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Record No. 5391

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In the  
Supreme Court of Appeals of Virginia  
at Richmond

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STATE FARM MUTUAL  
AUTOMOBILE INSURANCE  
COMPANY

v.

CHARLES F. DUNCAN

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FROM THE CIRCUIT COURT OF ROANOKE COUNTY

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RULE 5:12—BRIEFS.

§5. NUMBER OF COPIES. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. SIZE AND TYPE. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

# Supreme Court of Appeals of Virginia

AT RICHMOND.

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Record No. 5391

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VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 2nd day of October, 1961.

STATE FARM MUTUAL AUTOMOBILE INSURANCE  
COMPANY, Plaintiff in Error,

*against*

CHARLES F. DUNCAN, Defendant in Error.

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From the Circuit Court of Roanoke County

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Upon the petition of State Farm Mutual Automobile Insurance Company, a corporation, a writ of error and *superseas* is awarded it to a judgment rendered by the Circuit Court of Roanoke County on the 27th day of May, 1961, in a certain motion for judgment then therein depending wherein Charles F. Duncan was plaintiff and the petitioner was defendant, upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of ten thousand dollars, with condition as the law directs.

**RECORD**

\* \* \* \* \*

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\* \* \* \* \*

Filed in the Clerk's Office the 4 day of November, 1960.

Teste:

ROY K. BROWN, Clerk  
By FLORENCE HICKS, D. C.

**MOTION FOR JUDGMENT.**

To the Honorable Fred L. Hoback, Judge of said Court:

Charles F. Duncan, Plaintiff, who resides at Ironto in Montgomery County, Virginia, moves the Circuit Court of Roanoke County, Virginia, for a judgment against State Farm Mutual Automobile Insurance Company, a corporation with its home office at Bloomington, Illinois, for the sum of EIGHT THOUSAND DOLLARS (\$8,000.00), together with interest thereon from September 15, 1960, and costs amounting to \$21.25, which sum is due and owing by the State Farm Mutual Automobile Insurance Company, Defendant, to the said Charles F. Duncan, Plaintiff, for this to-wit:

(1) That on the 15th day of September, 1960, the said Charles F. Duncan did recover in the Circuit Court for the County of Roanoke, Virginia, judgment in the principal sum of EIGHT THOUSAND DOLLARS (\$8,000.00) together with interest and costs against George Anderson Manuel for personal injuries sustained by reason of the negligence of the said George Anderson Manuel in the operation of a Chevrolet pick-up truck, in the Town of Salem, Roanoke County, Virginia, on the 20th day of November, 1959, which said Chevrolet pick-up truck collided with a Mercury 1957 Monterey 4-door automobile #57-ME21414M owned and operated by the Plaintiff thereby causing personal injury to the Plaintiff for which he has recovered the aforesaid judgment.

page 3 } (2) That execution was duly issued out of the Clerk's Office of the Circuit Court for the County of

Roanoke, Virginia, on the 8th day of October, 1960, but said execution has not been returned to said Clerk's Office, all of which appears on Page 144 of Judgment Lien Docket No. 20 of the records of the said Clerk's Office; and no part of said judgment has been paid.

(3) That on the said 20th day of November, 1959, there was in existence and in full force and effect an automobile liability insurance policy #4063651-A02-46 issued to the Plaintiff upon said Mercury automobile, by the State Farm Mutual Automobile Insurance Company to Charles F. Duncan, Ironto, Virginia.

(4) That under said policy of insurance, the Plaintiff, Charles F. Duncan, is entitled to recover from the said State Farm Mutual Automobile Insurance Company the full amount of his said judgment with interest thereon until paid, and his costs upon said judgment and his costs herein.

(5) That the said Chevrolet Pick-up truck operated by the said George Anderson Manuel was, on the 20th day of November 1959, an "uninsured automobile" within the terms of said policy of insurance, in that with respect to its ownership, maintenance and use, there was on the 20th day of November 1959, in the amount specified in the Virginia Motor Safety Responsibility Act, neither cash or securities on file with the Virginia Commissioner of Motor Vehicles nor a bodily injury and property damage liability bond or insurance policy, applicable to the accident with respect to any person or organization legally responsible for the use of said pick-up truck.

(6) That under said policy of insurance, the said defendant undertook, promised and agreed to pay all sums which the plaintiff should be legally entitled to recover from the said George Anderson Manuel who was the operator of the said Chevrolet Pick-up truck, an uninsured automobile, page 4 } on November 20, 1959, when he did negligently and unlawfully drive said truck into and against plaintiff's said Mercury automobile which was then and there insured under the terms of said policy.

(7) That as soon as practical after the plaintiff was injured, he filed with the defendant proof of claim upon the forms furnished therefor by the defendant and did subsequently on February 24, 1960, give to the defendant, at its request, a sworn statement in the form of depositions; that said defendant did wholly fail and refuse to pay to the plaintiff any sum or sums which the plaintiff was entitled to recover from the said George Anderson Manuel by reason of said personal injuries, although said defendant was requested so to do.

(8) That on the 12th day of April, 1960, the plaintiff, Charles F. Duncan, instituted an action by Motion for Judgment against George Anderson Manuel in the Circuit Court of Roanoke County, Virginia, and did on the 12th day of April, 1960, deliver to the defendant a copy of the said Motion for Judgment served in connection with such action instituted in the Circuit Court of Roanoke County, Virginia; that on the 10th day of June 1960, plaintiff notified the defendant, State Farm Mutual Automobile Insurance Company, that he had caused an alias process to be issued against said George Anderson Manuel to be served upon the Commissioner of the Division of Motor Vehicles as Statutory agent for said George Anderson Manuel; that on the 3rd day of September 1960, plaintiff notified said State Farm Mutual Automobile Insurance Company that the action against said George Anderson Manuel was set for trial in the Circuit Court of Roanoke County, Virginia, on September 15, 1960; that the said plaintiff, Charles F. Duncan did otherwise fully comply with and do and perform all other things required of him by the terms of the defendant's said policy of insurance.

page 5 } Wherefor the said Charles F. Duncan respectfully moves the Circuit Court for the County of Roanoke, Virginia, for judgment against the said State Farm Mutual Automobile Insurance Company, defendant, for the sum of EIGHT THOUSAND DOLLARS (\$8,000.00) together with interest thereon from the 15th day of September 1960, until paid, and said costs which said sum is due and owing by the said defendant to the said plaintiff as aforesaid.

GIVEN under my hand this the 4th day of November, 1960.

CHARLES F. DUNCAN  
Plaintiff  
By ROBERT S. GUERRANT  
His Attorney.

\* \* \* \* \*

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\* \* \* \* \*

SPECIAL PLEA.

Comes now the defendant, State Farm Mutual Automobile Insurance Company, by its attorneys, and for its special plea states:

(1) Plaintiff at the time of the institution of his motion for judgment on the 12th day of April, 1960 against George Anderson Manuel in this court did not comply with Section 38.1-381 (e) Code of Virginia of 1950, by serving upon this defendant, as though it were a party defendant, in the manner prescribed by law, a copy of the process instituting the action at law by the plaintiff against the said George Anderson Manuel.

(2) By virtue of the plaintiff's aforesaid failure to comply with Section 38.1 (e.) of the Code of Virginia of 1950, plaintiff is precluded from maintaining this action against this defendant on the judgment obtained in the other proceeding against George Anderson Manuel.

(3) Hence this defendant moves this court to dismiss this action for the reasons aforesaid.

Respectfully,

STATE FARM MUTUAL AUTO-  
MOBILE INSURANCE COM-  
PANY

By Counsel.

WOODS, ROGERS, MUSE & WALKER  
301 Boxley Building  
Roanoke, Virginia

Attorneys for Defendant.

Filed in the Clerk's Office Circuit Court of Roanoke County  
Va., Nov. 29, 1960.

Teste:

ROY K. BROWN, Clerk  
By FLORENCE HICKS, Dep. Clerk.

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## STIPULATION.

The plaintiff and the defendant by their respective attorneys hereby stipulate as follows:

(1) Both parties waive a trial by jury and submit to the court for determination all questions of law and fact, upon the pleadings filed herein and this stipulation:

(2) In deciding the case the court will consider the following agreed statement of facts:

(a) The plaintiff, Charles F. Duncan, resides at Ironto in Montgomery County, Virginia, while the defendant, State Farm Mutual Automobile Insurance Company, is a foreign corporation with its home office in Bloomington, Illinois, being qualified to do business in the State of Virginia. The defendant's registered agent for service of process is Mr. E. A. Brayvogel, 1001 North Emmet Street, Charlottesville, Virginia.

(b) On the 20th day of November, 1959, there was in existence and in full force and effect an automobile liability insurance policy No. 4063651 issued by the defendant to the plaintiff upon a certain 1957 Mercury automobile. The said policy was issued on October 24, 1959, and was effective until January 2, 1960. Said policy is hereto attached and made a part of this stipulation. As required by §38.1-381(b) of the Code of Virginia of 1950, as amended, which subsection became effective on July 1, 1958, the said insurance policy contained, among other things, a section providing for "family protection against uninsured motorists" wherein it was agreed by the insurer to pay to the insured such sums as he should be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury sustained by the insured.

This section was a standard uninsured motorist provision as required by §38.1-381(b), having been approved by the State Corporation Commission of Virginia on July 1, 1958, and put into effect by the defendant on that date.

(c) On November 20, 1959, the plaintiff while operating the said 1957 Mercury automobile, was involved in a collision with a Chevrolet pick-up truck operated by one George Anderson Manuel in Salem, Virginia. The plaintiff sustained injuries as a result of the said accident and made claim against the said George Anderson Manuel for damages on account of said injuries.

(d) It was subsequently ascertained that the said George Anderson Manuel was not covered by liability insurance on the pick-up truck operated by him at the time of the accident. Accordingly, by a letter dated January 9, 1960, copy of which is attached hereto and made a part of this stipulation, the plaintiff, through his attorney, asserted a claim against the defendant under the uninsured motorists provisions of the aforesaid insurance policy.

(e) Thereafter, the plaintiff provided a statement under oath to the defendant concerning the accident and his injuries, and further provided a medical report and statement of medical expenses and lost wages amounting to a total figure of \$257.42.

(f) Thereafter, representatives of the defendant held several conferences with the plaintiff's attorney in an effort to settle the claim made by the plaintiff upon the defendant.

(g) On April 12, 1960, the plaintiff by his attorney instituted proceedings in the Circuit Court of Roanoke County, Virginia, against the aforesaid George Anderson Manuel. On the same date, April 12, 1960, the plaintiff, through his attorney, delivered a copy of the said motion for judgment to a secretary in the claim branch office of the defendant herein in Roanoke, Virginia, the plaintiff's attorney taking a receipt therefor. No effort was made by the plaintiff or his representative to have a copy of the said motion for judgment

served upon the defendant in the manner pre-  
 page 11 } scribed by law. By letter of June 10, 1960, copy  
 of which is attached hereto and made a part of this  
 stipulation, plaintiff, through his attorney, notified defendant,  
 that he had caused an alias process to be issued against  
 George Anderson Manuel to be served upon the Commissioner  
 of the Division of Motor Vehicles as statutory agent for  
 said George Anderson Manuel. On September 3, by letter,  
 plaintiff through his attorney notified this defendant through  
 its representatives that the case brought against George  
 Anderson Manuel had been scheduled for trial for September  
 15, 1960. No acknowledgment, communication concerning or  
 reply to said notice or letters was made by defendant to  
 plaintiff or his attorney. On the last mentioned date, Sep-  
 tember 15, 1960, trial was had at which no appearance was  
 made on behalf of the said George Anderson Manuel or on  
 behalf of the defendant herein, State Farm Mutual Auto-  
 mobile Insurance Company. Judgment was recovered at the trial  
 by the plaintiff against the said George Anderson Manuel,  
 in the amount of \$8,000 together with interest and costs.



(h) Execution was duly issued out of the Clerk's office of the Circuit Court for the County of Roanoke, Virginia on October 8, 1960, but the said execution has not been returned and to date the judgment has not been paid.

(i) Demand has been made by the plaintiff through his attorney on the defendant for payment of this judgment, and the defendant has declined to pay the same.

(j) On November 4, 1960, the plaintiff instituted the present action against this defendant, seeking to enforce payment by this defendant of the aforesaid judgment obtained in the Circuit Court of Roanoke County, Virginia, against the said George Anderson Manuel. Service of the notice of motion for judgment and motion for judgment was made upon Mr. E. A. Brayvogel, registered agent of this defendant, such service having been effected through the City Sergeant's Office in Richmond, Virginia. To the motion for judgment, this defendant filed its Special Plea, moving the court page 12 } to dismiss the proceedings herein because of the failure of the plaintiff to serve upon this defendant, as though it were a party defendant, in the manner prescribed by law, a copy of the process commencing the action at law by the plaintiff against the said George Anderson Manuel, as required by Section 38.1-381(e) (1) of the Code of Virginia of 1950, as amended, which subsection became effective on April 27, 1959. This section provides as follows:

"Any insured intending to rely on the coverage required by paragraph (b) [uninsured motorists protection] of this section shall, if any action is instituted against the owner or operator of an uninsured motor vehicle, serve a copy of the process upon the insurance company issuing the policy in the manner prescribed by law, as though such insurance company were a party defendant; such company shall thereafter have the right to file pleadings and take other action allowable by law in the name of the owner or operator of the uninsured motor vehicle or in its own name; provided, however, that nothing in this paragraph shall prevent such owner or operator from employing counsel of his own choice and taking any action in his own interest in connection with such proceedings.

"This subsection shall not apply to any cause of action arising prior to the effective date of this amendment."

(3) This case is submitted to the court for determination of the matters set forth in paragraph two (2) above. No additional evidence is to be submitted by either party.

Executed this 17 day of February, 1961.

CHARLES F. DUNCAN  
By ROBERT S. GUERRANT  
R. R. RUSH  
His Attorneys.

STATE FARM MUTUAL AUTO-  
MOBILE INSURANCE COM-  
PANY  
WOODS, ROGERS, MUSE &  
WALKER  
Its Attorneys.

Filed 3/29/61.

F. L. H.

\* \* \* \* \*

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January 9, 1960.

State Farm Mutual Insurance Company  
Claim Department  
5005 Williamson Road, N. W.  
Roanoke, Virginia

In *Re*: Charles F. Duncan, Ironto, Virginia, State  
Farm Policy No. 4063 651-A02-46

Gentlemen:

Your assured, whom I represent, was injured in an automobile accident which occurred on November 20, 1959, near the intersection of 4th St. and College Avenue, in the Town of Salem, Virginia.

The accident involved the car owned and operated by your assured, Charles F. Duncan, who at the time was driving his 1947 Mercury *Monterey* 4 Dr. Hardtop, Motor No. 8 57 ME2141M, and a 1958 Chevrolet Pick-up truck owned by Peery Manuel, operated at the time of the accident by his brother, George Anderson Manuel, both of whom live at 729 College Avenue, Salem, Virginia.

I have personally talked to Peery Manuel and George Anderson Manuel, who informed me that they had no liability insurance coverage on the truck at the time of the accident. It is apparent, therefore, that claim will be made against

State Farm under the uninsured Motors provision of the said policy.

It is apparent that Duncan, who was severely injured as a result of the accident, as will be shown in a doctor's report which I expect to have in my possession within the course of the next few days.

My investigation indicates that this is a clear case of liability against Manuel, who was convicted for driving under the influence of intoxicants at the time of the accident.

If you desire to do so, I would be happy to discuss with your representative the possibility of a compromise settlement of Duncan's claim.

Yours very truly,

ROBERT S. GUERRANT

RSG:s

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June 10, 1960.

State Farm Mutual Insurance Company  
Claim Department  
5005 Williamson Road, N. W.  
Roanoke, Virginia

*Re: Charles F. Duncan, Ironto, Virginia Your as-  
sured State Farm Pol. No. 4063 651-A02-46 v.  
George Anderson Manuel*

This is to notify you that today I am having issued an alias process directed to Sergeant of the City of Richmond to be served upon the Commissioner of Division of Motor Vehicles as Statutory Agent for Manuel, who is now a non-resident of the State of Virginia, for more than sixty days.

Yours very truly

ROBERT S. GUERRANT.

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COURT'S OPINION.

The facts in this matter will not be set out herein, as they have been covered by stipulation of Counsel, and also reiterated in the first Brief filed herein on behalf of the Defendant. Counsel for both parties have filed able Briefs, and in addition to the authorities covered therein, this Court has likewise endeavored to find additional authorities dealing with the problem involved.

A Special Plea has been filed herein by Counsel for the Defendant asserting that the Motion for Judgment brought by Plaintiff should be dismissed because of the failure of the Plaintiff to comply with the provisions of Section 38.1-381 (e) 1 of the 1950 Code of Virginia, as amended. The Plaintiff contends that he has fully complied with all of the provisions and terms of the policy issued by the Defendant, and that the Defendant cannot now rely upon the provisions of said Code Section to defeat the claim of the Plaintiff.

Since the Briefs were filed, Counsel for the Defendant furnished the Court and opposing Council copies of a recent Opinion by Mr. Justice Snead in the case of *Creteau v. Phoenix Assurance Company* (not yet reported in the Advance Sheets) and decided on April 24, 1961. It is contended by Counsel for the Defendant that this case determines the issues here involved. Counsel for the Plaintiff, however, assert that the said Opinion recognizes the exception that is applicable to the facts in the instant case.

page 54 } The Creteau case specifically states that:

“The language employed (in Section 38.1-381 (e) 1) is mandatory and established a condition precedent to the benefits of the Statute unless waived by the insurance company.”

It is fundamental that the insurance policy must set forth the contract between the assured and the insurer (See 10 M. J. Insurance, Section 19) and is to be construed according to its terms, and where the terms are plain and clear, the Court is bound to adhere to them, (See 10 M. J. Insurance, Section 24) although the policies are to be construed strictly against the insurer; but the Courts cannot make the contract and:

“Existing laws enter into and become parts of all contracts made under them, and no waiver of the parties nor stipulations by them can change the law.” See 10 M. J. Insurance, Sections 25 and 26.

Where a policy of insurance contains provisions in conflict with statutory provisions, the Statute will prevail. See *Scholz v. Standard Accident Insurance Company*, 145 Va. 694 (1926.)

However, Statutes do not prevent the parties from entering into a contract more favorable to the insured. (See *Sterling Insurance Company v. Dansey*, 195 Va. 933 (1954), and *Ambrose v. Acacia Mutual Life Insurance Company*, 190 Va. 189 (1949) cited in the Memorandum filed herein on behalf of the Plaintiff. The rules above stated apply equally to indemnity insurance. (See 10 M. J. Insurance, Section 114 and Section 150.)

The provisions of Code Section 38.1-381 (e) 1 are controlling in the instant case unless waived by the Defendant Insurance Company, and, while Mr. Justice Snead in the Creteau case (*supra*) was of the opinion that no waiver existed in that case, as pointed out by Counsel for the Plaintiff, the present case may be distinguished in several particulars from the Creteau case. In the first place, it is clear from the opinion that the policy written by the Phoenix Assurance Company was written and effective prior to the enactment of the amendment to Code Section 38.1-381 (e) 1, and, page 55 } consequently, the provisions thereof were thereafter equally binding upon the company and the insured. In the instant case, however, the insurance policy was issued by the Defendant company six months after the effective date of the amendment to said Code section. Consequently, the defendant company being chargeable equally along with the Plaintiff, if not more so, with knowledge of said amendment, nevertheless, saw fit to issue, for a valuable consideration, its insurance policy to the Plaintiff and provided, under Part 4 thereof, for notice which is entirely different from the provisions of said Code Section. While the authorities seem to be clear in holding that the provisions of Code Sections or statutes, which are more favorable to the insured than the policy provisions cannot be waived, no authority has been furnished this Court showing that the reverse is true, namely: that provisions of statutes which are more favorable to the insurer than the terms and provisions of its own policy may not be waived by the insurer. See in this connection a recent annotation appearing in 9 A. L. R. (2) 1436.

The uninsured motorist law is remedial legislation designed to protect the insured motorists of this State, and for that reason it should be construed most favorably for those it was designed to protect. (See Note—Uninsured Motorist Coverage in Virginia, 47 Virginia Law Review 145.

It is agreed in the instant case that the insured complied with all provisions of the policy issued by the Defendant company; furnished statements in regard to the accident; that conferences were had with representatives of the Defendant company and the Plaintiff's Attorney in an effort to settle the claim of the Plaintiff; that the Defendant company was fully advised as to the Motion for Judgment brought by the Plaintiff against the uninsured motorist; that a copy of the Motion for Judgment was delivered to the Claims Branch Office of the Defendant, and thereafter the Defendant company was kept fully advised of the proceedings and was notified on September 3, 1960, that the case was set for trial on September 15, 1960. At no time did a representative of the Defendant company inform the Plaintiff, who was the Defendant  
 page 56 } company's own insured, that their insured had not  
 complied with the provisions of Code Section 38.1-381 (e) 1, and that the company was intending to rely upon the provisions of this Code Section instead of the provisions of its own policy. As pointed out by Counsel for the Plaintiff, the Plaintiff could not have joined the Defendant Company as a party defendant to the Motion for Judgment by virtue of Section 8-96 of the Code of Virginia, and that the Plaintiff fully complied with the provisions of the policy as well as the applicable Sections of the Code dealing with Service of Process. The Defendant company had ample opportunity and authority to assume control of the defense in the instant case prior to the trial, but did not choose to do so.

When representatives of the Defendant company dealt with the Plaintiff in an effort to settle the claims of the Plaintiff and saw that the Plaintiff was proceeding according to the terms and provisions of the company's policy, if the company was intending to rely upon the provisions of the said Code Section 38.1-381 (e) 1, it then became the duty of the company to advise the Plaintiff that the company was relying upon the amended Code Section instead of the terms and provisions of its own policy issued after the amendment to the Code Section became effective. The Defendant company should now be estopped from asserting said Section as a defense and has waived the provisions of said section, first, by issuing the policy six months after the effective date of the Code Section with different provisions set forth in the policy as to notice; and, secondly, by the inconsistent conduct and actions of representatives of the company after being fully advised by the Plaintiff according to the terms and provisions of its own policy. See in addition to the Creteau case (*supra*) the



case of *Ambrose v. Acacia Mutual Life Insurance Company* (*supra.*)

In the Opinion of this Court the exception clearly recognized in the *Creteau* case as to waiver is particularly applicable to the facts in the instant case. Accordingly, the Defendant company should be bound by the terms and provisions of its own policy as well as the acts of its authorized representatives and agents, and the Special Plea in the instant case should be denied.

An appropriate Order may be prepared for entry in accordance with this Opinion.

F. L. HOBACK, Judge.

May 15, 1961.

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This action came on heretofore to be heard upon plaintiff's Motion for Judgment, the defendant's special plea and a stipulation of fact entered into between the plaintiff and the defendant wherein said parties waived a trial by jury and submitted the determination of all questions of law and fact to the Court upon the pleadings heretofore filed, the issue joined, and the said stipulation of fact, and the same was argued by counsel.

Whereupon the Court, after mature consideration, for the reasons set forth in its written opinion filed herein and hereby expressly made a part of this order, is of the opinion that the defendant's plea is not well taken, it is, accordingly, ADJUDGED and ORDERED that the defendant's special plea, which is the only plea or grounds of defense filed herein, be and the same is hereby denied.

And it further appearing unto the Court that the plaintiff, Charles F. Duncan, did on the 15th day of September, 1960, recover against George Anderson Manuel, an uninsured motorist, a judgment for the sum of \$8,000.00 together with interest from the 15th day of September, and the cost therein incurred, and that the said plaintiff, Charles F. Duncan, has fully complied with all of the terms and conditions of the policy of insurance issued by the defendant, wherein the defendant agreed to pay unto the said Charles F. Duncan all sum which the said Charles F. Duncan should be legally

entitled to recover from the said George Anderson  
page 58 } Manuel, it is further ADJUDGED AND OR-  
DERED

That the said plaintiff herein, Charles F. Duncan, do have and recover from the defendant, State Farm Mutual Automobile Insurance Company, a Corporation, the sum of \$8,000.00 with interest thereon from the 15th day of September, 1960, together with the costs therein, and the costs incurred in this action.

To the action of the Court herein, defendant, by counsel, duly excepted.

And it further appearing to the Court that the defendant, State Farm Mutual Automobile Insurance Company, has indicated its intention to apply to the Supreme Court of Appeals of Virginia for a Writ of Error and *Supersedeas* to the action of the Court herein, it is hereby ADJUDGED and ORDERED that if defendant duly files its Petition for Writ of Error in accordance with the Rules of the Supreme Court of Appeals of Virginia within four months of the date of this order, execution on the judgment herein is suspended until the Supreme Court of Appeals has acted upon said Petition; and, if a Writ of Error be granted in this case, it is ADJUDGED and ORDERED that execution on the judgment be suspended until an opinion has been rendered by the Supreme Court of Appeals of Virginia. The suspending of this judgment is conditioned upon the defendant, or some person or persons in its behalf, entering into bond, with corporate surety, before the Clerk of this Court, within 30 days from the date of this order in the amount of \$10,000.00 conditioned according to law.

Enter May 27, 1961.

F. L. HOBACK, Judge.

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KNOW ALL MEN BY THESE PRESENTS, That we, State Farm Mutual Automobile Insurance Company and Fidelity and Deposit Company of Maryland, their surety, are held and firmly bound unto the Commonwealth of Virginia, in the sum of Ten Thousand & 00/100 Dollars, to the payment whereof well and truly to be made to the said Common-

wealth of Virginia, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. And we hereby waive the benefit of our homestead exemptions as to this obligation, and any claim or right to discharge any liability to the Commonwealth arising under this bond or by virtue of said office, post or trust.

Sealed with our seals, and dated this 16 day of June, one thousand nine hundred and sixty-one.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That whereas the said State Farm Mutual Automobile Insurance Company, having indicated their intention of applying to the Supreme Court of Appeals of Virginia for an appeal from the judgment of the Circuit Court of Roanoke County, Virginia entered on May 27, 1961, in the case of Charles F. Duncan, Complainant, *v.* State Farm Mutual Automobile Insurance Company, respondent, execution on the judgment is suspended until the Supreme Court of Appeals has acted upon said Petition and, if a Writ of Error be granted in this case, execution of the judgment be suspended until an opinion has been rendered by the Supreme Court of Appeals of Virginia, upon the said State Farm Mutual Automobile Insurance Company, entering into a good and sufficient bond before the Clerk of this Court in the penalty of Ten Thousand Dollars (\$10,000.00), conditioned according to law, with corporate surety.

If therefore the said State Farm Mutual Automobile Insurance Company, shall pay all such costs and damages as may be awarded against them or incurred by any person by reason of said suspension then this obligation shall be void, otherwise to remain in full force and effect.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY (Seal)

By ROBERT J. ROGERS  
FIDELITY AND DEPOSIT COMPANY OF MARYLAND (Seal)

By .....  
Attorney ..... . . . .

In the Clerk's Office of the Circuit Court for the County of Roanoke, the 16 day of June, 1961.

This bond was executed and acknowledged by the obligors, and ordered to be recorded Fidelity and Deposit Company of Maryland the surety therein having first justified on oath

that..... estate..after the payment of all.....just debts, and those for which..he.....bound as security for others and expect..to have to pay,.....worth the sum of.....Dollars, over and above all exemptions allowed by law.

Teste:

ROY K. BROWN, Clerk  
By JAMES F. TOBY, Dep. Clerk.

A Copy—Teste:

ROY K. BROWN, Clerk  
By N. C. LOGAN, Dep. Clerk.

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\* \* \* \* \*

#### NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

To Mr. Roy K. Brown, Clerk of the Circuit Court of Roanoke County, Salem, Virginia:

Notice is hereby given that the defendant, State Farm Mutual Automobile Insurance Company, appeals from the Order entered in this case on May 27, 1961, and announces its intention of applying for a Writ of Error and *Supersedeas* to the Supreme Court of Appeals of Virginia.

#### ASSIGNMENTS OF ERROR.

(1) The trial court erred in denying the defendant's special plea filed herein.

(2) The trial court erred in entering judgment for the plaintiff against the defendant in the amount of \$8,000.00, with interest thereon from the 15th day of September, 1960.

Respectfully,

STATE FARM MUTUAL AUTO-  
MOBILE INSURANCE COM-  
PANY  
By ROBERT J. ROGERS  
Of Counsel for defendant.

Filed in the Clerk's Office Circuit Court of Roanoke County  
Va., Jun 22, 1961.

Teste:

ROY K. BROWN, Clerk  
By JAMES F. TOBY, Dep. Clerk

\* \* \* \* \*

A Copy—Teste:

H. G. TURNER, Clerk.

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