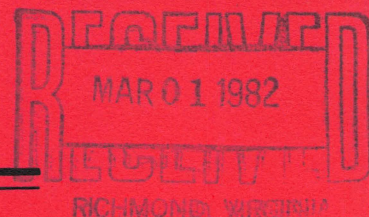


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CLERK
SUPREME COURT OF VIRGINIA



IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 810830

USAA CASUALTY INSURANCE COMPANY,
an unincorporated association doing
business in Virginia,

Appellant

v.

GERALD YACONIELLO,

Appellee

JOINT APPENDIX

WASHINGTON & LEE
LAW LIBRARY

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Norfolk, VA 23502

Counsel for Appellant

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1369 Laskin Road
Virginia Beach, VA 23451

Counsel for Appellee

JAN 31 1984

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VIRGINIA:

IN THE GENERAL DISTRICT COURT (CIVIL DIVISION) OF VIRGINIA BEACH

GERARD YACONIELLO,

Plaintiff,

vs.

USAA CASUALTY INSURANCE COMPANY,

SERVE: Harry N. Gustin,

Registered Agent

5735 Poplar Hall Drive

Norfolk, Virginia 23502

Defendant.

NOTICE OF MOTION FOR JUDGMENT

TAKE NOTICE that on Friday, September 8, 1978, at 10:00 a.m., or as soon thereafter as counsel may be heard, I will move this honorable court for entry of a judgment against you, the defendant, USAA Casualty Insurance Company, in the amount of Five Thousand (\$5,000.00) Dollars for reasons hereinafter set forth, to-wit:

1. That William J. Yaconiello entered into a contractual agreement with the defendant, USAA Casualty Insurance Company, from November 4, 1976 through November 4, 1977, to provide coverage in the amount of Five Thousand (\$5,000.00) Dollars for medical expenses incurred as a result of a motor vehicle accident.

2. That Gerard Yaconiello was a member of William J. Yaconiello's household during said period of contractual coverage and was, therefore, insured under said coverage.

3. That Gerard Yaconiello was involved in a motor vehicle accident on August 21, 1977, within the time period of said contract, in the City of Virginia Beach, Virginia. That as a result of this accident, your plaintiff, Gerard Yaconiello suffered serious injuries, was caused to be hospitalized, and incurred medical expenses well in excess of the policy limits of the contract with the defendant.

WHEREFORE, your plaintiff moves this honorable Court for a judgment in the amount of Five Thousand (\$5,000.00) Dollars and the costs of these proceedings.

GERARD YACONIELLO

BY:

Of Counsel

William R. O'Brien, p.q.
BRYDGES, HUDGINS, EGE, BURT & O'BRIEN
1369 Laskin Road
Virginia Beach, Virginia 23451

REQUEST FOR ADMISSIONS

The defendant hereby requests that the plaintiff admit that the attached automobile insurance policy is a duplicate of the policy issued to him by United Services Automobile Association and which is the subject matter of this suit in regard to the language contained in the policy attached hereto with regard to an "automobile."

UNITED SERVICES AUTOMOBILE ASSOCIATION CASUALTY INSURANCE COMPANY

By _____ Of Counsel _____

CERTIFICATION

I hereby certify that on this _____ day of _____, 1979, a true copy of the foregoing pleading, was mailed to all counsel of record.

Terry H. Davis, Jr.

Terry H. Davis, Jr.
TAYLOR, GUSTIN, HARRIS, FEARS & DAVIS
5735 Poplar Hall Drive
Norfolk, Virginia 23502

Filed: 2/13/79

USAA

United Services Automobile Association
(A Reciprocal Interinsurance Exchange)
USAA Building • San Antonio, Texas 78288

DUPLICATE

FAMILY AUTOMOBILE POLICY

NON-ASSESSABLE

This Policy is incomplete unless Family Policy Declarations or Renewal Declarations is attached hereto.
This Automobile Policy is NOT TRANSFERABLE under the plan of operation of the United Services Automobile Association.

RECIPROCAL—SPECIAL DEFINITIONS AND PROVISIONS—PLAN OF OPERATION

Wherever the words "Policy," "Insured," "Company," "Premium," and "President," occur herein they shall be taken and construed to mean "Contract," "Subscriber," "Reciprocal or Interinsurance Exchange," "Deposit," and "Attorney-in-Fact," respectively.

This policy is issued, as an Interinsurance Exchange, by the President, or his duly appointed deputy, as Attorney-in-Fact for United Services Automobile Association in accordance with the powers vested in him by an agreement, executed by the subscribers.

No Contingent Liability: No policyholder in this Exchange incurs any liability other than Deposit Premium or Premium Paid, the Exchange having a free surplus in the amount defined by Article 19.03 of the Texas Insurance Code, of 1951, as amended, and in accordance with the Exchange's Articles of Agreement.

Participation: The insured is by virtue of this policy a member of the Exchange, subject to the Articles of Agreement, reference to which is had and shall be entitled to such unabsorbed premium or dividend as may be declared by the advisory committee, subject, however, to approval in accordance with the provisions of the Texas Insurance Code, of 1951, as amended.

In the event of loss under this policy in connection with which the policyholder and the company cannot agree, and the policyholder institutes suit against the company in the jurisdiction where the loss occurs, the company agrees that it will on request from the policyholder advise the policyholder of the identity of the person upon whom service can be had in said suit, and the company further agrees that if it does not have an Agent to accept service in said jurisdiction, that it will promptly appoint an Agent upon whom service can be had, or enter its appearance in said suit.

UNITED SERVICES AUTOMOBILE ASSOCIATION at San Antonio, Texas

(A Reciprocal Interinsurance Exchange)

Agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to all of the terms of this policy:

PART I—LIABILITY

Coverage A—Bodily Injury Liability; Coverage B—Property Damage Liability: To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of:

A. bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury," sustained by any person;

B. injury to or destruction of property, including loss of use thereof, hereinafter called "property damage";

arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile, and the company shall defend any suit alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent; but the company may make such investigation and settlement of any claim or suit as it deems expedient.

Supplementary Payments: To pay, in addition to the applicable limits of liability:

(a) all expenses incurred by the company, all costs taxed against the insured in any such suit and all interest on the entire amount of any judgment therein which accrues after entry of the judgment and before the company has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the company's liability thereon;

(b) premiums on appeal bonds required in any such suit, premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, and the cost of bail bonds required of the insured because of accident or traffic law violation arising out of the use of an automobile insured hereunder, not to exceed \$100 per bail bond, but without any obligation to apply for or furnish any such bonds;

(c) expenses incurred by the insured for such immediate medical and surgical relief to others as shall be imperative at the time of an accident involving an automobile insured hereunder and not due to war;

(d) all reasonable expenses, other than loss of earnings, incurred by the insured at the company's request.

Persons Insured: The following are insureds under Part I:

(a) with respect to the owned automobile,

(1) the named insured and any resident of the same household,

(2) any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, and

(3) any other person or organization but only with respect to his or its liability because of acts or omissions of an insured under (a) (1) or (2) above;

(b) with respect to a non-owned automobile,

(1) the named insured,

(2) any relative, but only with respect to a private passenger automobile or trailer, provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission, and

(3) any other person or organization not owning or hiring the automobile, but only with respect to his or its liability because of acts or omissions of an insured under (b) (1) or (2) above.

The insurance afforded under Part I applies separately to each insured against whom claim is made or suit is brought, but the inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

Definitions: Under Part I:

"named insured" means the individual named in Item 1 of the declarations and also includes his spouse, if a resident of the same household;

"insured" means a person or organization described under "Persons Insured";

"relative" means a relative of the named insured who is a resident of the same household;

"owned automobile" means

(a) a private passenger, farm or utility automobile described in this policy for which a specific premium charge indicates that coverage is afforded,

(b) a trailer owned by the named insured,

(c) a private passenger, farm or utility automobile ownership of which is acquired by the named insured during the policy period, provided

(1) it replaces an owned automobile as defined in (a) above, or

(2) the company insures all private passenger, farm and utility automobiles owned by the named insured on the date of such acquisition and the named insured notifies the company during the policy period or within 30 days after the date of such acquisition of his election to make this and no other policy issued by the company applicable to such automobile, or

(d) a temporary substitute automobile;

"temporary substitute automobile" means any automobile or trailer, not owned by the named insured, while temporarily used with the permission of the owner as a substitute for the owned automobile or trailer when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction;

"non-owned automobile" means an automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile;

"private passenger automobile" means a four wheel private passenger, station wagon or jeep type automobile;

"farm automobile" means an automobile of the truck type with a load capacity of fifteen hundred pounds or less not used for business or commercial purposes other than farming;

"utility automobile" means an automobile, other than a farm automobile, with a load capacity of fifteen hundred pounds or less of the pick-up body, sedan delivery or panel truck type not used for business or commercial purposes;

"trailer" means a trailer designed for use with a private passenger automobile, if not being used for business or commercial purposes with other than a private passenger, farm or utility automobile, or a farm wagon or farm implement while used with a farm automobile;

"automobile business" means the business or occupation of selling, repairing, servicing, storing or parking automobiles;

"use" of an automobile includes the loading and unloading thereof;

"war" means war, whether or not declared, civil war, insurrection, rebellion or revolution, or any act or condition incident to any of the foregoing.

Exclusions: This policy does not apply under Part I:

(a) to any automobile while used as a public or livery conveyance, but this exclusion does not apply to the named insured with respect to bodily injury or property damage which results from the named insured's occupancy of a non-owned automobile other than as the operator thereof;

- (b) to bodily injury or property damage arising out of and in the course of the operation of farm machinery;
- (c) to bodily injury or property damage with respect to which an insured under this policy is also an insured under a public liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability;
- (d) to bodily injury or property damage arising out of the operation of farm machinery;
- (e) to bodily injury to any employee of the insured arising out of and in the course of (1) domestic employment by the insured, if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law, or (2) other employment by the insured;
- (f) to bodily injury to any fellow employee of the insured injured in the course of his employment if such injury arises out of the use of an automobile in the business of his employer, but this exclusion does not apply to the named insured with respect to injury sustained by any such fellow employee;
- (g) to an owned automobile while used by any person while such person is employed or otherwise engaged in the automobile business, but this exclusion does not apply to the named insured, a resident of the same household as the named insured, a partnership in which the named insured or such resident is a partner, or any partner, agent or employee of the named insured, such resident or partnership;
- (h) to a non-owned automobile while maintained or used by any person while such person is employed or otherwise engaged in
- (1) the automobile business of the insured or of any other person or organization,
 - (2) any other business or occupation of the insured, but this exclusion (h) (2) does not apply to a private passenger automobile operated or occupied by the named insured or by his private chauffeur or domestic servant or a trailer used therewith or with an owned automobile;
- (i) to injury to or destruction of (1) property owned or transported by the insured or (2) property rented to or in charge of the insured other than a residence or private garage;
- (j) to the ownership, maintenance, operation, use, loading or unloading of an automobile ownership of which is acquired by the named insured during the policy period or any

temporary substitute automobile therefor, if the named insured has purchased other automobile liability insurance applicable to such automobile for which a specific premium charge has been made.

Financial Responsibility Laws: When this policy is certified as proof of financial responsibility for the future under the provisions of any motor vehicle financial responsibility law, such insurance as is afforded by this policy for bodily injury liability or for property damage liability shall comply with the provisions of such law to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

Limits of Liability: The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury sustained by one person as the result of any one occurrence; the limit of such liability stated in the declarations as applicable to "each occurrence" is, subject to the above provision respecting each person, the total limit of the company's liability for all such damages arising out of bodily injury sustained by two or more persons as the result of any one occurrence.

The limit of property damage liability stated in the declarations as applicable to "each occurrence" is the total limit of the company's liability for all damages arising out of injury to or destruction of all property of one or more persons or organizations, including the loss of use thereof, as the result of any one occurrence.

Other Insurance: If the insured has other insurance against a loss covered by Part I of this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible insurance.

PART II — EXPENSES FOR MEDICAL SERVICES

Coverage C—Medical Payments: To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services.

Division 1. To or for the named insured and each relative who sustains bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury", caused by accident,

- (a) while occupying the owned automobile,
- (b) while occupying a non-owned automobile, but only if such person has, or reasonably believes he has, the permission of the owner to use the automobile and the use is within the scope of such permission, or
- (c) through being struck by an automobile or by a trailer of any type;

Division 2. To or for any other person who sustains bodily injury, caused by accident, while occupying

- (a) the owned automobile, while being used by the named insured, by any resident of the same household or by any other person with the permission of the named insured; or
- (b) a non-owned automobile, if the bodily injury results from

- (1) its operation or occupancy by the named insured or its operation on his behalf by his private chauffeur or domestic servant, or
- (2) its operation or occupancy by a relative, provided it is a private passenger automobile or trailer,

but only if such operator or occupant has, or reasonably believes he has, the permission of the owner to use the automobile and the use is within the scope of such permission.

Definitions: The definitions under Part I apply to Part II, and under Part II:

"occupying" means in or upon or entering into or alighting from.

Exclusions: This policy does not apply under Part II to bodily injury:

- (a) sustained while occupying (1) an owned automobile while used as a public or livery conveyance, or (2) any vehicle while located for use as a residence or premises;

- (b) sustained by the named insured or a relative while occupying or through being struck by (1) a farm type tractor or other equipment designed for use principally off public roads, while not upon public roads, or (2) a vehicle operated on rails or crawler-treads;

- (c) sustained by any person other than the named insured or a relative,

- (1) while such person is occupying a non-owned automobile while used as a public or livery conveyance, or

- (2) resulting from the maintenance or use of a non-owned automobile by such person while employed or otherwise engaged in the automobile business, or

- (3) resulting from the maintenance or use of a non-owned automobile by such person while employed or otherwise engaged in any other business or occupation, unless the bodily injury results from the operation or occupancy of a private passenger automobile by the named insured or by his private chauffeur or domestic servant, or of a trailer used therewith or with an owned automobile;

- (d) sustained by any person who is employed in the automobile business, if the accident arises out of the operation thereof and if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law;

- (e) due to war.

Limit of Liability: The limit of liability for medical payments stated in the declarations as applicable to "each person" is the limit of the company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury as the result of any one accident.

Other Insurance: If there is other automobile medical payments insurance against a loss covered by Part II of this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible automobile medical payments insurance; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible automobile medical payments insurance.

PART III — PHYSICAL DAMAGE

Coverage D (1)—Comprehensive (excluding Collision); (2)—Personal Effects:

- (1) To pay for loss caused other than by collision to the owned automobile or to a non-owned automobile. For the purpose of this coverage, breakage of glass and loss caused by missiles, falling objects, fire, theft or larceny, explosion, earthquake, windstorm, hail, water, flood, malicious mischief or vandalism, riot or civil commotion, or colliding with a bird or animal, shall not be deemed to be loss caused by collision.

- (2) To pay for loss caused by fire or lightning to robes, wearing apparel and other personal effects which are the property of the named insured or a relative, while such effects are in or upon the owned automobile.

Coverage E—Collision: To pay for loss caused by collision to the owned automobile or to a non-owned automobile but only for the amount of each such loss in excess of the deductible amount stated in the declarations as applicable hereto. The deductible amount shall not apply to loss caused by a collision with another automobile insured by the company.

Coverage F—Fire, Lightning and Transportation: To pay for loss to the owned automobile or a non-owned automobile, caused (a) by fire or lightning, (b) by smoke or smudge due to a sudden, unusual and faulty operation of any fixed heating equipment serving the premises in which the automobile is located, or (c) by the stranding, sinking, burning, collision or derailment of any conveyance in or upon which the automobile is being transported.

Coverage G—Theft: To pay for loss to the owned automobile or to a non-owned automobile caused by theft or larceny.

Coverage H—Combined Additional Coverage: To pay for loss to the owned automobile or a non-owned automobile caused by windstorm, hail, earthquake, explosion, riot or civil commotion, or the forced landing or falling of any aircraft or its parts or equipment, flood or rising waters, malicious mischief or vandalism, external discharge or leakage of water except loss resulting from rain, snow or sleet whether or not wind-driven; provided, with respect to each automobile \$25 shall be deducted from each loss caused by malicious mischief or vandalism.

Supplementary Payments: In addition to the applicable limit of liability:

- (a) to reimburse the insured for transportation expenses incurred during the period commencing 48 hours after a theft covered by this policy of the entire automobile has been reported to the company and the police, and terminating when the automobile is returned to use or the company pays for the loss; provided that the company shall not be obligated to pay aggregate expenses in excess of \$10 per day or totaling more than \$300.

- (b) to pay general average and salvage charges for which the insured becomes legally liable, as to the automobile being transported.

Definitions: The definitions of "named insured", "relative", "temporary substitute automobile", "private passenger automobile", "farm automobile", "utility automobile", "automobile business", "war", and "owned automobile" in Part I apply to Part III, but "owned automobile" does not include, under Part III, (1) a trailer owned by the named insured on the effective date of this policy and not described herein, or (2) a trailer ownership of which is acquired during the policy period unless the company insures all private passenger, farm and utility automobiles and trailers owned by the named insured on the date of such acquisition and the named insured notifies the company during the policy period or within 30 days after the date of such acquisition of his election to make this and no other policy issued by the company applicable to such trailer.

"insured" means

- (a) with respect to an owned automobile,

- (1) the named insured, and
- (2) any person or organization (other than a person or organization employed or otherwise engaged in the automobile business or as a carrier or other bailee for hire) maintaining, using or having custody of said automobile with the permission of the named insured and within the scope of such permission;

- (b) with respect to a non-owned automobile, the named insured and any relative while using such automobile, provided his actual operation or (if he is not operating) the other actual

use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission;

"**non-owned automobile**" means a private passenger automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile, while said automobile or trailer is in the possession or custody of the insured or is being operated by him;

"**loss**" means direct and accidental loss of or damage to (a) the automobile, including its equipment, or (b) other insured property;

"**collision**" means collision of an automobile covered by this policy with another object or with a vehicle to which it is attached or by upset of such automobile;

"**trailer**" means a trailer designed for use with a private passenger automobile, if not being used for business or commercial purposes with other than a private passenger, farm or utility automobile, and if not a home, office, store, display or passenger trailer.

Exclusions: This policy does not apply under Part III:

- (a) to any automobile while used as a public or livery conveyance;
- (b) to loss due to war;
- (c) to loss to a non-owned automobile arising out of its use by the insured while he is employed or otherwise engaged in the automobile business;
- (d) to loss to a private passenger, farm or utility automobile or trailer owned by the named insured and not described in this policy or to any temporary substitute automobile there-

PART IV — PROTECTION AGAINST UNINSURED MOTORISTS

Coverage J—Uninsured Motorists (Damages for Bodily Injury): To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury," sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile; provided, for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration.

No judgment against any person or organization alleged to be legally responsible for the bodily injury shall be conclusive, as between the insured and the company, of the issues of liability of such person or organization or of the amount of damages to which the insured is legally entitled unless such judgment is entered pursuant to an action prosecuted by the insured with the written consent of the company.

Definitions: The definitions under Part I, except the definition of "insured," apply to Part IV, and under Part IV:

"**insured**" means:

- (a) the named insured and any relative;
- (b) any other person while occupying an insured automobile; and
- (c) any person, with respect to damages he is entitled to recover because of bodily injury to which this Part applies sustained by an insured under (a) or (b) above.

The insurance afforded under Part IV applies separately to each insured, but the inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

"**insured automobile**" means:

- (a) an automobile described in the policy for which a specific premium charge indicates that coverage is afforded;
- (b) a private passenger, farm or utility automobile, ownership of which is acquired by the named insured during the policy period, provided:
 - (1) it replaces an insured automobile as defined in (a) above, or
 - (2) the company insures under this Coverage all private passenger, farm and utility automobiles owned by the named insured on the date of such acquisition and the named insured notifies the company during the policy period or within 30 days after the date of such acquisition of his election to make the Liability and Uninsured Motorist Coverages under this and no other policy issued by the company applicable to such automobile;
- (c) a temporary substitute automobile for an insured automobile as defined in (a) or (b) above, and
- (d) a non-owned automobile while being operated by the named insured; and the term "insured automobile" includes a trailer while being used with an automobile described in (a), (b), (c) or (d) above, but shall not include:
 - (1) any automobile or trailer owned by a resident of the same household as the named insured,
 - (2) any automobile while used as a public or livery conveyance, or
 - (3) any automobile while being used without the permission of the owner.

"**uninsured automobile**" includes a trailer of any type and means:

- (a) an automobile or trailer with respect to the ownership, maintenance or use of which there is, in at least the amounts specified by the financial responsibility law of the state in which the insured automobile is principally garaged, no bodily injury liability bond or insurance policy applicable at the time of the accident with respect to any person or organization legally responsible for the use of such automobile, or with respect to which there is a bodily injury liability bond or insurance policy applicable at the time of the accident but the company writing the same denies coverage thereunder or

(b) a hit-and-run automobile;

but the term "uninsured automobile" shall not include:

- (1) an insured automobile or an automobile furnished for the regular use of the named insured or a relative,
- (2) an automobile or trailer owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law or any similar law,
- (3) an automobile or trailer owned by the United States of America, Canada, a state, a political subdivision of any such government or an agency of any of the foregoing,
- (4) a land motor vehicle or trailer if operated on rails or crawler-treads or while located for use as a residence or premises and not as a vehicle, or
- (5) a farm type tractor or equipment designed for use principally off public roads, except while actually upon public roads.

for, if the insured has other valid and collectible insurance against such loss.

- (e) to damage which is due and confined to wear and tear, freezing, mechanical or electrical breakdown or failure, unless such damage results from a theft covered by this policy;
- (f) to tires, unless damaged by fire, malicious mischief or vandalism, or stolen or unless the loss be coincident with and from the same cause as other loss covered by this policy;
- (g) to loss due to radioactive contamination;
- (h) under coverage E, to breakage of glass if insurance with respect to such breakage is otherwise afforded.

Limit of Liability: The limit of the company's liability for loss shall not exceed the actual cash value of the property, or if the loss is of a part thereof the actual cash value of such part, at time of loss, nor what it would then cost to repair or replace the property or such part thereof with other of like kind and quality, nor, with respect to a non-owned automobile described in this policy, the applicable limit of liability stated in the declarations; provided, however, the limit of the company's liability (a) for loss to personal effects arising out of any one occurrence is \$100, and (b) for loss to any trailer not owned by the named insured is \$500.

Other Insurance: If the insured has other insurance against a loss covered by Part III of this policy, the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability of this policy bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible insurance.

"**hit-and-run automobile**" means an automobile which causes bodily injury to an insured arising out of physical contact of such automobile with the insured or with an automobile which the insured is occupying at the time of the accident, provided: (a) there cannot be ascertained the identity of either the operator or the owner of such "hit-and-run automobile"; (b) the insured or someone on his behalf shall have reported the accident within 24 hours to a police, peace or judicial officer or to the Commissioner of Motor Vehicles, and shall have filed with the company within 30 days thereafter a statement under oath that the insured or his legal representative has a cause or causes of action arising out of such accident for damages against a person or persons whose identity is unascertainable, and setting forth the facts in support thereof; and (c) at the company's request, the insured or his legal representative makes available for inspection the automobile which the insured was occupying at the time of the accident.

"**occupying**" means in or upon or entering into or alighting from.

"**state**" includes the District of Columbia, a territory or possession of the United States, and a province of Canada.

Exclusions: This policy does not apply under Part IV:

- (a) to bodily injury to an insured while occupying an automobile (other than an insured automobile) owned by the named insured or a relative, or through being struck by such an automobile;
- (b) to bodily injury to an insured with respect to which such insured, his legal representative or any person entitled to payment under this coverage shall, without written consent of the company, make any settlement with any person or organization who may be legally liable therefor;
- (c) so as to insure directly or indirectly to the benefit of any workmen's compensation or disability benefits carrier or any person or organization qualifying as a self-insurer under any workmen's compensation or disability benefits law or any similar law.

Limits of Liability:

- (a) The limit of liability for uninsured motorists coverage stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care or loss of services, because of bodily injury sustained by one person as the result of any one accident and, subject to the above provision respecting each person, the limit of liability stated in the declarations as applicable to "each accident" is the total limit of the company's liability for all damages, including damages for care or loss of services, because of bodily injury sustained by two or more persons as the result of any one accident.
- (b) Any amount payable under the terms of this Part because of bodily injury sustained in an accident by a person who is an insured under this Part shall be reduced by:
 - (1) all sums paid on account of such bodily injury by or on behalf of (i) the owner or operator of the uninsured automobile and (ii) any other person or organization jointly or severally liable together with such owner or operator for such bodily injury including all sums paid under Coverage A, and
 - (2) the amount paid and the present value of all amounts payable on account of such bodily injury under any workmen's compensation law, disability benefits law or any similar law.
- (c) Any payment made under this Part to or for any insured shall be applied in reduction of the amount of damages which he may be entitled to recover from any person insured under Coverage A.
- (d) The company shall not be obligated to pay under this Coverage that part of the damages which the insured may be entitled to recover from the owner or operator of an uninsured automobile which represents expenses for medical services paid or payable under Part II.

Other Insurance: With respect to bodily injury to an insured while occupying an automobile not owned by the named insured, the insurance under Part IV shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance.

Except as provided in the foregoing paragraph, if the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable for a greater proportion of any loss to which this Coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.

Arbitration: If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of bodily injury to the insured, or do not agree as to the amount of payment which may be owing under this Part, then, upon written demand of either, the matter or matters upon which such person and the company do not agree shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Such person and the company each agree to consider itself bound and to be bound by any award made by the arbitrators pursuant to this Part.

Trust Agreement: In the event of payment to any person under this Part:

(a) the company shall be entitled to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury because of which such payment is made;

(b) such person shall hold in trust for the benefit of the company all rights of recovery which he shall have against such other person or organization because of the damages which are the subject of claim made under this Part;

(c) such person shall do whatever is proper to secure and shall do nothing after loss to prejudice such rights;

(d) if requested in writing by the company, such person shall take, through any representative designated by the company, such action as may be necessary or appropriate to recover such payment as damages from such other person or organization, such action to be taken in the name of such person; in the event of a recovery, the company shall be reimbursed out of such recovery for expenses, costs and attorneys' fees incurred by it in connection therewith;

(e) such person shall execute and deliver to the company such instruments and papers as may be appropriate to secure the rights and obligations of such person and the company established by this provision.

CONDITIONS

Conditions 1, 2, 3, 6, 14, 15, 16 and 18 apply to all Parts. Conditions 4 and 5, 7 through 13, and 17 apply only to the Parts noted thereunder.

Policy Period, Territory: This policy applies only to accidents, occurrences and loss during the policy period while the automobile is within the United States of America, its territories or possessions, or Canada, or is being transported between ports thereof.

Premium: If the named insured disposes of, acquires ownership of, or replaces a private passenger, farm or utility automobile or, with respect to Part III, a trailer, any premium adjustment necessary shall be made as of the date of such change in accordance with the annuals in use by the company. The named insured shall, upon request, furnish reasonable proof of the number of such automobiles or trailers and a description thereof.

Notice: In the event of an accident, occurrence or loss, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable. In the event of theft the insured shall so promptly notify the police. If claim is made or suit is brought against the insured, he shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

If, before the company makes payment of loss under Part IV, the insured or his legal representative shall institute any legal action for bodily injury against any person or organization legally responsible for the use of an automobile involved in the accident, a copy of the summons and complaint or other process served in connection with such legal action shall be forwarded immediately to the company by the insured or his legal representative.

Two or More Automobiles—Parts I, II and III: When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each, but an automobile and a trailer attached thereto shall be held to be one automobile as respects limits of liability under Part I of this policy, and separate automobiles under Part III of this policy, including any deductible provisions applicable thereto.

Assistance and Cooperation of the Insured—Parts I and III: The insured shall cooperate with the company and, upon the company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of bodily injury, property damage or loss with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

Part IV: After notice of claim under Part IV, the company may require the insured to take such action as may be necessary or appropriate to preserve his right to recover damages from any person or organization alleged to be legally responsible for the bodily injury; and in any action against the company, the company may require the insured to join such person or organization as a party defendant.

1. Action Against Company—Part I: No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. No person or organization shall have any right under this policy to join the company as a party to any action against the insured to determine the insured's liability, nor shall the company be impleaded by the insured or his legal representative. Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.

Parts II, III and IV: No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy nor, under Part III, until thirty days after proof of loss is filed and the amount of loss is determined as provided in this policy.

7. Medical Reports; Proof and Payment of Claim—Part II: As soon as practicable the injured person or someone on his behalf shall give to the company written proof of claim, under oath if required, and shall, after each request from the company, execute authorization to enable the company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the company when and as often as the company may reasonably require.

The company may pay the injured person or any person or organization rendering the services and such payment shall reduce the amount payable hereunder for such injury. Payment hereunder shall not constitute an admission of liability of any person or, except hereunder, of the company.

8. Insured's Duties in Event of Loss—Part III: In the event of loss the insured shall:

(a) protect the automobile, whether or not the loss is covered by this policy, and any further loss due to the insured's failure to protect shall not be recoverable under this policy; reasonable expenses incurred in affording such protection shall be deemed incurred at the company's request;

(b) file with the company, within 91 days after loss, his sworn proof of loss in such form and including such information as the company may reasonably require and shall, upon the company's request, exhibit the damaged property and submit to examination under oath.

9. Proof of Claim; Medical Reports—Part IV: As soon as practicable, the insured or other person making claim shall give to the company written proof of claim, under oath if required, including full particulars of the nature and extent of the injuries, treatment, and other details entering into the determination of the amount payable. The insured and every other person making claim shall submit to examinations under oath by any person named by the company and subscribe the same, as often as may reasonably be required. Proof of claim shall be made upon forms furnished by the company unless the company shall have failed to furnish such forms within 15 days after receiving notice of claim.

The injured person shall submit to physical examinations by physicians selected by the company when and as often as the company may reasonably require and he, or in the event of his incapacity his legal representative, or in the event of his death his legal representative or the person or persons entitled to sue therefor, shall upon each request from the company execute authorization to enable the company to obtain medical reports and copies of records.

10. Appraisal—Part III: If the insured and the company fail to agree as to the amount of loss, either may, within 60 days after proof of loss is filed, demand an appraisal of the loss. In such event the insured and the company shall each select a competent appraiser, and the appraisers shall select a competent and disinterested umpire. The appraisers shall state separately the actual cash value and the amount of loss and failing to agree shall submit their differences to the umpire. An award in writing of any two shall determine the amount of loss. The insured and the company shall each pay his chosen appraiser and shall bear equally the other expenses of the appraisal and umpire.

The company shall not be held to have waived any of its rights by any act relating to appraisal.

11. Payment of Loss—Part III: The company may pay for the loss in money; or may repair or replace the damaged or stolen property; or may, at any time before the loss is paid or the property is so replaced, at its expense return any stolen property to the named insured, or at its option to the address shown in the declarations, with payment for any resultant damage thereto; or may take all or such part of the property at the agreed or appraised value but there shall be no abandonment to the company. The company may settle any claim for loss either with the insured or the owner of the property.

Part IV: Any amount due is payable (a) to the insured, or (b) if the insured be a minor to his parent or guardian, or (c) if the insured be deceased to his surviving spouse, otherwise (d) to a person authorized by law to receive such payment or to a person legally entitled to recover the damages which the payment represents; provided, the company may at its option pay any amount due in accordance with division (d) hereof.

12. No Benefit to Bailees—Part III: The insurance afforded by this policy shall not inure directly or indirectly to the benefit of any carrier or other bailee for hire liable for loss to the automobile.

13. Subrogation—Parts I and III: In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

14. Changes: Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by the attorney-in-fact.

15. Assignment: Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon; if, however, the insured named in Item 1 of the declarations, or his spouse if a resident of the same household, shall die, this policy shall cover (1) the survivor as named insured, (2) his legal representative as named insured but only while acting within the scope of his duties as such, (3) any person having proper temporary custody of an owned automobile, as an insured, until the appointment and qualification of such legal representative, and (4) under division 1 of Part II any person who was a relative at the time of such death.

16. Cancellation: This policy may be canceled by the insured named in Item 1 of the declarations by surrender thereof to the company or by mailing to the company written notice stating when thereafter the cancellation shall be effective. This policy may be canceled by the company by mailing to the insured named in Item 1 of the declarations at the address shown in this policy written notice stating when not less than ten days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The time of the surrender or the effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by such insured or by the company shall be equivalent to mailing.

If such insured cancels, earned premium shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made either at the time cancellation is effected or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation.

17. Cancellation by Company Limited—Part I: After this policy has been in effect for sixty days or, if the policy is a renewal, effective immediately, the company shall not exercise its right to cancel the insurance afforded under Part I unless:

1. the named insured fails to discharge when due any of his obligations in connection with the payment of premium for this policy or any installment thereof whether payable directly or under any premium finance plan; or
2. the insurance was obtained through fraudulent misrepresentation; or
3. the insured violates any of the terms and conditions of the policy; or
4. the named insured or any other operator, either resident in the same household, or who customarily operates an automobile insured under the policy,
 - (a) has had his driver's license suspended or revoked during the policy period, or
 - (b) is or becomes subject to epilepsy or heart attacks, and such individual cannot produce a certificate from a physician testifying to his unqualified ability to operate a motor vehicle, or

(c) is or has been convicted of or forfeits bail, during the 36 months immediately preceding the effective date of the policy or during the policy period, for:

- (1) any felony, or
- (2) criminal negligence resulting in death, homicide or assault, arising out of the operation of a motor vehicle, or
- (3) operating a motor vehicle while in an intoxicated condition or while under the influence of drugs, or
- (4) leaving the scene of an accident without stopping to report, or
- (5) theft of a motor vehicle, or
- (6) making false statements in an application for a driver's license, or
- (7) a third violation, committed within a period of 18 months, of (i) any ordinance or regulation limiting the speed of motor vehicles or (ii) any of the provisions in the motor vehicle laws of any state, the violation of which constitutes a misdemeanor, whether or not the violations were repetitions of the same offense or were different offenses.

18. Declarations: By acceptance of this policy, the insured named in Item 1 of the declarations agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH
on the 13th day of April, 1981

JUDGMENT ORDER

It appearing that on the 2nd day of March, 1981, the Court reached a determination relative to the liability issues with the matter remaining open for the extent of the damages after further review, it is the Judgment Order and decree of this Court that plaintiff recover of the defendant the sum of Six Thousand Six Hundred Eleven Dollars and Fifty-five cents, (\$6,611.55). The Court notes the objection and the acception of the defendant to this order.

ENTER:

Seen:

William R. P. Bui

Tom (Helen) J. J.

A Copy Testor: J. Curtis Fruh, Clerk
By Chris S. Hale D.C.

STATEMENT OF FACTS
AND INCIDENTS OF THE CASE

This matter was heard upon oral statement of counsel as to an agreed upon stipulation of facts. Gerald Yaconiello was riding a bicycle when an individual operating a motorcycle struck him causing injury resulting in medical and dental expenses in the amount of Six Thousand Six Hundred Eleven Dollars and Fifty Five Cents (\$6,611.55). The applicable language in the insurance policy granting or denying coverage to the plaintiff for the medical expenses is as follows:

"Part II - Expenses For Medical Services
Coverage C - Medical Payments: To pay
all reasonable expenses (to the insured)
. . . (c) through being struck by an
automobile or by a trailer of any type;"

The defendant denied coverage based upon the position that a motorcycle was not, "an automobile". The policy of insurance issued by the defendant and identified as being attached to the defendant's Motion for Admission certified to by R. J. Goldsburg was introduced in evidence by agreement. The trial court reviewed the entire policy with regard to it's ruling but it was agreed that the only applicable language granting coverage to the plaintiff was as quoted above.

The issue was whether a motorcycle "is an automobile" within the coverage afforded by the subject policy.

The trial court reviewed the entire policy of insurance and noted that "automobile" was not defined under Part II - Expenses For Medical Services but that "private passenger automobile" was defined in Part I - Liability to mean a four wheel station wagon or jeep type automobile. The court felt that such a definition should have been used in Part II if a motorcycle was not to be included within the definition of automobile. The trial court

further reviewed the annotation found in 38ALR2nd 867 but relied upon Stanley v. Tomlin, 143 Va. 187 (1925) to rule that the term automobile includes a motorcycle thereby granting coverage and rendering the defendant liable for the agreed upon amount of damages. The defendant's objection and exception to the ruling of the court was noted.

Entered
5/12/81

Judge

Seen and agreed to:

_____ p.q.

_____ p.q.

NOTICE

Take notice that the undersigned will present the foregoing Statement of Facts to the trial judge at 9:00 a.m. on May 12, 1981 or soon thereafter the defendant may be heard.

CERTIFICATION OF MAILING

I hereby certify that this pleading was mailed to William R. O'Brien, counsel for the plaintiff, on this ____ day of April, 1981.

USAA CASUALTY INSURANCE COMPANY

By _____

Wm H. Quinn
Of Counsel

ENTERED: 5/12/81

IN THE SUPREME COURT OF VIRGINIA

USAA CASUALTY INSURANCE COMPANY,
an unincorporated association doing
business in Virginia,

Appellant

v.

GERALD YACONIELLO,

Appellee

ASSIGNMENT OF ERROR

The trial Court erred in ruling that the Appellee be provided with insurance coverage by the Appellant. Specifically, it was error to have the Court rule that "motorcycle" was encompassed within the term "automobile as contained in the subject insurance policy.

FILED WITH THE PETITION.

