLE TO THE PREVIOUS POLICY.

As stated in Plaintiff's earlier memorandum, defendant has admitted issuance of the group insurance policy and issuance of the individual exchange policy insuring the life of the deceased. The sole defense relied upon in this Court for defendant's non-payment of the proceeds of the conversion policy is "that the named insured [G. David Tyree] was not a 'full-time employee' of a member of the insured group nor 'in active service' at his customary place of employment;" and, that the insured "was not a 'full-time employee' of any member of the insured group, and was not in 'active service' and was not otherwise eligible for such insurance." (Quotes are from defendant's GROUND
OF DEFENSE). All these defenses relate to the group policy which was surrendered in return for the subsequent individual policy; none relate to the individual policy.

Nowhere in the second policy are there any statements or representations with respect to Mr. Tyree's work activity. Moreover, the second exchange policy contains the following language:

This Policy includes all pages and any supplements and the application, a copy of which is attached, and this constitutes the Entire Contract. In the absence of fraud, all statements made by the insured shall be deemed representations and not warranties and no such statement shall be used in defense of a claim under the Policy unless it is contained in the written application and a copy of the application is attached hereto when the Policy is issued.

(Source: p. 5 of the exchange policy). (emphasis added).
(See Exhibit "A" attached hereto).

A provision such as the one quoted above is generally required to be included in a life insurance contract issued in the State of Virginia.¹ However, Virginia Code Section 38.1-405 provides as follows:

Sec. 38.1-405. STANDARD PROVISIONS NOT REQUIRED IN CERTAIN CASES. - The provisions of Sections 38.1-390 to 38.1-404 do not apply to policies of reinsurance, or to policies issued or granted in exchange for lapsed or surrendered policies, or to group insurance, or to policies issued by fraternal benefit societies.

(Code of Va., 1950, as amended). (Emphasis applied)

1. Virginia Code Section 38.1-390. Standard provisions required - No policy of life insurance other than industrial insurance, annuities, and pure endowments with or without return of premiums or of premiums and interest, shall be delivered or issued for delivery in this State unless it contains in substance all of the provisions prescribed in Section 38.1-391 to 38.1-402 of this article (Code 1950, Section 38-371; 1952, c. 317).

Virginia Code Section 38.1-393. Policy constitutes entire contract; statements deemed representations. In each such policy there shall be a provision that the policy or the policy and the application therefor if a copy of the application is endorsed upon or attached to the policy when issued, shall constitute the entire contract between the parties, and that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and that no such statement or statements shall be used in defense of a claim under the policy unless contained in a written application and unless in a written application and unless a copy of such statement or statements be endorsed upon or attached to the policy when issued. (Code 1950, Section 38-371 (3); 1950, p. 179; 1952, c. 317)

source: Michies Code of Virginia, Vol. 6A, 1976 Repl. Volume. (emphasis supplied)

in other words, the defendant insurance company had the option of whether or not to include the intergration language of Section 38.1-393, and it knowingly voluntarily, and intentionally chose to do so. The insurance company, not the decedant, chose to include this language.

The case of Sivertsen vs. Guardian Life Insurance Company of America, 423 F. 2d 443, (4th Cir., 1970), a copy of which is attached as exhibit "B", is the only reported case construing this statutory provision. In Sivertsen a group insurance policy was issued to Virginia Wesleyan College. On August 10, 1965, in connection with the installation of the group insurance plan, the deceased/insured, Sivertsen, filed a written application for coverage thereunder. According to the Court, his application for original coverage contained false and material misrepresentations with respect to his prior health history. Approximately four and one-half months later, on December 31, 1965, Sivertsen terminated his employment with Virginia Wesleyan College. On January 12, 1966, within permissible time limits, Sivertsen formally applied for conversion of the group policy to individual coverage, which policy became effective on February 16, 1966. Sivertsen died about four months thereafter in June 1966. On the subsequent suit by the insured's widow/beneficiary, the principal defense upon which the insurance company relied was the alledgedly false and material misrepresentations made by the insured in obtaining coverage under the original group plan. The widow argued that under Virginia law, the insurance company was not entitled to assert a defense of misrepresentation because the written application was not endorsed upon or attached to the insurance policy when issued. In that regard, although the second policy contained no language of integration, she argued that the Court should read such language into the policy pursuant to Sec. 38.1-393, Op.Cit. The Fourth Circuit rejected her argument, saying that pursuant to Sec. 38.1-405, such language was not mandatory:

The Virginia statute relied upon Section 38.1-393, Code of Virginia of 1950, has no application here by virtue of Section 38.1-405, which specifically exempts "policies issued or granted in exchange for lapsed or surrendered policies***". By its terms,

the original policy expired some six weeks after Sivertsen terminated his employment with Virginia Wesleyan College on December 31, 1965. On January 12, 1966, within permissible time limits, Sivertsen had formally applied for its conversion, and his wife had returned the original policy on January 25, 1966. The converted policy became effective automatically on February 16, 1966, which was 31 days after the last premium due date. The policy sued upon was therefore the converted policy which was not subject to the requirements of Section 38.1-393 of the Virginia Code by virtue of Section 38.1-405.

Sivertsen v. Guardian Life Insurance Company of America, op.cit.
at p. 447 (emphasis supplied).

Accordingly, the insurance company was permitted to introduce evidence relating to the insured/decedant's application for the original group coverage and ultimately to avoid liability on the policy. To the contrary, had Section 38.1-393 applied, the insurance company would have been barred from relying upon alleged misrepresentation contained in the application for the original policy.

The facts of Sivertsen are virtually identical to the facts in this case as alleged by the defendant. However, in Sivertsen the omission of 38.1-393 language enabled the insurance company to avoid liability. On the other hand, in the case at bar, the exchange policy did contain language such as that provided in Section 38.1-393. And, as is clear from the terms of Section 38.1-405, and from the Sivertsen decision, the inclusion of such language in exchange policies is not a requirement of Virginia law. It was thus included at the option of the insurance company. The Kegley case, previously discussed in plaintiff's earlier memorandum provides a clue as to why it may be desirable from an insurance company's viewpoint to include language of integration such as set forth in Section 38.1-393.

In Provident Life Insurance Company vs. Kegley, (199 Va. 273), an employee converted his group policy to an individual policy following termination of his employment. In the event of suicide within two years of its issue date, the exchange policy limited the insurance company's liability to a refund of all premiums paid prior to death. Less than six months from the effective date of the exchange policy, but over two years after the effective

date of the insurance coverage under the predecessor group policy, Kegley committed suicide. The beneficiary under the second policy argued that the suicide occurred more than two years after the effective date of Kegley's group coverage and that the new policy was "merely a continuation" of the insurance provided for under the group policy. The insurance company, on the other hand, argued that the conversion policy was a completely new contract, and that the suicide occurred within two years of its plain terms and this limited the liability to premiums paid. The Circuit Court heard the case on an agreed statement of facts and awarded Mrs. Kegley judgment. The Supreme Court of Virginia reversed.

Inasmuch as the Kegley case has been cited and extensively discussed in Plaintiff's earlier memorandum, it is not necessary to repeat that discussion here. However, it is important to add that the Virginia Supreme Court's ruling in Kegley was, in part, based upon finding the following language in the exchange policy:

A clause in this policy [the conversion policy] also provided: "This policy has been issued in consideration of the application, a copy of which is attached to and made part of this policy, and of the payment of premiums as provided herein. This policy and the application for it constitute the entire contract***".

-Provident Life Insurance Company v. Kegley, op.cit., p 277

This language is substantially the same as Sec. 38.1-393. At the time of the issuance of the Kegley policy, the Code of Virginia contained what are now Code sections 38.1-390, 38.1-393, and 38.1-405, above discussed. Accordingly, the inclusion of the above language in the Kegley policy was wholly voluntary on the part of Kegley's Insurance company and unilaterally beneficial to it.

The combination of sections 38.1-405 and the Kegley and Sivertsen decisions presented the insurance company with a choice of alternatives. They could include language of integration and protect themselves in the event the Kegley factual pattern reoccurred. Such protection would be at the risk of exposure, however, in the event the facts of Sivertsen were repeated. On the

other hand, pursuant to the express provisions of Sec. 38.1-405 and the ruling in Sivertsen, the insurance company could have omitted the language of integration in the second exchange policy, and thereby preserved their defenses in respect of the original application. The Guardian Life Insurance Company of America pursued the second alternative. They based their successful defense in Sivertsen upon the alleged misrepresentations in the original application. Provident Life Insurance Company opted for the former alternative and avoided liability in Kegley. Thus, an insurance company operating in Virginia knows in advance and can legitimately expect the Courts to honor whatever documentation arrangement they choose to use. That is, they can structure their documentation in such a way that each policy is independent of the other, such as was the case in Kegley. Or they can structure their documentation in such a way as to connect the two policies, thereby preserving their defenses relating to both, such as was the case in Sivertsen. What an insurance company cannot legitimately expect is to have it both ways. That is, they cannot expect a Court to connect the two policies, when their own documentation disaffirms this connection. That is what this Court is being asked to do in this case. The defendant has deliberately cast the second policy as an independent entity. It achieved, thereby, pursuant to Kegley, an extension of the suicide liability limitation. Accordingly, it should not be heard to say that the policies are connected. Rather, it should bear the logical result of its own deliberate draftmanship.

From the Kegley case, it can be seen that an insurance company was able to escape liability to a putative beneficiary by characterizing the second, exchange policy, as a separate policy and not as a mere continuation of earlier group coverage. Accordingly, it can be presumed that the voluntary inclusion on the part of the defendant of the language of integration in the second, exchange policy, was not accidental or haphazard. Rather, it is evident that the inclusion of this wording in the policy was deliberate and

carefully chosen. The following statements by the Virginia Supreme Court, although made in different factual contexts, state the general rules in Virginia with respect to the interpretations of the life insurance contracts. They are particularly appropriate in this case in which we are dealing with the interpretation and legal effect of the language contained in the second policy:

In Stratton vs. New York Life Ins. Co., 115 Va. 257, 78 S.E. 636, the court, quoting with approval from Georgia Home Insurance Co., v. Kinnier, 28 Gratt. (69 Va.) 105 said: "The maximum that the words of an instrument shall be taken most strongly against the party employing them," is particularly appropriate in the construction of a policy of insurance, and especially of such conditions as we are now considering. The instrument is wholly the work of the underwriter, and is usually filled with a multitude and variety of stipulations, seldom read by the assured when he accepts the policy, and, if read, rarely if ever understood, abounding in forfeitures and in provisions generally harsh and difficult of performance, it should be strictly construed against the insurer, and liberally in favor of the insured.

Harrison vs. Provident Relief Association, 141 Va. 659, 671 (1925). (Emphasis supplied).

and,

If language used in an insurance policy is susceptible of two meanings, one of which will permit recovery and the other will not, the language should be construed most favorably to the insured. See National Fire Ins. Co. v. Dervishian, 206 Va. 563,

-Jackson v. North American Assurance Society, 212 Va. 177, 179 (1971)

Additionally, keeping in mind that it was the choice of the insurance company to include the language of intergration in the second policy, the following statement made by the Virginia Supreme Court on June 11, 1976 in interpreting an intergration clause in a contract between an owner and a building contractor is particularly appropriate here:

"the rule which excludes parol evidence when offered to vary the terms and conditions of an integrated written contract has nowhere been more strictly adhered to in its integrity than in Virginia. It, in effect, declares that, where parties have reduced their contract to a writing which imposes a legal obligation in clear and explicit terms the writing shall be the sole

memorial of that contract, and it is conclusively concluded that the writing contains the whole contract, and is the sole evidence of the agreement." (Citation omitted). Pulaski Bank Ex'r v. Harrell, 203 Va. 227, 223, 123 S.E. 2d 382, 387 (1962)

See also High Knob, Inc. v. Allen 205 Va. 503, 506, 138 S.E. 2d 49, 52 (1964); Durham v. Pool Equipment Co., 205 Va. 441, 446, 138 S.E. 2d 55, 59 (1964); Enlow & Son v. Higginson, 201 Va. 780, 789-90, 113 S.E. 2d 855, 862 (1960).

-Erhlich v. Hendrick Construction Co., 217 Va. 108, 112 (1976). (Emphasis supplied).

It was the insurance company which chose to integrate the second policy and they should not be permitted to circumvent its legal effect.

2. THE EXPRESS NEGATION OF ALL RIGHTS, PRIVILEGES AND BENEFITS UNDER THE GROUP POLICY, WHICH IS CONTAINED IN THE APPLICATION FOR THE CONVERSION POLICY, CONSTITUTES A BAR TO DEFENDANT'S RELYING UPON ANY DEFENSE RELATED TO THE ORIGINAL GROUP POLICY.

There is other language chosen by the insurance company which manifests an intent to look only to the second policy for a determination of the rights of the parties. In the application for the second policy, the decedent signed the following declaration:

"I hereby surrender said certificate,... and in consideration of the issuance by North American Life and Casualty Company, Minneapolis, Minnesota, of the policy herein applied for, I do hereby relinquish all rights to privileges or benefits under said Group Policy or Employees Policy,

(source: p 3 of the exchange policy (emphasis added). (See Exhibit "C" attached hereto).

As counsel for defendant argued at the pre-trial conference, both Provident Life Insurance Co., v. Kegley, (199 Va. 273) and Philadelphia Life Insurance Co., v. Erwin. (165 Va. 469) are still good law in Virginia. The Virginia Supreme Court in Kegley distinguished, but did not overrule Erwin. It is interesting to note the language contained in the application for the second Erwin policy;

Said release also expressly states "that the new policy described above is issued on the basis of the application of the original policy, which application shall be taken and considered as the application for said new policy and a part of the new contract of insurance."

Such language is exactly opposite to the language contained in the Tyree conversion application, above cited. It is suggested that Kegley could very well have been decided differently if language similar to that used in Erwin above cited, had been used in Kegley. Further, as indicated in the Plaintiff's earlier memorandum of law, Kegley has been cited with approval in two subsequent cases: Moore vs. John Hancock Life Insurance Company, (398 F.2d 154, 1968, reversing and remanding; and 432 F. 2d 823, 1971, reversing 4th Cir.) and Binkley vs. Manufacturer's Life Insurance Company (471 F.2d, 889, 10th Cir., 1973). The Court in Binkley, like Kegley referred only to the second policy in reaching its decision. However, the Court in Moore, although it cited Kegley with approval, connected the original group policy with the later exchange policy and noted the following:

Counsel appears to have overlooked that the application for conversion signed by Moore included the provision "this application..... with the application on which the original Policy and Annuity was issued, shall be a Part of the new policy and copies of said application shall be attached to the new Policy."

Moore vs. John Hancock Mutual Life Insurance Company, Op.Cit.
Supra at page 159 (emphasis supplied).

In summary, in Erwin and Moore, the conversion application expressly incorporated the terms and representations contained in the original application and made it a part of the new exchange policy. The respective Courts in those cases connected the original and conversion policies. On the other hand, while the entire policies are not set forth in Kegley and Binkley, the opinions in these latter two cases do not reflect the presence of any such connective language in the conversion application. In those cases, the respective Courts refused to connect the two policies. The Tyree conversion application expressly negates a connection between the original and subsequent policies. Again, this express negation was inserted by the insurance company. Accordingly, they should not be permitted to take the inconsistent position that the two policies

are one.

CONCLUSION

It is suggested that under existing decisions and case law, the defendant insurance company had a choice as to whether or not to connect the two policies. Under Section 38.1-405, and under Erwin, Moore, and Sivertsen, they could have preserved any rights with respect to the first policy by merely connecting the two on the application for the second conversion policy and omitting language of integration in the second policy. Of course, such a connection may have subjected them to liability if the facts of Kegley were applied to such a set of documents. On the other hand, they could have chosen and did choose, to negate the initial policy in the application for the second policy and to include language of integration in the second policy. It is submitted, therefore, that in accordance with the Virginia statutory and case law, above cited, that the language contained in the application for conversion of the initial policy/ combined with the language of integration contained in the second policy constitutes a waiver on the part of the insurance company with respect to any rights or defenses which they may have under the original policy. In deciding Kegley, the Virginia Supreme Court relied upon, in part, the following language from the North Carolina case of Lineberry vs. Security Life Insurance Company, 77 S.E. 2d 652:

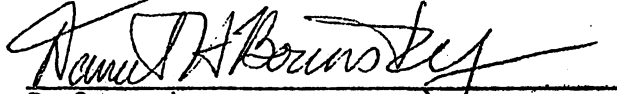
When the three instruments - the group policy, the certificate and the new policy - were considered in the light of settled rules of construction, it was clear that the insurance policy sued on was a separate, distinct and independent contract, unmodified in any respect by the group policy or the certificate. "The language used by the parties is unambiguous. Its meaning is clear. There is no room for judicial construction. As the parties contracted, so are they bound. ***It is there in plain English***"


Provident Life Insurance Co. vs. Kegley, Op.Cit. p. 279 (Emphasis supplied).

It is suggested that this analysis and conclusion is equally applicable to the Tyree policies. In accordance with the foregoing, Plaintiff respectfully renews

its request for the Court to grant her motion for summary judgment in the amount sued for.

KETTI M. TYREE


By Counsel


DANIEL H. BORINSKY
Nageotte, Borinsky & Zelnick
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191
Counsel for Plaintiff

I hereby certify that I have this 30th day of MARCH, 1977 mailed, postage paid, a copy of the foregoing to E. Brodnax Haskins, Esq., John J. Wicker, Jr., Esq., and Floyd C. Bagley, Esq., counsel for defendant.


DANIEL H. BORINSKY

CONTROL OF POLICY

Ownership. The Insured shall be the Owner of this Policy, unless otherwise provided. With the exception of any benefit payable to the Beneficiary, the Owner, subject to the rights of any assignee, shall have all rights, privileges and benefits contained in this Policy.

Beneficiary. The Beneficiary shall be as designated in the application of this Policy unless otherwise provided. Any primary Beneficiary shall have an interest superior to any contingent Beneficiary. The interest of any Beneficiary who dies before the Insured or in a common disaster with the Insured shall terminate at the death of any such Beneficiary. If no other Beneficiary is living at the death of the Insured, the proceeds will then be paid to the then Owner of this Policy, if living, otherwise to the executor or administrator of the Owner's Estate.

The right to change the Beneficiary in this Policy has been reserved to the Owner unless otherwise provided in a

written statement filed with the Company at its Home Office. Subject to the rights of any assignee or irrevocable Beneficiary on record with the Company, a new Beneficiary may be designated by filing at the Home Office of the Company a written request in a form satisfactory to the Company, and signed by the Owner. A change of Beneficiary will take effect when it has been recorded at the Home Office of the Company; but once recorded, whether the Insured is living or not, the change of Beneficiary shall relate back and take effect as of its date of execution, except with respect to any payment made, or action taken, by the Company before the recording.

Assignment. An assignment of this Policy shall not be binding until the Home Office of the Company has received and has recorded a written instrument to that effect. The Company assumes no responsibility for the validity or sufficiency of an assignment.

GENERAL PROVISIONS

The Entire Contract. This Policy includes all pages and any Supplements and the application, a copy of which is attached, and this constitutes the Entire Contract. In the absence of fraud, all statements made by the Insured shall be deemed representations and not warranties and no such statement shall be used in defense of a claim under the Policy unless it is contained in the written application and a copy of the application is attached hereto when the Policy is issued.

Only the President, a Vice-President, the Treasurer, or the Secretary of the Company shall have the power on behalf of the Company to modify or waive any of the provisions of this Policy, and then only in writing.

Payments By The Company. All benefits under this Policy are payable at the Home Office in Minneapolis, Minnesota. At the time of such payment the Company may require the surrender of this Policy. Any indebtedness or premium due and unpaid will be deducted from such payment. On any Policy providing for them, the Company may defer the granting of a Cash Surrender Value or of a Cash Loan, except to pay premiums on policies of this Company, for the period permitted by law but not exceeding 6 months after receipt of the application therefor.

Incontestability. This Policy shall be incontestable after it has been in force during the lifetime of the Insured for a period of 2 years from its Date of Issue, except for:

- (1) the nonpayment of premium;
- (2) any provisions relating to benefits in event of total and permanent disability;
- (3) any provisions relating to additional insurance benefits in event of death by accidental means.

Suicide. If, within 2 years from the Date of Issue, the death of the Insured occurs by suicide, while sane or insane, the liability of the Company hereunder shall be limited to the return of an amount equal to the premiums paid, less any indebtedness to the Company on account of or secured by this Policy.

Policy Months and Policy Years. Policy months, years and anniversaries shall be determined from the Policy Date.

Indebtedness. The term indebtedness as used herein shall refer to indebtedness secured by this Policy.

SIVERTSEN v. GUARDIAN LIFE INSURANCE COMPANY OF AMERICA 443

Cite as 423 F.2d 443 (1970)

help in the prosecution of Dix, and the trial court correctly found that no such information was supplied. At both conferences the Government counsel urged Dix to consult his attorney. No plea of guilty was entered, and nothing Dix said was brought to the attention of the jury.

Nevertheless, on this appeal Dix argues that the remarks of the Government attorneys that Caplinger could not effectively represent both DePugh and Dix so undermined Dix's confidence in Caplinger that he refused to follow the latter's advice to testify in his own behalf. As noted above, it was Dix's refusal to testify or to put on other testimony providing evidentiary support for all of the facts assumed in the hypothetical question that led the court to withdraw the hypothetical question and the insanity defense.

If such a contention had been made at the trial, and if there was factual support for it in the record, reversal might be necessary. But Dix does not provide a record reference showing that such a contention was advanced in the trial court, nor has our own examination of the record revealed one. Moreover, insofar as we have been able to determine without the assistance of Dix's counsel, the record contains no factual support for the assertion that Dix declined to testify because he had lost confidence in Caplinger as a result of Dix's meetings with Government attorneys or otherwise. Caplinger represented Dix throughout the trial. Moreover, at the point in the trial when Dix refused to testify, he was questioned by the court and gave no intimation that such refusal was based upon a loss of confidence in Caplinger. Finally, on this appeal Dix is represented by Caplinger's general partner, James S. Munn.

We conclude that the trial court did not err in refusing to dismiss the case as to Dix because of the incidents described above. We do, however, most vigorously renew the caution expressed in *Coughlan*, see note 12, *supra*, that prosecuting and law enforcement officials should not confer with defendants

after return of an indictment in the absence of the defendant's attorney unless the attorney consents thereto.

The several other arguments advanced by one or more of the defendants on this appeal have been considered, but we find them so lacking in merit that discussion is not required.

Affirmed.



Phyllis J. SIVERTSEN, Appellant,

v.

The GUARDIAN LIFE INSURANCE
COMPANY OF AMERICA,

Appellee.

No. 13282.

United States Court of Appeals
Fourth Circuit.

Argued Dec. 3, 1969.

Decided Jan. 28, 1970.

Rehearing Denied March 23, 1970.

Action on life policy. The United States District Court for the Eastern District of Virginia, at Norfolk, John A. MacKenzie, J., granted insurer's motion for judgment notwithstanding the verdict and insured's widow appealed. The Court of Appeals, Harvey, District Judge, held that where insured in completing application for policy of term life insurance answered negatively questions whether he had ever had heart trouble, high blood pressure or circulatory impairment and in response to question whether he had consulted any medical practitioner disclosed name of family physician who had treated insured for flu, and insured did not mention his Navy medical record which contained reports of three physicians which led to Navy's conclusion that insured was en-

titled to permanent disability rating, insurer was not liable on policy.

Affirmed.

Craven, Circuit Judge, dissented.

1. Insurance ⇨292.5

Where insured in completing application for policy of term life insurance answered negatively questions whether he had ever had heart trouble, high blood pressure or circulatory impairment and in response to question whether he had consulted any medical practitioner disclosed name of family physician who had treated insured for flu, and insured did not mention his Navy medical record which contained reports of three physicians which led to Navy's conclusion that insured was entitled to permanent disability rating, insurer was not liable on policy.

2. Insurance ⇨253

Under Virginia law, false material representation voids life policy.

3. Federal Civil Procedure ⇨2746

Where insurer successfully defending appeal by widow of insured under life policy unnecessarily caused matters to be included in joint appendix, portion of costs of appeal would be imposed on insurer. Fed.Rules App.Proc. rule 30(b), 28 U.S.C.A.

On Petition for Rehearing

4. Insurance ⇨271.2

Where insured after terminating employment formally applied for conversion of group policy, and original policy was returned and converted policy became effective before insured's death, policy sued on by widow of insured was the converted policy, granted in exchange for surrendered policy; hence insurer was not precluded from asserting defense of misrepresentation on ground that written application was not endorsed upon or attached to policy in question. Code Va.1950, §§ 38.1-393, 38.1-405.

Joseph A. Gawrys, Norfolk, Va. (Van-Deventer, Black, Meredith & Martin, Norfolk, Va., on brief), for appellant.

William C. Worthington, Norfolk, Va. (Williams, Worrell, Kelly & Worthington, Norfolk, Va., on brief) for appellee.

Before WINTER and CRAVEN, Circuit Judges, and HARVEY, District Judge.

HARVEY, District Judge.

Suit on a life insurance policy issued by The Guardian Life Insurance Company of America (Guardian) was brought in the court below by the widow of the deceased insured. Following a three-day trial, the jury returned a verdict on January 10, 1968 in favor of the widow in the amount of \$20,000. Motions for a directed verdict, for judgment n. o. v. and for a new trial made by Guardian before the entry of judgment were denied by the District Judge for reasons stated in a Memorandum filed February 1, 1968. Claiming that the insured made statements in the application for the insurance policy which were materially false, Guardian thereafter filed under Rule 50(b), F.R.Civ.P., another motion for a judgment n. o. v. The trial testimony was written up and reviewed by the District Judge who subsequently filed a Memorandum Order dated December 30, 1968 concluding that he had erred in his earlier ruling and granting the insurance company's motion.

From the setting aside of the jury verdict and the entry of judgment for Guardian, the widow now appeals. We affirm for the reason that the only reasonable conclusion that can be drawn from the evidence is that the insured made materially false statements concerning his health in filling out the application which resulted in the issuance of the policy in question.

[1] Lt. Col. Warren S. Sivertsen, the insured, retired from the Marine Corps in 1962. In early 1965, he accepted a position with a new educational institu-

tion known as Virginia Wesleyan College. Through a friend who was an agent of Guardian, he arranged for a so-called "baby group" insurance plan for employees of the college. On August 10, 1965, Sivertsen himself filed a written application with Guardian for an individual policy of term life insurance to be issued under the plan. Included in the application were the following questions:

"B. * * *

"4. Have you consulted any physician or medical practitioner or been treated in any hospital, clinic, sanitarium or similar institution during the past five years? * * *

"C.1. Are you now ill?

"2. Have you ever had heart trouble, chest pain, high blood pressure or any other circulatory impairment, * * * or had any other * * * health impairment?"

The application further provided that if the answers to any of these questions would be "yes" then the applicant should give details "including the results of any routine physical examinations or periodic physical check-ups." Sivertsen answered "No" to questions C.1. and C.2. and "Yes" to question B.4. The only detail supplied was information that he had consulted Dr. A. White of Virginia Beach, Va., in April of 1965 for flu. Guardian communicated with Dr. White, who was Sivertsen's family physician, and finding no evidence of any significant health impairment or disease, issued the policy on September 15, 1965.

When the evidence as to Sivertsen's medical history for the five years immediately preceding the filing of the application is viewed in a light most favorable to the widow, the only conclusion that can be reached is that he falsely represented material facts in answering the questions set forth hereinabove. This particular insured was a well-educated man, 48 years of age and Vice President of a newly formed college at the time that he completed the application. He had previously had many years

of administrative experience as a regular officer in the United States Marines, and he himself was instrumental in arranging for the purchase by the college of the plan of which his own policy was a part. On July 19, 1965, only three weeks before he filed the application, Sivertsen had been advised by the Physical Review Council of the Navy Department that he had been found unfit to perform the duties of his rank because of physical disability and was being retired permanently with a disability rating of 20%. Included among the medical findings were the following:

"Hernia, * * * Neuralgia, * * *
Arthritis due to direct trauma, * * *
Cicatrix, * * * Hypertensive
cardiovascular disease, benign, labile,
* * * Tinnitus, * * *."

Sivertsen died on June 26, 1966. In a rating decision, the Veterans Administration subsequently found that the primary causes of his death were leukemia and pneumonia and that a contributing cause of his death was hypertensive cardiovascular disease, a condition which arose during Sivertsen's period of military service.

The finding of permanent disability by the Navy Physical Review Council in 1965 was the culmination of some three years of medical examinations of Sivertsen and extensive administrative review of the degree of disability to which he was entitled on his retirement. In 1962, he was confined in a Naval Hospital for periods of 11 and 17 days respectively for pre-retirement physical examinations. An initial conclusion that he was physically fit for duty was appealed by Sivertsen to the Physical Evaluation Board of the Marine Corps which overruled the lower board and made an interim finding of a 30% disability. During the next three years, Sivertsen was examined further to determine whether his disability was temporary or permanent, including a final physical examination in May of 1965 at a Naval Hospital which led to the ultimate conclusion by the Physical Review Council that he should be permanently retired

with a disability rating of 20%. Three of the reports made by examining physicians during these years mentioned the presence of hypertensive cardiovascular disease.

In answering questions in the application relating to his health, no mention whatsoever was made by Sivertsen of this extensive medical record which had so recently led to the Navy's conclusion that he was entitled to a permanent disability rating. Sivertsen did no more than give Guardian the name of his family doctor who had treated him for flu in April of 1965 and who was not familiar with the Navy proceedings.

[2] When questions B.4., C.1. and C.2. are considered in the light of the insured's medical history and his permanent disability rating from the Department of the Navy, the evidence is so overwhelmingly against the widow as to leave "no room to doubt what the fact is." *Garrison v. United States*, 62 F.2d 41, 42 (4th Cir. 1932); *Richmond Television Corp. v. United States*, 354 F.2d 410, 414 (4th Cir. 1965). Under Virginia law, which we must apply in this case, a false material representation voids an insurance policy. *Hawkeye-Security Ins. Co. v. Government Emp. Ins. Co.*, 207 Va. 944, 154 S.E.2d 173

(1967); *Chitwood v. Prudential Insurance Co. of America*, 206 Va. 314, 143 S.E.2d 915 (1965). As the record permitted only one finding, we conclude that the District Court correctly set aside the jury verdict and granted Guardian's motion for judgment n. o. v.

[3] The appellant has filed a motion under Appellate Rule 30(b) seeking to have imposed on Guardian a portion of the costs on appeal. Our review of the joint appendix leads us to conclude that Guardian has caused matters to be included in the joint appendix unnecessarily, and we therefore direct that \$485.56 of the printing costs be paid by Guardian.

Affirmed.

CRAVEN, Circuit Judge (dissenting).

I dissent for the reasons stated by the district judge in his well-reasoned Memorandum of Decision¹ dated February 1, 1968. At that time—when the case was of fresh impression—the district judge denied the insurance company's alternative motions for judgment n. o. v. or for a new trial. It is too bad he had a second thought 11 months later. I think that he was right the first time, and that the questions presented were for the jury. Certainty in the adminis-

1. That memorandum states, in pertinent part:

[T]he defendant urges that the answers by Colonel Sivertsen to questions 4(a), (b), (c) and (d) on the application for insurance were false in that they failed to disclose prior medical history and that it is the duty of the Court in such circumstances to rule that these misstatements were material and that the policy was therefore avoided on these grounds. In answer to interrogatories numbers 32, 43, 44, 45, 55, 56, and 57, The Guardian Life Insurance Company indicated that the only fact misrepresented, which they considered at all material to them was the matter of the hypertensive cardiovascular disease. The plaintiff counters this with competent medical testimony that a review of 25 years of physical examinations and medical records of the deceased did not disclose that Sivertsen ever had hypertensive

cardiovascular disease and that he did not have it at the time the application was made. Further, says the plaintiff, this is borne out by the fact that the autopsy performed after Sivertsen's death in June, 1966 did not indicate any hypertrophy of the left ventricle or any other indication of hypertensive cardiovascular disease.

The Court is of the opinion that the conflicting medical testimony on the only fact considered material by the life insurance company (the presence of hypertensive cardiovascular disease) took the question beyond the province of the Court, which is the usual judge of materiality, and it was properly left to the jury, under the instructions specifically given on the point, to determine whether Sivertsen actually had hypertensive cardiovascular disease at all, or to such a degree as to be material.

eration of justice is not the valued goal it was once thought to be, for it is increasingly recognized that the search for certainty sometimes produces only certitude. I think the case could have been properly decided either way and should have been left to the jury.

OPINION AND ORDER ON PETITION FOR REHEARING

PER CURIAM.

In her petition for rehearing, the widow claims (1) that the insurance company here was not entitled under Virginia law to assert a defense of misrepresentation because the written application was not endorsed upon or attached to the insurance policy in question when issued; and (2) that since the pertinent medical evidence was conflicting, this issue was for the jury to resolve. We find no merit in these contentions and deny rehearing.

[4] The Virginia statute relied upon, § 38.1-393, Code of Virginia of 1950, has no application here by virtue of § 38.1-405, which specifically exempts "policies issued or granted in exchange for lapsed or surrendered policies * * *". By its terms, the original policy expired some six weeks after Sivertsen terminated his employment with Virginia Wesleyan College on December 31, 1965. On January 12, 1966, within permissible time limits, Sivertsen had formally applied for its conversion, and his wife had returned the original policy on January 25, 1966. The converted policy became effective automatically on February 16, 1966, which was 31 days after the last premium due date. The policy sued upon was therefore the converted policy which was not subject to the requirements of § 38.1-393 of the Virginia Code by virtue of § 38.1-405.

The widow's second point was adequately covered in the majority and dissenting opinions previously filed.

Despite the widow's suggestion for a rehearing in banc, no judge either a member of the Court or of the panel that

rendered the decision has requested a vote on the suggestion. Rule 35, Fed.R. App.Pro.

Rehearing denied.

CRAVEN, Circuit Judge (dissenting).

I agree that the widow's contentions regarding the propriety of judgment n. o. v. were adequately covered in the opinions previously filed. However, I do not believe the questions raised by Mrs. Sivertsen as to the effect of § 38.1-393 and § 38.1-405, Code of Virginia (1950), should be disposed of without further argument. Section 38.1-405 does exempt "policies issued or granted in exchange for lapsed or surrendered policies" from the requirement of § 38.1-393 that the written application for insurance be attached to the policy when issued. Does this mean that conversion and reissuance of a policy is enough to cure the initial issuance of that policy without the attachment of the written application? I think not. The purpose of the attachment requirement is "that the insured shall have in his possession during his lifetime, and that the beneficiary shall have after the death of the insured, the entire evidence of the contract." *Fisette v. Mutual Life Insurance Co.*, 162 La. 620, 110 So. 880, quoted with approval in *Southland Life Insurance Co. v. Donati*, 201 Va. 855, 114 S.E. 2d 595, 597 (1960). Interpreting § 38.1-393, the Virginia Supreme Court has said the legislature intended "to restrict the insurer in the use of statements made by the insured in defense of a claim under the policy unless they be incorporated into the contract in the mode prescribed." *Id.* at 596. Since the legislature has taken such pains to see that the insured and his beneficiary be given the "entire evidence of the contract," it would seem incongruous to hold that an insurer's failure to supply the entire contract could be remedied by the reissuance of an equally incomplete policy upon conversion. The legislature would seem to have contemplated that the § 38.1-405 exemption apply only to policies granted in exchange for lapsed or surrendered

policies that were in compliance with § 38.1-393.

Because the proper disposition of this question, and of others requiring interpretation of § 38.1-393, is unclear and has not been adequately considered by the court, I would grant the widow's petition for rehearing with reargument limited to the § 38.1-393 and § 38.1-405 aspects of the appeal.

I agree that these questions of state law do not justify rehearing en banc.



Kyle I. TURNER, Plaintiff-Appellee,

v.

**UNITED STATES of America,
Defendant and Third-Party
Plaintiff-Appellant,**

v.

**MATANUSKA VALLEY BANK and
Richard M. Jones, Third-Party
Defendants.**

No. 23922.

**United States Court of Appeals,
Ninth Circuit.**

March 10, 1970.

Action against taxpayer to recover penalty for failure to pay withholding taxes. The United States District Court for the District of Alaska, Raymond L. Plummer, Chief Judge, rendered summary judgment in favor of taxpayer and the government appealed. The Court of Appeals, Hufstedler, Circuit Judge, held that evidence generated substantial question of material fact whether bank vice president, who as condition of loan agreement was made officer and director of corporate borrower and countersigned all company checks, was within reach of statute providing for penalty in amount of tax for failure to pay over any tax and thus would be liable for withholding taxes which had not been

paid by borrower, precluding summary judgment.

Reversed.

1. Internal Revenue \Rightarrow 2332

"Final", within meaning of rule that statute providing for penalty in amount of tax on failure to collect and pay over any tax reaches, in case of corporations, those who have the final word as to what bills should or should not be paid and when, means significant, rather than exclusive control. 26 U.S.C.A. (I.R.C.1954) § 6672.

See publication Words and Phrases for other judicial constructions and definitions.

2. Federal Civil Procedure \Rightarrow 2516

Evidence generated substantial question of material fact whether bank vice president, who as condition of loan agreement was made officer and director of corporate borrower and countersigned all company checks, was within reach of statute providing for penalty in amount of tax for failure to pay over any tax and thus would be liable for withholding taxes which had not been paid by borrower, precluding summary judgment. 26 U.S.C.A. (I.R.C.1954) § 6672.

Gilbert E. Andrews (argued), Asst. U. S. Atty., Douglas B. Bailey, U. S. Atty., Anchorage, Alaska, Lee A. Jackson, Atty., Johnnie M. Walters, Asst. Atty. Gen., Dept. of Justice, Washington, D. C., for the appellant.

Robert Flint, Anchorage, Alaska, argued Allen McGrath, McGrath & Welthorff, Anchorage, Alaska, for Turner.

L. S. Kurtz, Jr., Anchorage, Alaska, argued Burr, Boney, & Penae, Anchorage, Alaska, for Valley Bank.

Before BARNES, ELY, and HUFSTEDLER, Circuit Judges.

HUFSTEDLER, Circuit Judge:

The Government appeals from a summary judgment in favor of Turner. a

I hereby apply to North American Life & Casualty Company, Minneapolis, Minnesota, for a policy of Life Insurance in accordance with the provisions of: Group Policy No. 64084-479 Certificate No. 4330 or Employees' Policy No. _____ insuring my life as an Employee of Nagerette, Tyree & Boring

<p>1a. Name (Print in full.) <u>G. David Tyree, Jr.</u></p> <p>1b. Residence Street and No. or R. F. D. <u>12416 Hatchway Ct</u> Town <u>Woodbridge</u> County <u>A. Va</u> State <u>Va</u></p> <p>1c. Business Address Street and No. or R. F. D. <u>14908 Jeff Davis Hwy</u> Town <u>Woodbridge Va</u> State _____</p> <p>1d. Date of Birth Month <u>April</u> Day <u>9</u> Year <u>1943</u> Age at Last Birthday <u>31</u></p> <p>1e. Place of Birth City <u>Memphis, Tenn.</u> State <u>Tenn.</u></p> <p>2a. On what date was employment terminated with above Company? Month <u>3</u> Day <u>31</u> Year <u>75</u></p> <p>2b. Occupation when employment terminated. Give exact duties in full <u>Attorney</u></p> <p>2c. Present occupation. Give exact duties in full <u>none</u></p> <p>2d. Name of present employer <u>n/a</u></p> <p>2e. If unemployed, what are your intentions regarding future employment <u>none presently</u></p>	<p>3. Have you made or do you contemplate making any aircraft flights or ascensions? If so, give full details. <u>no</u></p> <p style="text-align: right;">EXHIBIT # "C"</p> <p>4a. Plan of Policy desired <u>whole Life</u></p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%; vertical-align: top;"> <p>4b. Amount <u>\$ 10,000</u></p> </td> <td style="width: 50%; vertical-align: top;"> <p>4c. Premium Payable <input checked="" type="checkbox"/> Annually <input type="checkbox"/> Quarterly <input type="checkbox"/> Semi-annually <input type="checkbox"/> Monthly Mark with 'X' which desired</p> </td> </tr> </table> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%; vertical-align: top;"> <p>5a. Address for Premium Notices. <input type="checkbox"/> Business <input checked="" type="checkbox"/> Residence</p> </td> <td style="width: 50%; vertical-align: top;"> <p>5b. Do you desire premium loan privilege to be Automatic? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/></p> </td> </tr> </table> <p>6a. Beneficiary <u>Kelli M. Tyree</u></p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%; vertical-align: top;"> <p>6b. Relationship of beneficiary <u>wife</u></p> </td> <td style="width: 50%; vertical-align: top;"> <p>6c. Date of birth of beneficiary. Month <u>Aug</u> Day <u>10</u> Year <u>1945</u> Age <u>29</u></p> </td> </tr> </table> <p>6d. Address of beneficiary <u>12416 Hatchway Ct</u> <u>Woodbridge, Va 22192</u></p> <p>6e. Do you reserve the right to change the beneficiary. Yes <input checked="" type="checkbox"/> No <input type="checkbox"/></p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%; vertical-align: top;"> <p>7a. Mail Policy to <input type="checkbox"/> Business <input checked="" type="checkbox"/> Residence <u>Residence</u></p> </td> <td style="width: 50%; vertical-align: top;"> <p>7b. Amount of Premium remitted with this Application <u>\$ 150.90</u></p> </td> </tr> </table>	<p>4b. Amount <u>\$ 10,000</u></p>	<p>4c. Premium Payable <input checked="" type="checkbox"/> Annually <input type="checkbox"/> Quarterly <input type="checkbox"/> Semi-annually <input type="checkbox"/> Monthly Mark with 'X' which desired</p>	<p>5a. Address for Premium Notices. <input type="checkbox"/> Business <input checked="" type="checkbox"/> Residence</p>	<p>5b. Do you desire premium loan privilege to be Automatic? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/></p>	<p>6b. Relationship of beneficiary <u>wife</u></p>	<p>6c. Date of birth of beneficiary. Month <u>Aug</u> Day <u>10</u> Year <u>1945</u> Age <u>29</u></p>	<p>7a. Mail Policy to <input type="checkbox"/> Business <input checked="" type="checkbox"/> Residence <u>Residence</u></p>	<p>7b. Amount of Premium remitted with this Application <u>\$ 150.90</u></p>
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<p>7a. Mail Policy to <input type="checkbox"/> Business <input checked="" type="checkbox"/> Residence <u>Residence</u></p>	<p>7b. Amount of Premium remitted with this Application <u>\$ 150.90</u></p>								

Certificate

I hereby surrender said ~~Certificate Policy~~ (Cross out One) and in consideration of the issuance by North American Life and Casualty Company, Minneapolis, Minnesota, of the policy herein applied for, I do hereby relinquish all rights to privileges or benefits under said Group Policy or Employees' Policy, and do hereby release said North American Life and Casualty Company, its successors and assigns, from all liability under said Group Policy or Employees' Policy. I hereby declare that the statements and answers as written or printed herein are full, complete and true, whether written by my own hand or otherwise, and agree that every such statement and answer is material to the risk.

Dated at Woodbridge, Va this 3rd day of April 1975.

Witness: Charles H. Kieckhefer G. David Tyree, Jr.
(Signature of Applicant for Insurance)
(Write name in full)

FINAL JUDGMENT ORDER

This case came on the 19th day of May, 1977 by the Plaintiff, Ketti M. Tyree, by her attorneys, Daniel H. Borinsky and Robert J. Zelnick, upon her Motion for Judgment and the Defendant, North American Life and Casualty Company, by their attorneys, John J. Wicker, Jr., E. Brodnax Haskins, and Floyd C. Bagley upon their Answer and Grounds of Defense.

THEREUPON, plaintiff renewed her motion for Summary Judgment upon her Supplemental Memorandum for Summary Judgment, which motion was taken under advisement by the Court and the trial proceeded without a ruling being given on this issue.

WHEREUPON, came a jury who were summoned, elected, tried and sworn well and truly to try the issues joined between the parties.

THEREUPON, counsel for the Plaintiff and counsel for the Defendant made opening statements, and counsel for the plaintiff proceeded to introduce her evidence.

At the conclusion thereof, counsel for the Defendant moved to strike the Plaintiff's evidence and enter summary judgment for the Defendant which motion was denied by the Court, as to which ruling counsel for the Defendant duly excepted.

WHEREUPON, counsel for the Defendant proceeded to introduce its evidence.

WHEREUPON, at the conclusion of all of the evidence, the instructions were argued by counsel, and all objections of the Court's rulings were duly noted, out of the presence of the jury.

WHEREUPON, the jury returned and was instructed by the Court as to the law. After hearing closing arguments for the Plaintiff and the Defendant, the jury returned to consider its verdict.

After mature consideration, the jury returned and rendered the following verdict, to-wit:

"We the jury on the issue joined between Ketti M. Tyree, Plaintiff, and North American Life and Casualty Company, Defendant, find in favor of the Plaintiff." (Benjamin F. Chavez, Foreman).

WHEREUPON, the jury was polled and the verdict was confirmed.

THEREUPON, the jury was discharged.

WHEREUPON, the Defendant, by counsel, moved the Court to set aside the verdict of the jury as being contrary to law and evidence in the case, and for misdirection of the jury and for various erroneous rulings of the Court shown by the stenographic transcript of the Court Reporters, and enter judgment, notwithstanding the verdict, for the Defendant, or, in the alternative, to grant a new trial to the Defendant, which motion of the Defendant was denied by the Court, to which Defendant, by counsel, duly excepted.

UPON CONSIDERATION WHEREOF, the Court being of the opinion that judgment should be entered for the Plaintiff in accordance with the jury verdict, it is,

ADJUDGED, ORDERED and DECREED that the Plaintiff, Ketti M. Tyree, should be and she hereby is granted judgment against the

Defendant, North American Life and Casualty Company, in the sum of \$10,000.00 with interest at the legal rate from July 1, 1975, together with her Court costs in this proceeding; and

It being represented that Defendant intends to appeal to the Supreme Court of Virginia, the execution of this judgment is hereby suspended, provided that the Defendant, or someone for it, within 15 days after entry of this judgment order, enters into bond in the Clerk's Office of this Court conditioned according to law, especially the provisions of §8-477 of the Code of Virginia, in the penal sum of FOURTEEN THOUSAND DOLLARS (\$14,000.00), with surety approved by said Clerk of Court; and

That the Clerk, in preparing the record for said appeal shall affix and include therein his certificate that a proper bond, conforming to this Order, has been entered into with surety and penalty as aforesaid, and the date thereof; and

It is further ADJUDGED, ORDERED and DECREED that the Court Reporters' stenographic transcript of the testimony and exhibits and various motions and objections and exceptions of counsel, and rulings by the Court, from time to time during the trial and immediately thereafter, shall be included as part of the official record.

To which actions of the Court, the Plaintiff and Defendant, by counsel, objected to so much thereof that failed to sustain their respective motions and objections formally filed and made.

ENTER this 24th day of June, 1977.



THOMAS J. MIDDLETON, JUDGE
CIRCUIT COURT OF PRINCE WILLIAM COUNTY

WE ASK FOR THIS:

Daniel H. Borinsky
DANIEL H. BORINSKY
COUNSEL FOR PLAINTIFF

and

Robert J. Zelnick
ROBERT J. ZELNICK
COUNSEL FOR PLAINTIFF

14908 Jefferson Davis Highway, Woodbridge, Va. 22191

John J. Wicker, Jr.
JOHN J. WICKER, JR.
COUNSEL FOR DEFENDANT


and

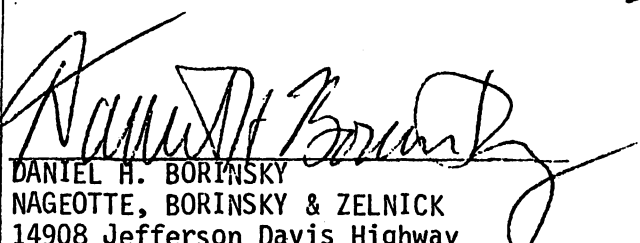
E. Brodnax Haskins
E. BRODNAX HASKINS
COUNSEL FOR DEFENDANT

706 Mutual Building, Richmond, Va. 23219

NOTICE

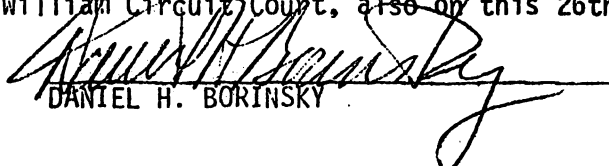
PLEASE TAKE NOTICE that the Plaintiff, Ketti M. Tyree, by Counsel, will move the Court, sitting in Manassas, on the 2nd day of September, 1977, at 10:00 A.M., or as soon thereafter as counsel may be heard, for an order, in accordance with the attached objection, certifying that the record is incomplete.


KETTI M. TYREE, By Counsel


DANIEL H. BORINSKY
NAGEOTTE, BORINSKY & ZELNICK
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191
Counsel for Plaintiff

CERTIFICATE OF SERVICE


I hereby certify that I have, on this 26th day of August, 1977, hand delivered/mailed, postage pre-paid, a copy of the foregoing notice to John Wicker, Brodnax Haskins, and Floyd Bagley, Counsel for the Defendant. In addition, a copy hereof and the related objection has been hand delivered/mailed to the Honorable Arthur Sinclair, Senior Judge, Prince William Circuit Court, also on this 26th day of August, 1977.

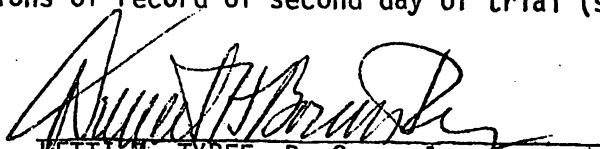

DANIEL H. BORINSKY

OBJECTION PURSUANT TO RULE 5:11

COMES NOW the Plaintiff, Ketti M. Tyree, by counsel, and as and for her objection to the transcript filed on August 18, 1977 by the defendant, states that the said transcript is incomplete in that the following is omitted therefrom:

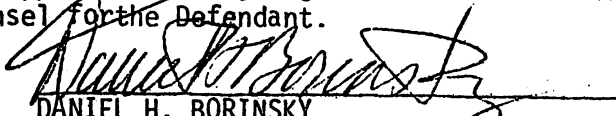
1. All motions in Chambers heard by the presiding Judge on the day of the trial (see Volume I, Page 3).
2. Arguments relating to Plaintiffs instructions numbers one thru five (see Volume 2, Pages 30 and 31).
3. Arguments relating to Defendants' instructions A, B, C, and D (see Volume 2, Page 39).
4. Closing arguments of both parties, Courts instructions to jury, rendition of verdict by the jury (see Volume 2, Page 44).
5. Final remarks of counsel in Court (see Volume 2, Page 52).
6. Other indeterminate portions of record of second day of trial (see Volume 2, Page 3).


DANIEL H. BORINSKY
Nageotte, Borinsky & Zelnick
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191
Counsel for the Plaintiff


KETTI M. TYREE, By Counsel

CERTIFICATE OF SERVICE

I hereby certify that I have, on this 26th day of August, 1977, hand delivered/mailed, postage pre-paid, a copy of the foregoing notice to John Wicker, Brodnax Haskins, and Floyd Bagley, Counsel for the Defendant.


DANIEL H. BORINSKY

ORDER

THIS CAUSE came on to be heard on September 2, 1977, upon the objections filed by the Plaintiff, pursuant to Rule 5:11 of the Rules of the Supreme Court of Virginia, that the transcript of the trial filed herein was incomplete, and was argued by counsel.

UPON CONSIDERATION WHEREOF, it appearing to the Court that the Plaintiff's objections are well founded, it is hereby certified pursuant to Rule 5:11 that the transcript of the trial filed in this case by the Defendant on August 18, 1977 is incomplete.

FURTHER, the Court being of the opinion that it cannot specify with particularity the respects in which said transcript is incomplete, that the parties are in disagreement as to the respects said transcript is incomplete, and that such issue should properly be resolved by the judge presiding at trial, it is further,

ADJUDGED, ORDERED, and DECREED that this matter be continued to allow the Honorable Thomas J. Middleton, the presiding judge at the trial of this case, to obtain appointment by the Virginia Supreme Court as judge designate for the Circuit Court of Prince William County so he may designate and certify the specific omissions in the transcript of trial.

ENTERED this 6th day of September, 1977.


ARTHUR W. SINCLAIR - JUDGE

ORDER

This cause came on this day to be heard upon the objections filed by the Plaintiff, pursuant to Rule 5:11 of the Rules of the Supreme Court of Virginia, that the transcript of the trial filed herein was incomplete, and was argued by counsel.

Upon consideration whereof, it appearing to the Court that ^{certain of} the Plaintiff's objections are well founded, it is hereby certified pursuant to Rule 5:11 that the transcript of the trial filed in this case by the Defendant on August 18, 1977 is incomplete in the following respects:

1. All motions in Chambers heard by the presiding Judge on the day of the trial are omitted.

2. Arguments, objections and rulings relating to Plaintiff's instructions numbers one through five are omitted.

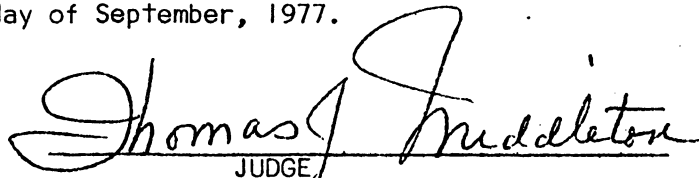
3. Arguments, objections and rulings relating to Defendant's instructions A, B, C, and D are omitted.

4. Closing arguments of both parties, the Court's instructions to the jury and rendition of verdict by the jury are omitted.

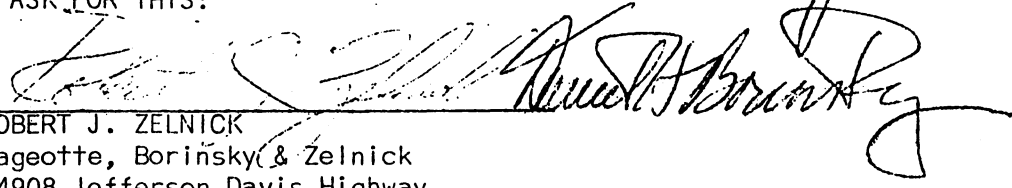
~~5. Final remarks of counsel in Court are omitted.~~ Jpm

~~6. Other indeterminate portions of the record of the second day of trial are omitted.~~ Jpm

Entered this 6th day of September, 1977.


JUDGE

I ASK FOR THIS:


ROBERT J. ZELNICK
Nageotte, Borinsky & Zelnick
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191
Counsel for Plaintiff

Patient's name and address

George D. Pyree

AUTHORIZATION TO RELEASE INFORMATION: I hereby authorize undersigned physician to release any information acquired in the course of my examination or treatment.

Signed (patient, or parent if minor)

Date

Diagnosis and concurrent conditions (If diagnosis code other than ICDA* used, give name)

Carcinoma of the colon

Q2
G.T.

Condition due to injury or sickness arising out of patient's employment?

Yes ☐ No ☐

Pregnancy?

Yes ☐ No ☐

If yes, approximate date pregnancy commenced.

Date

Report of services (or attach itemized bill) (If previous form submitted to this carrier, you need show only dates and services since last report)

Procedure

code - if used

(If code other than

CPT** used, give name)

Charges

Date of services

Place of services

Description of surgical or medical services rendered

See attached statement

EXHIBIT NO.

PLI - DEFICIENCY COMPL.

CASE NO. 7560

DATE 5/19/77

JUDGE

O - Doctor's Office

H - Patient's Home

NH - Nursing Home

Total charges

\$ 1076.50

OH - Outpatient Hospital

OL - Other Locations

Amount paid

\$

*ICDA - International Classification of Diseases

Balance due

\$

**CPT - Current Procedural Terminology (current edition)

Date symptoms first appeared or accident happened.

Date patient first consulted you for this condition.

Has patient ever had same or similar condition?

☐ No ☐ If "yes," state when and describe.

Patient still under your care for this condition?

Yes ☐ No ☐

When was patient continuously totally disabled (unable to work)?

From 7/11/74 Thru present

When was patient partially disabled?

From Thru

Still disabled, date patient should be able to return to work.

Patient was house confined.

From Thru

Does patient have other health coverage?

Yes ☐ No ☐

If "Yes," please identify.

Physician's Name (Print)

Degree

Individual Practitioners -- SS#

All Others -- Employer I. D. #

Must be furnished under authority of law.

Physician's Signature

Dr. F. SMITH, JR., M.D.

Telephone

820-1156

Seminary Professional Village

5226 Daven Ave.

Street Address

Alexandria, Virginia 22311

State or Province

ZIP Code

Employer's Statement

Employee's

Name

On what date was he able to do any part of his work, supervisory or other?

, 19

On what date did he first quit work entirely because of this sickness or injury?

, 19

On what date did he resume his regular duties?

, 19

Was injury or disease covered under workmen's compensation? Yes ☐ No ☐ If "yes," give name and address of your compensation carrier.

Date, 19 Signature of Employer

(Title)

Name of Company

Make: Submarine, Supplied

53

Phone No. Address

(Street and no.)

(City or town)

(State)

(ZIP code)

EXHIBIT NO. 2

PLI) DEF) COMI)

CASE NO. 17560DATE 5/19/77JUDGE: pm

EX. 7
G.T.

ATTENDING PHYSICIAN'S SUPPLEMENTARY STATEMENT

IDS-1

patient's name	<u>George D. Tyne, Jr.</u>
Nature of sickness or injury. Describe complications, if any.)	<u>Carcinoma of the colon</u>
Describe any other diseases or infirmity affecting present condition.	
Give dates of treatments. Since last report)	Office <u>4/4/75 ; 4/9/75 ; 4/24/75 & 4/29/75</u> Home _____ Hospital _____
Is patient still under your care for this condition? If discharged, give date.	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Date _____, 19____
How long was or will patient be continu- ously totally disabled (unable to work)?	From <u>9-11</u> , 19 <u>74</u> through <u>indefinite</u> , 19____
If accident, how long was or will patient be partially disabled?	From _____, 19____ through _____, 19____
If sickness, was patient confined to the house? If "Yes," give dates.)	Yes <input type="checkbox"/> No <input type="checkbox"/> From _____, 19____ through _____, 19____

Date <u>4/29/75</u>	Physician's Name (Print) <u>G. F. Smith, Jr.</u>	Degree _____	Individual Practitioner's - SS# _____
Physician's Signature <u>G. F. Smith, Jr.</u>	Telephone _____	All others - Employer I. D. # <u>54 0886553</u>	Must be furnished under authority of law.

HEMATOLOGY ONCOLOGY
Street Address ASSOCIATES LTD.
5226 Dawes Avenue
City or Town _____ State or Province _____ ZIP Code _____

Attended by "Embodiment" Associates




EXHIBIT NO. 3
 PLI 1 DEF 1 COM 1
 CASE NO. 7560
 DATE 5/19 1977
 JUDGE: Jpm

EX 5
GT

ATTENDING PHYSICIAN'S SUPPLEMENTARY STATEMENT

IDS-1

Patient's name	George D. Tyree
Nature of sickness or injury. Describe complications, if any.)	Carcinoma of the colon
Describe any other diseases or infirmity affecting present condition.	
Give dates of treatments. (since last report)	Office <u>see attached statement</u> Home _____ Hospital _____
Is patient still under your care for this condition? If discharged, give date.	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Date _____, 19____
How long was or will patient be continu- ously totally disabled (unable to work)?	From _____, 19____ through <u>Indefinite</u> , 19____
After accident, how long was or will patient be partially disabled?	From _____, 19____ through _____, 19____
During sickness, was patient confined to the house? If "Yes," give dates.)	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> From _____, 19____ through <u>Indefinite</u> , 19____

FOR DEPOSIT ONLY HEMATOLOGY ONCOLOGY		Individual Practitioner's - SS#	
Date 4/4/75	Physician's Name (Print) 79-74-205	Degree MD	All others - Employer I. D. # 54 0886553
Physician's Signature <i>J. F. Smith</i>		Telephone _____ Must be furnished under authority of law.	
Street Address _____ City or Town		State or Province ZIP Code _____ 	

OF DISABILITY REPORT

Reverse side is for Attending Physician's Report. This form is acceptable for reporting to either or both Companies.

Claim No. 15-25-72 COP Date of last report 4-4, 1975

1. Policyowner's full name	<u>George David Tyree, Jr.</u> Weight <u>170</u> Age <u>32</u>	
2. () dates physician treated you since last report.	Office <u>see attached</u> Home <u>n/a</u> Hospital <u>n/a</u>	
3. If confined in a hospital since last report, give hospital and period covered.	Hospital and address From <u>VI</u> 19 <u>75</u> to <u>Q6</u> 19 <u>75</u>	
4. Have you been continuously confined within doors since date of last report?	<u>no</u>	
5. If not confined, what are your activities and how do you spend your time?	<u>limited activities</u>	
6. Describe any change in your condition.	<u>none</u>	
7. Have you resumed any duties?	No <input checked="" type="checkbox"/> Yes <input type="checkbox"/> Date you resumed work _____, 19____	

I authorize any physician, hospital, insurer or other organization or person having any records, data or information concerning me or my minor dependents to furnish such records, data or information as may be requested by such company to MUTUAL OF OMAHA INSURANCE COMPANY and/or UNITED BENEFIT LIFE INSURANCE COMPANY or their duly authorized representative. I understand that in executing this authorization I waive the right for such information to be privileged.

A photocopy of this authorization shall be considered as effective and valid as the original.

Date 4-29, 1975 Policyowner's signature George David Tyree Jr. Is address ☒ Permanent? ☐ Temporary?
Address 12416 Hatchway Ct. Woodbridge Va. 22192
Number and Street City or Town State ZIP Code

MU94 8-74 Policy No. C-30 AG14-519098-73M

Ident. EXHIBIT NO. 4
PLI 1 DEF 1 COMI 1
CASE NO. 62560
DATE 5/19/1977
JUDGE: _____

Note: Underline in Duplex



Life Insurance Affiliate: United of Omaha

POLICYOWNER'S CONTINUANCE

OF DISABILITY REPORT

Mutual of Omaha Insurance Company
United Benefit Life Insurance Company
Home Office: Omaha, Nebraska

Reverse side is for Attending Physician's Report. This form is acceptable for reporting to either or both Companies.

Claim No. 15-257900

Date of last report @ 3-1, 1975

1. Policyowner's full name	<u>George David Tyree, Jr</u>	Weight <u>180</u> Age <u>31</u>
2. If dates physician treated you since last report.	Office <u>LF Smith Jr</u> Home <u>0</u> Hospital <u>0</u>	
3. If confined in a hospital since last report, give hospital and period covered.	Hospital and address <u>n/a</u>	From <u> </u> , 19 <u> </u> to <u> </u> , 19 <u> </u>
4. Have you been continuously confined within doors since date of last report?	<u>no</u>	
5. If not confined, what are your activities and how do you spend your time?	<u>activities severely limited - mostly at home</u>	
6. Describe any change in your condition.	<u>none</u>	
7. Have you resumed any duties?	No <input checked="" type="checkbox"/> Yes <input type="checkbox"/>	Date you resumed work <u>n/a</u> , 19 <u> </u>

(X) 4
G.T.

I authorize any physician, hospital, insurer or other organization or person having any records, data or information concerning me or my minor dependents to furnish such records, data or information as may be requested by such company to MUTUAL OF OMAHA INSURANCE COMPANY and/or UNITED BENEFIT LIFE INSURANCE COMPANY or their duly authorized representative. I understand that in executing this authorization I waive the right for such information to be privileged.

A photocopy of this authorization shall be considered as effective and valid as the original.

Date 4/4, 1975 Policyowner's signature George David Tyree Jr
Address 12416 Hatchway Ct Woodbridge Va 22192
Number and Street City or Town State ZIP Code

Is address
☒ Permanent?
☐ Temporary?

MU94 8-73 Policy No. C3GAG1U-58098-73 M

Exhibit EXHIBIT NO. 5
PLI 1 DEFICI COMI
CASE NO. 6 7560
DATE 3/19 1977
JUDGE:

RICHARD R. NAGEOTTE
ATTORNEY AT LAW, LTD.
14908 JEFFERSON DAVIS HWY.
WOODBRIIDGE, VIRGINIA 22191

Ident
RICHARD R. NAGEOTTE
G. DAVID TYREE
DANIEL H. BORINSKY
ATTORNEYS AT LAW

EXHIBIT NO. 6
PLI: 1 DEF. COM. 1
CASE NO. 42560
DATE 5/19/1977
JUDGE: _____

PHONE 491-4136
AREA CODE 703

March 7, 1975

Mutual of Omaha Insurance Company
Claim Division
Dodge and 33rd Street
Omaha, Nebraska 68131

Re: Disability Claim 15-25 79 00 ✓
Policy No. C30AGIU-519098-73M

Gentlemen:

In regard to my letter to you dated February 21, 1975 and your response thereto, I enclose an Attending Physician's Statement filled out by my doctor, L. F. Smith, Jr. As you can see, I have been regarded as totally disabled since the date of my entrance into the hospital on 9/11/74. I have attempted to go to work on several occasions since December 12, 1974, but find it increasingly difficult to put in any type of meaningful time at my employment. However, I have given due credit for the days that I have done some legal matters, either in the office or at home.

Since writing, I was unable to work the last week of February, adding an additional \$250.00 to my claim, bringing the same to a total of \$2,171.52 through the end of February, 1975. I would appreciate your considering this matter a case of total disability and sending a monthly check for \$1,000.00 on a regular basis.

I again request that this claim be handled as expeditiously as possible as I am in need of the money from my disability claim. If you have any questions, kindly contact me at your very earliest opportunity and I will be pleased to discuss this matter with any of your representatives.

Very cordially yours;

G. David Tyree
G. DAVID TYREE

GDT:df

Enclosures

RECEIVED
CLAIM DEPT.

OCT 06 1975

NORTH AMERICAN LIFE
AND CASUALTY CO.

Note: Underlining Supplied

EXHIBIT NO. 7
PLI 1 DEFICOM 1
CASE NO. 12560
DATE 5/19/1977
JUDGE:

RICHARD R. NAGEOTTE
& DAVID TYREE
DANIEL H. BORINSKY
ATTORNEYS AT LAW

RICHARD R. NAGEOTTE
ATTORNEY AT LAW, LTD.
14908 JEFFERSON DAVIS HWY.
WOODBIDGE, VIRGINIA 22191
PHONE 491-4136
AREA CODE 703

February 21, 1975

Mutual of Omaha Insurance Company
Claim Division
Dodge and 33rd Street
Omaha, Nebraska 68131

Re: Disability Claim 15-25 79 00
Policy No. C30AGIU-519098-73M

Gentlemen:

I hereby make additional claim for benefits due to total disability as provided by the above policy. I have previously been paid benefits through December 3, 1974. I have been completely unable to work for 12 days during the balance of December, for 19 days during the month of January, and for 11 days through February 21, 1975.

I calculate my entitlement to compensation as \$545.40 for December, \$826.12 for January, and \$550.00 for February, making a total of \$1,921.52.

I am not making claim for the days which I have been physically able to come into my office, even though I have only worked approximately one hour on each of these days, mainly reviewing mail and dictating a few letters.

I would greatly appreciate your expeditious handling of this matter and if you have any questions regarding this claim, contact me immediately. Verification of my total disability can be made by my doctors, Smith, Uneo and Dobrzynsky, whose reports you already have on file.

Very cordially yours,

G. David Tyree

G. DAVID TYREE

GDT:mkt

RECEIVED
CLAIM DEPT.

OCT 06 1975

NORTH AMERICAN LIFE
AND CASUALTY CO.

NORTH AMERICAN *Life and Casualty Company*

HOME OFFICE: MINNEAPOLIS, MINNESOTA

CANADIAN HEAD OFFICE: TORONTO, ONTARIO

(A Stock Company)

(Herein called Company)

POLICYHOLDER: NALAC EMPLOYERS INSURANCE TRUST

GROUP ORDINARY LIFE POLICY NUMBER: O-4084

EFFECTIVE DATE: MAY 1, 1972

12:01 a.m. at address of the Policyholder.

POLICY ANNIVERSARY: JANUARY 1

each year thereafter.

This Policy is issued in consideration of the Application of the Policyholder and payment of the premiums as provided in this Policy. The first premium is due and payable on the Effective Date of this Policy and subsequent premiums are due and payable in accordance with the Premium Provisions so long as this Policy remains in force.

The Company agrees to provide the Benefits set forth in the Table of Benefits to *Insured Persons* in accordance with the provisions and conditions of this Policy.

This Policy is subject to all the conditions and provisions set forth on this and the subsequent pages, which are made a part of this Policy.

IN WITNESS WHEREOF, NORTH AMERICAN LIFE AND CASUALTY COMPANY has executed this Policy at Minneapolis, Minnesota on the 30th day of May, 1972.

W. H. Kernerle Secretary
Howard C. Barnhill President
Carly M. Coffey Registrar
RECEIVED COPY

GROUP INSURANCE POLICY --- NON-PARTICIPATING

G5-01-01A-00

Exhibit "B"
(page 1 of 40)

ELIGIBILITY AND EFFECTIVE DATE

ELIGIBILITY FOR INSURED PERSON

The following persons will be eligible to be insured under this Policy:

- (a) All full-time employees to age 65 in ACTIVE SERVICE at their customary place of employment who work a minimum of 30 hours per week for employer members.
- (b) All other persons are excluded.

Notwithstanding the Eligibility Requirements above, insurance will not be effective until completion of the following waiting period.

WAITING PERIOD:

- (1) For persons in ACTIVE SERVICE on or before the Policy Effective Date: The Policy Effective Date.
- (2) For persons whose ACTIVE SERVICE began after the Policy Effective Date: One month of continuous ACTIVE SERVICE.
- (3) For persons who converted all or part of the Insurance on his life under the Policy in accordance with the Conversion Privilege provided by this Policy: The date Evidence of Insurability (submitted without expense to the Company) is approved by the Company.

EFFECTIVE DATE OF INDIVIDUAL INSURANCE

Insurance will become effective for an *Insured Person* on the first day of the month coinciding with or next following the first of the dates indicated below, provided the INSURED PERSON has agreed to make the required contribution toward the cost of the amount of insurance to which he is entitled, and further provided that the INSURED PERSON is in ACTIVE SERVICE on that date, otherwise his Effective Date will be deferred until his return to ACTIVE SERVICE;

- (a) the date of completion of any applicable waiting period or if none, upon the date of his eligibility if application is made on or before the date of eligibility, or
- (b) the date of completion of any applicable waiting period or if none, upon the date of written application if made within 31 days following date of eligibility, or
- (c) the date of approval of evidence of insurability by the Home Office of the Company (such evidence to be furnished without expense to the Company).

Notwithstanding any provision to the contrary in the case of an *Insured Person* whose insurance under this Policy had terminated in accordance with Individual Termination of Insurance Provision 28 and who again becomes eligible for this insurance, the insurance for such *Insured Person* will not take effect unless any Individual policy which may have been issued to such *Insured Person* in accordance with Conversion Provision 31 has terminated or been surrendered to the Company, and any right to reinstate it has expired.

GENERAL DEFINITIONS

Following are the definitions of terms which appear in italics in this Policy.

INSURED PERSON: Means an eligible individual whose Insurance became effective and has not terminated.

ACTIVE SERVICE: An *Insured Person* will be considered in *Active Service* on a day which is a scheduled work day if he is performing in the customary manner all of the regular duties of his employment on a full-time basis either at his customary place of employment or at some location to which that employment requires him to travel, or if he is absent from work solely by reason of vacation and at the time his Insurance would otherwise become effective he has not been absent from work for a period of more than three consecutive weeks. An **INSURED PERSON** will be considered in **ACTIVE SERVICE** on a day which is not a scheduled work day only if he was performing in the customary manner all of the regular duties of his employment on the last preceding scheduled work day.

POLICY YEARS AND MONTHS: Will be computed from the effective date of this Policy which will be the beginning of the first Policy Year.

(PAGE 8 OF 40)

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

KETTI M. TYREE,

Plaintiff;

vs.

NORTH AMERICAN LIFE
AND CASUALTY COMPANY,

Defendant.

Law No. 7560

EXHIBIT NO. 9
PLI 1 DEF 1 COM 1
CASE NO. 7560
DATE 5/19 1977
JUDGE:

Deposition of Gary Suing, taken before me, Gene B. Taulborg, General Notary Public and Official Court Reporter within and for the State of Nebraska, at 10 o'clock A.M., on the 29th day of March, 1977, at the Mutual of Omaha Insurance Company, Dodge at 33rd Street, Omaha, Douglas County, Nebraska, in the office of Gary C. Norton, pursuant to the notice herein, to be read in evidence in behalf of Defendant in an action pending in the Circuit Court of Prince William County, Virginia, as captioned above.

- o -

Circuit Court Clerk's Office
Prince William County, Va.
12 97
Deputy Clerk

- A P P E A R A N C E S -

NO APPEARANCE

on behalf of Plaintiff;

MR. GARY C. NORTON, Attorney,
Mutual of Omaha Insurance Company,
Omaha, Nebraska,

on behalf of Defendant.

G A R Y S U I N G,

of lawful age, being by me first duly examined,
cautioned, and solemnly sworn, as hereinafter
certified, depose and sayeth as follows, viz.:

- DIRECT EXAMINATION -

BY MR. NORTON:

Q. Would you please state your name for the record.

A. Gary Suing.

Q. Who are you employed by, Mr. Suing?

A. Mutual of Omaha.

Q. How long have you been employed with Mutual of Omaha?

A. Six and a half years.

Q. In what capacity are you employed with Mutual of Omaha?

A. I am a continuing disability analyst.

Q. Could you explain some of the duties of a continuing
disability analyst?

A. Yes; I administer long-term disability claims.

It is processing them for payment.

1 Q. Are there any other duties, like approving payments, or --

2 A. Yes, I approve the payments and initiate any investi-
3 gation as far as checking total disability.

4 Q. In your capacity as a continuing disability analyst,
5 did you have an occasion to review and pay a claim
6 submitted by George David Tyree, Jr.?

7 A. Yes, I did.

8 Q. Could you describe the type of claim and what action you
9 took when you first received it?

10 A. Yes. This is a disability policy which pays a
11 thousand dollars a month when Mr. Tyree was totally
12 disabled as a result of sickness or accident.

13 Q. Excuse me, this policy was owned by Mr. Tyree?

14 A. Yes, it was.

15 Q. And when did he first submit the claim?

16 A. He first gave us notice of claim on October 21, 1974.

17 Q. What did you do in response to the receipt of that notice?

18 A. Upon receipt of the notice, claim forms were sent
19 out to Mr. Tyree, and an inspection report ordered to
20 obtain additional information to verify disability.

21 Q. Were those claim forms and inspection reports received?

22 A. Yes, they were.

23 ~~Q. What did they show?~~

24 ~~A. The first claim form was completed by Mr. Tyree~~
25 ~~on November 14th, showing total disability beginning~~

~~September 11, 1974. And this was verified by his~~
~~physician, a Dr. McGinn.~~

Q. Does the company have a percentage of disability that must exist before they pay a claim?

A. No, there is no set percentage, just the insured must be unable to perform all the duties of his occupation to be eligible for total disability.

Q. How does Mutual of Omaha determine whether he is unable to perform the duties of his occupation?

A. This is verified by the attending physician, by a statement from the attending physician, and by investigation in the file, through an inspection, check with employers, neighbors, et cetera.

Q. After those processes were completed in Mr. Tyree's claim, what was your conclusion as to his request for benefits under his policy of insurance?

A. After the initial claim form, inspection reports, he was considered totally disabled.

Q. For exactly what period of time were disability payments made?

A. The initial payment was made for the period September 11th through December 3rd, 1974.

Q. Were there additional periods after that for which the company received proof forms and made payments?

A. Yes, there were. We made payments for continuous

1 total disability, except for a few days when he was
2 considered partially disabled, through his death on
3 May 29, 1975.

4 Q. Then am I to understand that from September until May
5 Mutual paid this individual total disability benefits,
6 except for certain days, ~~when he returned to the office?~~

7 A. Yes. He was considered totally disabled, continuously,
8 totally disabled, during this period of time, ~~even though~~
9 ~~he did go to the office on occasion to handle some legal~~
10 ~~matters~~

11 ~~Q. You mentioned that there were several days when he was~~
12 ~~only partially disabled. Do you have any documentation~~
13 ~~as to the dates when he was only partially disabled?~~
14 ~~And what is partial disability?~~

15 A. Well, ~~first of all, partial disability is when he~~
16 ~~is able to perform some of the duties of his occupation.~~

17 ~~And Mr. Tyree wrote us himself, advising that he was~~
18 ~~able to go to the office on certain days and handle~~
19 ~~some affairs, although he stated that this was for a~~
20 ~~period of up to an hour or less.~~

21 Q. ~~Though he was able to go to the office for less than~~
22 ~~an hour, Mutual considered him partially disabled for~~
23 ~~that period of time?~~

24 ~~A. Yes.~~

25 ~~Q. And that would be for what period of time?~~

1 ~~A. Only for those days that he was able to go to the~~
2 ~~office.~~

3 Q. Do you have an idea of the number of days that Mutual
4 considered him only partially disabled?

5 A. Yes, there were 16 days during the months of December
6 January, and February.

7 Q. Other than that, Mutual considered him totally disabled?

8 A. Yes.

9 ~~Q. Can you produce the first written indication which Mutual~~
10 ~~received that Mr. Tyree was making a claim under his~~
11 ~~disability policy?~~

12 ~~A. Yes. It was the notice of claim completed by him~~
13 ~~on October 24, 1974.~~

14 ~~Q. Mr. Suing, I hand you a letter dated February 21, 1975.~~
15 ~~Can you identify and state whether or not Mutual relied~~
16 ~~upon its contents in agreeing to pay Mr. Tyree's claim?~~

17 ~~A. No, we didn't rely on this letter alone in paying~~
18 ~~total disability benefits.~~

19 ~~Q. Can you tell me why Mutual of Omaha did not rely on that~~
20 ~~letter?~~

21 ~~A. Yes. We require a statement from the attending~~
22 ~~physician, also, to verify total disability.~~

23 ~~Q. And what did Mr. Tyree's attending physician inform~~
24 ~~Mutual, within the context of the claim file?~~

25 ~~A. That he was totally and continuously disabled as of~~

1 September 11, 1974.

2 MR. NORTON: I'd like to ask that that document
3 I just handed you be marked Exhibit 1.

4 (Exhibit 1 marked by reporter)

5 Q. Mr. Suing, I am going to hand you a second document here
6 that was written March 5th, 1975, and ask that you identify
7 it. And I am further going to ask whether Mutual relied
8 on its contents in agreeing to honor Mr. Tyree's disability
9 claim?

10 A. Yes, this is a claim form completed by the attending
11 physician; in this case, Dr. Smith. And he indicates on
12 this form that Mr. Tyree was totally disabled from
13 September 11, 1974, through the present date.

14 Q. Can you tell which the present date is?

15 A. March 5th, 1975.

16 Q. What was the diagnosis given for Mr. Tyree's disability?

17 A. Carcinoma of the colon.

18 Q. In laymen's terms, what would that be?

19 A. Cancer.

20 MR. NORTON: I'd like to ask that the document
21 I just handed you be marked Exhibit 2.

22 (Exhibit 2 marked by reporter)

23 Q. Mr. Suing, now I hand you a letter bearing the date of
24 March 7, 1975, and ask you to identify it.

25 A. Yes, this is a letter from Mr. Tyree, advising us

1 of certain days that he was able to go into the office
2 to do some work, and also advising that during the
3 other periods of time he was totally disabled from
4 performing any work.

5 Q. Did, in fact, the company place any reliance upon the
6 contents of this letter in paying Mr. Tyree's claim?

7 A. Only in the fact that we consider him partially
8 disabled on the days he indicated he was able to do
9 some work.

10 Q. Did the company place any reliance on the contents
11 in the March 7th letter in paying Mr. Tyree's claim?

12 A. No, we don't use this letter, or such a letter,
13 from the insured as verification of total disability.

14 Q. Did the contents of the March 7th letter have any bearing
15 on the amount of money that Mr. Tyree received under his
16 policy of insurance?

17 A. Yes, it did. Mr. Tyree's policy did not pay benefits
18 when he was considered partially disabled; that is, able
19 to perform some of the duties of his occupation. And
20 since he indicated in his letter that he was able to
21 perform some work on certain days, no benefits were paid
22 on those days.

23 Q. Though at no time, as I understand, did Mutual ever
24 consider Mr. Tyree not disabled completely?

25 A. Yes, he has some form of disability, either partial

1 or total, from September 11th through his date of death.

2 MR. NORTON: I'd like to ask that the letter
3 you have identified be marked as Exhibit 3.

4 (Exhibit 3 marked by reporter)

5 Q. Mr. Suing, I hand you a document dated April 4, 1975,
6 and I'd like you to describe and state whether or not
7 Mutual relied upon its contents in processing Mr. Tyree's
8 claim.

9 A. This is a photocopy of the front of a claim form
10 completed by Mr. Tyree, it was completed on April 4, 1975,
11 in which he indicates he is totally disabled and unable to
12 do any work.

13 Q. In fact, is that not the policyholder's portion of the
14 proof of loss form?

15 A. Yes, it is.

16 MR. NORTON: I'd like to ask that that portion
17 of the proof of loss form be marked Exhibit 4.

18 (Exhibit 4 marked by reporter)

19 Q. Mr. Suing, I hand you a document dated April 4, 1975,
20 Could you describe and state whether or not the company
21 relied upon the contents of this document in paying
22 Mr. Tyree's claim?

23 A. Yes, this is the physician's portion of the claim
24 form completed by Dr. Smith, in which he indicates
25 Mr. Tyree is indefinitely totally disabled.

1 Q. From what date does that show?

2 A. He doesn't give any exact dates, he just states
3 total disability as indefinite.

4 Q. In the context of Mutual's continuing handling of that
5 claim file, would Mutual have brought disability benefits
6 up to the date of the receipt of that proof form?

7 A. Yes, we would have.

8 Q. And would that have been done in reliance of the physician'
9 signature?

10 A. Yes.

11 MR. NORTON: I'd like to ask that that document
12 I just handed you be marked Exhibit 5.

13 (Exhibit 5 marked by reporter)

14 Q. Mr. Suing, I hand you an additional document dated April 29t
15 I'd like you to describe and state whether or not Mutual
16 relied upon its contents in its continued handling of
17 Mr. Tyree's disability claim?

18 A. Yes; this, again, is the policy owner's portion of
19 the claim form, completed by Mr. Tyree, indicating he is
20 totally disabled.

21 Q. Does Mr. Tyree give any date of disability?

22 A. No. He just indicates he has not been able to resume
23 any duties.

24 Q. What does he show for his present activities?

25 A. Limited activities.

1 MR. NORTON: I'd like to ask that this document
2 be marked Exhibit 6.

3 (Exhibit 6 marked by reporter)

4 Q. Mr. Suing, I hand you the last document, which is dated
5 April 29th. Again, could you describe and state whether
6 Mutual relied upon its contents in paying Mr. Tyree's
7 claim?

8 A. Yes, this is the physician's portion of the claim
9 form.

10 Q. What does it show as to dates of treatment or disability?
11 Can you describe it?

12 A. Yes; the attending physician, Dr. Smith, has shown
13 total disability from September 11, 1974, through
14 indefinite.

15 Q. Were any dates of treatment given?

16 A. Yes, there were dates of treatment on April 4th,
17 April 9th, April 24th, and April 29th, 1975.

18 Q. And, again, what was the diagnosis?

19 A. Carcinoma of the colon.

20 Q. Mr. Tyree died on what date?

21 A. May 29, 1975.

22 Q. And the company's handling of his claim file was concluded
23 when?

24 A. The final payment from May 4th through May 29th,
25 1975, was paid on September 4, 1975, and it was paid to

1 Ketti Tyree, the wife of George Tyree.

2 Q. Mr. Suing, I would like you to identify the document
3 dated April 29th.

4 A. Yes, this is the physician's portion of the claim
5 form, showing Mr. Tyree totally disabled from September 11,
6 1974, through indefinite.

7 MR. NORTON: I'd like to ask the document
8 bearing the date April 29th be marked Exhibit No. 7.

9 (Exhibit 7 marked by reporter)

10 Q. Mr. Suing, I'd like to return for a minute to the first
11 claim's notice that the company received, and would like
12 you to identify it for the record.

13 A. Yes, this is our notice of claim, completed by
14 Mr. Tyree, indicating he was totally disabled, beginning
15 September 11, 1974.

16 Q. And in fact of the matter, was not that document used
17 to start his claim file?

18 A. Yes, it was.

19 MR. NORTON: I'd like to ask that that document
20 be marked Exhibit 8.

21 (Exhibit 8 marked by reporter)

22 MR. NORTON: I'd like to offer the documents
23 that have been identified as Exhibits 1 through 8
24 into evidence.

25 I have no further questions.

- C E R T I F I C A T E -

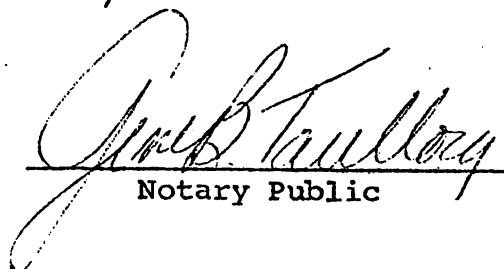
STATE OF NEBRASKA)
) SS.
COUNTY OF DOUGLAS)

I, Gene B. Taulborg, Notary Public in and for the State of Nebraska, do hereby certify that Gary Suing was by me duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him was reduced to writing by myself;

That the within and foregoing deposition was taken at the time and place herein specified;

That I am not counsel, attorney or relative of either party or otherwise interested in the event of this suit.

IN TESTIMONY WHEREOF I have placed my hand and notarial seal this 7.74 day of April, 1977.


Notary Public

Costs:

Notary's fee and reporter's fee: \$ 55.95.

REQUEST FOR PARTICIPATION - NALAC EMPLOYERS INSURANCE TRUST

TO THE TRUSTEES:

The undersigned employer requests to participate in the NALAC Employers Insurance Trust and adopts all of the terms and conditions of the Agreement and Declaration of Trust as amended, between all participating Employers and the Trustees.

The undersigned employer requests that (1) group insurance be made available to its eligible employees in accordance with the terms of the group insurance policies issued to the Trust, (2) such insurance become effective as of the first day of the month following NALAC's receipt of the required enrollment materials, or as of the date approved by the insurance company; whichever is later and (3) such insurance continue, in accordance with the terms of the policies, as long as the undersigned employer continues to be a participating employer.

Employer (Correct Legal Name)
NAGEOTTE, TYREE & BORINSKY
Address (No., Street, City, State & Zip Code)
14908 Jefferson Davis Highway, Woodbridge, Virginia 22191
Nature of Business
Law Firm

1. Is any portion of the insurance applied for a replacement of existing insurance?

Yes ☐ No ☒

EXHIBIT NO: 10
PLI 1 DEF 1 COM 1
CASE NO. 22560
DATE 5/20/1977
JUDGE: [Signature]

2. The employer hereby applies for participation in the following plans, as set forth in the Trust

(A) Life and Accidental Death and Dismemberment Insurance plans for employees:

Plan 1 ☐ Plan 2 ☒ Plan 3 ☐

(B) Weekly Income Plan. The weekly income benefit corresponds with the employee's life insurance classification.

Yes ☐ No ☒

(C) Family Protector Plan

(E) High Limit AD&D

Yes ☐ No ☒

Yes ☐ No ☒

(D) Super Imposed Major Medical Plan

Yes ☐ No ☒

3. (A) The employer understands that all employees including partners, proprietors and officers, if a corporation, must work 30 hours or more per week to be eligible for insurance.

(B) The employer wishes to exclude employees under a union contract from eligibility under the Insurance Trust.

Yes ☐ No ☒

4. The total number of employees on the employer's payroll is: Eight, one of whom works less than thirty hours per week.

5. The employer is aware that he will pay not less than 25% of the cost of the Group Term Life and AD&D program.

6. The employer realizes that insurance for which evidence of insurability is required will become effective only after approval of such evidence of insurability by the insurance company.

7. The employer understands that employees shall not be eligible to obtain insurance until such employees have been actively at work for the employer for thirty (30) consecutive days immediately prior to the coverage effective date, and have submitted signed enrollment cards.

Employer Signature: <i>[Signature]</i>	Title: Partner	Date: 2/12/75
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NORTH AMERICAN *Life and Casualty Company*

A STOCK COMPANY • HOME OFFICE • MINNEAPOLIS, MINNESOTA 55403

EXHIBIT NO. 1
PLI or DEF 1 COMI 1
CASE NO. New 7560
DATE 5-13-77
JUDGE: Jfm

Agrees to Pay

to the Beneficiary the Sum Insured upon receipt of due proof of the Insured's death. The Policy is issued in consideration of the application and the payment of the premiums.

The Policy Schedule indicates the Supplemental Benefits, if any, and contains dates and amounts referred to herein. The printed or written matter supplied by the Company on the following pages is also a part of this Policy.

L. Leifert
Countersigned

John W. Hove
Vice President and Secretary

Harold C. Brunell
President

Not valid unless countersigned by
authorized Company Representative.

WHOLE LIFE POLICY
Proceeds Payable at Death—Premiums Payable for Life
Nonparticipating

Life 3124 (11-66)

conditions as this Policy.

the Table will be furnished on request.

POLICY SCHEDULE

FORM NO.	BENEFITS	ANNUAL PREMIUM	YEARS PAYABLE
3124	THE BASE POLICY	\$145.30	FUR LIFE

SUPPLEMENTAL BENEFITS

NONE

LIFE 3100 (11-66) 3101 3102 4112-31 LS-350

INSURED	G DAVID TYREE JR	AGE 31	POLICY NUMBER L-1126840
OWNER	THE INSURED		PREMIUM CLASS STANDARD
			POLICY DATE MAY 1, 1975
SUM INSURED	\$10,000.00	RECEIVED CLAIM DEPT.	ISSUE DATE APR. 21, 1975
<p>JUN 11 1975</p> <p>NORTH AMERICAN LIFE AND CASUALTY CO.</p> <p>PREMIUM \$145.30 PAYABLE EVERY 12 MONTHS FROM POLICY DATE FOR YEARS PAYABLE OR UNTIL PRIOR DEATH OF THE INSURED.</p>			

I hereby apply to North American Life & Casualty Company, Minneapolis, Minnesota, for a policy of Life Insurance in accordance with the provisions of: Group Policy No. 64084-47 Certificate No. 4330 or Employees' Policy No. _____ insuring my life as an Employee of Wagerite, Tyre & Machinery

a. Name (Print in full.)

G. David Tyree, Jr.

b. Residence

Street and No. or R. F. D. 12416 Hatchway Ct
Town Woodbridge County A. Va. State Va.

c. Business Address

Street and No. or R. F. D. 14908 Jeff Davis Hwy
Town Woodbridge State Va.

d. Date of Birth

Month April Day 7 Year 1943 Age at Last Birthday 31

e. Place of Birth

City Memphis, Tenn. State Tenn.

f. On what date was employment terminated with above Company?

Month 3 Day 31 Year 75

g. Occupation when employment terminated. Give exact duties in full

Manager

h. Present occupation. Give exact duties in full

none

i. Name of present employer

n/a

j. If unemployed, what are your intentions regarding future employment

none presently

3. Have you made or do you contemplate making any aircraft flights or ascensions? If so, give full details.

no

4a. Plan of Policy desired

whole Life

4b. Amount

\$ 10,000

4c. Premium Payable

☒ Annually ☐ Quarterly
☐ Semi-annually ☐ Monthly

Mark with 'X' which desired

5a. Address for Premium Notices.

☐ Business ☒ Residence

5b. Do you desire premium loan privilege to be Automatic?

Yes ☒ No ☐

6a. Beneficiary

Kelli M. Tyree

6b. Relationship of beneficiary

wife

6c. Date of birth of beneficiary.

Month Aug Day 10 Year 1945 Age 29

6d. Address of beneficiary

12416 Hatchway Ct
Woodbridge, Va. 22192

6e. Do you reserve the right to change the beneficiary.
Yes ☒ No ☐

7a. Mail Policy to

☐ Business ☒ Residence

7b. Amount of Premium remitted with this Application

\$ 150.90

Certificate
I hereby surrender said ~~Certificate~~ Policy (Cross out One) and in consideration of the issuance by North American Life and Casualty Company, Minneapolis, Minnesota, of the policy herein applied for, I do hereby relinquish all rights to privileges or benefits under said Group Policy or Employees' Policy, and do hereby release said North American Life and Casualty Company, its successors and assigns, from all liability under said Group Policy or Employees' Policy. I hereby declare that the statements and answers as written or printed herein are full, complete and true, whether written by my own hand or otherwise, and agree that every such statement and answer is material to the risk.

Dated at Woodbridge, Va. this 3rd day of April 1975.

Witness: Robert H. Hargrett

G. David Tyree, Jr.
(Signature of Applicant for Insurance)
(Write name in full)

ENDORSEMENT MODIFYING "CASH LOAN" AND "AUTOMATIC PREMIUM LOAN" PROVISIONS

The provisions in this Policy entitled "Cash Loan" and "Automatic Premium Loan" are hereby deleted and the following substituted therefor:

Cash Loan. After this Policy has a cash value and while it is in force other than as extended term insurance, the Company will lend, on the sole security of this Policy properly assigned, any amount which does not exceed the cash value as of the date to which premiums have been paid, or as of the next policy anniversary date, if earlier, or if no further premiums are payable. From the amount of such loan there shall be deducted (1) interest in advance at the rate of 5.7% per annum on such loan to the next policy anniversary and (2) any existing indebtedness. Thereafter interest in advance at the same rate shall be payable annually at the beginning of each policy year and if not paid when due, shall be added to the existing indebtedness and shall bear interest at the same rate.

Any loan may be repaid in whole or in part while this Policy is in force, unless meanwhile a non-forfeiture benefit shall have become effective. If the total indebtedness equals or exceeds the cash value at any time, this Policy shall

terminate 31 days after a notice has been mailed to the last known address of the Owner and of any Assignee of Record.

Automatic Premium Loan. Upon written request prior to the expiration of the grace period of any unpaid premium, the Company will automatically charge as a loan against this Policy the amount which, after deduction of interest at the rate of 5.7% per annum to the next anniversary of this Policy, will be sufficient to pay any unpaid premium, provided that such loan plus other indebtedness does not exceed the cash value at the next premium due date. If such loan plus any other indebtedness exceeds the cash value, a loan will be made for that fraction of the premium which will maintain this Policy in force to the date on which the total indebtedness equals the cash value. This provision may be revoked at the Owner's written request.

Any loan under this provision will be subject to the terms and conditions stated under "Cash Loan".

This endorsement is attached to and made a part of this Policy.

NORTH AMERICAN LIFE AND CASUALTY COMPANY



Secretary


Countersigned

CONTROL OF POLICY

Ownership. The Insured shall be the Owner of this Policy, unless otherwise provided. With the exception of any benefit payable to the Beneficiary, the Owner, subject to the rights of any assignee, shall have all rights, privileges and benefits contained in this Policy.

Beneficiary. The Beneficiary shall be as designated in the application of this Policy unless otherwise provided. Any primary Beneficiary shall have an interest superior to any contingent Beneficiary. The interest of any Beneficiary who dies before the Insured or in a common disaster with the Insured shall terminate at the death of any such Beneficiary. If no other Beneficiary is living at the death of the Insured, the proceeds will then be paid to the then Owner of this Policy, if living, otherwise to the executor or administrator of the Owner's Estate.

The right to change the Beneficiary in this Policy has been reserved to the Owner unless otherwise provided in a

written statement filed with the Company at its Home Office. Subject to the rights of any assignee or irrevocable Beneficiary on record with the Company, a new Beneficiary may be designated by filing at the Home Office of the Company a written request in a form satisfactory to the Company, and signed by the Owner. A change of Beneficiary will take effect when it has been recorded at the Home Office of the Company, but once recorded, whether the Insured is living or not, the change of Beneficiary shall relate back and take effect as of its date of execution, except with respect to any payment made, or action taken, by the Company before the recording.

Assignment. An assignment of this Policy shall not be binding until the Home Office of the Company has received and has recorded a written instrument to that effect. The Company assumes no responsibility for the validity or sufficiency of an assignment.

GENERAL PROVISIONS

The Entire Contract. This Policy includes all pages and any Supplements and the application, a copy of which is attached, and this constitutes the Entire Contract. In the absence of fraud, all statements made by the Insured shall be deemed representations and not warranties and no such statement shall be used in defense of a claim under the Policy unless it is contained in the written application and a copy of the application is attached hereto when the Policy is issued.

Only the President, a Vice-President, the Treasurer, or the Secretary of the Company shall have the power on behalf of the Company to modify or waive any of the provisions of this Policy, and then only in writing.

Payments By The Company. All benefits under this Policy are payable at the Home Office in Minneapolis, Minnesota. At the time of such payment the Company may require the surrender of this Policy. Any indebtedness or premium due and unpaid will be deducted from such payment. On any Policy providing for them, the Company may defer the granting of a Cash Surrender Value or of a Cash Loan, except to pay premiums on policies of this Company, for the period permitted by law but not exceeding 6 months after receipt of the application therefor.

Incontestability. This Policy shall be incontestable after it has been in force during the lifetime of the Insured for a period of 2 years from its Date of Issue, except for:

- (1) the nonpayment of premium;
- (2) any provisions relating to benefits in event of total and permanent disability;
- (3) any provisions relating to additional insurance benefits in event of death by accidental means.

Suicide. If, within 2 years from the Date of Issue, the death of the Insured occurs by suicide, while sane or insane, the liability of the Company hereunder shall be limited to the return of an amount equal to the premiums paid, less any indebtedness to the Company on account of or secured by this Policy.

Policy Months and Policy Years. Policy months, years and anniversaries shall be determined from the Policy Date.

Indebtedness. The term indebtedness as used herein shall refer to indebtedness secured by this Policy.

SETTLEMENT OPTIONS

Instead of having the proceeds payable in one sum in the event of death or, with the consent of the Company, in the event of any other final settlement, the Owner may elect one of the Options by written notice to the Company at any time before the occurrence of the event upon which the proceeds become payable. If no election has been made by the Owner, the Payee may make an election by written notice within 6 months after such event of death or, with the consent of the Company, within 2 months after final proceeds otherwise become payable. These Options are available only if payments are to be made to the person whose life is insured or to a living primary Beneficiary and then only if each payment provided for is at least \$20.00. These Options are not available if payments would be made to an executor, administrator, trustee, corporation, partnership, association or assignee.

Option 1—Proceeds At Interest. Interest payments at the rate of 2½ per cent per year to be made by the Company on any proceeds held on deposit.

Option 2—Payments for a Definite Period. The proceeds will be paid in equal monthly installments for the number of years selected as set forth in the Table.

Option 3—Life Annuity with Guaranty for Minimum Period. The Company will pay equal monthly installments

during the life of the Payee, but at least for the minimum period shown in the Table. The amount of each monthly payment per \$1,000 of proceeds depends on the age and sex of the Payee when the first payment is made and on the guaranteed period chosen. If the Payee dies within the guaranteed period, the discounted value of the remaining guaranteed payments, computed on the basis of interest at the rate of 2½ per cent per annum, compounded annually, will be paid by the Company as a final payment.

Option 4—Payments of Designated Amount. The proceeds will be paid in installments of selected amount with payments totalling not less than 5 per cent of the proceeds each year. Payments will be made until the proceeds, with interest credited at the rate of 2½ per cent per annum, are exhausted.

Option 5—Life Annuity with Cash Refund. The Company will pay equal monthly installments during the life of the Payee; and upon the death of the Payee after installments have commenced, the Company will pay in one sum any excess of the amount of the proceeds applied under this Option over the total payments made under this Option. The amount of each monthly payment per \$1,000 of proceeds depends on the age and sex of the Payee when the first payment is made.

Monthly Payments Per \$1,000 of Proceeds

Monthly Payments Per \$1,000 of Proceeds											
APPLIED UNDER OPTION 2		APPLIED UNDER OPTIONS 3 AND 5									
		Age of Payee Nearest Birthday When First Payment Is Made		OPTION 3		OPTION 5	Age of Payee Nearest Birthday When First Payment Is Made		OPTION 3		OPTION 5
				10 Years Minimum	20 Years Minimum				10 Years Minimum	20 Years Minimum	
Designated Period	Monthly Installment										
1 yr.	\$84.28	Male	Female				Male	Female			
2 yrs.	42.66		11 & under	\$2.63	\$2.61	\$2.59	46	51	\$4.09	\$3.90	\$3.80
3 "	28.79		12	2.64	2.63	2.60	47	52	4.17	3.95	3.84
4 "	21.86		13	2.66	2.65	2.62	48	53	4.25	4.01	3.92
5 "	17.70		14	2.67	2.66	2.63	49	54	4.33	4.07	3.98
		10 & under	15	2.69	2.68	2.65	50	55	4.42	4.12	4.04
6 "	14.93										
7 "	12.95	11	16	2.71	2.70	2.67	51	56	4.50	4.18	4.11
8 "	11.47	12	17	2.73	2.71	2.68	52	57	4.60	4.24	4.18
9 "	10.32	13	18	2.74	2.73	2.70	53	58	4.69	4.30	4.25
10 "	9.39	14	19	2.76	2.75	2.72	54	59	4.79	4.36	4.33
		15	20	2.78	2.77	2.74	55	60	4.90	4.41	4.40
11 "	8.64										
12 "	8.02	16	21	2.81	2.79	2.76	56	61	5.01	4.47	4.49
13 "	7.49	17	22	2.83	2.81	2.78	57	62	5.12	4.53	4.57
14 "	7.03	18	23	2.85	2.84	2.80	58	63	5.23	4.59	4.66
15 "	6.64	19	24	2.88	2.86	2.82	59	64	5.35	4.64	4.75
		20	25	2.90	2.88	2.84	60	65	5.48	4.70	4.85
16 "	6.30										
17 "	6.00	21	26	2.93	2.91	2.87	61	66	5.61	4.75	4.95
18 "	5.73	22	27	2.95	2.93	2.89	62	67	5.74	4.80	5.05
19 "	5.49	23	28	2.98	2.96	2.92	63	68	5.87	4.85	5.16
20 "	5.27	24	29	3.01	2.99	2.94	64	69	6.01	4.90	5.27
		25	30	3.04	3.02	2.97	65	70	6.16	4.94	5.39
21 "	5.08										
22 "	4.90	26	31	3.08	3.05	3.00	66	71	6.30	4.98	5.52
23 "	4.74	27	32	3.11	3.08	3.02	67	72	6.45	5.02	5.65
24 "	4.60	28	33	3.14	3.11	3.05	68	73	6.60	5.05	5.78
25 "	4.46	29	34	3.18	3.15	3.08	69	74	6.76	5.09	5.99
		30	35	3.22	3.18	3.11	70	75	6.91	5.12	6.07
26 "	4.34										
27 "	4.22	31	36	3.26	3.22	3.15	71	76	7.07	5.14	6.23
28 "	4.12	32	37	3.30	3.25	3.18	72	77	7.23	5.17	6.39
29 "	4.02	33	38	3.34	3.29	3.22	73	78	7.38	5.19	6.56
30 "	3.93	34	39	3.39	3.33	3.25	74	79	7.54	5.20	6.74
		35	40	3.43	3.37	3.29	75	80	7.69	5.22	6.92
		36	41	3.48	3.41	3.33	76	81	7.84	5.23	7.12
		37	42	3.53	3.45	3.37	77	82	7.98	5.24	7.31
		38	43	3.59	3.50	3.41	78	83	8.13	5.25	7.55
		39	44	3.64	3.54	3.45	79	84	8.26	5.26	7.78
		40	45	3.70	3.59	3.50	80	85 & over	8.39	5.26	8.02
		41	46	3.76	3.64	3.54	81		8.51	5.26	8.27
		42	47	3.82	3.69	3.59	82		8.63	5.26	8.54
		43	48	3.88	3.74	3.64	83		8.73	5.26	8.81
		44	49	3.95	3.79	3.69	84		8.83	5.26	9.12
		45	50	4.02	3.84	3.74	85 & over		8.92	5.26	9.41

If the Owner elects Option 3 or 5 to become operative automatically for the Beneficiary, the amount of payment per \$1,000 of proceeds applied under such Option will

same sex but 3 years older than such Payee.

Any moneys unpaid at the death of a Payee will be paid to the estate of such Payee unless otherwise provided.

PREMIUMS AND REINSTATEMENT

Payment of Premiums. All premiums are payable on or before their due dates at the Home Office, or to an authorized agent, in exchange for an official receipt signed by the Treasurer and countersigned by such agent.

Premiums may be paid at annual, semiannual, quarterly or monthly intervals at the rates of the Company in effect on the Policy Date. Intervals of payments shall be measured in months from the Policy Date and each premium after the first is due on the expiration of the period for which the preceding premium was paid. On any due date the interval of payment may be changed, but the Company may refuse to permit a change to a shorter interval of payment if the amount of premium for such shorter interval is less than that then acceptable by the Company.

Grace Period. A grace period of 31 days will be allowed for the payment of every premium after the first. This Policy shall continue in force during the grace period. If the Insured dies during the grace period, the unpaid premium

shall be deducted from the proceeds of this Policy.

Age Adjustment. If there has been any error or inaccuracy in stating the age of the Insured, the amount payable hereunder shall be that which the premium paid would have purchased at the correct age, according to the Company's published rates at Date of Issue.

Reinstatement. If this Policy shall lapse because of default in the payment of any premium, it may, upon properly signed written request to the Company, be reinstated at any time during the lifetime of the Insured within 5 years of the date of such default upon the production of evidence of insurability, including good health, satisfactory to the Company and the payment of all due and unpaid premiums with interest at 6 per cent per annum, compounded annually, to date of reinstatement. Any indebtedness at the date of default, together with interest thereon at 6 per cent per annum, compounded annually, shall be repaid in cash or, if not in excess of the Loan Value at date of reinstatement, continued as an indebtedness against this Policy.

LOANS

Cash Loan. After this Policy has a cash value and while it is in force other than as extended term insurance, the Company will lend, on the sole security of this Policy properly assigned, any amount which does not exceed the cash value as of the date to which premiums have been paid, or as of the next policy anniversary date, if earlier, or if no further premiums are payable. From the amount of such loan there shall be deducted (1) interest in advance at the rate of 6 per cent per annum on such loan to the next policy anniversary and (2) any existing indebtedness. Thereafter interest in advance at the same rate shall be payable annually at the beginning of each policy year and if not paid when due, shall be added to the existing indebtedness and shall bear interest at the same rate.

Any loan may be repaid in whole or in part while this Policy is in force, unless meanwhile a non-forfeiture benefit shall have become effective. If the total indebtedness equals or exceeds the cash value at any time, this Policy shall terminate

31 days after a notice has been mailed to the last known address of the Owner and of any Assignee of Record.

Automatic Premium Loan. Upon written request prior to the expiration of the grace period of any unpaid premium, the Company will automatically charge as a loan against this Policy the amount which, after deduction of interest at the rate of 6 per cent per annum to the next anniversary of this Policy, will be sufficient to pay any unpaid premium, provided that such loan plus other indebtedness does not exceed the cash value at the next premium due date. If such loan plus any other indebtedness exceeds the cash value, a loan will be made for that fraction of the premium which will maintain this Policy in force to the date on which the total indebtedness equals the cash value. This provision may be revoked at the Owner's written request.

Any loan under this provision will be subject to the terms and conditions stated under "Cash Loan."

POLICY CHANGE

With the consent of the Company this Policy may be exchanged for a corresponding policy on another plan of insurance or a policy of lesser amount. The exchange will

be subject to such conditions and payment, if any, as the Company may require.

End of Policy Year	Cash Value	Paid Up Ins.	Extended Insurance*	Yrs.	Days	Cash Value	Paid Up Ins.	Extended Insurance*	Yrs.	Days	Cash Value	Paid Up Ins.	Extended Insurance*	Yrs.	Days	Cash Value	Paid Up Ins.	Extended Insurance*	Yrs.	Days	Cash Value	Paid Up Ins.	Extended Insurance*	Yrs.	Days	End of Policy Year
ISSUE AGE 30					ISSUE AGE 31					ISSUE AGE 32					ISSUE AGE 33					ISSUE AGE 34						
1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
3	6	21	2	2	2	7	24	2	72	8	26	2	160	9	28	2	208	11	34	2	331	11	34	2	331	3
4	18	60	5	206		20	65	5	280	22	69	5	323	23	70	5	359	25	74	5	405	25	74	5	405	4
5	31	100	8	164		33	103	8	129	35	106	8	79	37	109	8	17	40	115	8	7	40	115	8	7	5
6	44	137	10	214		46	140	10	106	49	144	10	52	52	149	9	350	55	153	9	270	55	153	9	270	6
7	57	173	12	269		60	177	11	330	63	180	11	216	67	186	11	144	70	189	11	18	70	189	11	18	7
8	71	209	13	194		74	212	13	44	78	217	12	299	82	222	12	180	85	223	12	17	85	223	12	17	8
9	85	243	14	201		89	247	14	59	93	251	13	275	97	255	13	122	101	258	12	332	101	258	12	332	9
10	99	275	15	118		103	278	14	310	108	284	14	170	113	289	14	25	117	291	13	205	117	291	13	205	10
11	113	305	15	329		118	310	15	166	123	314	15	1	129	321	14	225	134	324	14	50	134	324	14	50	11
12	128	336	16	150		134	342	15	363	139	345	15	170	145	351	15	7	150	353	14	176	150	353	14	176	12
13	143	365	16	285		149	370	16	108	155	375	15	293	161	379	15	109	167	383	14	288	167	383	14	288	13
14	159	395	17	39		165	399	16	207	171	403	16	10	178	408	15	199	185	413	15	22	185	413	15	22	14
15	174	421	17	90		181	426	16	270	188	431	16	82	195	435	15	256	202	439	15	64	202	439	15	64	15
16	190	447	17	136		197	452	16	301	205	458	16	123	212	461	15	284	220	467	15	101	220	467	15	101	16
17	206	472	17	153		214	478	16	329	222	483	16	137	229	486	15	288	237	490	15	94	237	490	15	94	17
18	223	498	17	169		231	502	16	332	239	507	16	129	247	511	15	290	255	514	15	87	255	514	15	87	18
19	239	520	17	139		248	526	16	313	256	529	16	100	265	534	15	272	273	537	15	60	273	537	15	60	19
20	256	543	17	111		265	548	16	275	274	553	16	73	283	557	15	236	292	561	15	34	292	561	15	34	20
At Age 65	518	788	13	164		513	780	13	99	507	771	13	20	501	762	12	311	494	751	12	227	494	751	12	227	At Age 65
Non-Forfeiture Factor	13.867					14.405				14.973				15.573				16.208								Non-Forfeiture Factor
ISSUE AGE 35					ISSUE AGE 36					ISSUE AGE 37					ISSUE AGE 38					ISSUE AGE 39						
1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
3	12	36	2	339		13	38	2	337	14	39	2	329	15	41	2	315	17	45	2	358	17	45	2	358	3
4	27	78	5	256		28	78	5	173	30	81	5	149	32	84	5	116	34	87	5	76	34	87	5	76	4
5	42	117	7	288		44	119	7	200	46	121	7	110	49	125	7	62	51	127	6	327	51	127	6	327	5
6	57	154	9	133		60	158	9	44	63	161	8	311	66	164	8	209	69	167	8	103	69	167	8	103	6
7	73	192	10	249		76	194	10	114	80	199	10	16	83	201	9	239	87	205	9	131	87	205	9	131	7
8	89	228	11	253		93	231	11	121	97	235	10	351	101	238	10	211	105	241	10	71	105	241	10	71	8
9	105	261	12	171		110	266	12	43	114	269	11	242	119	273	11	106	123	275	10	306	123	275	10	306	9
10	122	295	13	52		127	299	12	260	132	303	12	100	137	306	11	305	142	309	11	144	142	309	11	144	10
11	139	327	13	236		144	330	13	58	150	335	12	268	155	337	12	89	161	342	11	298	161	342	11	298	11
12	156	358	14	7		162	362	13	199	168	366	13	27	174	369	12	219	180	372	12	47	180	372	12	47	12
13	174	389	14	125		180	392	13	302	186	394	13	114	193	399	12	313	199	402	12	127	199	402	12	127	13
14	191	416	14	184		198	420	14	5	205	424	13	190	212	428	13	11	219	431	12	196	219	431	12	196	14
15	209	443	14	237		216	447	14	45	224	452	13	237	231	455	13	47	238	457	12	222	238	457	12	222	15
16	227	469	14	263		235	474	14	79	242	476	13	242	250	480	13	60	258	484	12	242	258	484	12	242	16
17	245	494	14	266		253	478	14	72	267	504	13	261	270	507	13	69	278	510	12	242	278	510	12	242	17
18	264	520	14	266		272	523	14	64	281	527	13	244	289	530	13	44	298	534	12	226	298	534	12	226	18
19	282	542	14	231		291	546	14	38	300	550	13	211	309	554	13	20	318	558	12	197	318	558	12	197	19
20	301	565	14	198		310	569	13	362	319	572	13	165	329	577	12	348	338	580	12	157	338	580	12	157	20
At Age 65	488	742	12	154		481	732	12	69	473	719	11	339	465	707	11	249	456	694	11	147	456	694	11	147	At Age 65
Non-Forfeiture Factor	16.879					17.588				18.337				19.128				19.962								Non-Forfeiture Factor
ISSUE AGE 40					ISSUE AGE 41					ISSUE AGE 42					ISSUE AGE 43					ISSUE AGE 44						
1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
2	1	3	0	67		1	3	0	62	2	5	0	114	3	8	0	156	3	8	0	144	3	8	0	144	2
3	18	46	2	331		19	48	2	301	20	49	2	268	22	52	2	276	23	53	2	235	23	53	2	235	3
4	35	87	4	349		37	90	4	299	39	92	4	245	41	94	4	187	43	96	4	128	43	96	4	128	4
5	53	129	6	224		56	132	6	159	58	133	6	56	61	137	5	350	64	140	5	275	64	140	5	275	5
6	72	170	7	361		75	172	7	250	78	174	7	140	81	177	7	31	84	178	6	286	84	178	6	286	6
7	90	207	8	355		94	210	8	241	98	213	8	127	101	214	7	354	105	217	7	279	105	217	7	279	7
8	109	244	9	295		113	246	9	153	117	248	9	15	122	253	8	263	126	254	8	125	126	254	8	125	8
9	128	279	10	166		133	282	10	2																	

TABLE OF NON-FORFEITURE VALUES

End of Policy Year	Cash Value	Paid Up Ins.	Extended Insurance* Yrs.	Days	Cash Value	Paid Up Ins.	Extended Insurance* Yrs.	Days	Cash Value	Paid Up Ins.	Extended Insurance* Yrs.	Days	Cash Value	Paid Up Ins.	Extended Insurance* Yrs.	Days	Cash Value	Paid Up Ins.	Extended Insurance* Yrs.	Days	End of Policy Year
	ISSUE AGE 45				ISSUE AGE 46				ISSUE AGE 47				ISSUE AGE 48				ISSUE AGE 49				
1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
2	4	10	0	175	4	9	0	160	5	11	0	183	6	13	0	201	6	13	0	183	2
3	24	54	2	193	26	57	2	185	27	58	2	142	28	58	2	100	30	61	2	85	3
4	45	98	4	68	47	100	4	8	49	102	3	311	51	103	3	250	53	105	3	191	4
5	66	140	5	172	69	143	5	99	72	146	5	25	74	146	4	293	77	148	4	219	5
6	88	182	6	202	91	184	6	95	94	185	5	355	98	189	5	270	101	190	5	167	6
7	109	220	7	127	113	223	7	16	117	225	6	269	121	227	6	159	125	230	6	52	7
8	131	258	8	10	135	260	7	240	140	263	7	125	144	264	6	361	149	267	6	250	8
9	153	294	8	203	158	297	8	68	163	299	7	300	168	301	7	169	173	304	7	42	9
10	175	329	8	354	180	330	8	203	186	334	8	71	192	337	7	305	198	340	7	176	10
11	197	361	9	103	203	364	8	370	209	367	8	173	215	369	8	31	222	373	7	268	11
12	219	393	9	187	226	396	9	41	232	398	8	249	239	402	8	108	246	405	7	334	12
13	241	423	9	244	248	426	9	88	255	428	8	300	263	433	8	162	270	435	8	15	13
14	263	451	9	280	271	455	9	128	279	459	8	344	286	461	8	187	294	465	8	45	14
15	285	479	9	297	294	484	9	151	302	487	8	360	310	490	8	210	318	493	8	63	15
16	308	507	9	312	316	509	9	149	324	512	8	354	333	516	8	212	341	519	8	63	16
17	330	532	9	303	330	534	9	137	347	538	8	350	356	542	8	207	364	544	8	58	17
18	352	556	9	286	361	560	9	129	370	563	8	341	379	566	8	197	387	568	8	48	18
19	374	580	9	264	383	583	9	106	392	586	8	318	401	589	8	175	410	592	8	35	19
20	395	601	9	227	405	605	9	79	414	608	8	293	423	610	8	150	432	613	8	11	20
At Age 65	395	601	9	227	383	583	9	106	370	563	8	341	356	542	8	207	341	519	8	63	At Age 65
Non-Forfeiture Factor	26.028				27.249				28.541				29.909				31.357				Non-Forfeiture Factor
	ISSUE AGE 50				ISSUE AGE 51				ISSUE AGE 52				ISSUE AGE 53				ISSUE AGE 54				
1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
2	7	15	0	196	7	14	0	179	8	16	0	187	8	16	0	171	9	17	0	176	2
3	31	61	2	43	32	62	2	3	34	64	1	349	35	65	1	308	36	65	1	270	3
4	55	106	3	132	57	107	3	74	59	109	3	17	62	112	2	343	64	113	2	286	4
5	80	151	4	146	83	153	4	74	85	153	3	352	88	155	3	282	91	156	3	215	5
6	104	191	5	67	108	194	4	351	111	195	4	255	115	198	4	177	119	200	4	101	6
7	129	232	5	311	133	233	5	207	137	235	5	107	142	239	5	23	146	240	4	292	7
8	154	270	6	140	159	273	6	34	164	276	5	294	168	277	5	180	173	279	5	80	8
9	179	307	6	295	184	309	6	173	189	311	6	54	195	315	5	314	200	316	5	201	9
10	203	341	7	39	209	344	6	281	215	347	6	161	221	349	6	44	227	352	5	295	10
11	228	375	7	131	235	379	7	8	241	381	6	243	247	383	6	117	254	387	6	3	11
12	253	408	7	199	260	411	7	67	267	414	6	304	273	415	6	172	280	418	6	54	12
13	277	438	7	238	285	442	7	110	292	444	6	341	299	447	6	216	306	449	6	95	13
14	302	468	7	273	309	470	7	132	317	474	7	4	324	476	6	242	331	478	6	122	14
15	326	496	7	288	334	499	7	154	341	501	7	16	349	504	6	263	356	506	6	143	15
16	350	523	7	296	358	526	7	162	366	528	7	33	373	530	6	271	381	533	6	159	16
17	373	548	7	291	381	550	7	158	389	552	7	29	397	555	6	276	404	556	6	155	17
18	396	571	7	282	404	574	7	150	412	576	7	21	420	578	6	268	428	581	6	152	18
19	418	593	7	262	427	597	7	138	435	599	7	9	443	601	6	254	451	603	6	135	19
20	440	615	7	240	449	618	7	115	457	620	6	349	465	622	6	227	473	624	6	105	20
At Age 65	326	496	7	288	309	470	7	132	292	444	6	341	273	415	6	172	254	387	6	3	At Age 65
Non-Forfeiture Factor	32.891				34.516				36.238				38.065				40.005				Non-Forfeiture Factor
	ISSUE AGE 55				ISSUE AGE 56				ISSUE AGE 57				ISSUE AGE 58				ISSUE AGE 59				
1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
2	11	20	0	197	12	22	0	197	14	24	0	210	16	27	0	219	17	28	0	213	2
3	39	69	1	264	41	71	1	241	44	74	1	230	46	76	1	205	49	79	1	192	3
4	67	115	2	246	70	118	2	206	73	120	2	166	77	124	2	138	80	127	2	97	4
5	95	160	3	162	99	163	3	110	103	166	3	58	107	169	3	6	111	172	2	319	5
6	123	203	4	26	128	207	3	329	132	209	3	256	137	213	3	194	142	216	3	133	6
7	151	244	4	210	156	247	4	130	162	251	4	60	167	254	3	347	172	257	3	271	7
8	179	283	4	358	185	287	4	272	190	289	4	179	196	293	4	98	202	297	4	20	8
9	207	321	5	110	213	324	5	12	219	327	4	283	225	330	4	194	231	334	4	109	9
10	234	356	5	195	241	360	5	97	247	363	4	360	254	367	4	274	260	369	4	187	10
11	261	390	5	261	268	394	5	159	275	397	5	62	281	399	4	330	288	403	4	249	11
12	288	423	5	316	295	426	5	212	302	429	5	114	308	431	5	14	315	434	4	295	12
13	314	453	5	354	321	456	5	250	328	459	5	151	335	461	5	57	342	464	4	333	13
14	339	481	6	14	347	485	5	282	354	487	5	182	361	490	5	85	368	492	4	355	14
15	364	509	6	35	372	512	5	300	379	514	5	198	387	518	5	103	394	520	5	1	15
16	389	536	6	50	396	537	5	305	404	541	5	206	412	544	5	106	420	547	5	4	16
17	413	560	6	51	420	562	5	302	437	565	5	199	437	569	5	99	445	572	4	358	17
18	436	583	6	37	444	586	5	292	453	590	5	189	461	593	5	80	470	597	4	343	18
19	459	606	6	15	468	609	5	274	485	612	5	163	485	616	5	56	494	619	4	322	19
20	482	628	5	353	491	631	5	245	500	635	5	138	508	637	5	25	517	641	4	295	20
At Age 65	234	356	5	195	213	324	5	12	190	289	4	179	167	254	3	347	142	216	3	133	At Age 65
Non-Forfeiture Factor	41.969				44.052				46.262				48.605				51.092				Non-Forfeiture Factor

Cash Surrender Value. The Owner may surrender this Policy at any time for its Cash Surrender Value, which will be the cash value under the Policy less any indebtedness. Values at interim points in a policy year will be calculated with due allowance for fractional premiums paid and time elapsed since the last anniversary, provided, however, that the cash value within 60 days of the due date of an unpaid premium shall be the same as on such due date.

Any paid-up insurance or extended term insurance under which this Policy is continued may be surrendered at any time for an amount equal to the net single premium at the attained age of the Insured for the remaining benefits under such insurance, less any indebtedness, provided, however, that within 30 days after any policy anniversary such amount shall be not less than the amount on such anniversary.

Paid-up Non-forfeiture Benefits. After this Policy has a value, if any premium remains unpaid at the end of its grace period, this Policy will be continued in force from the due date of such premium as paid-up insurance without supplemental benefits as follows:

EXTENDED TERM INSURANCE. Unless this Policy is in a Special Premium Class as set forth in the Policy Schedule, it will be continued as paid-up extended term insurance for the Sum Insured less any indebtedness, provided, however, that the Owner shall have the right, by written notice to the Company during the lifetime of the Insured and before the expiration of 60 days after the due date of the unpaid premium, to elect reduced paid-up life insurance, as provided below, in lieu of extended term insurance.

REDUCED PAID-UP LIFE INSURANCE. If this Policy is in a Special Premium Class as set forth in the Policy Schedule, it will be continued as paid-up life insurance for a reduced amount payable at the same time and subject to the same conditions as this Policy.

The period of extended term insurance or the amount of reduced paid-up life insurance will be such as the Cash Surrender Value will purchase when applied as a net single premium at the then attained age of the Insured.

Basis of Values. Non-forfeiture Values for this Policy are based on the Commissioners' 1958 Standard Ordinary Mortality Table with interest at 3½% assuming deaths occur at the end of policy years and taking into account that this Policy is issued on the basis of age last birthday, except that the net single premiums for extended term insurance are based on the Commissioners' 1958 Extended Term Insurance Table.

The cash value at the end of any policy year is equal to the excess, if any, of the then present value of future benefits over the then present value of the Non-forfeiture Factors shown in the Table of Non-forfeiture Values applied to the remaining policy years for which premiums are payable, taking the result to the higher dollar. These values are greater than or equal to those required by the laws of the state in which this Policy is delivered and a detailed statement of the method of computation of the values has been filed with the insurance supervisory official of such state.

Table of Non-forfeiture Values. Cash Values, Paid-up Insurance Values, and Non-forfeiture Factors shown in the Table of Non-forfeiture Values are for each \$1,000 of Sum Insured under this Policy; Extended Term Insurance values are the same for any Sum Insured. All values in this Table are based on the assumption that premiums have been paid to the end of the policy year and that this Policy is free from indebtedness. The values applicable to this Policy are shown for the Age corresponding to the Age at Issue set forth in the Policy Schedule. Any values not contained in the Table will be furnished on request.

LIST OF FACTS ADMITTED BY NORTH AMERICAN LIFE AND CASUALTY COMPANY:

- (1) On March 1, 1975, the defendant issued group life insurance policy #4084-479 insuring the life of, among others, G. David Tyree, Jr.
- (2) On May 1, 1975, after the aforesaid G. David Tyree, Jr. made request for a conversion policy, the defendant issued conversion policy number L-1126840 in consideration of the sum of \$148.60 premium paid by the decedent, G. David Tyree, Jr.
- (3) Both the aforesaid policies named the plaintiff, Ketti M. Tyree, as beneficiary in the event of the death of the said G. David Tyree, Jr.
- (4) That the said G. David Tyree, Jr. died on May 29, 1975.
- (5) That the defendant, North American Life and Casualty Company received notice and proof of death of the decedent, G. David Tyree, Jr.
- (6) That both of the said policies were in the amount of \$10,000.00

EXHIBIT NO. 2

PLI ☒ DEF. ☐ COM. ☐

CASE NO. Law 7560

DATE 5/19/1977

JUDGE: JPM

P R O C E E D I N G S

(Motions were heard in chambers.)

OPEN COURT

(The court reporter was sworn.)

THE COURT: Please place the jury in the box.

THE CLERK: Members of the jury, as I call
your names, will you come forward and have a seat in
the jury box in the order that I call your names,
please?

Betty Gentzel

Edith Grupe

Harry P. Davis

Susan Combs

Reginald Owens

William Simmons

Lauretta J. Easley

Judith Miller

Guy Anderson

David Grove

Benjamin Chavez

Thomas Zimmerman

Elba K. Malone, Jr.

1 (The jury was sworn.)

2 THE COURT: Members of the jury, I am Judge
3 Middleton, and the presiding Judge in this case.

4 I want to apologize to you for keeping you
5 waiting in order to start this trial, but there are
6 many legal issues, some of which could have been resolved
7 in a different fashion, and had they been resolved that
8 way, might have resulted in this case not having been
9 heard by the jury.

10 But, they have been resolved by me in a fashion
11 which requires a jury trial at this point.

12 First of all, I want to introduce to you the
13 parties.

14 The name of the case is Ketti M. Tyree, plaintiff,
15 versus North American Life and Casualty Company.

16 Mrs. Tyree? This is Ketti M. Tyree, sitting
17 on the end. Next to her is Mr. Robert Zelnick. Next
18 to him is Mr. Daniel Borinsky. They represent Mrs. Tyree
19 in this case.

20 On the right is Mr. Floyd Bagley. Next to him
21 is Senator Wicker and Mr. Brodnax Haskins. Mr. Haskins,
22 Mr. Wicker and Mr. Bagley represent North American Life
23 and Casualty Company.

1 OPEN COURT

2 MR. BORINSKY: Your Honor, my first witness
3 will be Mrs. Ketti Tyree.

4 THE COURT: Will you please take the stand?
5 Whereupon,

6 KETTI TYREE,
7 the plaintiff, was called for examination by counsel on
8 behalf of the plaintiff, and, after having been duly
9 sworn, was examined and testified as follows:

10 DIRECT EXAMINATION

11 BY MR. BORINSKY:

12 Q Mrs. Tyree, will you state your name for the
13 benefit of the Court?

14 A I am Ketti M. Tyree.

15 Q Mrs. Tyree --

16 THE COURT: Mr. Borinsky, excuse me. Mrs.
17 Tyree has a very soft voice, and the jury has to hear
18 you, and those lawyers and I, so speak up, will you,
19 please? All right, go ahead.

20 MR. BORINSKY: Maybe if I stand over here
21 everyone can hear a little better.

22 BY MR. BORINSKY:

23 Q Mrs. Tyree, were you at one time married to Mr.

1 George David Tyree, Jr.?

2 A. I was.

3 Q. Did there come a time when Mr. Tyree died?

4 A. Yes.

5 Q. Approximately when was that?

6 A. May 29, 1975.

7 Q. Had he been sick?

8 A. They discovered a tumor in September of '75.

9 ✓ He had been sick.

10 Q. They discovered a tumor in September of '75?

11 Do you mean '74?

12 A. Yes. Okay, right.

13 Q. Nine months prior to his death?

14 A. Right.

15 Q. How old was Mr. Tyree?

16 A. 31.

17 Q. What occupation had Mr. Tyree engaged in from
18 the time you had been married until his death?

19 A. He was a lawyer.

20 Q. You lived with Mr. Tyree until his death?

21 A. Yes.

22 Q. Did you own a home with Mr. Tyree?

23 A. Yes, sir.

1 Q Where was that home located?

2 A In Woodbridge, Virginia, close to his office.

3 Q About how far from his office was that home?

4 A Oh, about ten - five minutes.

5 Q How long -- Approximately when did you purchase
6 that home?

7 A '73.

8 Q Did Mr. Tyree maintain an office in his home?

9 A Yes. After we had moved in, he bought a
10 filing cabinet, and he had a desk and a telephone, an
11 adding machine, a calculator. It was an office away
12 from an office.

13 Q When did you say this home was established, this
14 office in the home was established?

15 A As soon as he started working. As soon as
16 we were out in Woodbridge, he started -- he furnished
17 another office downstairs so that he could get his
18 work done down there too, at night.

19 Q Where was the office located in the home?

20 A It was in the basement away from the patten
21 of little feet.

22 Q Did you have occasion to become aware as to
23 whether or not -- How frequently did Mr. Tyree use this

1 office?

2 A. He was down there a lot. He used it quite
3 often.

4 Q. Did there come a time when Mr. Tyree -- When
5 would Mr. Tyree use this office that I'm speaking of?
6 What time of day would he normally use the office?

7 A. Well, when he would get home from work, he would
8 go down there and work because he didn't have any inter-
9 ruptions, and the phone was always ringing at his main
10 office. So, he would work after dinner down there, and
11 he would work on Saturdays and Sundays because there
12 would be no interruption for him.

13 Q. You said earlier that Mr. Tyree --

14 MR. HASKINS: He's leading the witness.

15 THE COURT: You are leading the witness, Mr.
16 Borinsky. I know that it might be difficult, but do not
17 lead the witness.

18 MR. BORINSKY: Thank you, Your Honor.

19 BY MR. BORINSKY:

20 Q. Can you describe Mr. Tyree's work pattern
21 after his sickness was diagnosed in September?

22 A. He decided to continue to work, and he would
23 work downstairs, and I had a lot of the office out there

1 a lot, bring out files. He had his law books out there.

2 He would work on the files, you know, as
3 often as he felt like it which was about 30 hours a week.

4 He kept busy. He had to. He had to keep his
5 mind occupied, and he loved law, and that's the way he
6 kept from getting depressed or upset or worried about
7 anything. He would jump in and work.

8 Q Did he work at the office after he was diagnosed?

9 A He went in when he felt like it. He had good
10 days and bad days. So, he would go in two, three, four
11 times a week, whenever he felt it necessary.

12 But, mostly, the people in the office would
13 come to him, and he would get the phone there, and I
14 would go over and get the files sometimes, too. But,
15 usually, people in the office would bring the folders
16 out, and he would work on them at home. It was easier
17 for him.

18 But, he would go into the office.

19 Q How long did he continue working?

20 A He continued working up until the end of March
21 or the beginning of April. Around then he decided he
22 would rather just spend the time with us, and not worry
23 about it.

1 Q Did he work after April, after the end of March
2 and the beginning of April?

3 A No, he quit working then. He just wanted to
4 be with us.

5 Q Did you have a job during the period we're
6 speaking of; that is, since you were married up until
7 the time of his death?

8 A Since we were married, up -- Well, I -- You
9 mean way back? We were married in '66, and I had a job
10 back then.

11 Q Let me revise the question: Since you moved
12 to Woodbridge in approximately 1973, did you have employ-
13 ment?

14 A No, I had a baby when we moved out there. She
15 was four months old. Then, I had another baby in May,
16 right before we found out that David had cancer.

17 So, I had a sick husband and two toddlers.

18 Q You were home?

19 A Yes.

20 MR. BORINSKY: Your Honor, if I may have a
21 discussion?

22 THE COURT: All right.

23 (Mr. Borinsky has a discussion at counsel table

1 out of the hearing of the Court.)

2 BY MR. BORINSKY:

3 Q In the period after he was diagnosed as having
4 the disease, did you notice any change in his mental
5 capabilities?

6 A Oh, no, no. He was -- No. Cancer of the liver
7 does not affect the mind. He was very alert, very
8 active. He kept very busy, as busy as he could.

9 Q Then, in precisely what respect did the cancer
10 affect him? Would it be physically or mentally?

11 A Just physically. He had a hard time with the
12 medication they gave him. It made fluid settle in his
13 stomach, and when it did that, he became very uncomfortable.
14 He would have to go have it drained, but after it was
15 drained, he could function physically for four days,
16 and then it would build-up again.

17 But, mentally, he was alert, and he was active.
18 And, he was very intelligent, and he kept his intelligence
19 the whole time. He was a fantastic lawyer.

20 Q Was his ability to communicate with other
21 people impaired?

22 A Definitely not.

23 Q Could he speak on the phone?

1 A. On the phone quite often, yes.

2 Q. You observed that?

3 A. Yes, uh-huh.

4 Q. Could he dictate letters?

5 A. Yes. He would work downstairs a lot.

6 Q. Did he have a Dictaphone in his office?

7 A. Yes. He had them bring one out, and he dictated
8 a lot.

9 MR. BORINSKY: I have no further questions.
10 for Mrs. Tyree.

11 THE WITNESS: Thank you.

12 THE COURT: Mr. Haskins, are you going to
13 examine?

14 MR. HASKINS: Yes, sir.

15 CROSS EXAMINATION

16 BY MR. HASKINS:

17 Q. Mrs. Tyree, you are the beneficiary of your
18 husband's policy, is that correct?

19 A. Yes, sir.

20 Q. You're the one that gets \$10,000.00 if this
21 case is won today, is that correct?

22 A. It would go to my children.

23 Q. It goes to you. You're the main beneficiary, is

1 that correct?

2 A. Yes, sir.

3 Q. Now, you said awhile ago that your husband
4 was working 30 hours a week, right? Why did you use
5 the phrase "30 hours per week"?

6 A. Because I don't think he really was working
7 40, which is your average work week. He was working
8 a little less, but he was very active.

9 Q. You used the term "30 hours a week" because
10 you know that is the policy requirement in order to be
11 eligible --

12 MR. ZELNICK: Objection, Your Honor.

13 THE COURT: Don't answer the question. What
14 is your objection?

15 MR. ZELNICK: I object to Mr. Haskins impuning
16 to Mrs. Tyree what she does or doesn't know. It's
17 improper for him to make a statement as to what's in
18 her mind.

19 THE COURT: I am going to overrule the objection.
20 Mr. Haskins, I think that you have a very natural, deep
21 voice, and I think that your questions come out in a
22 very tough way.

23 MR. HASKINS: I don't intend that, Your Honor.

1 THE COURT: I am asking you to just ask questions
2 one-at-a-time, and let her answer. I know you don't
3 intend that.

4 Do you recall the question, ma'am?

5 If you don't, I'll have him ask it again.

6 THE WITNESS: I'm sorry. I'm awfully nervous.
7 I'm sorry.

8 THE COURT: Listen to what he says, and answer
9 the question.

10 Would you ask it again, Mr. Haskins?

11 BY MR. HASKINS:

12 Q Mrs. Tyree, the 30 hours a week about which
13 you were just speaking, you know that that was a require-
14 ment of the insurance company, that your husband must
15 work 30 hours a week before he became eligible for the
16 insurance, isn't that correct?

17 A Are you asking me if I knew that before he took
18 out the insurance, or when he did, or after he did?

19 Q It makes no difference. When did you know it?

20 A Well, I do know it.

21 Q You knew it at that time, didn't you?

22 A No, sir, not at that time.

23 Q Now, your husband was very sick?

1 A. Yes, sir.

2 Q And, he had to visit doctors very, very often,
3 isn't that correct?

4 A. Yes, sir, for chemotherapy.

5 Q Dr. Smith was one of his doctors, isn't that
6 correct?

7 A. Yes, sir.

8 Q In September of 1974, your husband was receiving
9 total disability benefits --

10 MR. ZELNICK: May we approach the Bench, Your
11 Honor?

12 THE COURT: All right.

13 BENCH CONFERENCE

14 MR. ZELNICK: This is exactly the point we
15 brought up in chambers.

16 MR. BORINSKY: It's irrelevant.

17 MR. ZELNICK: Whether or not Mr. Tyree ever
18 received any benefits whatsoever is totally irrelevant
19 to the facts in this case. They're strangers to the
20 case, and we have the West Virginia case which we cited.
21 I believe we cited it again, and that was whether he
22 ever received any benefits is inherently inadmissible.
23 In fact, until a foundation is laid strongly to show

1 similarity between the Mutual of Omaha policy --

2 THE COURT: I understand your position. What's
3 your response, Mr. Haskins?

4 MR. HASKINS: The question is whether the man
5 was able to work. She testified he was. I've got an
6 opportunity now to rebut that by showing that he wasn't.
7 I can ask her. I think it's a proper area of cross exam-
8 ination.

9 THE COURT: There was no evidence at all to
10 show what total disability means, and that bothers me.
11 You've asked her a question of whether he received total
12 disability payments from Mutual of Omaha.

13 Now, let's assume that she knows, and the answer
14 is yes. Then she has admitted that he was totally dis-
15 abled, but what totally disabled means under the terms of
16 that policy the jury has no way of knowing at this time.
17 And, I am concerned about that.

18 MR. HASKINS: I think it would be incumbent upon
19 me to prove my case, but certainly I can ask her questions
20 on cross examination that concerns the man's condition.

21 THE COURT: There's no question but what you
22 can ask her about the condition, about his condition.
23 I can agree with that completely. But, the question that

1 you're asking her now is whether somebody else agreed
2 that his condition was one of total disability because
3 he was, in fact, receiving this payment.

4 That has nothing to do with the knowledge of
5 the condition. That has to do with the insurance company's
6 knowledge of the condition. And, I think you have to
7 lay a foundation as to what total disability is before
8 you ask her that question.

9 So, I am going to sustain the objection.

10 MR. ZELNICK: Will you ask the jury to disregard
11 the question?

12 THE COURT: I am going to tell the jury that
13 I sustained the objection. I already told them that if
14 I sustain an objection, they have to ignore the evidence.
15 All right?

16 OPEN COURT

17 THE COURT: The objection made by counsel has
18 been sustained.

19 BY MR. HASKINS:

20 Q. Now, when your husband became progressively
21 worse, which happened after September of '74 --

22 MR. ZELNICK: Objection. That's not in evidence,
23 that he became progressively worse.

1 THE COURT: Ask her the question, and we'll go
2 forward.

3 BY MR. HASKINS:

4 Q Did your husband's health become progressively
5 worse after September of 1974?

6 A Actually, it became better. That's when he
7 had the operation.

8 Q Wasn't that in June of '74?

9 A No, it was in September, and after they removed
10 the tumor, he was able to get around better for a little
11 while. He felt better for a little while.

12 Q Was he able to get around very much in December
13 of 1974?

14 A Yes. He got around. I don't understand what
15 you mean by getting around.

16 Q Going to the office?

17 A Yes, he went into the office.

18 Q As you got into January and February, he
19 became more used to using his home than he did the office,
20 is that a fair statement?

21 A He used both, but the home more, yes.

22 Q And, as you get into February, he began to stay
23 at home most of the time, isn't that correct?

1 A. He was still going in, I'd say, two times a
2 week as far as I can recall.

3 Q. But, he never stayed but a short time, did he?

4 A. Just enough time to get more work to take
5 home.

6 Q. Then, when we get into March, he was home all
7 the time almost, wasn't he?

8 A. I honestly do not remember.

9 Q. On March the 1st when this group policy was
10 obtained, he was a very sick man, wasn't he?

11 A. He had cancer, yes.

12 Q. And, he was constantly having, and required to
13 have, this fluid drained off his stomach?

14 A. About once a week, and he went -- If he could
15 go into the doctor, he could go into the office, too.
16 He did. He was a very headstrong man. He did what he
17 wanted to do when he wanted to do it.

18 Q. Do you remember a Mr. Shaeff or a Mr. Gary
19 coming to your house to talk to your husband?

20 A. I remember the heavier-set gentleman that was
21 in the back, but I don't know if I recall him from the
22 last time that we were here or from before then.

23 You have to understand, I had two children and a

1 husband to take care of.

2 Q And, when you were taking care of him, in what
3 fashion were you taking care of your husband, Mrs. Tyree?

4 A The way any wife would take care of her
5 husband. But, too, I just had a baby also.

6 Q Would you describe, please, your ministrations
7 to your husband?

8 A Well, I fed him; I did the dishes; I cleaned
9 house; I kept the children out of his way so he could
10 work when he wanted to.

11 Q Did he take his meals in bed?

12 A No. No, not till the end.

13 Q Till when?

14 A I am afraid that some of this has kind of been
15 blocked out because I -- It was a difficult period for
16 me, and I had a very hard time of it.

17 Q Can you recall as best you can?

18 A He was still getting around in May. We went
19 on a trip in May. He -- Physically, he was very weak in
20 May. He was very tired. But, we got to be alone together
21 before he died.

22 MR. HASKINS: No further questions.

23 THE COURT: Do you have any redirect, sir?

1 MR. BORINSKY: Including your problem: Was
2 he working 30 hours during the applicable period.

3 THE COURT: Is it not possible to arrive at
4 some sort of a stipulation? Or maybe we can't arrive
5 at one, I don't know. It's your case, and I don't
6 presume to tell either one of you how to try it.

7 MR. HASKINS: Thank you, Your Honor.

8 THE COURT: All I want to do is get the issue
9 before the jury.

10 Now, is it possible to stipulate that this
11 group life insurance policy was obtained by Nageotte,
12 Tyree and Borinsky; that a certificate of insurance was
13 issued -- I shouldn't say insurance, a certificate was
14 issued, that is a cold fact, it was issued. You have
15 the policy, you have the certificate.

16 MR. ZELNICK: And that Mrs. Tyree was the
17 beneficiary.

18 THE COURT: She was the beneficiary under
19 both policies; that the man has died; that the defendant,
20 North American Life and Casualty -- notice and proof of
21 death -- What does that mean?

22 MR. BORINSKY: Received.

23 THE COURT: Received notice and proof of death?

1 MR. HASKINS: Yes, sir.

2 MR. WICKER: No question about that.

3 MR. ZELNICK: With the proviso, of course,
4 that we discussed in chambers prior, namely our
5 objection that the group policy itself is irrelevant.
6 We not waiving our objection on that ground.

7 THE COURT: I understand you're not waiving it.

8 MR. ZELNICK: I think, if we could stipulate
9 to the facts that the Court has just submitted --

10 MR. WICKER: I don't like to have two people
11 give argument, and he is much more able than I am, but
12 I see some things here, if I was on the jury, a statement
13 like that was read to me of disputed facts, the impression
14 would be made on me that this is a fair statement of the
15 total facts. If you had a statement there, one thing,
16 you state that this policy was issued insuring the life
17 of so-and-so among others, but there is no mention
18 whatsoever that that was a qualified -- that that was
19 without medical examination. It contained a specific
20 condition.

21 It was conditioned upon so-and-so, working 30
22 hours a week other than vacation. But, without that,
23 if I was on the jury, I would figure: Well, it's a

1 opportunity to comment on this particular issue. I
2 would like to state to Your Honor, represent to Your
3 Honor, my version.

4 THE COURT: About what happened? Well, look,
5 it's not germane to where we are right now. If it does
6 become important in the case, I'll certainly give you
7 a time and place to comment on what happened.

8 All right. Now, have you rested your case,
9 Mr. Borinsky?

10 MR. BORINSKY: Yes, Your Honor.

11 THE COURT: Do you want to argue a motion
12 to strike, Mr. Haskins?

13 MR. HASKINS: Yes, sir.

14 (The counsel move down from the Bench.)

15 MR. HASKINS: If Your Honor please, it is the
16 defendant's position in this case that it is the
17 plaintiff's burden to prove that the person who was
18 allegedly insured is within the class of people entitled
19 to insurance.

20 He has not proven that Mr. Tyree was in active
21 service as required by the policy of insurance, a policy
22 the provisions of which he had admitted to be valid in
23 his prior answers to request for admissions.

1 He has alleged that the fact of the existence
2 of a group life insurance policy which was the basis of
3 his recovery initially, and he has never shown that
4 the plaintiff was within the class of people, and that
5 he was not a stranger to the coverage.

6 We submit that as we -- In our case, one of
7 the cases which we cited to the Court, Washington
8 National Insurance Company versus Burch, which is in
9 270 Fed2nd 300, that Court held that the burden was on
10 the plaintiff to establish that the burden of proof on
11 the issue of employment is clearly upon the plaintiff.

12 This case we just cited to Your Honor was a
13 case involving the very factual issue of employment.

14 We submit to the Court that 30 hours a week
15 was all that the plaintiff herself testified to. She
16 never stated that he was within -- That he was working
17 full-time at his office a minimum of 30 hours a week
18 as the policy provisions require. We submit that they
19 have not established a prima facie case; that is, that
20 they are entitled to recover initially.

21 For that reason, we move to strike the plaintiff's
22 evidence, and have a summary judgment for the defendant.

23 THE COURT: All right. Hand me the policy.

1 the burden that they have not carried, the entitlement
2 to the recovery.

3 THE COURT: I am going to overrule the motion
4 to strike and require that the defense go forward.

5 MR. WICKER: Note the exception, Your Honor.

6 THE COURT: Your exception is noted.

7 May I bring the jury in now?

8 MR. HASKINS: Yes, Your Honor.

9 THE COURT: Please bring the jury in.

10 (The jury returned to the courtroom and resumed
11 their place in the jury box.)

12 THE COURT: Members of the jury, the plaintiff,
13 while you were out has had admitted into evidence a list
14 of facts which were admitted which I have ruled were
15 admitted by the North American Life and Casualty Company,
16 those facts on this form, and I am going to, if counsel
17 wishes, let the jury see it. It's up to you whether you
18 want them to or not.

19 Right now I am admitting it into evidence, and
20 these are facts which were admitted for your information.

21 All right. Now, the plaintiff has rested
22 his case at this time, and the defense is now going
23 forward with his evidence in the issue.

1 Go ahead, Mr. Haskins.

2 MR. HASKINS: I am waiting for Mr. Gary, if
3 Your Honor please.

4 THE COURT: Has he gone after him?

5 Mr. Gary.

6 Whereupon,

7 RALPH E. GARY,

8 a witness, was called for examination by counsel on behalf
9 of the defendant, and, after having been duly sworn
10 was examined and testified as follows:

11 DIRECT EXAMINATION

12 BY MR. HASKINS:

13 Q Would you state your name, please?

14 A Ralph Everett Gary.

15 Q Mr. Gary, what is your occupation?

16 A I am a field representative for Equifax Services.

17 Q Would you talk so the members of the jury

18 can --

19 A I am a field representative for Equifax Services
20 in McLean, Virginia.

21 Q What is Equifax Services, please, sir?

22 A We make business reports for various companies,
23 insurance investigations for a lot of the insurance

1 companies, and regular business reports, employment
2 et cetera.

3 Q Did you have occasion to visit Mr. George
4 David Tyree, Jr. in 1975?

5 A Yes, I did.

6 Q Would you tell the ladies and gentlemen of
7 the jury what day you saw him?

8 A Yes, sir. On May the 16th, 1975.

9 Q Where did you see him?

10 A I saw him in his bedroom.

11 Q Would you tell the ladies and gentlemen -- the
12 lady and gentlemen of the jury what you observed about
13 Mr. Tyree's general condition?

14 A The man was very ill at the time that I saw
15 him. He had on a pair of shorts. He was approximately
16 six foot two, he looked like to me, but his stomach
17 was quite swollen, and his leg was quite swollen, and he
18 was very gray in appearance.

19 But, he had all his faculties about him. He
20 talked very sharply, and he got up on the side of the
21 bed and talked to me.

22 Q Did you talk to Mr. Tyree about his working?

23 A Yes, sir.

1 MR. BORINSKY: Objection. May I approach the
2 bench?

3 THE COURT: All right.

4 BENCH CONFERENCE

5 THE COURT: All right.

6 MR. BORINSKY: He's about to -- He said he
7 talked to Mr. Tyree. He's going to ask him what he said.

8 THE COURT: Are you going to ask him what Mr.
9 Tyree said?

10 MR. HASKINS: I am going to ask him how he
11 determined how many weeks or months or so forth that Mr.
12 Tyree worked in the preceding six months.

13 THE COURT: Based on his conversation with
14 Mr. Tyree?

15 MR. HASKINS: Yes.

16 THE COURT: All right.

17 MR. BORINSKY: Then my objection would be the
18 hearsay objection, that this is clearly an out-of-court
19 statement made by another party. This is precisely
20 the issue we have been talking about before, and that
21 this is just plain, flatout hearsay, and it's just not
22 admissible.

23 MR. HASKINS: How do they propose me to prove

1 my case? How can you possibly do it otherwise?

2 MR. BORINSKY: I can think of numerous ways
3 they could do it.

4 MR. ZELNICK: There are two more cases. If
5 they want to allege fraud, and then these things would
6 be admissible. They have chosen not to go on the
7 theory of fraud and misrepresentation.

8 It's not up to the Court to find a way for the
9 defendant to make his case. It's up to them to make
10 the proper admissible evidence.

11 And, this evidence is not admissible, it's
12 pure hearsay, and there is no exception.

13 THE COURT: Where's my book?

14 Mr. Haskins, do you know if you ask this man
15 the question whether or not he was aware of impending
16 death at that time? He was apparently only 13 days
17 from the actual date of his death.

18 MR. HASKINS: Do I know whether the man knew?
19 I never discussed that with this man.

20 THE COURT: All right.

21 MR. HASKINS: I'll ask him right now.

22 THE COURT: I don't want to get myself involved
23 in this because I am too involved in it already as I sit

1 earlier have a greater circumstantial guarantee of
2 trustworthiness than the testimony of this man.

3 The only other thing is is that he's here
4 for cross examination. That's the offsetting factor.
5 And, with those written documents, there isn't anything.

6 MR. BORINSKY: Are you now then -- In respect
7 to that, I would say that still (b) has never been met.
8 There are other people. There are documents. There
9 are diaries -- produce documents when he worked. Did
10 he ever request --

11 THE COURT: I can only treat one issue at a
12 time. At this point in time, I am going to sustain
13 the objection. All right.

14 OPEN COURT

15 MR. HASKINS: If Your Honor please, may I
16 ask this witness a question out of the hearing of the jury?

17 THE COURT: Members of the jury, would you
18 please step out for a moment?

19 (The jury then retired to the jury room.)

20 MR. HASKINS: The Court has sustained the
21 objection of counsel for the plaintiff to any testimony
22 that Mr. Gary would give regarding the conversations that
23 he had with Mr. Tyree on the grounds of hearsay evidence.

1 We ask the Court at this time to permit us,
2 for the purposes of appeal, to have Mr. Gary testify
3 so that the Appellate Court would know the substance
4 of his testimony.

5 THE COURT: Let the record show that the jury
6 has been dismissed from the room, and you may now inter-
7rogate Mr. Gary.

8 MR. BORINSKY: I just want to note my objection
9 to this.

10 THE COURT: Fine. Okay.

11 BY MR. HASKINS:

12 Q. For whom did you interview Mr. Tyree?

13 A. At the time I interviewed him, it was Mutual
14 of Omaha, New York.

15 Q. What was the purpose of your interview?

16 A. It was a disability claim.

17 Q. And, what were you talking to him for?

18 A. I was to talk to him concerning his disability
19 claim. We have a routine form which we use, and ask so
20 many questions, and whatever they ask us to determine
21 when it comes into our office.

22 Q. Did you ask Mr. Tyree these questions?

23 A. Yes, sir.

1 Q According to the form. What did you ask him
2 if you can recall regarding his employment?

3 A When we have a disability claim, whether it's
4 a continuous disability, or just an initial disability
5 claim, we always ask the question about when they last
6 worked.

7 When I talked to Mr. Tyree, I asked him when
8 he last worked, or was he doing any work at that time.
9 He said: I'd have to say no.

10 He explained to me that -- I asked him when
11 he last had any clients, and he said that the last time
12 that he had taken on any client was in September of 1974,
13 which was when he went into the hospital. I understand
14 at Potomac Hospital. And, it was discovered that he
15 had cancer.

16 He said that he went into the office five days
17 in December, and, then, that he became so ill that he
18 had to leave, and that we went back for three days in
19 January. He said they had some very important cases come
20 in, and he went in to try to work on them, but he could
21 not, and he had not been back to work since.

22 He did mention that he had gone into the office
23 now and then to spend half an hour, 45 minutes, to talk

1 to the men and that they'd call him at home.

2 He told me at that time that he had ten or
3 eleven cases pending which people were paying him a few
4 small fees on from time-to-time.

5 MR. HASKINS: That's all I have, if Your Honor
6 please.

7 THE COURT: Do you wish to examine, Mr. Borinsky?

8 MR. BORINSKY: I don't think so, Your Honor.

9 THE COURT: Is this witness to be excused?

10 MR. HASKINS: Again, I offer that testimony
11 for the purpose of the jury.

12 THE COURT: If I understand the position of
13 both parties now, the objection was made by Mr. Borinsky
14 concerning the testimony which Mr. Gary was going to
15 give relating to the conversations which Mr. Gary had
16 with Mr. Tyree.

17 And, I sustained that objection as to those
18 conversations.

19 MR. WICKER: And, we except.

20 THE COURT: And, that's where we are right now,
21 okay.

22 MR. HASKINS: I've, of course, excepted. The
23 Court understands that.

1 Appeal, at this stage of the procedure, so your statement
2 will be heard.

3 MR. HASKINS: Will you call Mr. Sheaff, please?
4 Whereupon,

5 ROBERT SHEAFF, JR.,
6 a witness, was called for examination by counsel on
7 behalf of the defendant, and, after having been duly
8 sworn, was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. HASKINS:

11 Q Will you state your name, please?

12 A My name is Robert W. Sheaff, Jr.

13 THE COURT: How do you spell your last name,
14 please?

15 THE WITNESS: S-h-e-a-f-f.

16 THE COURT: Thank you.

17 BY MR. HASKINS:

18 Q Mr. Sheaff, on the 19th of March, 1975, were
19 you employed?

20 A I was employed by Mutual of Omaha Insurance
21 Company.

22 Q What was your occupation?

23 A I was District Claims Representative for

1 Virginia and West Virginia.

2 Q Did you have an occasion to talk to George
3 David Tyree, Jr.?

4 A Yes, I did.

5 Q Would you tell the Court, please, what day you
6 talked to him?

7 A I talked to Mr. Tyree on March the 18th of '75.

8 Q Did you discuss his employment status at that
9 time?

10 A Yes, I did.

11 Q Would you tell the Court, please, what he
12 told you about his employment status?

13 A Mr. Tyree told me that he was clearing up
14 his affairs because he knew that he would be deceased
15 soon.

16 Q And, how soon -- Or did he say it was just a
17 matter of time?

18 A Just a matter of time.

19 Q What did he tell you about his working, the
20 hours that he worked?

21 A Mr. Tyree, on the day that I visited with him,
22 he was at his office, and he stated that he was training
23 a new lawyer for the corporation, and he was also straightening

1 up some paperwork on some bills and things that people
2 had owed him.

3 He was trying to get that straightened up
4 before he deceased.

5 Q Did he tell you that he had worked any in the
6 last several months?

7 A Yes, sir, he had worked a couple of days in
8 December, and about four days in January, and about six
9 days in February.

10 Q Did he say that he had worked any in March?

11 A No, sir, he had not.

12 Q When he made claim to you, did he make claim
13 for the days that he had worked?

14 A No, sir.

15 Q Do you remember how many days you actually
16 paid him for the period that you just discussed?

17 A 74 days, I believe, sir.

18 Q 74 out of how many?

19 A 120, approximately.

20 Q Let me ask you one more time: When did he say --
21 How many days did he --

22 A I'm sorry, it would be 74 days out of approxi-
23 mately 90.

1 Q 74 out of 90?

2 A That's correct.

3 Q And, you saw him in March, is that correct?

4 A That's correct, on the 18th.

5 Q What did he say about the days that he had
6 worked in February, the number of days?

7 A Approximately four or five days.

8 Q And, how about January?

9 A There were three or four days in January he
10 had worked.

11 Q Did he tell you that he didn't come to the
12 office those other days?

13 A Yes, sir.

14 MR. HASKINS: Your Honor, please, this man
15 knew he was going to die according to the testimony.

16 THE COURT: I was just reading that exception,
17 Mr. Haskins, and the statement in the belief of impending
18 death says: That a statement made by declarant while
19 believing that his death was imminent concerning the
20 cause or circumstances of what he believed to be his
21 impending death.

22 Now, is this testimony about the cause or
23 circumstance of what he believed to be his impending death?

1 MR. HASKINS: Your Honor, please, are you
2 asking me to be intellectually honest with the Court?

3 THE COURT: I believe I'll ask him the question
4 myself:

5 Why were you investigating this man, Mr.
6 Sheaff?

7 THE WITNESS: It's my job for Mutual of Omaha.
8 I was the investigating adjustor.

9 THE COURT: Why were you investigating this
10 particular man?

11 THE WITNESS: On this particular claim form
12 that he had sent into the company, he had put that he
13 had worked several days between December and March,
14 but he didn't specify what days or how many days.

15 So, it was my job to go out with him and find
16 out how many days and what particular days he had worked
17 and make an initial payment for his disability.

18 THE COURT: Did you find that he was disabled?
19 Was it within your power to determine whether he was
20 disabled or not?

21 THE WITNESS: From the information in the file
22 at that particular time, the man was totally disabled,
23 and he had been classified as so from his doctors. I think

1 he was seeing three doctors, a Dr. Smith, a Dr. Dobrzynski,
2 and a Dr. Ueno, those three doctors had declared him totally
3 disabled.

4 And, upon visiting with him, I found him to
5 be totally disabled also.

6 THE COURT: On what did you base that judgment?

7 THE WITNESS: On the hours that he was working
8 in the past and what he was doing at the present time.
9 In other words, at the present time, his friends would
10 drive him over to the office, or one of the other attorneys
11 would drive him over to his office, and he would sit
12 around there, and he would fix the papers, and tell his
13 secretary who he wanted to bill and so forth.

14 Also, upon his physical appearance. His face
15 was very shallow. He had lost about 90 pounds within
16 the last three to four months before he deceased.

17 THE COURT: How do you know that?

18 THE WITNESS: From the doctor's statement on
19 his claim form, and from his appearance. His face was
20 very shallow; his eyes were sunken back. He had grown
21 a beard to fill up some of the shallowness in his face.
22 He was very weak, unstable upon standing.

23 THE COURT: What do you mean by "total disability"?

1 THE WITNESS: Totally unable to do his gainful
2 occupation of work.

3 THE COURT: And, did you make that finding?

4 THE WITNESS: Yes, sir.

5 THE COURT: I am not going to allow this
6 witness to testify as to what Mr. Tyree told him, but
7 I think he is entitled to testify as to what he observed,
8 what he found, what his conclusions were based upon his
9 knowledge of what total disability is.

10 MR. ZELNICK: Your Honor, we object to his
11 conclusions on the basis that he's certainly not qualified
12 as a medical witness.

13 THE COURT: If he knows what he means by totally
14 disabled, he can tell the jury what he means, and what
15 he found.

16 MR. ZELNICK: He based it upon the weight,
17 because he knows he lost weight, and that was a hearsay
18 statement from one of the doctors, and the doctor is
19 here, and the doctor can testify.

20 I don't think that Mr. Sheaff is qualified.
21 First of all, they've indicated they are calling
22 expert witnesses and this would be in the realm of an
23 expert opinion, and I think they have to lay a foundation

1 that Mr. Sheaff is qualified, that he has a medical
2 background.

3 He presumed the reason Mr. Tyree grew a beard.
4 That is pure speculation by Mr. Sheaff. He said that
5 Mr. Tyree was hollow in the cheek, that he grew a
6 beard. I think that that's about the only thing he can
7 say that he observed. The rest of his statements are
8 speculation and conclusions that he'd drawn.

9 There is no proper foundation for that, and
10 the ones, such as the loss of weight, was based on things
11 outside of his knowledge, based on statements of the
12 doctor.

13 The doctor is here to testify. He'd be the
14 best witness as to that particular matter.

15 MR. BORINSKY: Your Honor, if I may, after
16 that, furthermore Mr. Sheaff's purpose was to determine
17 whether this person qualified under a Mutual of Omaha
18 policy, under their definition of total disability. We
19 don't have that Mutual of Omaha policy here. We don't
20 know what their definition was.

21 THE COURT: I am going to allow this witness
22 to testify as to why he went to see Mr. Tyree.

23 MR. ZELNICK: Your Honor, we object to that on

1 the ground that any mention of receiving disability
2 payments is, again, highly prejudicial to us.

3 THE COURT: He said he went to see Mr. Tyree
4 to determine whether or not Mr. Tyree had been working
5 on certain days over a specified period of time in
6 connection with a policy which he made a claim under
7 with Mutual of Omaha.

8 Did you not say that, Mr. Sheaff?

9 THE WITNESS: Yes, sir.

10 THE COURT: That was his purpose for going
11 there.

12 MR. ZELNICK: But, that brings in the very
13 topic that the Court had ruled inadmissible earlier,
14 that there was a disability policy. We contend again
15 that there was --

16 THE COURT: The question of total disability
17 was the issue. This man went for a specific purpose,
18 and I think he is entitled to state why he went there.
19 I think he is entitled to state what he found when he
20 got there. I think that he is entitled to say that,
21 based upon the information which he obtained, he filed
22 a report with the company that the man worked -- or did
23 not work 74 out of 90 days, or whatever that total was.

1 MR. ZELNICK: Well, that's based on statements
2 made to Mr. Sheaff.

3 THE COURT: I understand that. If he filed
4 a report with the company that says that, that based on
5 what he learned, he filed that report. That's what
6 I understand his purpose was, to file that report.

7 Is that correct?

8 THE WITNESS: That's right. Judge, I have a
9 copy of the report.

10 THE COURT: I don't want a copy of the report
11 itself in evidence without seeing what it is, but he
12 went there to do a specific thing, and he found a man
13 who met certain physical qualifications. He found that
14 he hadn't worked in the period of time --

15 MR. ZELNICK: The only way he knew that is
16 because Mr. Tyree told him.

17 THE COURT: He found these things out, though,
18 didn't he?

19 MR. ZELNICK: But, Mr. Tyree told him that,
20 that's what the Court had ruled earlier. Mr. Gary was --

21 THE COURT: Based upon that, he filed a
22 report, didn't he?

23 MR. ZELNICK: Mr. Gary found out the same thing.

1 He said that Mr. Tyree told him that he didn't work.
2 Mr. Sheaff, this knowledge certainly just didn't come
3 into his head with an arrow. The only way he knew
4 anything is what Mr. Tyree told him. Everything he
5 says is based upon hearsay evidence.

6 And, the Court has consistently ruled that
7 those statements are not admissible, and I think that
8 Dr. Smith is here and would be the best witness for the
9 defense.

10 I don't want to tell them how to run their
11 case, but he would be the best witness as to whether
12 or not Mr. Tyree was disabled at the time and whether
13 he was able to work.

14 Mr. Sheaff, I don't want to impugn his ability,
15 but I don't believe he is a doctor, and I don't think
16 he is qualified to speak in terms of whether or not
17 Mr. Tyree was disabled.

18 There is no evidence before the Court as to
19 the provisions of the Mutual of Omaha policy. Mr. Sheaff
20 is only concerned with whether or not Mr. Tyree was
21 disabled under the definition of the Mutual of Omaha
22 policy.

23 Mr. Sheaff was not down there concerned with his

1 general good health or bad health. Anything Mr. Sheaff
2 knows about the number of days Mr. Tyree worked, what
3 he was doing with his files, how he was handling his
4 cases, is based solely on Mr. Tyree's statements.

5 And, the Court has ruled several times today
6 that Mr. Tyree's statements are not admissible. Whether
7 it be a written statement from Mr. Tyree saying he worked
8 four days of the month of February, or whether he told
9 Mr. Sheaff, and Mr. Sheaff is here now and says Mr. Tyree
10 only told me he worked four days in the month of January,
11 I don't see how, by leaving off the first part of it,
12 and saying Mr. Tyree only worked four days in the month
13 of January, that that makes the statement admissible
14 because the only way he knew that was by what Mr. Tyree
15 told him.

16 If he said he looked at time sheets, and the
17 times sheets showed that Mr. Tyree only worked four
18 days, that would be a different story, or if he had
19 some kind of evidence that he was able to verify himself,
20 something that Mr. Tyree didn't say; but everything that
21 Mr. Sheaff knows is based solely, 100%, on what Mr.
22 Tyree told him.

23 There are alternatives available to show whether

1 or not he was working. There are other people, there
2 are records, there are documents that exist that could
3 help prove the claim and what the insurance company
4 is trying to prove in this case, and he has not come
5 forward with any of these.

6 THE COURT: All right.

7 Did your company pay that claim?

8 THE WITNESS: Yes, sir.

9 MR. HASKINS: I would ask the Court to ask him
10 who paid the claim.

11 THE COURT: Who? Well, Mutual of Omaha paid
12 the claim.

13 MR. HASKINS: He wrote the checks, I think.

14 THE COURT: You personally paid the claim, sir?

15 THE WITNESS: Yes, sir.

16 THE COURT: All right, I am going to do this.
17 I am sorry to keep injecting myself in the case, but I
18 think I am dealing with something that is very material
19 and it bothers me, and it would be very easy to sit here
20 and say everything is hearsay and throw it out the
21 window. But, I think it is required of me to this. This
22 man made an investigation. As the result of the inves-
23 tigation, he did something. He paid a total disability

1 claim. He made a judgment based on whatever he saw,
2 and whatever he observed, that the claim was payable.

3 And, he took an action: He paid it.

4 MR. ZELNICK: Your Honor, if we could submit --

5 THE COURT: I understand your arguments, Mr.
6 Zelnick. I have heard them many times now. I am very
7 conscious of them. When I come down, I keep coming back
8 to the question of circumstantial guarantees of trust-
9 worthiness, and I think that that definition is met
10 with this witness if he is asked questions properly.

11 Now, I will agree with what Mr. Zelnick says,
12 even though I am retracting what I did a minute ago, I
13 don't think that anything relating to the conversation
14 as occurred, but I think that this witness can testify
15 the reason why he went to see this man, what total dis-
16 ability is under the policy on which he operates, what
17 he observed, and what he did as a result of his observa-
18 tions, that it is admissible testimony; i.e., pay the
19 check.

20 MR. ZELNICK: Can we question him off the
21 record before the jury comes in, sir?

22 THE COURT: Yes, you may. Just a moment.
23 Do you understand what I'm saying, Mr. Haskins?

1 MR. HASKINS: Yes, sir.

2 THE COURT: And, you want to voir dire. Do
3 you want to conduct a voir dire, Mr. Zelnick and Mr.
4 Borinsky?

5 MR. BORINSKY: Yes, sir.

6 VOIR DIRE EXAMINATION

7 BY MR. BORINSKY:

8 Q What time a day did you visit Mr. Tyree?

9 A It was in the afternoon, after 2:00 o'clock.

10 Q Did Mr. Tyree know that you were coming?

11 A No, he didn't.

12 Q Where did you first come to see him?

13 A At his office.

14 Q Do you recall talking on the telephone to me
15 a few days ago?

16 A Yes, that's correct.

17 Q Do you recall telling me that the first place
18 you went was to his home?

19 A You asked me a moment ago which place I first
20 visited with Mr. Tyree. That was at his office.

21 Q Where was the first place that you went?

22 A To Mr. Tyree's home, and visited with his wife.

23 Q Why did you go to his home rather than his office?

1 A. That's where I would expect to find him.

2 Q. What did you find when you went to visit him
3 at his home?

4 A. I found that he wasn't there. Mrs. Tyree said
5 that he had gone over to the office for a couple of
6 hours, that I could visit him there.

7 Q. You came by surprise, and he just happened
8 to have been at his office for a couple of hours?

9 A. That's correct.

10 MR. HASKINS: This is cross examination. This
11 is not voir dire.

12 THE COURT: I am going to give him some leeway,
13 Mr. Haskins. I don't know what point he's trying to
14 prove, and I'll give him a chance to do it out of the
15 presence of the jury.

16 BY MR. BORINSKY:

17 Q. Have you examined the Mutual of Omaha policy
18 under which Mr. Tyree was paid?

19 A. Not recently, no, sir.

20 Q. When did you last examine it?

21 A. It would have been in June of '76.

22 Q. How long is the policy?

23 A. That particular policy, I do not remember.

1 Q You say "that particular policy", are there
2 several?

3 A Yes, sir, over 3000 policies.

4 Q 3000 different policies?

5 A Of Mutual of Omaha, yes, sir.

6 Q Do you recall examining this specific policy?

7 A No, sir.

8 Q Is it not a fact, then, that you really can't
9 say for certain how total disability was defined pursuant
10 to the policy under which Mr. Tyree was making a claim?
11 Is that not a fact?

12 A At the present time, I could not quote the
13 definition, no, sir.

14 Q Well, you just now said that you don't remember
15 reading the policy. Is it not a fact that you do not
16 know the definition of disability, of total disability,
17 under the policy under which Mr. Tyree was claiming?
18 Is that a fact, that you don't know the definition of
19 disability in accordance with that policy?

20 A That's kind of a hard statement to answer.
21 Under all the policies, the definition of total disability
22 would be: unable to earn a gainful --

23 Q You say there were 3000 policies. Did you

1 examine all 3000 policies?

2 A. No, sir, I did not.

3 Q. How are you able to say, then, that under all
4 the policies it was such-and-such a way?

5 A. All the Mutual of Omaha total disability policies
6 were similar.

7 Q. Similar? But, you don't know that they are
8 identical?

9 A. They were different in words, yes, sir.

10 Q. You had said earlier that Mr. Tyree had indicated
11 that he had worked a few days in March, a few days in
12 February, a few days in January?

13 A. That's correct.

14 Q. How many days would he have had to have worked for
15 him not to be eligible for coverage under his policy?

16 A. Pardon me?

17 Q. How many days would he have had to have worked
18 in, say, the month of February, before you would have said:
19 You don't get any benefit because you worked too many
20 days?

21 A. If he was totally disabled, Mutual of Omaha
22 would have paid him for his total disability during any
23 of the periods of time also. Mr. Tyree did not have a

1 deductible under the policy that I recall.

2 Q You mean you paid him for certain days because
3 he wasn't totally disabled because you considered him
4 not to be totally disabled?

5 A Mr. Tyree told me he worked on those particular
6 days.

7 Q You were paying him for any day that he didn't
8 work, is that what you're saying?

9 A Yes, sir. If the claim sheet proved that he
10 was totally disabled, and he was being seen by a doctor,
11 who also said that he was totally disabled, the only
12 thing that I could verify was the dates that he had
13 worked.

14 And, he had put on the claim forms that he
15 had worked several days.

16 Q Would you consider him to be totally disabled
17 if he worked, say, 15 days a month?

18 A That's not up to me to decide.

19 Q You say if he was seeing a doctor, and he
20 couldn't work, that you would pay him benefits. Would
21 it be a case, then, that if he just didn't, say, show
22 up for work two weeks because he had the flu, would he,
23 under the policy, be entitled to two weeks of benefits,

1 under the Mutual policy?

2 A. Not without proof of loss.

3 Q You are saying, then, that under the Mutual
4 of Omaha policy, had he been out two weeks with the
5 flu, he would have been entitled to two weeks of benefits
6 under the policy?

7 A. If he had shown proof of loss.

8 Q That he had diminished earnings for that
9 period?

10 A. That's correct.

11 Q You said a minute ago, when I asked you about
12 if he worked 15 days, would he have still been considered
13 totally disabled, that it wasn't your decision. Whose
14 decision was it to make as to whether or not he was
15 totally disabled, or disabled?

16 A. It was based upon the company, Mutual of Omaha,
17 and myself. I handle any type of claim that Mutual of
18 Omaha thought needed personal handling, or a personal
19 visitation.

20 A lot of these claims, the people needed to
21 know what to do. In other words, they had to show
22 proof of loss forms, and I would go by, explain the
23 policy briefly, and that they had to show proof of loss

1 each 30 days before their benefits could be allowed.

2 So, that's exactly what I did.

3 Q When you went out, had the benefit already
4 been approved, or did you approve it?

5 A The initial benefit? No, sir. I approved it.

6 Q Had they made payment before you had visited
7 Mr. Tyree?

8 A No, sir.

9 Q They had made no payments?

10 A Not that I know of.

11 Q Till March the 15th?

12 A Not that I know of.

13 MR. BORINSKY: I have no further questions
14 at this time, Your Honor.

15 THE COURT: All right, sir. Mr. Haskins, I'll
16 lay the general ground rules down for you.

17 MR. HASKINS: Yes, sir.

18 THE COURT: I am going to allow you to question
19 this man in the presence of the jury with respect to
20 the purpose of his call, and the action that he took
21 as a result of the call.

22 MR. ZELNICK: Please note our objection on
23 the grounds stated previously, Your Honor.

1 THE COURT: Yes, sir.

2 MR. ZELNICK: Particularly on the response on
3 voir dire that he was not familiar with the terms of
4 the policy, that there were 3000 different policies,
5 with variations in each, and he did not know which
6 policy Mr. Tyree was insured under.

7 THE COURT: Yes, sir.

8 Please bring the jury in.

9 (The jury returned to the courtroom and resumed
10 their place in the jury box.)

11 THE COURT: Proceed, Mr. Haskins.

12 MR. HASKINS: Thank you, sir.

13 DIRECT EXAMINATION (Resumed.)

14 BY MR. HASKINS:

15 Q Would you state your name, please?

16 A My name is Robert William Sheaff, Jr.

17 Q Mr. Sheaff, where do you live?

18 A I live in Vinton, Virginia.

19 Q Where is that?

20 A It's in the Roanoke County area.

21 Q Were you employed on the 19th of March, 1975?

22 A Yes, sir.

23 Q By whom were you employed?

1 A. I was employed by Mutual of Omaha.

2 Q. What is Mutual of Omaha?

3 A. It is an insurance company.

4 Q. And, what were your specific duties with that
5 company?

6 A. At that particular time, I was the District
7 Claim Representative of Virginia and West Virginia.

8 Q. And, what does a District Claim Representative
9 do?

10 A. The District Claim Representative visited the
11 insured after they had made claim of total disability
12 and explained the provisions of the policy and made an
13 initial payment.

14 Q. Did you, on this day of March 19th, 1975, see
15 Mr. George David Tyree, Jr.?

16 A. Yes, sir.

17 Q. Would you please describe to the jury his
18 general appearance to you?

19 A. This was on March the 18th. I visited Mr.
20 Tyree at his office in Woodbridge, Virginia. Mr. Tyree
21 was approximately 6 foot 3 inches, as I remember him.
22 He was very slim, in fact, he had taken up seven or
23 eight inches on his belt, which indicated to me that he

1 had lost 90 or 100 pounds.

2 MR. ZELNICK: Objection, Your Honor.

3 THE COURT: Ignore what it indicated to him.
4 You may state that the belt had several notches taken
5 up. With respect to the other, I ask that the jury
6 disregard it.

7 THE WITNESS: I'm sorry. His face seemed
8 very shallow to me as if he may have lost weight.

9 MR. ZELNICK: Objection, again, Your Honor.

10 THE COURT: State only what you observed,
11 Mr. Shaeff, not your conclusions. Only what you observed.
12 Do you understand the distinction?

13 THE WITNESS: Yes, sir.

14 THE COURT: I ask the jury to disregard the
15 conclusions stated by the witness.

16 BY MR. HASKINS:

17 Q. What was the purpose of this visit with Mr.
18 Tyree?

19 A. Mutual of Omaha had sent me to visit with Mr.
20 Tyree to determine what days he had worked in December,
21 January and February of 1975.

22 Q. Was he making a claim to your company?

23 A. Yes, sir, he had already made claim.

1 Q What kind of claim?

2 A He had made a claim for total disability.

3 Q In your occupation as a claims representative,
4 do you know what total disability is, or did you know
5 what total disability is?

6 MR. ZELNICK: Objection.

7 MR. BORINSKY: Objection.

8 THE COURT: One at a time, gentlemen.

9 MR. ZELNICK: May we approach the Bench on
10 that, Your Honor?

11 THE COURT: All right. Come on up.

12 BENCH CONFERENCE

13 MR. ZELNICK: Your Honor, on the question
14 Borinsky asked on voir dire, Mr. Sheaff indicated that
15 there were 3000 policies. He did not know the definition,
16 and it varied from policy-to-policy, that there were
17 substantial differences in each, and you can't get just
18 a vague, general definition of what he believes it to be
19 when there could be 3000 possible variations, when he
20 admits that he hasn't looked at the policy in a year's
21 time, and did not know precisely how it was defined in
22 this case.

23 And the precise, exact, specific definition is

1 crucial. It is not simply a question of what is disability
2 in the vague, general sense. It's a term of art under
3 the insurance policy, just like all insurance policies
4 contain words of art. It is defined very precisely.
5 It's not something that can be sewed up in one sentence.

6 I just think that the Court can take judicial
7 notice that a disability policy, if any insurance policy,
8 does not contain one paragraph.

9 MR. BORINSKY: They can introduce the policy.

10 THE COURT: If he doesn't know what the
11 definition of total disability was under the particular
12 policy with which he dealt, I am concerned that I can
13 let him give a general definition of total disability.

14 MR. HASKINS: He's not giving a general --

15 THE COURT: You asked before if he knew what
16 total disability was under the policy that insured Mr.
17 Tyree, and I believe he said he didn't know.

18 MR. HASKINS: He said everyone of them said --

19 THE COURT: He said they were similar, not
20 identical.

21 MR. HASKINS: You're not going to bind me to
22 that, are you?

23 THE COURT: Hang on, Mr. Haskins. I told

1 earlier that he could testify as to what he did as a
2 result of his investigation, didn't I?

3 MR. HASKINS: Yes, sir, you did.

4 I thought you told me that he was in a position
5 to determine what total disability was.

6 THE COURT: But, when the evidence -- when the
7 voir dire indicated that the question of total disability
8 became --

9 MR. HASKINS: We'll just withdraw the question,
10 Judge.

11 THE COURT: Withdraw it and go ahead then.
12 All right.

13 OPEN COURT

14 BY MR. HASKINS:

15 Q How long did you talk to Mr. Tyree?

16 A Approximately one-and-a-half to two hours.

17 Q What were your duties with respect to making
18 payments to claimants?

19 A First, that the claim file had enough information
20 and was documented to the point where it showed that
21 the man was totally disabled. In the opinion, in the
22 doctor's eyes, in this particular file --

23 MR. ZELNICK: Objection, Your Honor.

1 THE COURT: Sustained. Don't go any further.

2 BY MR. HASKINS:

3 Q Did you pay Mr. Tyree any money?

4 A Yes, sir, I paid him \$2,400.00.

5 Q Would you tell the lady and gentlemen of the
6 jury the days that you paid him for being totally disabled?

7 A Paid him for 74 days out of 90 days for total
8 disability, from December the 3rd to March the 3rd.

9 Q Can you tell the lady and gentlemen of the
10 jury the number of days, based upon your findings, that
11 Mr. Tyree actually worked in December, January, February
12 and March?

13 A Altogether, 16 days.

14 Q Do you have any notations as to exactly what
15 days you paid him?

16 A Yes, sir.

17 Q What days did you not pay him for? Can you
18 tell us that?

19 A What days I did not pay him for?

20 Q What days did he work?

21 A Can I refer to these notations?

22 Q Yes, you can.

23 A In December, he worked on the 3rd --

1 MR. ZELNICK: Your Honor, I object. He can
2 say what days he paid him for. He can't state as to
3 what days he worked.

4 THE COURT: Listen to the question, sir.

5 BY MR. HASKINS:

6 Q. What days did you give credit for?

7 A. What days did he get paid credit for?

8 Q. No, what days were your company permitted to
9 have a credit for? When they didn't have to pay him,
10 your company?

11 A. The company did not have to pay him for the
12 day of December the 3rd, 5th, 9th, 11th, 12th, 20th,
13 30th, 31st. They did not have to pay him on January
14 the 2nd, 8th, 22nd or the 24th, and they did not have
15 to pay on February the 14th, 13th and 14th, and 21st.

16 Q. How about March?

17 A. In March they didn't have to pay him for any
18 days.

19 Q. You mean he didn't work any days, or they didn't
20 have to pay him for any days?

21 A. He didn't work any days in March.

22 MR. ZELNICK: Objection, again.

23 THE COURT: The question is with respect to the

1 company. What days did they or did they not pay him.

2 I instruct the jury to disregard any answers
3 given by this witness except for the days of payment.

4 Do you want to restate that question, Mr. Haskins?

5 That's any of the testimony in the last
6 couple of statements that he made.

7 BY MR. HASKINS:

8 Q The days that you have numbered there were
9 the days that Mr. Tyree worked?

10 MR. ZELNICK: Objection, Your Honor?

11 THE COURT: Sustained.

12 BY MR. HASKINS:

13 Q The 74 days that you paid him, what period of
14 time did that cover?

15 A From December the 3rd to March the 3rd, 1975.

16 Q How many days is that?

17 A 90.

18 MR. HASKINS: No further questions.

19 Yes, there is one. Let me ask him some more
20 questions.

21 BY MR. HASKINS:

22 Q Did you go to Mr. Tyree's house before you
23 went to his office?

1 A. Yes, sir.

2 Q. Did you talk to Mrs. Tyree?

3 A. Yes, sir.

4 Q. Did you ask Mrs. Tyree about Mr. Tyree's
5 working?

6 A. Yes, sir.

7 Q. What did she tell you about his working?

8 A. She said that he had gone over to the office
9 to handle some things there, and straighten up his
10 business.

11 Q. What did she tell you about his work history
12 over the past three months?

13 A. That he very seldom went over to his office
14 at all any more since his condition has deteriorated.

15 Q. And, did she tell you when his condition
16 started to deteriorate?

17 A. No, sir, not that I remember.

18 Q. Did she give you any specific period of time
19 in which he had not been into the office?

20 A. No specific period of time, no, sir.

21 MR. HASKINS: Thank you. Answer Mr. Borinsky's
22 questions, please.

23 THE COURT: Mr. Borinsky.

CROSS EXAMINATION

BY MR. BORINSKY:

Q When you saw Mrs. Tyree, Mr. Sheaff, did you go inside the house?

A Yes, I did.

Q Did you see an office in the home?

A No, I did not.

Q Did Mrs. Tyree mention that Mr. Tyree had an office in the home?

A No, she did not.

Q Did you ask her about that?

A No, sir.

Q Was Mr. Tyree expecting you?

A No, sir.

Q So, your testimony is that you just came without prior notice to Mr. Tyree?

A That's correct.

Q When you visited Mr. Tyree, can you describe the interior of his office?

A The interior of his office?

Q Yes. Did he have books on the desk?

A Certainly.

Q Did he have files on the desk?

1 A. Not that I noticed, no, sir. Only two coffee
2 cups on the desk, and that was mine and his.

3 Q. Did he have a file cabinet in the office?

4 A. I'm sure he did. I don't remember.

5 Q. How many times did you see Mr. Tyree in person?

6 A. Just on that particular day.

7 Q. Did you ever talk to him other than that day
8 by telephone or anything else?

9 A. Not that I remember, no, sir.

10 Q. You saw him one time, March the 18th?

11 A. Yes, sir.

12 Q. If Mr. Tyree had stated to you that he worked
13 more frequently than he actually stated to you, would
14 you have reduced his benefits?

15 A. If he had stated that to me, I would had to
16 have reduced his benefits.

17 MR. BORINSKY: I have no further questions,
18 Your Honor.

19 THE COURT: Anything else, Mr. Haskins?

20 MR. HASKINS: No. May this witness be excused?

21 THE COURT: Do you agree?

22 MR. BORINSKY: No objections.

23 THE COURT: Thank you for testifying. You are

1 free to go.

2 Do you have another witness, Mr. Haskins?

3 (Witness excused.)

4 Whereupon,

5 DR. L. F. SMITH, JR.

6 a witness, was called for examination by counsel on
7 behalf of the defendant; and, having been duly sworn
8 was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. HASKINS:

11 Q. State your name, please?

12 A. Dr. L. F. Smith.

13 Q. Dr. Smith, where do you practice medicine?

14 A. Alexandria, Virginia.

15 Q. Did you have an occasion to treat George
16 David Tyree, Jr.?

17 A. Yes.

18 Q. When did he come under your care?

19 A. In October of 1974.

20 Q. I hand you a copy of a paper and ask you if
21 you can identify it.

22 Do you want me to give it to him?

23 THE COURT: Go ahead. If he must identify it,

1 let him have it.

2 BY MR. HASKINS:

3 Q Is that your signature?

4 A Yes, it is.

5 Q Did you fill in this --

6 THE COURT: Did he identify the paper, sir?
7 Did you ask him what it was?

8 THE WITNESS: The signature. This is my sig-
9 nature, but I did not fill in this part of it.

10 BY MR. HASKINS:

11 Q Do you know what it is?

12 A It doesn't have a title on it, unh-unh.

13 This is my signature, though.

14 Q Well, what does it appear to be, Doctor?

15 A It appears to be a statement of disability.

16 Q Will you read right here [indicating], right
17 there.

18 MR. ZELNICK: I object to reading it until it's
19 been introduced into evidence.

20 THE COURT: Please bring that statement up
21 here, Mr. Haskins.

22 Counsel, please approach the Bench.
23

BENCH CONFERENCE

1
2 THE COURT: Are you going to ask him whether
3 he filed this form out? He says that's his signature.

4 MR. HASKINS: Yes, sir.

5 THE COURT: Are you going to ask him about
6 the contents of the form?

7 MR. HASKINS: Yes, sir, I am.

8 THE COURT: Unless he's -- unless his signature
9 means or indicates his agreement with what is stated
10 on the form, I am not going to let him testify. I think
11 you have to lay a foundation as to whether his signature
12 indicates his concurrence with what was on the form,
13 and whether he reviewed what was on the form, and knew
14 what was on it when he signed it, and he signed it to
15 indicate his opinion.

16 MR. HASKINS: All right, sir. I'll start over.

17 THE COURT: You need a proper foundation. I
18 sustain the objection.

OPEN COURT

19
20 BY MR. HASKINS:

21 Q Doctor, do you recall signing this paper here?

22 A Not specifically. This is my signature,
23 though.

1 Q Did you sign it for the purpose of having
2 someone believe what was on here?

3 A Yes.

4 Q So, actually what you did when you signed
5 this --

6 MR. ZELNICK: He's leading his own witness.

7 THE COURT: Don't lead the witness. Go ahead.

8 BY MR. HASKINS:

9 Q Did you go over this as a basis for signing
10 it when you signed it?

11 A Yes. We have approximately 30 to 40 of these
12 per week coming across my desk, and we sign quite a few
13 of them.

14 Q And, you expected --

15 A We have employees that fill out these dates
16 and fill out these forms for us.

17 Q But, as you say, they do it for you?

18 A I usually look at the name of the individual.

19 Q Is his name on there?

20 A Yes. And, then, I sign the form, uh-huh.

21 Q Did you do this for Mr. Tyree for his insurance
22 benefits?

23 A It's been so long, I don't even recall signing

1 the form. I did sign the form, but in looking at this,
2 right offhand, I couldn't say exactly what it was for.

3 Q Do you intend, or did you intend at that time,
4 for whoever received that form to rely on its contents
5 as being supplied by you?

6 A Yes.

7 Q Will you please -- There's a line here that
8 says --

9 MR. ZELNICK: Objection to reading it until
10 it's been introduced.

11 MR. HASKINS: There's no problem with intro-
12 ducing it.

13 THE COURT: Overruled. Go ahead.

14 BY MR. HASKINS:

15 Q This is for George David Tyree, Jr., is that
16 correct?

17 A Correct.

18 Q This thing right here says: Patient was con-
19 tinually, totally disabled, and unable to work from
20 7/17/74 through present. Is that what it says?

21 A Yes, uh-huh.

22 Q And, then you signed that on March the 5th of
23 1975, did you not?

1 A. Yes.

2 MR. HASKINS: If Your Honor please, I offer
3 this as plaintiff's exhibit number one.

4 THE COURT: Show it to counsel.

5 MR. WICKER: Defendant's exhibit.

6 MR. ZELNICK: We object on the same grounds.
7 May we approach the Bench?

8 THE COURT: If you want to come here and
9 state the grounds of your objection, you may do so.

10 BENCH CONFERENCE

11 THE COURT: All right, sir.

12 MR. ZELNICK: The criteria that you just laid
13 down a minute ago that Dr. Smith has said that it's
14 his signature, but he has no recollection of signing
15 it. He doesn't recall what the contents were, and
16 somebody else filled it out, and he's not testifying
17 that it was accurate at the time he signed it.

18 THE COURT: He has testified that this was
19 a form that was prepared by people working for him for
20 his signature with respect to Mr. Tyree, and that at
21 the time that he signed it he was certifying or stating
22 that Mr. Tyree had been unemployed for that period of
23 time, or was totally disabled for that period of time.

1 MR. ZELNICK: We also object the period of
2 time. It was a hearsay statement. He asked Dr. Smith
3 as to your notes, and it's an out-of-Court statement.
4 The best evidence is to ask the doctor right now whether
5 Mr. Tyree was able to work.

6 THE COURT: Your objection is overruled. Go
7 ahead.

8 OPEN COURT

9 BY MR. HASKINS:

10 Q Doctor, I am going to ask you to look at another
11 paper here.

12 THE COURT: This document is being admitted as
13 Defendant's No. 1, is that correct?

14 MR. HASKINS: Thank you.

15 (The document referred to
16 was marked Defendant's
17 Exhibit No. 1 for identi-
fication and was admitted
into evidence.)

18 BY MR. HASKINS:

19 Q Doctor, I show you this paper here, and ask
20 if you signed that copy? Is that a copy of what you
21 signed?

22 A This is an imprinted signature on this particular
23 form. That is a rubber stamp of my signature.

1 Q That's a rubber stamp of your signature. Do
2 you keep that stamp for convenience?

3 A I authorize my bookkeeper to use that stamp
4 when it seems appropriate.

5 Q In this particular instance, when she uses
6 your signature, she does it for the purpose of aiding
7 you so that you don't have to go through the physical
8 motion of signing, isn't that true?

9 A That's correct.

10 Q And, still, if you signed --

11 MR. ZELNICK: He's continuing to lead.

12 MR. HASKINS: If Your Honor please, I am not
13 going to elicit something the doctor doesn't want to
14 say. I am only trying to save time.

15 THE COURT: I understand that, sir, and I
16 realize that, and the Court will give you a leeway, but
17 don't lead all the time.

18 Go ahead.

19 BY MR. HASKINS:

20 Q Doctor Smith, you intended that, even though
21 it was a facsimile, did you intend it to be used as
22 though it was your genuine signature?

23 A It is used as my genuine signature.

1 Q This right here, do you recall this with
2 respect to Mr. Tyree?

3 A More than likely I did not see this particular
4 statement if this signature is on here. Whenever I see
5 it, I sign it personally, like I did in that situation.

6 Q But, again, it's for the purpose of furnishing
7 information so that Mr. Tyree can receive money?

8 A From my office, yes.

9 MR. ZELNICK: Objection. The purpose for
10 what that paper is used for is not in evidence. Mr.
11 Haskins is simply making assumptions.

12 THE COURT: Ask him for the purpose.

13 BY MR. HASKINS:

14 Q What was the purpose of it, sir?

15 A In the type of practice that I am in, we are
16 constantly dealing with disability. All we're trying
17 to do is help our patients facilitate their applications
18 for different things, and that's the reason we use a
19 signature stamp like this.

20 And, this appears to be a supplemental statement
21 from the physician's office stating disability.

22 Q What is the date of that, please, Doctor?

23 A The date of the document?

1 Q Yes, sir.

2 A 4/29/75.

3 Q April 29th, '75?

4 A Right.

5 Q Would you recite to the jury, please, what
6 the disability statement is with respect to the man's
7 disability, and how long he's been disabled?

8 MR. BORINSKY: May we approach the Bench?

9 BENCH CONFERENCE

10 MR. BORINSKY: This is different than the one
11 he actually identified. If he says that his secretary
12 did this, how can he testify to this? He's never seen
13 it before. It's his rubber stamp, but by somebody else.

14 THE COURT: My understanding of the testimony
15 at this point is that he authorized somebody to place
16 his signature on there by means of a rubber stamp because
17 of the business that came to the office.

18 Now, you're asking, Mr. Haskins, if it didn't
19 say so-and-so. You haven't asked him whether a judgment
20 was made through the auspices of his office or whether
21 a judgment was made by him that this man was disabled
22 through this period of time.

23 MR. HASKINS: I can do that.

1 THE COURT: I think you had better lay this
2 foundation. When you are using this type of signature,
3 you may authorize your signature to be placed on there,
4 already having made a determination.

5 MR. HASKINS: He did it for his convenience,
6 and he intended people to rely on it.

7 THE COURT: The question we need to become
8 involved with is whether he had already made the judgment
9 concerning the total disability, and he hasn't stated
10 that he did. And, I think that it is objectionable at
11 this point.

12 Lay a foundation, and we'll go on, all right?

13 OPEN COURT

14 BY MR. HASKINS:

15 Q Would you please, Doctor, study that report
16 and tell me whether or not you agree with its contents?

17 MR. ZELNICK: Again, leading the witness. I
18 would object. It's a leading question.

19 THE COURT: It's not a question of whether he
20 agrees. Ask him what you are trying to prove through
21 that document.

22 BY MR. HASKINS:

23 Q Would you certify those contents right there

1 to be accurate today, the contents of that paper?

2 A I'd have to look at the dates.

3 Q But, you were telling me just a few moments
4 ago --

5 THE COURT: Ask him one question at a time.
6 You've got another questions pending. Let him answer.

7 THE WITNESS: This information, except for
8 one office visit date, would appear to be correct infor-
9 mation.

10 BY MR. HASKINS:

11 Q What did you say his total disability -- total
12 inability to work, what was the date there?

13 A The date that has been filed in was 9/11/74.

14 Q Through when?

15 A Indefinite.

16 Q And, that was in April that you made that
17 statement, April of '75 that you made that statement,
18 April 29?

19 MR. BORINSKY: Not that he made that statment.
20 That's a rubber stamp. He never made any statement.

21 BY MR. HASKINS:

22 Q Your office personnel made that statement that
23 he was -- or did your office make that statement?

1 A. You know, actually, these things aren't that
2 exact in a physician's office like ours. In other words,
3 the gentleman was operated on 9/11/74. That was put
4 down as the date the disability began through indefinite.

5 In other words, my feeling in this situation
6 was that the patient was disabled by his disease.

7 MR. HASKINS: No further questions.

8 If Your Honor please, I offer this as Defendant's
9 Exhibit No. 2.

10 THE COURT: Do you object?

11 MR. ZELNICK: Yes, Your Honor, same grounds
12 as before.

13 THE COURT: This exhibit will be admitted over
14 the objections of counsel.

15 (The document referred to was
16 marked Defendant's Exhibit No.
17 2 for identification and was
received in evidence.)

18 THE COURT: Do you wish to examine?

19 MR. BORINSKY: Yes, Your Honor.

20 THE COURT: Does that conclude your examination
21 of this witness?

22 MR. HASKINS: No, sir.

23 THE COURT: I'm sorry. Go ahead.

1 BY MR. HASKINS:

2 Q Doctor, is this your signature?

3 A This is also the imprint stamp.

4 Q Will you please recite there what the date
5 of disability is, and what the date of the report is?

6 A It just says "indefinite". It doesn't say
7 here. The date of the report is 4/4/75. But as to
8 how long the patient was continuously, totally disabled,
9 it just says "indefinite."

10 Q This was just the second, or third, or some
11 other physician's report that had been filed, isn't
12 that correct?

13 A Well, this would appear to have been filed
14 previous to that other document of 4/29.

15 MR. HASKINS: Your Honor, please, we'd like
16 to offer this as Defendant's Exhibit No. 3.

17 THE COURT: Show it to counsel.

18 MR. ZELNICK: We object to this. Same grounds
19 as the other two documents.

20 THE COURT: Doctor, did you testify that that
21 was a stamped signature?

22 THE WITNESS: That's also a stamped signature.

23 THE COURT: Was this document prepared under

1 your supervision?

2 THE WITNESS: These documents are not under my
3 direct supervision, but these documents were prepared
4 by my office under our direction, but not direct supervision.

5 THE COURT: Would the statements which are
6 made on this document be ratified by you? Do you agree
7 that they are correct? Are they correct, not that you
8 agree or not, are they correct as of the date of this
9 document?

10 THE WITNESS: They would appear to be correct.

11 THE COURT: Is there any doubt in your mind?

12 THE WITNESS: I qualify that statement because
13 of the defining of disability, what my concept of dis-
14 ability is in this particular situation, the patient's
15 disease would more than qualify him to be a disabled
16 person for most employment, not necessarily saying that
17 he was confined to a bed, confined to a wheelchair,
18 confined to a stretcher.

19 THE COURT: I understand. The only question
20 we are concerned with right now is this document and
21 whether the information which is contained on it is
22 true and accurate to the best of your knowledge and
23 belief.

1 THE WITNESS: To the best of my knowledge, it is.

2 THE COURT: It will be admitted.

3 (The document referred to was
4 marked Defendant's Exhibit No.
5 3 for identification and
6 received in evidence.)

7 MR. HASKINS: Answer Mr. Borinsky's questions,
8 please.

9 THE COURT: Mr. Borinsky?

10 CROSS EXAMINATION

11 BY MR. BORINSKY:

12 Q Doctor Smith, how many doctors practice out
13 of your office?

14 A Three.

15 Q State their names, please?

16 A Dr. Winston M. Ueno, Robert F. Dobrzynski,
17 and L. F. Smith, myself.

18 Q You practice in a corporate form?

19 A We are a group practice, yes.

20 Q What is the name of the group practice?

21 A At the time of this particular, it was still
22 in my name L. F. Smith, Jr. M.D., Ltd. I think that
23 was correct. We recently changed that in the last year
or so, but I don't recall the exact date we changed.

1 Q Always practicing in a corporate form?

2 A Yes.

3 Q Did you hold any office in that corporation?

4 A Yes.

5 Q What was the office you held during the times
6 which you saw Mr. Tyree?

7 A I was president of the corporation.

8 Q What was the time in which your corporation
9 treated Mr. Tyree?

10 A I think he was first seen on 10/11/74 and last
11 seen on 5/12/75.

12 Q Approximately how many times was Mr. Tyree
13 seen by your corporation?

14 A Approximately?

15 Q Uh-huh.

16 MR. HASKINS: I don't understand the relevancy
17 of this.

18 THE COURT: Overrule the objection. Go ahead.

19 THE WITNESS: Approximately 40 times.

20 BY MR. BORINSKY:

21 Q Approximately how many of those times were
22 you the treating physician?

23 A Five times.

1 Q Five out of about forty times. And, the
2 other times, who was the treating physician?

3 A Primarily Dr. Dobrzynski.

4 Q Occasionally, it may have been Ueno?

5 A Dr. Ueno also saw Dr. Tyree, uh-huh.

6 Q Those particular four or five times you saw
7 him, can you recite the dates that you saw him, Mr. Tyree?

8 A Yes. I saw him on 12/31/74, 2/12/75, 2/25/75,
9 3/5/75 and 5/12/75.

10 Q Other than those specific dates that you
11 mentioned, did you have occasion to meet Mr. Tyree?

12 A Well, our office, of course, is one long hall
13 with a lot of examining rooms. Of course, I would see
14 him frequently in the hall coming in for what we call
15 a paracentesis.

16 Q What is a paracentesis?

17 A It's where the fluid is drawn off the abdomen.

18 Q Other than those days which you just mentioned,
19 are there -- Did you have occasion to talk with Mr.
20 Tyree?

21 A I talked -- Yes, I did have occasion to talk
22 with Mr. Tyree, uh-huh.

23 Q You had indicated before that some 30 or 40 of

1 these forms, or ones similar to the ones you have just
2 identified to the Court --

3 THE COURT: Please keep your voice up. The
4 jury has to hear.

5 BY MR. BORINSKY:

6 Q You indicated that some 30 or 40 of the docu-
7 ments, similar to those you have previously seen, come
8 through office every week. In your capacity as president,
9 are you generally the signatory on those documents?

10 A At that particular time, I was the signatory
11 on all the documents that left our office of this nature.

12 Q You mean, even if someone was exclusively
13 seeing Dr. Dorrzynski, you would make the determination,
14 or you would affix your name?

15 A My signature would frequently appear -- Well,
16 not frequently--would appear on this document. If I
17 had any question, I would, you know, consult with the
18 appropriate physician before signing it.

19 Q Now, you said you treated Mr. Tyree about five
20 or half-a-dozen times, and also talked to him. In your
21 opinion, from Mr. Tyree's -- Well, can you describe Mr.
22 Tyree's mental facilities?

23 A Yes, throughout the time -- In fact, I saw him

1 the last visit to our office. He was always alert and
2 in complete control of all of his faculties. Some
3 things about the entire situation, it's been so long
4 that I really can't remember all of the details.

5 Q Did he have any difficulty in communicating
6 with you?

7 A Not to my knowledge.

8 Q In your opinion, would he be able to have con-
9 versations on the phone?

10 A Yes.

11 Q To dictate letters?

12 A In fact, I remember having conversations on
13 the phone with him, occasionally calling the office
14 with a problem, but I have no reason to believe he was
15 ever confused when I talked with him.

16 Q Could he dictate letters?

17 A I would assume so.

18 Q Did you ever make specific inquiry of him as
19 to whether or not he was performing any duties as an
20 attorney?

21 A The knowledge I would have at this time --

22 MR. HASKINS: Objection. All day long --

23 THE COURT: All right. Come up here and tell

1 me what your objection is.

2 MR. BORINSKY: I'll withdraw it.

3 THE COURT: You're withdrawing your question,
4 sir?

5 MR. BORINSKY: Yes.

6 THE COURT: All right. Go on.

7 BY MR. BORINSKY:

8 Q Do you have any personal knowledge that Mr.
9 Tyree was not in fact, performing his duties as an attorney?

10 A No, I don't. I don't have any knowledge of
11 what he was doing at home or in the office, personal
12 knowledge.

13 Q So, your basis for your signing these documents
14 here was purely based on physical diagnosis of Mr.
15 Tyree?

16 A Well, I'll have to explain it. Most of these
17 things are almost automatic things in our office because
18 when someone has stage four carcinoma of the colon re-
19 quiring weekly paracentesis, my feeling is that that
20 patient is entitled to disability if he so desires.

21 I don't think anyone would expect him to
22 maintain a full schedule.

23 Q Would it be possible, if a particular person

1 were in a white collar job, that he could perform?

2 A. We have patients that do.

3 MR. HASKINS: He's had no personal knowledge
4 of what he did or when he worked.

5 MR. BORINSKY: This person --

6 THE COURT: You are going to ask a hypothetical
7 question, sir?

8 MR. BORINSKY: Yes.

9 THE COURT: On what basis?

10 MR. BORINSKY: That Dr. Smith is a physician
11 and qualified and competent to answer such a question.

12 THE COURT: Are you going to make him your
13 witness for the purpose?

14 MR. BORINSKY: No, I think I'll go into another
15 line of questioning.

16 THE COURT: All right. Go ahead.

17 BY MR. BORINSKY:

18 Q. Did you have occasion when one of these forms
19 came by your desk for signature, did you ever have
20 occasion to disapprove one that you recall?

21 A. Right offhand, I can't think of any particular
22 instance.

23 Q. You're saying that there's approximately 30 or

1 40 a week come by your office, and you've never not signed
2 one?

3 A. Not with one of our oncology patients.

4 Q. Okay.

5 A. We have with patients who, you know, obviously
6 didn't have disabling diseases, but I don't think I've
7 ever not signed one for one of our patients who has
8 cancer.

9 MR. BORINSKY: Fine. Just a minute.

10 MR. HASKINS: May we pass these to the jury?

11 THE COURT: Wait until he finishes his examin-
12 ation.

13 BY MR. BORINSKY:

14 Q. Dr. Smith, was Mr. Tyree physically capable
15 of performing as an attorney?

16 MR. HASKINS: I object to that.

17 THE WITNESS: I can describe his --

18 THE COURT: You can lay a foundation, if the
19 Doctor knows what such an occupation is, what it requires.
20 You may then inquire about it.

21 But, you are asking him as the treating physician
22 to state what his patient was capable of, and you have
23 to lay a proper foundation.

1 BY MR. BORINSKY:

2 Q Dr. Smith, would you describe the effects of
3 a disease such as the one Mr. Tyree had? What are the
4 effects on an individual? What does it mean, that
5 before the disease he could do (a), (b) and (c), and
6 after the disease he could only do (a)?

7 MR. HASKINS: I object to all of that. I think
8 he is trying to explain to the Doctor the form of the
9 answer that he's seeking.

10 THE COURT: I am going to overrule the objection.
11 Do you understand the question, Doctor?

12 THE WITNESS: I think that I have an idea of
13 what he's asking.

14 THE COURT: If you don't understand it, I'll
15 have it rephrased.

16 THE WITNESS: Would you rephrase it?

17 BY MR. BORINSKY:

18 Q All right. What are the sorts of things that
19 a person who has the type of disease that Mr. Tyree
20 had, what does it mean that he can't do? What is the
21 effect of such a disease?

22 A The primary limitation is physical. The
23 carcinoma of the colon, the general pattern of disease

1 spread, is usually via to the liver or to the intra-
2 abdominal contents, less than 25% spread to the brain
3 or the lungs or bones.

4 Usually the patient is not limited in his ability
5 to perform mental tasks, but, certainly, is severely
6 limited physically as far as prolonged periods of ambu-
7 lation or exertion after the disease has advanced to the
8 stage that Mr. Tyree's disease had.

9 Q So, what would be the specific effect on Mr.
10 Tyree of the disease?

11 A It would be fatigue, and, maybe, some dis-
12 comfort in the abdomen, and loss of appetite, loss of
13 weight, so-called constitutional symptoms.

14 Q In Mr. Tyree's case, though, was there any
15 effect on his mental capacities?

16 A As I indicated, my recollection of the situation,
17 is no. I don't have specific recollection of that very
18 last visit. I just don't really remember it because
19 he was in primarily because of the abdominal fluid, and
20 I had to do a paracentesis on him.

21 Q Would the specific limitations such as you
22 described, such as fatigue et cetera, would they limit
23 a person from reading books from the library and doing

1 research?

2 A. Provided that person wasn't on some hypnotic
3 or sedative-type agent for pain, I would say no, as long
4 as the patient didn't have evidence of advanced liver
5 disease or jaundice, and possibly when you have some
6 alterations in the thought process, but, generally
7 speaking, you should be able to function mentally prior
8 to that time.

9 Q. Was Mr. Tyree able to perform that way?

10 A. Mr. Tyree walked into the office usually,
11 and he conversed apparently normally. I did not get
12 into extensive conversations to test his cerebrations,
13 such as giving him small quizzes to do and things of
14 this nature, but he seemed normal to me mentally.

15 Q. Seemed normal mentally?

16 A. That would have been my judgment, just on the
17 exposure that I had.

18 Q. So, he could conduct business on the phone?

19 A. I would say yes.

20 Q. If fact, you said he did conduct business
21 with you?

22 A. He had called us on the phone before.

23 Q. Was he bedridden at any time during the time

1 that you saw him, that your company treated him?

2 A. I don't know. My partner has more definite
3 information along these lines because he apparently
4 had a very close relationship with Mr. Tyree. A lot
5 of the information I have in the past is hearsay
6 evidence from him.

7 Q. So, you mean your basis for the statements --

8 A. Not the statements I have made. The statements
9 I've made are based on the information I have in my
10 exposure. I could not go beyond that, on my contact.

11 I don't know what he did at home.

12 Q. The five or six times that you saw him, did
13 he always come in the office by himself, unassisted,
14 walk in the office himself?

15 A. He had, as I recall the last few times, he
16 required some assistance, but he did walk, and, then,
17 of course, if he got tired, we always had a wheelchair
18 available.

19 Q. That would have been in May?

20 A. Yes. But, I guess, really, he was rather an
21 unusual person, at least in my opinion, as far as
22 being able to press forward even in spite of all these
23 disabilities.

1 Q Dr. Smith, I have --

2 A He was a very proud person. He didn't want
3 to ride in a chair usually.

4 MR. BORINSKY: Thank you very much, Dr. Smith,
5 I have no further questions.

6 THE COURT: Is there any redirect, Mr. Haskins?

7 MR. HASKINS: Yes, sir.

8 REDIRECT EXAMINATION

9 BY MR. HASKINS:

10 Q You say you saw the man five times, totally?

11 A As I count it up here, yes.

12 Q Is that disproportionate to the number of
13 times that Dr. Dobrzynski saw him?

14 A Yes.

15 Q Is your recollection of your relationship with
16 Mr. Tyree somewhat sketchy, Doctor?

17 A Not his appearance, and seeing him walk, and
18 knowing that he could converse, but that is about all
19 the information that I have.

20 MR. HASKINS: Thank you. That's all.

21 May this witness be excused?

22 THE COURT: Mr. Borinsky?

23 MR. BORINSKY: I have no objection, Your Honor.

(Witness excused.)

THE COURT: Who is your next witness?

Do you want those forms given to the jury?

MR. HASKINS: Yes, Your Honor.

THE COURT: Members of the jury, these are exhibits that were introduced by the defendant during the examination of Dr. Smith.

BENCH CONFERENCE

MR. HASKINS: If I could speak with -- I don't think it would take more than fifteen minutes to have him on.

MR. ZELNICK: Who is that?

MR. HASKINS: I wish you hadn't asked me his name.

MR. BORINSKY: What's his name?

MR. HASKINS: It's the group underwriter.

THE COURT: Are there any other witnesses?

When you complete this case, are you going to have other witnesses come on in rebuttal?

MR. BORINSKY: We are finished.

THE COURT: You're finished, all right. We'll have to have a verdict form typed, and I'm a little bit concerned about what that verdict form ought to say. Have you any thoughts on it at all?

1 (The documents referred to
2 were marked Defendant's
3 Exhibits for identifi-
4 cation.)

5 MR. HASKINS: Your Honor, we would also offer
6 the de bene esse deposition of Gary Suing to connect
7 Mutual of Omaha in Omaha, Nebraska, pursuant to notice
8 served upon the defendant, taken before Gene B. Taulborg,
9 notary public and general court reporter, and we offer
10 that this be read into evidence at this time.

11 THE COURT: For what purpose do you offer
12 these, Mr. Haskins?

13 MR. HASKINS: For the same purpose that we
14 wanted to offer the letters with the request for dis-
15 ability which are now being marked for identification
16 by the Clerk. That is to show that he did contact
17 Mutual of Omaha, that he did initiate the claim, that
18 based upon that claim that they started the procedure
19 for the payment.

20 THE COURT: Do you object to the admission
21 of this deposition?

22 MR. ZELNICK: Yes, Your Honor, on several
23 grounds, same grounds that I stated this morning. It's
an improper de bene deposition because the record doesn't

1 reflect that Mr. Suing would be one hundred miles from
2 the Manassas area on the date of this trial, or that
3 he fits into any other exceptions that are required
4 under 4:7 for admission of a deposition.

5 THE COURT: Do you know who Mr. Suing is,
6 Mr. Zelnick?

7 MR. ZELNICK: The only thing I know is from
8 what it indicates, that he works for Mutual of Omaha.
9 So does Mr. Sheaff. Mr. Sheaff was present today.

10 THE COURT: When was it taken? You weren't
11 there, I take it?

12 MR. HASKINS: No, sir.

13 THE COURT: Someone took it for you?

14 MR. HASKINS: Yes, sir.

15 THE COURT: How am I supposed to know that
16 this man, Mr. Suing, is at a greater distance than one
17 hundred miles from the place of trial or hearing?

18 MR. HASKINS: That would be in the notary,
19 if it's acknowledged in the back, if Your Honor please.

20 THE COURT: It says that this deposition was
21 taken in the County of Douglas.

22 MR. HASKINS: State of Nebraska.

23 THE COURT: And 4.7 says that the deposition of

1 the witness maybe used for any purposes in an action
2 for law out of chancery and equity if the court finds
3 that the witness is at a greater distance than one
4 hundred miles from the place of trial or hearing.

5 That certainly would take notice of the fact
6 that Douglas, Nebraska is more than one hundred miles
7 from Manassas, Virginia.

8 MR. ZELNICK: We don't know that Mr. Suing --
9 There's nothing that says that he's a resident there,
10 that says permanent place of employment. It would be
11 the easiest thing. They had only two questions to get
12 on the record if the Rules are to have any meaning.

13 It should, at least, be part of the record,
14 if he's going to introduce it, and proffer it, that
15 it falls within the exception. We can't prove. We
16 don't know.

17 THE COURT: On the basis of the location of
18 the notary, I am going to overrule the objection.

19 What's your next objection?

20 MR. ZELNICK: We do have substantive objections
21 as well.

22 THE COURT: All right.

23 MR. ZELNICK: Mr. Suing's deposition is based

1 completely on hearsay. Mr. Suing has simply said --
2 95% of his deposition concerns letters he's received,
3 medical reports he's received, and then he just says
4 that we've paid the money based on these reports.

5 Dr. Smith has already testified. Mr. Sheaff
6 had already testified. Mr. Gary has already testified.
7 He's saying that they are basing that upon reports.
8 Everything that he's saying there is based purely upon
9 hearsay.

10 Mr. Suing never met Mr. Tyree. Mr. Suing
11 never did anything. This is just a backdoor attempt
12 to get in evidence that the Court has ruled inadmissible
13 prior to this.

14 THE COURT: I want to go through this with
15 you line-by-line, all right?

16 "Question: Would you please state your
17 name--"

18 Looking at page two.

19 "Question: Would you please state your
20 name for the record?"

21 "Answer: Gary Suing."

22 "Question: Who are you employed by,
23 Mr. Suing?"

1 "Answer: Mutual of Omaha."

2 "Question: How long have you been employed
3 with Mutual of Omaha?"

4 "Answer: Six and a half years."

5 "Question: In what capacity are you
6 employed with Mutual of Omaha?"

7 "Answer: I am a continuing disability analyst."

8 "Question: Could you explain some of the
9 duties --"

10 He explains the duties.

11 "Question: Are there any other duties,
12 like approving payments --"

13 Line four on page three.

14 "Question: In your capacity as a continuing
15 disability analyst, did you have occasion to review and
16 pay a claim submitted by George David Tyree, Jr.?"

17 "Answer: Yes, I did."

18 MR. ZELNICK: We object, Your Honor. I know
19 the Court has ruled on this earlier, but I object on
20 the grounds that we have stated previously, whether or
21 not Mutual of Omaha paid a claim or whether Mr. Tyree
22 submitted a claim is irrelevant, particularly where
23 they paid a claim without foundation in terms of the

1 policy and what is required in order for a claim to
2 be paid.

3 THE COURT: On that point, your objection is
4 overruled.

5 "Question: Could you describe the type
6 of claim and what action you took when you first
7 received it?"

8 Then it is described.

9 MR. ZELNICK: We object to that again, same
10 reason.

11 THE COURT: Just a moment. Let me see what
12 the definition is. I may agree with you, and I may
13 not.

14 I am going to overrule your objection. Over
15 a couple of pages there is a question --

16 MR. ZELNICK: There is the crutial word right
17 there. He was considered totally disabled by Mutual
18 of Omaha. He said: Totally disabled.

19 I don't see how the plaintiff can be bound
20 by what Mutual of Omaha considered.

21 THE COURT: On page four beginning at line
22 three:

23 "Question: Does the company have a

1 percentage of disability that must exist before they
2 pay a claim?"

3 "Answer: No. There is no set percentage,
4 just the insured must be unable to perform all the duties
5 of his occupation to be eligible for total disability."

6 "Question: How does Mutual of Omaha
7 determine whether he is unable to perform the duties?"

8 "Answer: This is verified by the attending
9 physician, by a statement --"

10 What this tells us is how Mutual of Omaha
11 does it. That's all it says.

12 Coming back over here:

13 "Question: Could you describe in your
14 capacity --"

15 On page three now. Let's see:

16 "Question: Could you describe the type
17 of claim and what action you took when you first re-
18 ceived it?"

19 "Answer: Yes. This is a disability
20 policy which pays a thousand dollars a month when Mr.
21 Tyree was totally disabled as a result of sickness or
22 accident."

23 "Question: Excuse me, this policy was owned

1 by Mr. Tyree?"

2 "Answer: Yes, it was."

3 "Question: And when did he first submit
4 the claim?"

5 "Answer: He first gave us notice of claim
6 on October 21, 1974."

7 "Question: What did you do in response to
8 the receipt of that notice?"

9 "Answer: Upon receipt of the notice, claim
10 forms were sent out to Mr. Tyree, and an inspection report
11 ordered to obtain additional information to verify disability."

12 "Question: Were those claim forms and
13 inspection reports received?"

14 "Answer: Yes, they were."

15 "Question: What did they show?"

16 "Answer: The first claim form was completed
17 by Mr. Tyree on November 14th, showing total disability
18 beginning September 11, 1974. And, this was verified by --"

19 Again, it's a fact.

20 MR. ZELNICK: You've ruled that the letters
21 that Mr. Tyree wrote are inadmissible. He's just
22 reading into the deposition what the letters said.

23 THE COURT: The first claim form was submitted

1 by Mr. Tyree showing total disability. He received that
2 claim form which says: Total disability.

3 MR. BORINSKY: Mr. Tyree made the statement that
4 he was totally disabled. You ruled that Mr. Tyree's state-
5 ments or letters or claims were inadmissible. Five minutes
6 before, you ruled they were not admissible. He is simply
7 reading them up into the record.

8 MR. HASKINS: If anybody's qualified to read
9 them, he is.

10 MR. ZELNICK: It's clearly hearsay.

11 THE COURT: I'll give you a chance to copy this
12 when I'm through with it.

13 MR. ZELNICK: We again object to this. He's
14 there talking about what the general rules are in very
15 vague terms. On two grounds I would object: First, that
16 he should talk specifically about Mr. Tyree, aside from
17 the fact that this is a one sentence synopsis by Mutual
18 of Omaha's representative. Mr. Sheaff represented there
19 were 3000 variations of policies. Has Your Honor ruled that
20 everything prior to this is admissible?

21 THE COURT: I'll tell you when I get through.
22 I'll let you look at it when I get through with it.

23 Just a minpte.

1 (Counsel remaining at the Bench, Judge Middleton
2 then addresses the jury as follows:)

3 THE COURT: Members of the jury, I am going
4 to be about five to ten minutes. If you want to go
5 back to the jury room, you are welcome to do so rather
6 than sitting there.

7 (The jury then retired to the jury room.)

8 THE COURT: All right, Mr. Haskins. I've just
9 about butchered your deposition, but I think this is
10 the part that is not subject to any hearsay rule, and
11 which could go into evidence.

12 What it comes down to is this: You're asking
13 this Mr. Suing who he is, and he identifies himself,
14 all right? And, he tells what he does in capacity with
15 the company.

16 He identifies himself as a disability analyst,
17 and he reviews the claim submitted by Mr. Tyree. I think
18 that's a fair comment.

19 "Question: Could you describe the type
20 of claim?"

21 He says it's a disability policy which pays
22 \$1,000.00 a month when Mr. Tyree was totally disabled
23 as a result of sickness or accident.

1 Now, Mr. Zelnick and Mr. Borinsky object to
2 that statement, but I am going to allow it to remain
3 in. That's because I think it ties in with later
4 testimony which comes in through this deposition.

5 MR. ZELNICK: It's also on the grounds that
6 it's repetitive of everything Mr. Sheaff testified to.

7 THE COURT: And, then, he identifies the policy
8 as owned by Mr. Tyree, when he first submitted the claim,
9 October 21, '74. "What did you do in response --", et
10 cetera. They sent out claim forms, et cetera.

11 "Question: Were the reports received?"

12 "Answer: Yes, they were."

13 "Question: Does the company have a
14 percentage of disability that must exist before they
15 pay a claim?"

16 Now, Mr. Zelnick excepts to that saying it's
17 very general, but he says: No, they don't.

18 "Question: How does Mutual of Omaha
19 determine whether he is unable to perform --"

20 He says: Verified by the attending physician.

21 "Question: After those processes were com-
22 pleted on Mr. Tyree's claim, what was your conclusion as to
23 his request for benefits under his policy of insurance?"

1 Now, they are asking for an operation of the
2 mind of this individual: What was your conclusion?
3 And, I don't interpret the question in that light. I
4 interpret the question -- It could have been more artfully
5 phrased --

6 MR. HASKINS: What was your procedure?

7 THE COURT: What did you do as a result of the --

8 MR. ZELNICK: For the record, whatever Mutual
9 of Omaha decided is totally irrelevant.

10 THE COURT: I am going to let it in regardless.
11 Under the initial claim form, he was considered totally
12 disabled.

13 "Question: For exactly what period of
14 time were disability payments made?"

15 "Answer: The initial payment was made for
16 the period September 11, through December 3rd,
17 1974."

18 MR. ZELNICK: Can I cite further authority
19 on that? A stranger to the suit?

20 THE COURT: "Question: Then am I to understand
21 from September until May, Mutual paid this individual
22 total disability benefits, except for certain days
23 when he returned to the office?"

1 "Answer: Yes. He was considered totally
2 disabled.--"

3 Now, the rest of this starts to go into
4 detail, and I don't think that that -- I think it ends
5 up in hearsay. This talks about what the man did,
6 what he did in his function, what decisions he made,
7 and I think that's what relevant to this case.

8 MR. HASKINS: All right, sir.

9 MR. ZELNICK: This very last sentence, sir,
10 they say he was paid for certain days when he returned
11 to the office. They don't know whether he returned to
12 the office or not. That was the same objection that
13 you ruled in favor --

14 THE COURT: Except for certain days, then, I'll
15 say. He was considered toally disabled, continually,
16 totally disabled, during this period of time, okay?

17 Now, let me just tell you so you can get your
18 objection in. I understand that you consider this ir-
19 relevant and extraneous. I think that it brings some
20 material points that bear on this case, and that is that
21 this individual was being paid total disability.

22 And, I think that there is a definition in
23 this transcript sufficient. Now, this man knew the policy,

1 and he discribed what total disability is, and I am going
2 to allow it into evidence. Okay?

3 MR. ZELNICK: We've made our objection for
4 the record.

5 THE COURT: What else?

6 MR. ZELNICK: Mr. Haskins indicated that there
7 was going to be another witness to be called.

8 MR. HASKINS: We object to the Court marking
9 up our nice, neat --

10 THE COURT: I'm sorry.

11 MR. ZELNICK: There's another witness that Mr.
12 Haskins is going to call, Mr. Grove or Gross?

13 MR. HASKINS: Mr. Grosser.

14 MR. ZELNICK: We object to that on the fact
15 that we filed interrogatories and answers, asking Mr.
16 Haskins to list all witnesses he intends to call, and
17 Mr. Haskins provided us the list, fairly recently --

18 MR. HASKINS: When is that?

19 MR. ZELNICK: April of '77. And, there are only
20 four names listed there. Now, I find --

21 MR. HASKINS: The only reason I was going to
22 use Grosser anyway was to get the policy in. If you
23 will stipulate this right here, and I've submitted it, I

1 Would you please bring the jury in?

2 OPEN COURT

3 (The jury returned to the courtroom and resumed
4 their place in the jury box.)

5 THE COURT: Mr. Bagley, would you please take
6 the witness stand?

7 Mr. Haskins, would you explain to the jury
8 what we are going to do?

9 MR. HASKINS: Ladies and gentlemen, this is
10 a de bene esse deposition which was taken in Omaha,
11 Nebraska, of a man who was a group life underwriter for
12 Mutual of Omaha Insurance Company.

13 He could not be in Court today, so we had a
14 court reporter transcribe the questions and the answers
15 that this man gave in response to the questions. Mr.
16 Bagley will read the responses, and I will read the
17 questions, and I ask that you consider this to be the
18 testimony of Mr. Suing although he is not here today.

19 THE COURT: Mr. Bagley is going to read the
20 answers given by Mr. Suing at the deposition. That
21 deposition was taken under oath. I think it says right
22 on the front page that it was. Mr. Bagley would you
23 please read what the front page says?

1 (Mr. Bagley then read to the jury the front
2 page of the deposition of Gary Suing.)

3 THE COURT: This deposition was taken under
4 oath, so the party was sworn at the time these answers
5 were given.

6 MR. BAGLEY: It does say, on the next page,
7 that it was sworn.

8 (Whereupon, the deposition of Gary Suing
9 was read to the jury as amended.)

10 MR. HASKINS: Thank you, Your Honor.

11 THE COURT: All right.

12 Please give me that copy, Mr. Bagley. I would
13 like to include that. Please mark that.

14 (The document referred to
15 was marked as a Defen-
16 dant's Exhibit for identi-
fication and received in
evidence.)

17 THE COURT: Who is your next witness, Mr.
18 Haskins.

19 MR. HASKINS: I would like to call Mr. Grosse

20 MR. BORINSKY: Your Honor, may I approach
21 the Bench?

22 THE COURT: Come up.
23

1 but I don't want the jury to get the wrong impression.

2 (The jury returned to the courtroom and resumed
3 their place in the jury box.)

4 THE COURT: Mr. Haskins, do you have any other
5 witnesses?

6 MR. HASKINS: Call Mrs. Tyree.

7 THE COURT: Mrs. Tyree, please take the witness
8 stand. You are still under oath.

9 Whereupon,

10 KETTI M. TYREE,
11 the plaintiff, was recalled for examination by counsel
12 on behalf of the defendant, and, after having been
13 previously duly sworn, was examined and testified further
14 as follows:

15 DIRECT EXAMINATION

16 BY MR. HASKINS:

17 Q. Mrs. Tyree, do you know whether or not the
18 North American Life and Casualty Insurance Company
19 returned the premium paid by your husband?

20 A. After my husband died, I received a check for
21 \$140 some odd dollars, and I gave it to Mr. Borinsky
22 because I thought that I was supposed to get \$10,000.00
23 instead of the check back.

1 Q You got your money back? You got the money?

2 A Yes. And, eventually, we did cash it, but it
3 was three or four months after I had received it.

4 MR. HASKINS: Thank you.

5 THE COURT: Mr. Borinsky, do you have any
6 questions of this witness?

7 MR. BORINSKY: No questions.

8 THE COURT: You may stand down.

9 MR. HASKINS: The defendant rests.

10 THE COURT: Does the plaintiff have any rebuttal
11 evidence?

12 MR. BORINSKY: No, Your Honor.

13 THE COURT: Does the plaintiff rest?

14 MR. BORINSKY: Yes, Your Honor.

15 THE COURT: Members of the jury, I think you
16 may want to take a poll among yourselves. We have
17 instructions in this case which are yet to be argued,
18 and you must wait while those instructions are worked
19 out for presentation to you.

20 I cannot estimate how long it is going to take
21 to do it, but based on everything else that's happened
22 in this case, I would say that it's going to take a
23 couple of hours. It's now 7:30.

1 THE COURT: The next instruction is Instruction
2 No. 6.

3 The burden is upon the Defendant to prove by
4 a preponderance of the evidence that G. David Tyree, Jr.
5 was not an eligible insured person in active service on
6 March 1, 1975. If the jury are uncertain as to whether
7 the Defendant has proven by a preponderance of the
8 evidence that G. David Tyree, Jr. was not an eligible
9 insured person, then the Defendant has failed to sustain
10 the burden of proof.

11 That is the burden instruction. Is there an
12 objection to that instruction?

13 MR. WICKER: Yes, sir.

14 THE COURT: All right, state your grounds, please.

15 MR. WICKER: This places the defendant in the
16 position of proving that Mr. Tyree was not an eligible
17 person; in other words, to prove that he was not in
18 active service. Now our objection is that we don't
19 believe that it is our duty to prove that he was not an
20 eligible person.

21 His beneficiary is here, asking for the payment
22 of the sum set forth in the policy, in both policies,
23 \$10,000, and proffering the policies as valid documents.

1 The burden of proof is on the plaintiff, of course,
2 always, to prove not just in the beginning but every
3 element of the case. In order for a person to recover
4 under a policy, or sue, they have to show that that
5 person came within the terms of that policy.

6 If that policy, for example, instead of
7 insuring, didn't insure G. David Tyree -- he was not an
8 employee at all of a firm, just not in, but they put his
9 name on the list, so, accordingly, the company issued
10 a certificate on the basis of the representations of the
11 employer or employing firm. He being a partner, naturally
12 he is responsible for what his firm asserts.

13 Now, as it turns out later, the company doesn't
14 have any examination, the company doesn't require any
15 visual proof or anything, is what they say there, but
16 they issue it on the basis of the representation made by
17 him and his firm in asking for this policy.

18 So then they got the policy and later it turns
19 out that the man is not and was not at the time of issuance
20 employed at all, just never mind the 30 hours a week,
21 just to make it very plain, that he wasn't employed at all.
22 It would be the same thing, and it turns out that way.

23 Now I say that the burden of proof is not on the

1 defendant to prove what it later found out. It didn't
2 have any medical exam; it didn't have any physical exam;
3 it didn't look at him; it didn't send somebody. There was
4 nothing there. It just issued the policy and said this
5 policy applies only to those who so-and-so, and it turns
6 out that Mr. Tyree was not one of those so-and-so -- 30
7 hours a week and full employment and like that.

8 Now if we were denying the physical act of
9 issuing the policy, that's one thing. We don't deny in
10 any way that the policy -- I'm talking about the group
11 policy now, the foundation policy -- was issued. And we
12 don't deny that G. David Tyree was named in that certifi-
13 cate as one of the men to be insured.

14 That certificate, later on, the application
15 there, included him. We don't deny that. But we do
16 deny that he was ever insured -- and I'm talking about
17 the first policy. We do deny that he was ever insured
18 for the simple reason that we do deny that he met the
19 plain terms of qualification in there, which might be,
20 for example, if it said he was an adult and it turned out
21 later that he was only 15.

22 Now, if they deny it, that's a question of
23 fact for the jury to determine, whether or not he met

1 these plain terms. If he did, then there is no argument;
2 that is, if the jury said he did. If the jury says he
3 did not on the thing, then the plaintiff's case falls.

4 Now the plaintiff, we think, has the burden of
5 proof in all cases. The only shift that occurs is if
6 and when they put forward some evidence to the contrary,
7 contrary to the defendant's claim; then the burden is
8 on us to move forward with evidence, which we did with
9 the different witnesses that we put on. We moved forward
10 and produced that evidence.

11 Now the burden of proof, however, didn't shift
12 at all. The burden of proof is always on the one who
13 asserts that, the defendant owes me so much money, and
14 he owes me so much money because here's a note; and the
15 defendant comes in and says, I didn't sign that note so
16 he has no note, my name is on there but I didn't sign it
17 so I don't owe it.

18 Surely it's not incumbent upon the defendant --
19 that's a perfectly plain and simple analogy -- but it's
20 not incumbent upon the defendant to prove that he didn't
21 sign it. The burden still remains upon the plaintiff,
22 who seeks to enforce the payment of money from the
23 defendant on the basis of a written document, to prove

1 that that document is genuine, in the case of the note.

2 Here, it's their duty to prove that this was
3 a valid insurance policy, that it was validly applicable
4 to this particular deceased.

5 I don't want to burden the Court any further
6 but that simply states the basis of our objection to
7 putting the burden of proof upon the defendant, and I
8 wanted to invite the attention of the Court on that. And
9 the additional reason is that when the plaintiff got
10 ready to file suit, the plaintiff knew, of course, or
11 her counsel, what was at stake and what the difference of
12 opinion was and so forth by that time. Now, if the
13 plaintiff had felt that there wasn't any question about
14 this thing, the plaintiff would have, in the Motion for
15 Judgment, would simply put out a Motion for Judgment on
16 that second individual policy. That's all.

17 But the plaintiff's Motion for Judgment, in
18 the first four paragraphs, referred to the group policy;
19 it founded its case right there; that's its foundation;
20 the insured is hereafter described -- and so forth; the
21 defendant issued group policy number so-and-so, insuring
22 the life, among others, of Tyree.

23 Then on May 1st of '75, after the aforesaid

1 G. David Tyree made a request for conversion, the
2 defendant issued conversion policy number 11-so-and-so
3 in consideration of the sum so-and-so, the premium. And
4 both of the policies named the plaintiff.

5 Now in the Motion for Judgment they founded
6 their case not only upon the individual, subsequent
7 policy but upon the first policy, as they had to do
8 because the individual policy plainly showed that it was
9 issued on the basis of an obligation in the first policy.

10 That, naturally, was based on the assumption --
11 it wasn't known at that time by the defendant that the
12 group policy was genuinely applicable, that it was valid,
13 that Mr. Tyree was eligible under the terms of that policy.
14 Consequently, the defendant found out otherwise, came
15 in an said, no, no, we're not liable.

16 There is nothing wrong with the terms of
17 either the group policy or the individual policy, but
18 that plainly said -- not in one place but in two places --
19 fully describes what is necessary for that policy to take
20 effect, in that group policy. And if the group policy
21 fell, everything on which it was based fell.

22 Consequently, we say that after that became
23 known, the burden of proof, if it falls anywhere, falls

1 upon the plaintiff, not the defendant. And furthermore,
2 in the opening statement to the jury -- as Your Honor
3 knows, frequently in pleadings, both the plaintiff's
4 pleadings and defendant's pleadings, later on sometime
5 when it gets to actual trial, well, they take a little
6 different position.

7 In this case the plaintiff's counsel, in his
8 opening statement, referred to and traced the thing
9 right on down, beginning with the group policy, on down
10 to conversion of the group policy into an individual
11 policy.

12 So, with all of those things being considered
13 we object to any instruction that would place the burden
14 of proof upon the defendant to prove that the policy
15 which it issued on the basis of the application of the
16 decedent, the plaintiff's decedent -- the burden of proof
17 there is not for us to show that that was an invalid
18 policy.

19 The burden of proof is simply -- the plaintiff
20 says it was valid. In addition to the opening statement,
21 when the plaintiff herself got on the stand, her counsel
22 led her through a series of questions dealing with the
23 provisions of this group policy, as to how many hours

1 per week and so forth that he worked. So that followed
2 all the way through to the recognition of the fact that
3 it was their burden. It's up to them, the one who
4 asserts, if you owe me money, there (indicating) is a
5 document that bears out what I'm saying.

6 And then we say, well, you don't fall within
7 the terms of that document -- oh, yes, I do; oh, yes,
8 sure I do, and it's my burden to prove that.

9 I'm sorry to have taken up so much time but
10 I thought it was due the Court to state it fully.

11 THE COURT: I understand that and I know you
12 feel very strongly about that position.

13 I'm going to grant the instruction. As I view
14 the case, the plaintiff is proceeding on Policy Number
15 Two, the whole life policy. The plaintiff came forward
16 and put into evidence before this jury the fact that the
17 group life policy had been issued.

18 It did that, and then it showed that it had
19 received a policy based on that policy. As I view the
20 defense's position, the defense has asserted the fact
21 that Mr. Tyree was not an eligible person under the
22 group life insurance policy.

23 Now, because it takes that position and denies

1 that he is eligible, I believe it has the burden to
2 show it. And that is why I'm going to issue the
3 instruction.

4 MR. WICKER: Well, of course, it's understood,
5 if Your Honor please, that you'll note our exception.

6 THE COURT: I'll note the exception. I under-
7 stand that.

8 MR. WICKER: Thank you.

9 THE COURT: All right, sir.

10 Those are the plaintiff's instructions. Now
11 we'll go into the defendant's instructions.

12 * * * * *

13 THE COURT: Is there any objection to
14 Instruction E?

15 MR. ZELNICK: Objection.

16 THE COURT: What is the basis of your objection,
17 sir?

18 MR. ZELNICK: That is the burden of proof
19 instruction. That has already been covered in our
20 Instruction 6, which the Court has granted. The defendant
21 does have the burden of proof, not the plaintiff.

22 THE COURT: Well, it does contain a preponder-
23 ance of the evidence statement, which is already admitted

1 in plaintiff's No. 2. So I think that last paragraph is
2 clearly repetitive. Your objection goes to the first
3 two paragraphs, Mr. Zelnick, and you state the fact that
4 the burden of proof instruction, already given by the
5 Court, is contrary to this instruction.

6 MR. ZELNICK: Exactly, Your Honor.

7 THE COURT: What is your reply to that?

8 MR. HASKINS: If Your Honor please, we'll
9 withdraw the third paragraph, preponderance of the
10 evidence; however, we do submit the balance of it.

11 THE COURT: All right, Instruction No. E is
12 denied. Now how about F?

13 MR. ZELNICK: We would object to that.

14 MR. WICKER: It isn't necessary to get up and
15 note an exception, is it?

16 THE COURT: No, I assume you're excepting to it.
17 Now, No. F?

18 MR. ZELNICK: We think that's covered by the
19 Court's No. 5.

20 THE COURT: You object to the admission of
21 Instruction F?

22 MR. ZELNICK: Yes, sir, that's right.

23 THE COURT: And you contend that it should be

1 admitted, Senator, and Mr. Haskins?

2 MR. WICKER: The objection of the plaintiff
3 is on what grounds, please, sir?

4 THE COURT: He wants to know the basis of your
5 objection to Instruction No. F, Mr. Zelnick.

6 MR. ZELNICK: It's covered by the Court's
7 Instruction No. 5.

8 MR. WICKER: No. 5?

9 THE COURT: That is not totally true, Mr.
10 Zelnick. The first paragraph of this instruction talks
11 about the individual life insurance policy. That is
12 not contained in the Court's instructions.

13 MR. ZELNICK: Well, Your Honor, we would
14 object to that. They say the uncontradicted evidence
15 shows that the second or individual life insurance policy
16 was issued by the defendant, not as a result of any new
17 negotiation but in discharge of the preexisting obliga-
18 tion contained in the group policy.

19 They say "uncontradicted evidence." We say
20 that there's no evidence on that; the only evidence is
21 that they issued that policy in consideration of the
22 premium paid, the \$148.00. That has already been admitted
23 in the Statement of Admissions submitted to the Court.

1 MR. HASKINS: If Your Honor please, he put his
2 application in for the second policy, which is part of
3 the evidence in the case, which says, in conformance
4 with the group policy, we make application for the
5 individual policy.

6 MR. WICKER: That's right.

7 MR. ZELNICK: I think it's a question of law
8 that the Court should rule on, the relationship between
9 the two parties. That is the issue that the Court has
10 taken under advisement, and I don't see how anything
11 contained in the first paragraph is relevant to the
12 issue before the jury.

13 THE COURT: What is your response, Senator?

14 MR. WICKER: My response is that this
15 instruction is not covered by Instruction No. 5. We
16 think that it covers the valid points and that it ought
17 to be granted, and we think it would be helpful to the
18 jury in reaching a decision one way or the other. So we
19 think this instruction certainly ought to be granted.

20 THE COURT: I'm going to deny the instruction.

21 MR. WICKER: Well, please note our exception.

22 THE COURT: Yes, sir.

23 I'm denying it for this reason: It seems to

1 me that the factual issues in this case, which must be
2 determined by the jury, is the question of whether or not
3 Mr. Tyree was an eligible insured person in active service
4 on March 1, 1975. I think that all other questions
5 which have been presented are matters of law. That is
6 the factual question remaining.

7 Therefore I think that the instruction should
8 be denied.

9 MR. WICKER: If Your Honor please, in view of
10 what Your Honor has just stated, we would like to
11 withdraw the first two paragraphs and offer the balance
12 of this instruction. Just cut out the first two para-
13 graphs, then have, if you find from the evidence that
14 the decedent was not in active service at his
15 employment and so forth, effective date, that he was not
16 working a minimum of 30 hours per week while performing
17 all of the regular duties of his employment on a full-
18 time basis at his law office or at some location to
19 which his employment required him to travel, then the
20 decedent was not eligible for participation in the
21 group life insurance contract, and consequently was not
22 entitled to the subsequent policy to which his insurance
23 was converted and you shall find your verdict for the

1 defendant. I think that's entirely in line with the
2 Court's thinking. It depends entirely on the jury's
3 finding; they must find from the evidence these things
4 which the Court has, I believe, agreed are essential.
5 We're just withdrawing those first two paragraphs; we're
6 offering it with the first two paragraph eliminated.

7 THE COURT: I'm still going to deny it. I
8 think it is covered by the previous instruction. It is
9 a little bit different, Senator, because it goes to the
10 ultimate issue of the policy that has been sued upon.
11 I concur in your point on that, but I do think that my
12 prior instruction does cover that.

13 MR. WICKER: All right. Our exception, of
14 course, is noted.

15 THE COURT: Yes, sir.

16 * * * * *

17 THE COURT: Gentlemen, are there any motions?

18 MR. ZELNICK: No, sir, Your Honor.

19 MR. WICKER: May the Court please, we have a
20 motion. I'll have to fill in some numbers because I
21 wasn't quite sure of the instruction numbers.

22 THE COURT: Would you like to have the instruc-
23 tions so that you can put the numbers in there?

1 MR. WICKER: Yes, sir.

2 THE COURT: All right, we'll get you the
3 instructions in just a moment.

4 MR. WICKER: All right, sir. While we're
5 waiting, I've written out what I have to say.

6 THE COURT: All right, go ahead, sir.

7 MR. WICKER: The defendant moves the Court
8 to set aside the verdict of the jury and enter a judgment
9 for the defendant or, in the alternative, grant a new
10 trial upon the following grounds: One, the verdict is
11 contrary to the law and the evidence and, two, the
12 misdirection of the jury, especially instructing the jury
13 that the burden of proof is upon the defendant to prove
14 that the plaintiff's decedent was not qualified for
15 inclusion in the group policy, and that the plaintiff's
16 decedent was therefore ineligible for such insurance
17 upon the basis of which the subsequent individual policy
18 was issued; and three, the refusal of the Court to grant
19 instructions offered by the defendant, especially
20 instructions -- and I've got three numbers here -- which
21 presented the defendant's side of the case and which were
22 supported by credible evidence.

23 THE COURT: All right, Senator.

1 MR. WICKER: I need to insert the numbers here.

2 THE COURT: Do you want to get the instruction
3 numbers to which you refer?

4 MR. WICKER: If Your Honor please.

5 THE COURT: All right. Mr. Gnadt will give
6 you those.

7 MR. WICKER: If Your Honor please, I have
8 inserted in this -- number two was misdirection of the
9 jury; that's Instruction No. 6.

10 THE COURT: Your second argument then would
11 relate to Instruction No. 6?

12 MR. WICKER: Yes, sir. And then, in the
13 next one, refusal --

14 THE COURT: That would be your third argument?

15 MR. WICKER: That would be the third, refusal
16 of the Court to grant instructions of the defendant,
17 especially E and F. They're the ones marked "refused."

18 THE COURT: All right, sir. Each one of
19 those motions --

20 MR. HASKINS: If Your Honor please, would the
21 Court permit me to make one?

22 THE COURT: You want to make an additional
23 objection?

1 I suggest that you sit down and, between you, draw
2 that order and when you find out what you can't agree
3 on, we're going to meet anyway, and at that time I'll
4 sign it and we'll be done with it in one fell swoop.

5 MR. ZELNICK: That will be fine, Your Honor.

6 MR. HASKINS: All right, sir.

7 * * * * *

8 CERTIFICATE OF REPORTER

9 I, Florence J. Tulloss, do hereby certify that
10 I took the stenographic notes of the foregoing proceeding
11 and reduced the same to typewriting; that I am neither
12 related to nor employed by any of the parties to the
13 action; and further, that I am not a relative or employee
14 of any attorney or counsel employed by the parties
15 hereto, nor financially interested in the action.

16 

17 Florence J. Tulloss, CVR
18 Notary Public in and for the
19 State of Virginia at Large
20
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