

215 VA 333

CLERK
SUPREME COURT OF VIRGINIA



IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

RECORD NUMBER
731088

WALTER ENNIS ARMSTRONG,
Administrator of the Estate
of Shari Lane Armstrong, deceased

APPELLANT

V.

NATIONWIDE MUTUAL INSURANCE COMPANY

APPELLEE

APPENDIX TO APPELLANT'S BRIEF

DUNCAN M. BYRD, JR.
Attorney At Law
Box 726
Hot Springs, Virginia 24445

AND

ERWIN S. SOLOMON
Erwin S. Solomon & Associates
Hot Springs, Virginia 24445

COUNSEL FOR APPELLANT

INDEX TO APPENDIX

	PAGE
Motion Declaratory Judgment	1-4
Motion To Quash Process	5-8
Answer of Insurance Co.	9-11
Depositions	12-51
Order	52
Amended Answer of Insurance Co.	53-57
Exhibit "A"	58-66
Exhibit "B"	67-74
Exhibit "C"	75-82
Stipulation	83-104
Memorandum of Defendant	105-120
Memorandum of Plaintiff	121-134
Reply Memorandum of Defendant	135-140
Letter	141-142
Transcript	143-173
Final Decree	174-175
Notice of Appeal & Assignment of Error	176-178
Notice Making Transcript Part of Record	179-180

and had attempted to start said truck. Upon the failure of said truck to start the said RICHARD A. MARTIN negligently, carelessly and without regard to the said Plaintiff's decedent, left said truck on the Hill with the emergency brake off, out of gear and on an incline toward the field. As a result of these negligent actions the Plaintiff's decedent was struck by said truck causing injuries resulting in her death.

4) That the said truck was insured under automobile policy #3-0567337 issued by Maryland Casualty Company to CHARLES MARTIN and that RICHARD A. MARTIN was insured under an assigned risk automobile policy issued by the Defendant Nationwide Insurance, Company on one 1968 Volkswagon, owned by RICHARD A. MARTIN.

5) That by previous order of this Court dated October 6, 1971 the said Maryland Casualty Company paid unto the Court the sum of FIFTY THOUSAND DOLLARS (\$50,000.00), which was the limit of the liability, under the aforesaid policy, and which was distributed to the Plaintiff and other parties Plaintiff's as compensation for injuries and/or death resulting from the aforesaid negligence of RICHARD A. MARTIN.

It was further ordered that by virtue of said payment the said Maryland Casualty Company was relieved

of all duties, liabilities and obligations under the aforesaid policy #3-0567337.

6) That the plaintiff's share of the aforesaid proceeds was FIVE THOUSAND FIVE HUNDRED THIRTY-TWO AND 36/100 DOLLARS (\$5,532.36).

7) That by order of this Court dated November 6, 1971 the Plaintiff was granted summary judgement against RICHARD A. MARTIN in the amount of TWENTY-FIVE THOUSAND FIVE HUNDRED DOLLARS (\$25,500.00) as fair and just solace for the damages/death resulting from the aforesaid negligence of RICHARD A. MARTIN.

8) That the Defendant has denied any obligations and/or liability under the aforesaid automobile liability policy issued to RICHARD A. MARTIN.

IN CONSIDERATION WHEREOF the Plaintiff respectfully prays that the Court adjudicate as follows:

1) That the Defendant Nationwide Insurance, Company is obligated under the aforesaid assigned risk automobile liability policy issued to RICHARD A. MARTIN and in effect on October 16, 1970, to pay damages resulting from the negligence of RICHARD A. MARTIN as set forth in paragraph two (2) and three (3) of this motion.

2) That the Defendant Nationwide Insurance, Company is obligated to pay unto the Plaintiff, within

the limits of liability of the aforesaid policy, the excess
over and above TWENTY-FIVE THOUSAND FIVE HUNDRED DOLLARS
[5,532.36]
(\$25,500.00) recovered against RICHARD A. MARTIN.

Respectfully submitted

WALTER ENNIS ARMSTRONG,
ADMINISTRATOR OF THE ESTATE
OF SHARI LANE ARMSTRONG

BY /s/ Duncan M. Byrd, Jr.
COUNSEL

/s/ Duncan M. Byrd, Jr.
Duncan M. Byrd, Jr.
Box 726
Hot Springs, Virginia
Counsel for Plaintiff

VIRGINIA,

IN THE CIRCUIT COURT OF BATH COUNTY

WALTER ENNIS ARMSTRONG,)
Administrator of the Estate of)
Shari Lane Armstrong,)

Complainant)

v.)

NATIONWIDE INSURANCE,)
COMPANY)

Defendant)

MOTION TO QUASH PROCESS

Comes now the Defendant, Nationwide Mutual Insurance Company, by counsel, and moves the Court to quash process served herein upon the following grounds:

1) Process herein was sought to be served upon this defendant, a foreign corporation, by serving this defendant's agent in Hot Springs, Virginia, Elmer H. Hurt.

2) The defendant is a foreign corporation, with its home office in Columbus, Ohio. Defendant is qualified to do business in Virginia, and has a registered agent whose name and address are David R. Smyth, 5401 Fort Avenue, Lynchburg, Virginia 24505.

3) Service of process on this defendant should be accomplished as required by Section 8-60 of the Code of Virginia, namely, by serving such process upon this defendant's registered agent, the said David R. Smyth, or by

service of such process upon the Clerk of the State Corporation Commission.

WHEREFORE, the process herein having been improperly served upon this defendant's local agent, Elmer H. Hurt, the same should be quashed and this proceeding dismissed.

Respectfully,

NATIONWIDE MUTUAL INSURANCE COMPANY

BY /s/ Robert J. Rogers
OF COUNSEL

Woods, Rogers, Muse, Walker & Thornton
105 Franklin Road, S. W.
Roanoke, Virginia

Counsel for Defendant

STATE OF VIRGINIA)
)
CITY OF ROANOKE) To-wit:

This day personally appeared the undersigned Notary Public in and for the City and State aforesaid, Robert J. Rogers, who first being duly sworn deposes and says that he is a member of the law firm of Woods, Rogers, Muse, Walker & Thornton, 105 Franklin Road, S. W., Roanoke, Virginia, attorneys for Nationwide Mutual Insurance Company, and as such is duly authorized to make this affidavit; that the matters and things stated in the foregoing motion to quash process are true and correct to his best knowledge, information and belief.

/s/ Robert J. Rogers

Subscribed and sworn to before me this 21st day of February, 1972.

/s/ Barbara B. Threatt
Notary Public

My Commission Expires:

October 10, 1972

CERTIFICATE

I, Robert J. Rogers, of counsel for defendant Nationwide Mutual Insurance Company certify that I served the foregoing motion to quash process upon the plaintiff by mailing a true copy thereof to his attorney, Duncan M. Byrd, Jr., Box 726, Hot Springs, Virginia, this 21st day of February, 1972.

/s/ Robert J. Rogers

Filed in the Clerk's Office
of Bath Circuit Court February
22, 1972

/s/ W. Claude Dodson, Clerk

under a policy of liability insurance issued by it, but defendant further states that said policy covered a 1963 Volkswagon vehicle, and the coverage thereunder did not apply or extend to any liability on the part of the said Richard A. Martin on account of the death of the said Shari Lane Armstrong.

4) Defendant further admits that it has and continues to deny any obligations and/or liability under the aforesaid policy of insurance issued by it to the said Richard A. Martin.

5) Defendant is not advised as to the truth of the allegations of the Complaint, being uninformed as to whether the facts alleged do or do not exist.

Respectfully,

NATIONWIDE MUTUAL INSURANCE COMPANY

BY /s/ Robert J. Rogers
OF COUNSEL

Woods, Rogers, Muse, Walker & Thornton
105 Franklin Road, S. W.
Roanoke, Virginia

Counsel for Nationwide Mutual Insurance Co.

CERTIFICATE

I, Robert J. Rogers, of counsel for defendant Nationwide Mutual Insurance Company, certify that I mailed

a true copy of the foregoing pleading to Duncan M. Byrd, Jr., Box 726, Hot Springs, Virginia, attorney of record for Plaintiff, this 28th day of April, 1972.

/s/ Robert J. Rogers

Filed in the Clerk's Office of Bath
County Circuit Court April 29, 1972

/s/ W. Claude Dodson, Clerk

VIRGINIA:

IN THE CIRCUIT COURT
OF BATH COUNTY

----- :
WALTER ENNIS ARMSTRONG :
Administrator of the Estate of :
Shari Lane Armstrong :

Plaintiff :

--vs-- :

NATIONWIDE INSURANCE COMPANY :

Defendant :
----- :

DECEMBER 28, 1972

DEPOSITIONS OF:

RICHARD ARRINGTON MARTIN

CHARLES ARRINGTON MARTIN

NOTARY PUBLIC
MEMBER
NATIONAL SHORTHAND
REPORTERS ASSOCIATION
VIRGINIA SHORTHAND
REPORTERS ASSOCIATION

ROBERT D. YOUNG
GENERAL COURT REPORTERS
P. O. BOX 2067
ROANOKE, VIRGINIA 24009

TELEPHONE
366-2892
AREA CODE 703

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES:

DUNCAN M. BYRD, ESQ., Warm Springs, Virginia
Counsel for Plaintiff

WOODS, ROGERS, MUSE, WALKER & THORNTON, ESQS.
Roanoke, Virginia

ROBERT J. ROGERS, ESQ.
Counsel for Defendants

ALSO PRESENT:

MR. E. S. SOLOMON

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Richard Arrington Martin	4	16	23	25
	--	--	26	--
Charles Arrington Martin	27	32	35	36

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

EXHIBITS - Deposition of Richard Arrington Martin

<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>PAGE</u>
One	Bill of Sale	5

1

2

3

4

5

6

The depositions of Richard Arrington Martin and Charles Arrington Martin are taken by consent at Warm Springs, Virginia on this the 28th day of December, 1972 in the presence of Duncan M. Byrd, Attorney for the Plaintiff and Robert J Rogers, Attorney for the Defendant.

7

8

9

10

11

12

All formalities as to caption, certificate and transmission are waived; it is agreed that Robert D. Young, Notary Public in and for the State of Virginia, at Large, may take said depositions in machine shorthand, transcribe the same to typewriting, and sign the names of the witnesses hereto.

13

14

15

16

17

18

19

20

MR. ROGERS: It is stipulated by and between the parties that these depositions are being taken without notice by agreement of counsel, notice being waived; that they are being taken for such purposes as are permitted under the Rules of the Supreme Court of Virginia; that all objections except as to the form of the question are reserved.

21

22

23

24

25

RICHARD ARRINGTON MARTIN

having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

1 Martin - Direct

2 DIRECT EXAMINATION

3 BY MR. ROGERS:

4 Q Will you state your name?

5 A Richard Arrington Martin.

6 Q What is your age, Richard?

7 A Twenty.

8 Q Will you tell me your birth date?

9 A August 25, '52.

10 Q Will you tell us where you now reside?

11 A Mountain Grove, Virginia.

12 Q Mountain Grove?

13 A Yes.

14 Q And is that at the home of your parents?

15 A Yes.

16 Q What is your father's name?

17 A Charles Arrington Martin.

18 Q Richard, what if any is your current occupation?

19 A In the Navy.

20 Q United States Navy?

21 A Yes.

22 Q When did you join the United States Navy?

23 A November 30, 1970.

24 Q Have you been in the Navy since November 30,

25 1970?

1 Martin - Direct

2 A Yes.

3 Q Where are you now stationed or assigned to duty?

4 A Norfolk, Virginia.

5 Q Now, I meant to ask you, are you married or
6 single?

7 A Single.

8 Q Did you formerly own a 1963 Volkswagen vehicle,
9 Richard?

10 A Yes.

11 MR. ROGERS: I will ask you to mark this as
12 as an Exhibit.

13 (Thereupon the Court Reporter marked the docu-
14 ment, being a bill of sale concerning the 1963 Volks-
15 wagen, as Exhibit Number One.)

16 BY MR. ROGERS:

17 Q Richard, I am going to hand you Exhibit Number
18 One and ask you if that is a bill of sale concerning the
19 aforementioned vehicle?

20 A Yes, sir.

21 Q The Volkswagen vehicle?

22 A Yes, sir.

23 Q And does that indicate that you bought this
24 Volkswagen vehicle from Covington Motor Company on June 29,
25 1970?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Martin - Direct

A Yes, sir.

Q Now, did the vehicle operate properly for you following the date that you purchased it?

A Yes, sir.

Q How long did it operate properly for you?

A Approximately a week.

Q About a week?

A Yes.

Q What happened at that time?

A Well, the motor blew up.

Q The motor in the VW blew up?

A Yes, sir.

Q I meant to ask you, prior to the time that the motor blew up, did you arrange for Nationwide Insurance Company to transfer your insurance to the 1963 Volkswagen vehicle?

A Yes, sir.

Q Now, after the motor blew up, were you able to operate the vehicle?

A No.

Q Were you ever able to operate the VW after that?

A No.

Q What did you do with the VW after the motor blew up?

1 Martin - Direct

2 A I took it to a boy in Covington, Robert Moore
3 to see if he could fix it.

4 Q Robert Moore?

5 A Yes, sir.

6 Q Did you leave it at his place?

7 A Yes.

8 Q How did you get it there?

9 A I pulled it with a truck.

10 Q Is that a pickup truck?

11 A Yes, sir.

12 Q And was that your father's pickup truck?

13 A Yes.

14 Q Now, do you know how long it stayed over at
15 Robert Moore's?

16 A About six months.

17 Q Now, in terms of time, if you bought the car
18 on June 29, 1970, I am referring to the Volkswagen vehicle,
19 and your engine blew up about a week later, would it have
20 been the first week or so of July that you took it to Robert
21 Moore's, you think?

22 A Yes.

23 Q Something in that area?

24 A Yes, sir.

25 Q Did it stay over at his place in Covington for

1

Martin - Direct

2

six months following that date, approximately?

3

A Yes.

4

Q Now, you, at that time I believe you were living

5

with your father?

6

A Yes.

7

Q And you all live on a farm, do you not?

8

A Yes, sir.

9

Q And how large was your farm?

10

A About fifteen acres.

11

Q Were you a student at that time or what did

12

you do?

13

A I had just graduated.

14

Q You had just graduated?

15

A Yes.

16

Q Were you working at that time?

17

A Yes.

18

Q And how did you get in to work and how did you

19

generally get around, transportation wise, after your engine

20

blew on your Volkswagen?

21

A I used either the car or the truck of my daddy's.

22

Q You refer to the car or the truck, let's be

23

more specific, that would be the car or truck that belonged

24

to your father?

25

A Yes, sir.

1

Martin - Direct

2

Q Did he keep the truck and car at home?

3

A Yes, sir.

4

Q And did you live at that home?

5

A Yes, sir.

6

Q You were a member of the household?

7

A Right.

8

Q And were you allowed to use the truck, pickup,

9

was it a pickup truck?

10

A Yes, sir.

11

Q What kind of pickup truck was it?

12

A A '55 Chevrolet.

13

Q Were you allowed to use the pickup truck at any

14

time for your purposes, for whatever you needed to do?

15

A Yes, sir.

16

Q And was the pickup truck placed at your use,

17

for your use on a regular basis?

18

A Yes, sir.

19

Q You were never able to operate the Volkswagen

20

vehicle again after that?

21

A No, sir.

22

Q And your transportation, what kind of car was

23

it?

24

A A '65 Chevrolet.

25

Q And your transportation was either the '65

1 Martin - Direct

2 Chevrolet or the pickup truck?

3 A Yes, sir.

4 Q And did you use the pickup truck regularly?

5 A Yes, sir.

6 Q Now I believe this pickup truck was the same
7 truck that was subsequently involved in an accident which
8 occurred on October 16, 1970 in Bath County, was it not?

9 A Yes, sir.

10 Q You were using the pickup truck then for your
11 own purposes, I take it, when you went to a football game?

12 A Yes, sir.

13 Q And was your use of the vehicle at that time
14 similiar to previous times when you had used the vehicle for
15 your own purposes?

16 A Yes, sir.

17 Q When the suit papers in a case under the style
18 of Walter Ennis Armstrong, Administrator of the Estate of
19 Shari Lane Armstrong Versus Richard A. Martin indicating that
20 these papers were filed on October 30, 1970, this being a
21 suit for \$75,500 and arising out of the accident of October 16,
22 1970, I believe you were living at home with your father at
23 that time, were you not?

24 A Yes, sir.

25 Q And this was prior to the time you went into

1 Martin - Direct

2 the Navy?

3 A Yes, sir.

4 Q I think the suit papers indicate that the papers
5 were actually served on your father but were you aware that
6 the suit had been filed?

7 A Yes, sir.

8 Q Now, you joined the Navy November 30, 1970?

9 A Yes, sir.

10 Q Were you aware of anything that occurred in
11 that suit subsequent to the filing of the suit, anything that
12 occurred in 1971, were you aware that any order, any judgment
13 order was entered against you?

14 A No.

15 Q Were you aware that an attorney was appointed
16 to represent your interests?

17 A No.

18 Q Did any attorney ever discuss the matter with
19 you?

20 A No, sir.

21 Q Now, you know Mr. Erwin Solomon, I believe?

22 A Yes, sir.

23 Q And did Mr. Solomon discuss the accident with
24 you at any time?

25 A He asked me a few questions right after the

1 Martin - Direct

2 accident.

2

3 Q Was this the night of the accident?

3

4 A Yes, sir.

4

5 Q And the accident occurred at approximately what
6 time?

6

7 A Between 8:00 and 9:00.

7

8 Q And that was at the high school, I believe it
9 was?

9

10 A Yes, sir.

10

11 Q In Bath County?

11

12 A Yes, sir.

12

13 Q And Mr. Solomon discussed the accident with you
14 several hours after the accident?

14

15 A Approximately right after the accident, approxi-
16 mately thirty minutes after.

15

17 Q Do you know in what capacity he was discussing
18 the accident with you? Did he indicate the nature of his
19 questions?

17

18

19

20 A No.

20

21 Q Were any type of criminal charges placed against
22 you as a result of the accident?

21

22

23 A No.

23

24 Q Do you know whether any other suits were filed
25 against you other than the Armstrong case?

24

25

1

Martin - Direct

2

A There was two, two others.

3

4

Q Do you know who filed suits on behalf of them, who they were and who filed suits?

5

A Chestnut and Buzzard.

6

7

Q Do you know who represented those two plaintiffs in those cases?

8

A Mr. Solomon, I believe.

9

10

11

Q Other than the night of the accident October 16, 1970, did Mr. Solomon discuss this matter with you at all to your recollection?

12

A No.

13

14

Q Did he ever discuss it with you, the lawsuit brought against you by the Armstrong Estate?

15

A No, sir.

16

17

18

Q Were you aware that a judgment was entered against you in the Armstrong case on November 1, 1971, a judgment of \$25,000?

19

A No.

20

21

Q Were you aware of that up until today when I told you a few minutes ago?

22

A No.

23

24

25

Q Now your insurance policy with Nationwide that had been issued on the Volkswagen vehicle I believe was \$15,000 and \$30,000 as far as you know, wasn't it?

1

Martin - Direct

2

A Yes.

3

Q And the suit or the judgment of \$25,000 presumably would exceed the amount of coverage that was available as far as you know under the Nationwide policy?

6

A Yes.

7

Q Let me ask you this, Richard: Were you aware of the insurance on the pickup truck that is in your father's name? Do you know what company had that insurance?

10

A Maryland Casualty.

11

Q And were you aware of any settlement for distribution of the proceeds under the Maryland Casualty policy?

13

A No.

14

Q Suit papers in the case under the style of Maryland Casualty Company Versus Richard A. Martin an infant and others were filed, apparently, on October 1, 1971. Did any attorney ever discuss this proceeding with you?

18

A No.

19

Q Specifically did Mr. Duncan Byrd discuss this matter, this litigation with you at all?

21

A No, sir.

22

Q Are you aware of what happened in that case or about the order being entered or anything or are you aware of the details of that case?

25

A No.

1

Martin - Direct

2

3

4

5

6

Q Other than the conversation that we have just had prior to these depositions, have you been aware of the nature of the present suit which is a case styled Walter Ennis Armstrong Administrator of the Estate of Shari Lane Armstrong Versus Nationwide Insurance Company?

7

A In what way do you mean?

8

9

10

11

Q Let me repeat the question: Are you aware of the nature of this suit: Walter Armstrong Versus Nationwide other than what I have just discussed with you prior to the deposition?

12

A Yes, sir.

13

Q I did discuss it with you?

14

A Yes.

15

16

Q But were you advised of this lawsuit prior to this time or did you know anything about it?

17

A Well, my father had told me.

18

Q Told you suit papers had been filed?

19

A Brought against me; yes.

20

21

Q Did you know what the case was about or any details?

22

A No.

23

24

25

Q Let me ask you this, Richard: With respect to any of the three lawsuits I have mentioned, one being the Armstrong case against you which was for \$75,500 which was

1 Martin - Direct

2 filed in October, 1970 or the Maryland Casualty proceedings
3 filed in October of '71 or the Armstrong Estate case against
4 Nationwide, has anyone ever sat down and explained any of
5 these proceedings to you?

6 A No.

7 Q Where is your Volkswagen vehicle, the 1963
8 Volkswagen that we have been talking about?

9 A Mountain Grove.

10 Q Is that at your home?

11 A Yes, sir.

12 Q Has it ever been operated since the engine
13 blew the week after you bought it?

14 A No.

15 Q May I assume that since the engine blew you
16 have pretty well relied upon the use of the pickup truck and
17 the automobile when you were at home?

18 A Yes, sir.

19 MR. ROGERS: I believe that is all.

20 * * * * *

21
22 CROSS EXAMINATION

23 BY MR. BYRD:

24 Q Richard, when did you first obtain your operator's
25 license, at what age?

1 Martin - Cross

2 A Sixteen.

3 Q Since that time, since right after you first
4 obtained your license, have your parents, I am talking now
5 prior to your purchasing this Volkswagen, did they furnish
6 an automobile for you, I mean did they buy an automobile for
7 your regular use?

8 A Yes.

9 Q What was the first automobile that you had fur-
10 nished for your use?

11 A '51 Chevrolet.

12 Q Now, your father purchased that for your use?

13 A Yes.

14 Q Now at that time when he purchased you the '51
15 Chevrolet, were there any other cars in the family at that
16 time? Do you understand?

17 A Just the family cars.

18 Q How many cars were there in the family, was
19 there a car and a pickup truck at that time?

20 A Yes, sir.

21 Q Now what was, was the pickup used by your father?

22 A Yes, sir.

23 Q And was the car used primarily by your mother?

24 A Yes, sir.

25 Q So then would you say that the reason for them

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

~~Martin - Cross~~

purchasing the '51 Chevrolet for you was because they needed the other two cars for their own use?

A Yes, sir.

Q Okay. Now on July of 1970, is this when you purchased the Volkswagen, is that right?

A June of '70.

Q Okay now, at that time what happened to the '51 Chevrolet?

A I traded it for the Volkswagen.

Q It was actually in your father's name?

A Yes, sir.

Q So he traded his '51 Chevrolet for a 1963 Volkswagen?

A That is right.

Q Was the Volkswagen titled in your name?

A It was in all three names, my parents and mine.

Q The title was in all three names or did they just have to sign for you because you were under age?

A No; the title was in my name.

Q So this was with your parent's consent, of course, when you purchased the Volkswagen?

A Yes.

Q Now at the time, during the summer months between graduation and the time you entered military service,

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Martin - Cross

were you regularly employed anywhere?

A Yes; Hot Springs Company.

Q Now, during this period of time, did you stay at home regularly or did you stay somewhere else?

A I stayed at home.

Q In other words you stayed there every night with the exception of visits?

A Yes.

MR. ROGERS: You are talking about the summer of '70?

MR. BYRD: Right.

BY MR. BYRD:

Q Now, at the time your Volkswagen broke down, was the relationship basically the same as it had been since you first got this 1951 Chevrolet as far as use of the automobiles?

A Yes, sir.

Q Now during this period of time when they had the three cars, did you use, well, did you ever have the opportunity to use the pickup truck or your mother's car during that period of time?

A I had the opportunity; yes.

Q Did you use it? Did you make use of these other automobiles very frequently?

1

Martin - Cross

2

A No.

3

Q On almost all occasions from the time shortly
4 after you obtained your operator's license when you got the
5 '51 Chevrolet up until the time your Volkswagen broke down,
6 almost all the use you made of an automobile was either the
7 '51 Chevrolet and later on the Volkswagen?

8

A Yes, sir.

9

Q So it was only on very infrequent occasions
10 that you used either your father's pickup or your mother's
11 car, is that correct?

12

A Yes.

13

Q Now when your Volkswagen broke down, you stated,
14 I think I am correct, that you took this to a Robert Morris?

15

A Robert Moore.

16

Q Robert Moore?

17

A Yes.

18

Q Is he a mechanic?

19

A Well, he is not a licensed mechanic but he does

20

Q He does repair work?

21

A Yes.

22

Q At the time you took the car down to Mr. Moore,
23 what type of, well, did he give you any type of estimate as
24 to how long it would take him to have the car repaired?

25

A No; he just said he would do it when he could,

1

Martin - Cross

2 when he got time.

3 Q At the time did you have any idea it would take
4 six months to fix the car?

5 A No.

6 Q Did you think at the time that this was only
7 going to be a temporary arrangement that you would be without
8 your Volkswagen?

9 A Yes, sir.

10 Q Okay now, is it because of this feeling that
11 it was a temporary situation that you did not go out and pur-
12 chase another car?

13 A Yes, sir.

14 Q So what did you do from this point on while
15 your car was in for repairs? How did you get around?

16 A I used either the truck or the car, depending

17 Q Now again was this done with the permission of
18 your parents?

19 A Yes.

20 Q In other words you used the pickup truck and
21 you used the car while yours was in for repairs, this was
22 done with their consent?

23 A Yes, sir.

24 Q Was it felt by all, was it felt by you at that
25 time that this would only be a temporary arrangement and that

1

Martin - Cross

2

you would get your Volkswagen back shortly?

3

A Yes.

4

Q Now this was really the first occasion that you

5

had to use either your mother's car or your father's pickup

6

on a regular basis since you had gotten your driver's license,

7

is that correct?

8

A State that question again?

9

Q I said: Is it not true then that after your

10

car was placed in repair that this was really the first time

11

since you had first gotten the use of the 1951 Chevrolet that

12

you had to use your father's pickup and your mother's car

13

on a regular basis, is that correct?

14

A Yes, sir; it was.

15

Q In other words this was the first time that you

16

did not have a car of your own that was furnished for your

17

regular use by either yourself or your parents?

18

A Yes, sir.

19

Q Now when you were making use of this car of

20

your mother's, your mother's car and on this particular night

21

of October 16, was your use of their automobiles, did that

22

entail some sacrifice on their part? By that I mean did that

23

interfere with their use of these automobiles to some extent?

24

A No.

25

Q In other words did the sudden change from three

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Martin - Cross

automobiles there, one furnished for your use, one furnished for your father's use and one furnished for your mother's use, did this elimination of one vehicle, did this create any type of hardship on your mother and father as far as the use of his truck and the use of her car?

A No.

MR. BYRD: Thank you.

* * * * *

REDIRECT EXAMINATION

BY MR. ROGERS:

Q Richard, as I understand it, originally the 1951 Chevrolet and subsequently the VW were furnished for your regular use by your parents?

A Yes, sir.

Q And then after the motor on the VW blew, then their vehicles including the pickup truck were furnished for your regular use?

A Yes.

Q And then at the time that you took the VW to Moore, he is not a licensed mechanic as I understand it?

A No.

Q And he is not a garage?

1 Martin - Redirect

2 A No.

3 Q And you had no idea when that vehicle would
4 come back, you thought it would not be too long but you didn't
5 know?

6 A No.

7 Q If I understood you, he indicated he would work
8 on it when he could?

9 A Yes.

10 Q And no time limitation was given?

11 A No.

12 Q And I take it that while it appeared to be tempo-
13 rary, as you thought initially, by the end of September
14 you realized it wasn't so temporary?

15 A Yes.

16 Q The '51 Chevrolet was titled in your name or
17 was it or do you recall?

18 A No.

19 MR. CHARLES MARTIN: In my name.

20 BY MR. ROGERS?

21 Q Let's get the Record straight. Your father in-
22 dicates that the '51 Chevrolet was titled in his name.

23 A Yes.

24 Q But the VW was titled in your name?

25 A Yes.

1

Martin - Redirect

2

Q In any event both of them were furnished for
3 your regular use?

4

A Yes, sir.

5

Q And then when neither one was available after
6 the VW engine blew, then the pickup truck and the other car
7 was furnished for your regular use?

8

A Yes, sir.

9

Q What year, model year, was the other car?

10

A The car?

11

Q Yes.

12

A '65.

13

MR. ROGERS: I believe that is all I have.

14

15

* * * * *

16

17

REXCROSS EXAMINATION

18

BY MR. BYRD:

19

Q Richard, I want to ask you two questions: After
20 you purchased the Volkswagen, did you take care of the pay-
21 ments and the maintenance on that yourself?

22

A Yes.

23

Q Now we have asked you several questions already
24 about this arrangement when you took the car to Moore's and
25 you stated earlier that you felt that this would be a temporary

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

situation that he would have the car repaired, I don't know what you said, but you said you didn't feel like it would be six months. Then Mr. Rogers asked you a question that after it got to be September that you realized that it wasn't quite so temporary. Now just at that point, say September, or early October, just what were your expectations as far as getting your Volkswagen back? Did you feel then that you were going to have it back on the road soon?

MR. ROGERS: Before you answer that question, well, let's go off the Record.

(Discussion off the Record.)

THE WITNESS: At that time I did.

MR. BYRD: Okay, that is all.

* * * * *

REDIRECT EXAMINATION

BY MR. ROGERS:

Q Is it fair to say that while you hoped to get it back soon, before six months, that you realized it might take longer than six months?

A That is true.

MR. ROGERS: Thank you, Richard. Richard, will you authorize the Court Reporter to sign this deposition

1 Martin - Redirect

2 for you?

3 THE WITNESS: Yes, sir.

4 FURTHER THE DEPONENT SAITH NOT.

5

6

Richard A. Martin
Witness

7

8

Robert D. Young
Robert D. Young

9

10

11

* * * * *

12

13

CHARLES ARRINGTON MARTIN

14

having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified

15

16

as follows:

17

DIRECT EXAMINATION

18

BY MR. ROGERS:

19

Q Let me ask you a few questions: Will you state your name, Mr. Martin?

20

21

A Charles Arrington Martin.

22

Q How old are you, Mr. Martin?

23

A Forty-five.

24

Q And you are married?

25

A Yes, sir.

1

Martin - Direct

2

Q And your wife's name?

3

A Charlotte Martin.

4

Q Where do you live?

5

A Mountain Grove.

6

Q Is that in Bath County?

7

A Yes.

8

Q How large is your property there?

9

A About fifteen acres.

10

Q I believe your son Richard has just testified

11

and is sitting next to you?

12

A Yes.

13

Q All right sir, do you recall Richard operating

14

a 1951 Chevrolet that you helped him or did acquire for him?

15

A Yes, sir.

16

Q And that car was titled how?

17

A Well now, he was going to school and he failed

18

a grade and had to go to Alleghany High School in the summer

19

in order to make it up as he didn't want to lose a year so

20

I went down and bought the '51 Chevrolet for him.

21

Q What year was that, do you remember?

22

A I don't remember what year.

23

Q Go ahead.

24

A Anyway I went and bought the car for him and he

25

paid all the gas bills and everything for him to go back and

1

Martin - Direct

2

forth to school to take it.

3

Q And he used that '51 Chevy to go back and forth
4 to school?

5

A Yes; he used it in summer school, right.

6

Q And he later acquired a Volkswagen, according
7 to the bill of sale, from the Covington Motor Company on
8 June 29, 1970. Were you familiar with his acquiring that?

9

A Yes, sir.

10

Q And do you know how the VW was titled?

11

A Titled in his name but we had to sign the note.

12

Q And you and your wife together had to sign the
13 note to pay for it?

14

A Yes, sir.

15

Q You have heard him testify, do you have any
16 recollection about the vehicle breaking down, the motor?

17

A Well, it seemed like a nice car when he got
18 it. He drove it about a week and the valve popped off and
19 went down through the piston and tore the motor up.

20

Q Did he later take it off the premises to some-
21 body's place?

22

A Yes; he took it down to Robert Moore's. He
23 works at a Texaco Service Station where I deliver gas to and
24 we knew he worked on them. We took it up there for him to
25 work on.

1

Martin - Direct

2

Q Did it stay at Robert Moore's for a long period of time?

3

4

A Yes; it did.

5

Q This was, I take it, about in the early part of July of 1970 when the VW broke down?

6

7

A Yes.

8

Q It was about a week or two after it was bought?

9

A That is right.

10

11

Q And up to the time of the accident of October of 1970, was the VW vehicle over at Robert Moore's?

12

A Yes.

13

14

Q Now, during the time, during the months of July and August and September of 1970, was Richard allowed to use your pickup truck and was that furnished for his regular use?

15

16

A Yes. We carry insurance to cover them all and he could use any of them he wanted to.

17

18

19

Q And he used them on a regular basis, either one of them?

20

21

A Yes, sir.

22

23

24

25

Q I believe suit papers in the case brought against Richard by the Armstrong Estate in October of 1970 as a result of the accident, suit papers were served on you as Richard's father, do you remember that?

A Right after the accident, about two or three

1 Martin - Direct

2 days after that, they brought them over there.

3 Q Were you aware that judgment was subsequently
4 entered a year later in November of 1971 against Richard in
5 that case?

6 A No, sir.

7 Q Until I told you today, had you been aware of
8 a judgment for \$25,000 against Richard?

9 A I didn't know nothing about it until you told
10 us awhile ago.

11 Q I believe you had insurance on the pickup truck,
12 did you not?

13 A Yes, sir.

14 Q And that was with Maryland Casualty Company?

15 A Yes.

16 Q And did you understand or have any knowledge
17 about any settlement that Maryland Casualty made with the
18 people who were involved in the accident?

19 A Well, all I know is what I heard, they said
20 that they paid \$50,000 to Judge Abbott to distribute out
21 among them.

22 Q Did you have any understanding as to what the
23 payment was for by way of releasing anybody?

24 A No, sir.

25 Q Did anybody ever discuss that proceeding with

1 Martin - Direct

2 you?

3 A No, sir.

4 Q The papers indicate that a suit was filed or
5 a petition was filed by Maryland Casualty on October 1, 1971
6 in connection with that matter. Did anybody discuss that
7 with you at all?

8 A No, sir.

9 Q I believe Richard was then in the Navy, was he
10 not?

11 A Yes, sir.

12 MR. ROGERS: I believe that is all.

13

14 * * * * *

15

16 CROSS EXAMINATION

17

18 BY MR. BYRD:

19 Q Mr. Martin, back in, well, I am not certain
20 of the year, but back when you first bought the '51 Chevrolet
21 for Richard's use when he was going to summer school, at
22 that time I think Richard already stated that there were
23 already two cars in the family, is that correct?

24 A That is correct, but we all used every one of
25 them.

Q Now, was the pickup truck, I mean did you use

2 primarily the pickup truck?

3 A Well, sometimes I would take it to work and
4 sometimes I would take the car.

5 Q Between you and your wife, was the use of the
6 truck and the car pretty well constant, I guess you would say?
7 In other words, were your needs as an operator and did your
8 needs as an operator and your wife's needs as an operator
9 pretty well fill to capacity the use of the two cars that you
10 had at that time?

11 A No, sir.

12 Q Now at the time that Richard purchased the
13 Volkswagen, did he take up the payments himself as far as the
14 payments on the car and the maintenance and the gasoline and
15 so on?

16 A Of the Volkswagen he did, because he was working.

17 Q He undertook, at any rate, to take care of the
18 maintenance of that car and its payments?

19 A Yes, sir.

20 Q Now, after Richard, when he put his car in the
21 garage, at this time did you understand that this would be
22 a temporary arrangement that he was going to be out of the
23 use of the car?

24 A Well, we didn't know how long it would take to
25 fix it. It is hard to get parts for a Volkswagen.

1 Martin - Cross

2 Q Did you have any idea how long it would take?

3 A No, sir.

4 Q Did you think it would take as long as six
5 months?

6 A Yes, sir.

7 Q You thought at that time it would be that much?

8 A Yes, sir.

9 Q At that time Richard had already graduated from
10 high school, had he not? He had graduated from high school
11 at this point, had he not?

12 A Yes, sir.

13 Q Had his use of an automobile expanded considerably
14 since he first started driving, when you first got the Chevro-
15 let?

16 A No, sir.

17 Q He didn't use the car any more than he did when
18 you first got the Chevrolet?

19 A About the same.

20 Q Did he drive back and forth to work every day?

21 A Yes.

22 Q When the Volkswagen went in the garage and he
23 started using your pickup and your wife's car, did that in
24 any way inconvenience you and your wife as far as your use
25 of the cars?

1 Martin - Cross

2 A No, sir. Let me explain to you, I have always
3 kept at least three vehicles around my house and in running
4 shape. I have got three, I have always kept at least three
5 around there in case one breaks down or something I have
6 always got another one.

7 MR. BYRD: That is all.

8

9

* * * * *

10

REDIRECT EXAMINATION

11

BY MR. ROGERS:

12

13

14

15

Q You say you have always kept three vehicles
that have always been furnished for the regular use of your
wife and your son, Richard, as well as yourself?

16

17

18

19

20

21

22

23

24

25

A I always kept license and insurance on them.

Q And when you indicated, Mr. Martin, that you
thought it could take as long as six months for the VW to be
repaired, I assume as far as you knew that Richard thought
the same thing?

A Yes; the boy didn't have time to work on it
regular and he had a lot of other work to do around there.

Q You knew you would get it back hopefully when
you could get it back and that it might take six months or
longer?

1 Martin - Redirect

2 A Yes.

3 MR. ROGERS: Thank you.

4 * * * * *

5
6 RECROSS EXAMINATION

7 BY MR. BYRD:

8 Q Mr. Martin, you stated you always kept three
9 cars around the house. Now, during the time you were main-
10 taining that '51 Chevrolet for Richard and after that when he
11 was maintaining the '63 Volkswagen for himself, do you mean
12 to say that you had three other cars in addition to that one?

13 A That is right.

14 Q When you had the '51 Chevrolet, what were the
15 other three cars?

16 A I had a pickup truck and my wife had a '57 Chev-
17 rolet or a Corvair, one of the two and I had a Packard.

18 Q And say in October of 1970, in addition to the
19 1963 Volkswagen, what other automobiles did you have operating
20 at that time?

21 A Let me think now, I trade so much. We had a
22 '65 Chevrolet, I know, and a pickup truck and I believe it
23 was a, no, it was a '51 Chevrolet that I had.

24 Q Not the same '51 Chevrolet you had before?

25 A No; this was a truck, we had two trucks.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Martin - Recross

Q Both of them operational at that time?

A Yes.

Q And they both had licenses and insurance and
so on?

A Yes, sir.

MR. BYRD: Thank you, that is all.

MR. ROGERS: Mr. Martin, will you authorize
the Court Reporter to sign the deposition for you?

THE WITNESS: Yes, sir.

FURTHER THE DEPONENT SAITH NOT.

Charles H. Martin
Witness

Robert D. Young
Robert D. Young

* * * * *

INVOICE

CHRYSLER FINANCE CO.,
 Cherry & Monroe Dial 952-2163
 COVINGTON, VA.

No. 1017

SOLD TO: Richard A. Monroe
 ADDRESS: 1000 E. 10th St.,

DATE 1/21/70

SALESMAN: W. J. ...

YEAR	MAKE	MODEL	BODY STYLE	NEW OR USED	KEY NO.																					
1969	Chrysler	Impala	4 Dr. Sed.	1																						
I.V.I. / SERIAL No.		UPHOLSTERY		TRANSMISSION No.																						
<p>INSURANCE COVERED INCLUDES</p> <input type="checkbox"/> FIRE AND THEFT <input type="checkbox"/> PUBLIC LIABILITY — AMT. <input type="checkbox"/> COLLISION — AMT. DEDUCT. <input type="checkbox"/> PROPERTY DAMAGE — AMT.																										
<p>OPTIONAL EQUIPMENT AND ACCESSORIES</p> <table border="1"> <thead> <tr> <th>GROUP</th> <th>DESCRIPTION</th> <th>PRICE</th> </tr> </thead> <tbody> <tr> <td colspan="3">NEW CAR — FACTORY INSTALLED:</td> </tr> <tr> <td colspan="3"> </td> </tr> <tr> <td colspan="3">NEW CAR — DEALER INSTALLED:</td> </tr> <tr> <td colspan="3"> </td> </tr> <tr> <td colspan="3">USED CAR — TRADE-IN:</td> </tr> <tr> <td colspan="3"> </td> </tr> </tbody> </table>						GROUP	DESCRIPTION	PRICE	NEW CAR — FACTORY INSTALLED:						NEW CAR — DEALER INSTALLED:						USED CAR — TRADE-IN:					
GROUP	DESCRIPTION	PRICE																								
NEW CAR — FACTORY INSTALLED:																										
NEW CAR — DEALER INSTALLED:																										
USED CAR — TRADE-IN:																										
<p>PRICE OF CAR</p>																										
<p>SALES TAX</p>																										
<p>DELIVERED PRICE</p>																										
<p>EXTRAS:</p>																										
<p>OPTIONAL EQUIP. & ACC.:</p>																										
<p>FACTORY INSTALLED</p>																										
<p>DEALER INSTALLED</p>																										
<p>SALES TAX</p>																										
<p>TOTAL CASH PRICE <u>402.00</u></p>																										
<p>COST OF FINANCING <u>28.00</u></p>																										
<p>COST OF INSURANCE</p>																										
<p>TOTAL TIME PRICE <u>430.00</u></p>																										
<p>SETTLEMENT:</p>																										
<p>DEPOSIT</p>																										
<p>CASH ON DELIVERY</p>																										
<p>TRADE-IN _____</p>																										
<p>LESS LIEN _____ <u>40.00</u></p>																										
YEAR	MAKE																									
1969	Chrysler																									
MODEL	BODY																									
	4 Dr. Sed.																									
I.V.I. / SERIAL No.																										
1000 E 10th St.																										
PAYMENTS:																										
Monthly \$ <u>80.00</u>																										
AT \$ <u>402.00</u>																										
TOTAL																										
NAME OF FINANCE COMPANY: <u>Chrysler Finance Corp. Div 7/6/70</u>																										

THE PURCHASER AUTHORIZES THE DEALER TO INSTALL THE OPTIONAL EQUIPMENT, ACCESSORIES, AND SERVICES HEREON DESCRIBED, AND TO PLACE THE INSURANCE HEREON CHECKED; ACKNOWLEDGES RECEIPT OF THIS CAR AND A COPY OF THIS INVOICE.

PURCHASER'S SIGNATURE

NO LIABILITY INSURANCE INCLUDED

NO INSURANCE OF ANY KIND INCLUDED IN THIS SALE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

COMMONWEALTH OF VIRGINIA

CITY OF ROANOKE

I, Robert D. Young, Notary Public in and for the State of Virginia, at Large, do hereby certify that the depositions of: RICHARD ARRINGTON MARTIN and CHARLES ARRINGTON MARTIN, were by me reduced to machine shorthand in the presence of the witnesses, afterwards transcribed upon a typewriter under my direction; and that the foregoing is a true and correct transcript of the depositions so given by them as aforesaid.

I further certify that these depositions were taken at the time and place in the foregoing caption specified, and were completed without adjournment.

I further certify that I am not a relative, counsel, or attorney for either party, or otherwise interested in the outcome of this action.

IN WITNESS WHEREOF, I have hereunto set my hand at Roanoke, Virginia, on this the 11th day of January, 1972.

Robert D. Young
ROBERT D. YOUNG
NOTARY PUBLIC

My commission expires August 16, 1975.

Rec'd in Court January 22 1973
Blanche M. [Signature]

VIRGINIA,

IN THE CIRCUIT COURT OF BATH COUNTY

WALTER ENNIS ARMSTRONG,)	
Administrator of the Estate)	
of Shari Lane Armstrong,)	
	)	AMENDED ANSWER OF
Complainant)	
	)	NATIONWIDE MUTUAL
v.)	
	)	INSURANCE COMPANY
NATIONWIDE INSURANCE COMPANY,)	
)	
Defendant)	

Comes now defendant, Nationwide Mutual Insurance Company, by counsel, and for its Amended Answer to the subpoena and complaint filed against it says as follows:

1) Defendant admits that plaintiff's decedent, Shari Lane Armstrong, died as a result of injuries sustained when struck by a truck when she was attending a football game in Bath County, Virginia.

2) Defendant further admits that said decedent, Shari Lane Armstrong, was struck by a truck titled in the name of Charles Martin, and which had been operated by Richard A. Martin, and which defendant further states was either owned by or furnished for the regular use of the said Richard A. Martin.

3) Defendant further admits that at the time of the said accident it had issued to the said Richard A.

Martin on a 1963 Volkswagon vehicle a policy of liability insurance, No. 535-488-025, a true copy of which is attached hereto as Exhibit A, but defendant further states that the coverage thereunder did not apply or extend to any liability on the part of the said Richard A. Martin on account of the death of the said Shari Lane Armstrong.

4) Defendant further admits that it has and continues to deny any obligations and/or liability under the aforesaid policy of insurance issued by it to the said Richard A. Martin.

5) Defendant says further that even if the coverage under the aforesaid insurance policy issued by it had been applicable, which defendant expressly denies, complainant is precluded from maintaining this action against defendant for the following:

(a) The alleged judgment on which this suit is based, was and is null and void. Said judgment was entered in proceedings brought by the present plaintiff against this defendant's insured, Richard A. Martin, under the style of Walter Ennis Armstrong, Administrator of the Estate of Shari Lane Armstrong v. Richard A. Martin, Law No. 245. The papers, true copies of which are attached hereto as Exhibit B and are asked to be read as a part of this Amended Answer, show that the action was filed

on October 30, 1970; that service of process was attempted on November 4, 1970, by delivering the papers to Mr. Charles Martin, father of Richard A. Martin; that on November 1, 1971, an order was entered appointing a guardian ad litem for defendant Richard A. Martin because of his infancy; that on the same date an answer was filed by said guardian ad litem, and that on the same date an order was entered stating that no appearance or answer had been made by defendant more than twenty-one days after service of process, and entering judgment against Richard A. Martin for \$25,000 with interest from November 1, 1970. The said judgment order of November 1, 1971, was null and void for the following reasons:

1. There was no valid service of process upon the defendant therein, Richard A. Martin, who as shown by the depositions filed the present proceedings, was not a resident of Bath County and did not reside with his father at the time service of process was attempted, but in fact the said defendant was a member of the military service and his true residence was the location of his military organization at the time of the attempted service of process.

2. The court had no jurisdiction over the person of the said defendant Richard A. Martin at the

time the said action was commenced against him and process served upon his father;

3. The said defendant Richard A. Martin, in said proceedings at the time of institution thereof and at the time of the entry of the judgment of November 1, 1971, was a member of the military service and by virtue thereof, was entitled to the full benefits of the Soldiers and Sailors Civil Relief Act of 1940 (50 U. S. C. App. § 5201 et seq.,) including protection against judgment by default;

4. The said judgment order of November 1, 1971, was contrary to and prohibited by the conduct of the plaintiff in that action, Walter Ennis Armstrong, Administrator of the Estate of Shari Lane Armstrong, who, prior to said judgment order, had released the said Richard A. Martin of all liability on account of the decedent's death, which release is evidenced by order of this court entered October 1, 1971, in proceedings under style of Maryland Casualty Company v. Richard A. Martin, infant, et al., a true copy of which order is attached hereto as Exhibit C and asked to be read as a part of this Amended Answer.

(b) As shown in Exhibit C attached hereto, Complainant has heretofore released Richard A. Martin,

this defendant's insured, of all liability on account of the death of the decedent. The effect of such release was to discharge any obligations this defendant might otherwise have had under the aforesaid insurance policy with respect to liability of its insured, Richard A. Martin.

(c) Complainant's actions and conduct preceding the institution of this proceeding preclude him from obtaining the equitable relief sought herein.

Respectfully,

NATIONWIDE MUTUAL INSURANCE
COMPANY

BY ROBERT J. ROGERS
OF COUNSEL

Woods, Rogers, Muse, Walker & Thornton
105 Franklin Road, S. W.
Roanoke, Virginia

Counsel for Nationwide Mutual Ins. Co.

AUTOMOBILE POLICY DECLARATION

POLICY NUMBER 538-483-025
 8-11-70
 6-11-71

IP NUMBER 538-487 RD

policy is effective.

This policy is effective and it expires at 12:01 A.M. standard time on the dates here shown. Any reference in the policy to premium notice or renewal terms is deleted.

VEH	YEAR	TRADE NAME	IDENTIFICATION NUMBER	ANNUAL PREMIUM	LIMITS OF LIABILITY FOR COVERAGES PROVIDED		
					PROPERTY DAMAGE LIABILITY	BODILY INJURY LIABILITY	
1	1951	Chev.	JAM-298773	\$ 350.00	\$5,000 unless otherwise specified herein	\$15,000 unless otherwise specified herein	\$30,000 unless otherwise specified herein
2				\$			
3				\$			
4				\$	\$	\$	\$
					EACH ACCIDENT	EACH PERSON	EACH ACCIDENT

Richard Arrington Martin
 Mountain Grove Route
 Warm Springs, Va. 24484

Named Insured, Address and place where vehicle is garaged, unless otherwise stated herein:

PROTECTION AGAINST UNINSURED MOTORISTS INSURANCE

End. 522 or End. 523, Protection Against Uninsured Motorists Insurance, is afforded as indicated by the endorsement number in Item 7 below. The premium for this coverage is included in the annual premium shown above.

The automobile will be used for personal, pleasure, family and business use, unless otherwise stated herein:

() The automobile is used principally in the business occupation of the Named Insured, including occasional use for personal, pleasure, family and other business purposes.

Use of the automobile for the purposes stated includes the loading and unloading thereof.

It is understood and agreed that in the event of cancellation of this policy by either the Insured or the Company, the earned premium calculated in accordance with the cancellation condition of the policy, shall be subject to a minimum of \$10 as provided in Section 18 of the Virginia Automobile Insurance Plan.

Form Auto 3442, and other forms if specified herein with this Declaration Page, form the policy identified by the policy number. The attached endorsement(s), if any, may show an additional premium charge.

Producer:

NATIONWIDE MUTUAL INSURANCE COMPANY
 Columbus, Ohio

McCaleb & Wayland, Inc.
 157 N. Maple Avenue
 Covington, Va. 24426

E. A. Rule Secretary
Rowman Doss President

Countersigned at:
 Lynchburg, Virginia

Authorized Representative:



TRANSFER ENDORSEMENT

290B

Subject to all other terms and conditions of the policy, it is understood and agreed that the insurance afforded is hereby transferred to the following described automobile, and discontinued with respect to any other automobile described therein.

Car #1

YEAR	TRADE NAME	BODY TYPE	IDENTIFICATION NO.	CYL.
1963	Volka.		209974	
19				

Attached to and forming part of policy number: 528-488-025	Effective at 12:01 A.M. on policy effective date or on <u>6</u> <u>29</u> <u>1970</u> (whichever is later). <small>No. Day Year</small>	This endorsement supersedes any prior endorsement numbered:
---	--	---

NATIONWIDE MUTUAL INSURANCE COMPANY
Columbus, Ohio

Assigned to:
Richard Arrington Martin

E. A. Rule
Secretary

Dean W. Jeffers
President

Countersigned at:
Lynchburg, Va.

Authorized Representative:

PLEASE ATTACH THIS ENDORSEMENT TO YOUR POLICY AS IT CONSTITUTES AN IMPORTANT PART OF THE CONTRACT.

Ohio 2124-B-5-69



McCaleb & Mayland, Inc.
157 N. Maple Ave.
Covington, Va. 24426

ENDORSEMENT

214

Date: 8/12/70

Subject to all other terms and conditions of the policy, it is understood and agreed that the policy stated below is hereby amended as follows:

VAIP#: 556-187

Premium Amount Due: \$ _____

Return Premium Amount:
\$1.75 _____

PLEASE SEND WITHIN 15 DAYS FROM DATE OF THIS NOTICE.

This adjustment was made due to the following:

- A () A Financial Responsibility Certificate Form SR-22 has been filed with the Division of Motor Vehicles.
- B () There has been a change in the classification.
- C () Broad Form Use of Other Automobiles Coverage was added.
- D () An additional vehicle was added.
- E () The Virginia Automobile Rate Administrative Bureau disapproved the previous premium charged due to incorrect classification.
- F () There was a change in your address.
- G () Your policy was transferred from an Operator's Policy to an Owner's Policy.
- H () Financial Responsibility Certificate is no longer required.
- I (x) Change of car & 10% Compact Car discount allowed.

Former Premium: \$228.00. New Premium: \$206.00.

P. S. Producer: Please attach your check for \$1.67, representing the unearned portion of your commission to our check and forward to the policyholder or finance company. Thank you.

Attached to and forming part of policy number: 538-488-025	Effective at 12:01 A.M. on policy effective date or on 6 22 1970 (whichever is later). <small>Mo. Day Year</small>	This endorsement supersedes any prior endorsement numbered:
--	---	---

This endorsement is executed by Nationwide Mutual Insurance Company if said Company has issued the policy to which this endorsement is attached; it is executed by Nationwide Mutual Fire Insurance Company if said Company has issued the policy to which this endorsement is attached.

NATIONWIDE MUTUAL INSURANCE COMPANY
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY
Columbus, Ohio

Issued to:
Richard Arrington Martin
Mountain Grove Route
Warm Springs, Va. 24484

E.A. Rula Secretary
Bowman President

Countersigned at: Lynchburg, Va.
Authorized Representative:

STANDARD AUTOMOBILE COMBINATION SPECIMEN POLICY

Not To Be Construed
As A Valid Contract



The man from Nationwide is on your side™

NATIONWIDE INSURANCE

HOME OFFICE • COLUMBUS, OHIO

NATIONWIDE MUTUAL INSURANCE COMPANY

(A Mutual Insurance Company, Herein Called the Company)

... with the Insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the
... in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

Coverages

Coverage A — Fire, Lightning, Transportation, Windstorm, Hail, Earthquake or Explosion

... pay for direct and accidental loss of or damage to the automobile
... inafter called loss, caused

- (1) by fire or lightning,
- (2) by smoke or smudge due to a sudden and faulty operation of any fixed heating equipment situated on premises in which the automobile is located,
- (3) by the stranding, sinking, burning, or other incident of any conveyance in or upon which the automobile is transported, or
- (4) by windstorm, hail, earthquake or other non-excluding loss or damage caused by rain, snow or sleet whether or not wind-driven.

Coverage B — Comprehensive loss of or Damage to the Automobile, Except by Collision or Upset

... pay for direct and accidental loss of or damage to the automobile,
... inafter called loss, except loss caused by collision of the automo-
... with another object or by upset of the automobile or by collision
... of the automobile with a vehicle to which it is attached. Breakage of
... and loss caused by missiles, falling objects, fire, theft, explosion,
... quake, windstorm, hail, water, flood, malicious mischief or van-
... m, riot or civil commotion shall not be deemed loss caused by
... sion or upset.

Coverage C — Theft (Broad Form)

... pay for loss of or damage to the automobile, hereinafter called
... caused by theft, larceny, robbery or pilferage.

Coverage D-1 — Collision or Upset

... pay for direct and accidental loss of or damage to the automobile,
... nafter called loss, caused by collision of the automobile with an-
... object or by upset of the automobile, but only for the amount of
... such loss in excess of the deductible amount, if any, stated in the
... rations as applicable hereto.

Division 1. To or for any person who sustains bodily injury, sickness or disease, caused by accident, while in, upon or while entering into or alighting from the automobile, provided the automobile is being used by the Named Insured or his spouse if a resident of the same household, or with the permission of either or

Division 2. To or for each Insured who sustains bodily injury, sickness or disease, caused by accident, while in, upon, or while entering into or alighting from, or through being struck by, an automobile.

II Defense, Settlement, Supplementary Payments

With respect to such insurance as is afforded by this policy for bodily injury liability and for property damage liability, the Company shall:

(a) defend any suit against the Insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the Company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;

(b) pay all premium on appeal to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, the cost of bail bonds required of the Insured in the event of accident or traffic law violation during the policy period, not to exceed \$100 per bail bond, without any obligation to appear for or furnish any such bonds;

(c) pay all expenses incurred by the Company, all costs taxed against the Insured in any such suit and all interest accruing after entry of judgment until the Company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the Company's liability thereon;

(d) pay expenses incurred by the Insured for such immediate medical and surgical relief to others as shall be imperative at the time of the accident;

(e) reimburse the Insured for all reasonable expenses, other than loss of earnings, incurred at the Company's request;

and the amounts so incurred, except settlements of claims and suits, are payable by the Company in addition to the applicable limit of liability of this policy.

Coverage D-2 — Collision or Upset — 80 Per Cent

pay for any direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by collision of the automobile with another object or by upset of the automobile, but not exceeding 80 per cent of the first \$250 and 100 per cent of the amount in excess of \$250 for each such loss or damage.

Coverage E — Towing and Labor Costs

pay for towing and labor costs necessitated by the disablement of the automobile, provided the labor is performed at the place of disablement.

Coverage F — Property Damage Liability

pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile.

Coverage G — Bodily Injury Liability

pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile.

Coverage H — Medical Payments

pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services:

III Definition of "Insured"

(a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word "Insured" includes the Named Insured and, if the Named Insured is an individual, his spouse if a resident of the same household, and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the Named Insured or such spouse or with the permission of either. The insurance with respect to any person or organization other than the Named Insured or such spouse does not apply:

(1) to any person or organization, or to any agent or employee thereof, operating an automobile sales agency, repair shop, service station, storage garage or public parking place, with respect to any accident arising out of the operation thereof, but this provision does not apply to a resident of the same household as the Named Insured, to a partnership in which such resident or the Named Insured is a partner, or to any partner, agent or employee of such resident or partnership;

(2) to any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer.

(b) With respect to the insurance under division 2 of Coverage H the unqualified word "Insured" means:

(1) the Named Insured, if an individual or husband and wife who are residents of the same household, otherwise the person specifically designated in the declarations, and

(2) while residents of the same household as the Named Insured or such designated person, his spouse and the relatives of either;

provided, if such Named Insured or designated person shall die, this insurance shall cover any person who was an Insured at the time of such death.

Automobile Defined, Trailers, Private Passenger Automobile, Two or More Automobiles, Including Automatic Insurance

1 Automobile. Except with respect to division 2 of Coverage H and cept where stated to the contrary, the word "automobile" means:

(1) **Described Automobile** — the motor vehicle or trailer described in this policy;

(2) **Trailer** — under Coverages F, G and division 1 of Coverage H, a trailer not described in this policy, if designed for use with a private passenger automobile, if not being used for business purposes with another type automobile, and under division 1 of Coverage H if not a home, office, store, display or passenger trailer;

(3) **Temporary Substitute Automobile** — under Coverages F, G and division 1 of Coverage H, an automobile not owned by the Named Insured or his spouse if a resident of the same household, while temporarily used as a substitute for the described automobile when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction;

(4) **Newly Acquired Automobile** — an automobile, ownership of which is acquired by the Named Insured or his spouse if a resident of the same household, if (i) it replaces an automobile owned by either and covered by this policy, or the Company insures all automobiles owned by the Named Insured and such spouse on the date of its delivery, and (ii) the Named Insured or such spouse notifies the Company within thirty days following such delivery date; but such notice is not required under Coverages F, G and division 1 of Coverage H if the newly acquired automobile replaces an owned automobile covered by this policy. The insurance with respect to the newly acquired automobile does not apply to any loss against which the Named Insured or such spouse has other valid and collectible insurance. Under Coverages A, B, C, D-1 and D-2, when a limit of liability is expressed in the declarations as a stated amount, such limit as to the newly acquired automobile shall be replaced by the actual cash value. The Named Insured shall pay any additional premium required because of the application of the insurance to such newly acquired automobile.

The word "automobile" also includes under Coverages A, B, C, D-1 and D-2 its equipment and other equipment permanently attached thereto.

Under division 2 of Coverage H, the word "automobile" means a land motor vehicle or trailer not operated on rails or crawler-treads, but does not mean: (1) a farm type tractor or other equipment designed for use principally off public roads, except while actually upon public roads, or (2) a land motor vehicle or trailer while located for use as a garage or premises and not as a vehicle.

Private Passenger Automobile. The term "private passenger automobile" means a private passenger, station wagon or jeep type automobile, also includes under Coverages F, G and division 1 of Coverage H automobiles the purposes of use of which are stated in the declarations as "pleasure and business."

Semitrailer. The word "trailer" includes semitrailer.

Two or More Automobiles. When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each, but a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile as respects limits of liability under Coverages F and G and separate automobiles as respects limits of liability, including any deductible provisions, under Coverages A, B, C, D-1, D-2 and E.

Use of Other Automobiles

When the Named Insured is an individual or husband and wife and when during the policy period such Named Insured, or the spouse of such individual if a resident of the same household, owns a private passenger automobile covered by this policy, such insurance as is afforded by this policy under Coverages D-1, D-2, F, G and division 1 of Coverage H with respect to said automobile applies with respect to any other automobile, subject to the following provisions:

(a) With respect to this insurance under Coverages F and G the unqualified word "insured" includes (1) such Named Insured and spouse, and (2) any other person or organization legally responsible for the use by such Named Insured or spouse of an automobile not owned or hired by such other person or organization. Insuring Agreement III does not apply to this insurance.

(b) Under division 1 of Coverage H, this insurance applies only if the injury results from the operation of such other automobile by such Named Insured or spouse or on behalf of either by a private chauffeur or domestic servant of such Named Insured or spouse, or from the occupancy of said automobile by such Named Insured or spouse.

(c) Under Coverages D-1 and D-2, this insurance applies only with respect to a private passenger automobile while being operated or used by such Named Insured or spouse. Exclusion (k) does not apply to this insuring agreement.

(d) This insuring agreement does not apply:

(1) to any automobile owned by or furnished for regular use to either the Named Insured or a member of the same household other than a private chauffeur or domestic servant of such Named Insured or spouse;

(2) to any accident arising out of the operation of an automobile sales agency, repair shop, service station, storage garage or public parking place;

(3) under Coverages F, G or division 1 of Coverage H, to any automobile while used in a business or occupation of such Named Insured or spouse except a private passenger automobile operated or occupied by such Named Insured, spouse, private chauffeur or domestic servant;

(4) under Coverages D-1 or D-2, to any loss when there is any other insurance which would apply thereto in the absence of this insuring agreement, whether such other insurance covers the interest of the Named Insured or spouse, the owner of the automobile or any other person or organization.

VI Loss of Use by Theft—Rental Reimbursement

The Company, following a theft covered under this policy of the entire automobile, shall reimburse the Named Insured for expense not exceeding \$5 for any one day nor totaling more than \$150 or the actual cash value of the automobile at time of theft, whichever is less, incurred for the rental of a substitute automobile, including taxicabs. Such reimbursement is payable by the Company in addition to the applicable limit of liability of this policy.

Reimbursement is limited to such expense incurred during the period commencing seventy-two hours after such theft has been reported to the Company and the police and terminating, regardless of expiration of the policy period, on the date the whereabouts of the automobile becomes known to the Named Insured or the Company or on such earlier date as the Company makes or tenders settlement for such theft. Such reimbursement shall be made only if the stolen automobile was a private passenger automobile not used as a public or livery conveyance and not owned and held for sale by an automobile dealer.

VII General Average and Salvage Charges

The Company, with respect to such transportation insurance as is afforded by this policy, shall pay any general average and salvage charges for which the Named Insured becomes legally liable.

VIII Policy Period, Territory, Purposes of Use

This policy applies only to accidents which occur and to direct and accidental losses to the automobile which are sustained 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 and, if a "described automobile" under Insuring Agreement IV, is owned, maintained and used for the purposes stated as applicable thereto in the declarations.

EXCLUSIONS

THIS POLICY DOES NOT APPLY:

(j) except under division 2 of Coverage H, while the automobile is used as a public or livery conveyance, unless such use is specifically declared and described in this policy;

(k) under Coverages F and G, to liability assumed by the Insured under any contract or agreement;

(l) under Coverages F and G, while the automobile is used for the towing of any trailer owned or hired by the Insured and not covered by like insurance in the Company; or while any trailer covered by this policy is used with any automobile owned or hired by the Insured and not covered by like insurance in the Company;

(m) under Coverage G, to bodily injury to or sickness, disease or death of 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;

(n) under Coverage G, to any obligation for which the Insured or any other person as his insurer may be held liable under any workmen's compensation law, unemployment compensation or disability benefits law, or under any similar law;

(o) under Coverage F, to injury to or destruction of property owned or transported by the Insured, or property rented to or in charge of the Insured other than a residence or private garage injured or destroyed or a private passenger automobile covered by this policy;

(p) under division 1 of Coverage H, to bodily injury to or sickness, disease or death of any employee of the Named Insured or spouse arising out of and in the course of

(1) domestic employment by the Named Insured or spouse, 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 Named Insured or spouse;

(q) under Coverage H, to bodily injury to or sickness, disease or death

(r) under Coverages A, B, C, D-1, D-2 and E, to loss due to radioactive contamination;

(s) under any Liability Coverage, to injury, sickness, disease, death or destruction

(1) with respect to which an Insured under the policy is also an Insured under a nuclear energy 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; or

(2) resulting from the hazardous properties of nuclear material and with respect to which (i) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (ii) the Insured is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization;

(3) under any Medical Payments Coverage, or under any Supplementary Payments provision relating to immediate medical or surgical relief, to expenses incurred with respect to bodily injury, sickness, disease or death resulting from the hazardous properties of nuclear material and arising out of the operation of a nuclear facility by any person or organization;

(4) under any Liability Coverage, to injury, sickness, disease, death or destruction resulting from the hazardous properties of nuclear material, if

(1) the nuclear material (i) is at any nuclear facility owned by, or operated by or on behalf of, an Insured or (ii) has been discharged or dispersed therefrom;

(2) the nuclear material is contained in spent fuel or waste at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of an Insured; or

(3) the injury, sickness, disease, death or destruction arises out of the furnishing by an Insured of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any nuclear facility, but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (3) applies only to injury to or destruction of property at such nuclear facility.

As used in Exclusion (r):

"hazardous properties" include radioactive, toxic, or explosive properties;

"nuclear material" means source material, special nuclear material or byproduct material;

of any person who is an employee of an automobile sales agency, repair shop, service station, storage garage or public parking place, 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;

(1) under division 2 of Coverage H, to bodily injury to or sickness, disease or death of an Insured sustained while in or upon or while entering into or alighting from an automobile owned by any Insured;

(2) to injury, sickness, disease, death or loss due to war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing,

(3) with respect to expenses under Insuring Agreement II (d) or under Coverage H, or

(4) under Coverages A, B, C, D-1, D-2 and E;

(5) under Coverages A, B, C, D-1, D-2 and E, if the automobile is or at any time becomes subject to any bailment lease, conditional sale, purchase agreement, mortgage or other encumbrance not specifically declared and described in this policy;

(6) under Coverages A, B, C, D-1, D-2 and E, to any damage to the automobile which is due and confined to wear and tear, freezing, mechanical or electrical breakdown or failure, unless such damage is the result of other loss covered by this policy;

(7) under Coverages A, B, C, D-1, D-2 and E, to robes, wearing apparel or personal effects;

(8) under Coverages A, B, C, D-1, D-2 and E, to tires unless damaged by fire or stolen or unless such loss be coincident with and from the same cause as other loss covered by this policy;

(9) under Coverages B and C, to loss due to conversion, embezzlement or secretion by any person in possession of the automobile under a bailment lease, conditional sale, purchase agreement, mortgage or other encumbrance;

(10) under Coverages D-1 and D-2, to breakage of glass if insurance with respect to such breakage is otherwise afforded;

"source material", "special nuclear material", and "byproduct material" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof;

"spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a nuclear reactor;

"waste" means any waste material (1) containing byproduct material and (2) resulting from the operation by any person or organization of any nuclear facility included within the definition of nuclear facility under paragraph (1) or (2) thereof;

"nuclear facility" means

(1) any nuclear reactor,

(2) any equipment or device designed or used for (i) separating the isotopes of uranium or plutonium, (ii) processing or utilizing spent fuel, or (iii) handling, processing or packaging waste,

(3) any equipment or device used for the processing, fabricating or alloying of special nuclear material if at any time the total amount of such material in the custody of the Insured at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235,

(4) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste,

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations;

"nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material;

With respect to injury to or destruction of property, the word "injury" or "destruction" includes all forms of radioactive contamination of property;

(11) under Coverages F and G, to injury, sickness, disease, death or destruction which arises out of the loading or unloading of an automobile, provided that this limitation does not apply with respect to claims made or suits brought against the following Insureds:

(1) the Named Insured or, if the Named Insured is an individual, his spouse, if a resident of the same household;

(2) a lessee or borrower of the automobile or an employee of either of them or of the Named Insured;

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

CONDITIONS

6 Notice of Accident (Coverages F, G and H)

When an accident occurs written notice shall be given by or on behalf of the Insured to the Company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the Insured and also reasonably obtainable information respecting the date, place and circumstances of the accident, the names and addresses of the injured and of available witnesses.

7 Notice of Claim or Suit (Coverages F and G)

When a claim is made or suit is brought against the Insured, the Insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.

8 Limit of Liability (Coverage F)

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

9 Limits of Liability (Coverage G)

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, sickness or disease, including death at any time resulting therefrom, sustained by one person as the result of any one accident; the limit of such liability stated in the declarations as applicable to "each accident" is, subject to the above provision respecting each person, the total limit of the Company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by two or more persons as the result of any one accident.

10 Limits of Liability (Coverage H)

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, including each Insured, who sustains bodily injury, sickness, disease or death as the result of any one accident.

11 Severability of Interests (Coverages F and G)

The term "the Insured" is used severally and not collectively, but the inclusion herein of more than one Insured shall not operate to increase the limits of the Company's liability.

12 Action Against Company (Coverages F and G)

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. Nothing contained in this policy shall give any person or organization any right to join the Company as a co-defendant in any action against the Insured to determine the Insured's liability. Bankruptcy or insolvency of the Insured or of the Insured's estate shall not relieve the Company of any of its obligations hereunder.

8 Action Against Company (Coverage H)

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 until thirty days after the required proofs of claim have been filed with the Company.

9 Financial Responsibility Laws (Coverages F and G)

When this policy is certified as proof of financial responsibility for the future under the provisions of the motor vehicle financial responsibility law of any state or province, 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 which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use of the automobile during the policy period, 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.

10 Assault and Battery (Coverages F and G)

Assault and battery shall be deemed an accident unless committed by or at the direction of the Insured.

11 Medical Reports; Proof and Payment of Claim (Coverage H)

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.

12 Named Insured's Duties When Loss Occurs (Coverages A, B, C, D-1, D-2 and E)

When loss occurs, the Named Insured shall:

- (a) protect the automobile whether or not the loss is covered by this policy, and any further loss due to the Named Insured's failure to protect shall not be recoverable under this policy; reasonable expense incurred in affording such protection shall be deemed incurred at the Company's request;
- (b) give notice thereof as soon as practicable to the Company or any of its authorized agents and also, in the event of theft, larceny, robbery or pilferage, to the police but shall not, except at his own cost, offer or pay any reward for recovery of the automobile;
- (c) file proof of loss with the Company within sixty days after the occurrence of loss, unless such time is extended in writing by the Company, in the form of a sworn statement of the Named Insured setting forth the interest of the Named Insured and of all others in the property affected, any encumbrances thereon, the actual cash value thereof at time of loss, the amount, place, time and cause of such loss, the amount of rental or other expense for which reimbursement is provided under this policy, together with original receipts therefor, and the description and amounts of all other insurance covering such property.

Upon the Company's request, the Named Insured shall exhibit the damaged property to the Company and submit to examinations under oath by anyone designated by the Company, subscribe the same and produce for the Company's examination all pertinent records and sales invoices, or certified copies if originals be lost, permitting copies thereof to be made, all at such reasonable times and places as the Company shall designate.

13 Appraisal (Coverages A, B, C, D-1, D-2 and E)

If the Named Insured and the Company fail to agree as to the amount of loss, each shall, on the written demand of either, made within sixty days after receipt of proof of loss by the Company, select a competent and disinterested appraiser, and the appraisal shall be made at a reasonable time and place. The appraisers shall first select a competent and disinterested umpire, and failing for fifteen days to agree upon such umpire, then, on the request of the Named Insured or the Company, such umpire shall be selected by a judge of a court of record in the county and state in which such appraisal is pending. The appraisers shall then appraise the loss, stating separately the actual cash value at the time of loss 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 Named Insured and the Company shall each pay his or its 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.

14 Limit of Liability; Settlement Options; No Abandonment (Coverages A, B, C, D-1 and D-2)

The limit of the Company's liability for loss shall not exceed either

- (1) the actual cash value of the automobile, or if the loss is of a part thereof the actual cash value of such part, at time of loss or
- (2) what it would then cost to repair or replace the automobile or such part thereof with other of like kind and quality, with deduction for depreciation, or
- (3) the applicable limit of liability stated in the declarations.

The Company may pay for the loss in money or may repair or replace the automobile or such part thereof, as aforesaid, or may return any stolen property with payment for any resultant damage thereto at any time before the loss is paid or the property is so replaced, or may make all or such part of the automobile at the agreed or appraised value but there shall be no abandonment to the Company.

15 Action Against Company (Coverages A, B, C, D-1, D-2 and E)

No action shall lie against the Company unless, as a condition precedent hereto, the Named Insured shall have fully complied with all the terms of this policy nor until thirty days after proof of loss is filed and the amount of loss is determined as provided in this policy.

16 No Benefit to Bailee (Coverages A, B, C, D-1, D-2 and E)

The insurance afforded by this policy shall not enure directly or indirectly to the benefit of any carrier or bailee liable for loss to the automobile.

17 Assistance and Cooperation of the Insured

(Coverages A, B, C, D-1, D-2, E, F and G)

The Insured shall cooperate with the Company and, upon the Company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. 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.

18 Subrogation (Coverages A, B, C, D-1, D-2, E, F and G)

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.

19 Other Insurance (Coverages A, B, C, D-1, D-2, E, F, G and H)

Except under Coverage H, if the Insured has other insurance against a loss covered by 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, under Coverages F and G the insurance with respect

to temporary substitute automobiles under Insuring Agreement IV or other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectible insurance.

Under division 1 of Coverage H, the insurance with respect to temporary substitute automobiles under Insuring Agreement IV or other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectible automobile medical payments insurance.

Under division 2 of Coverage H, the insurance shall be excess over any other valid and collectible automobile medical payments insurance available to an Insured under any other policy.

20 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.

21 Assignment

Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon; if, however, the Named Insured shall die, this policy shall cover

(1) the Named Insured's spouse, if a resident of the same household at the time of such death, and legal representative as Named Insureds, and

(2) under Coverages F and G, subject otherwise to the provisions of Insuring Agreement III, any person having proper temporary custody of the automobile, as an Insured, and under division 1 of Coverage H while the automobile is used by such person, until the appointment and qualification of such legal representative;

provided that notice of cancellation addressed to the Insured named in the declarations and mailed to the address shown in this policy shall be sufficient notice to effect cancellation of this policy.

22 Cancellation

This policy may be cancelled by the Named Insured by mailing to the Company written notice stating when thereafter the cancellation shall be effective. This policy may be cancelled by the Company by mailing to the Named Insured 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 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 the Named Insured or by the Company shall be equivalent to mailing.

If the Named 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.

23 Terms of Policy Conformed to Statute

Terms of this policy which are in conflict with the statutes of the state wherein this policy is issued are hereby amended to conform to such statutes.

24 Declarations

By acceptance of this policy the Named Insured 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.

25 Assistance and Cooperation of the Insured

(Virginia only)

The failure or refusal of the Insured to cooperate with or assist the Company which prejudices the Company's defense of an action for damages arising out of the operation or use of an automobile shall constitute non-compliance with the requirements of this policy that the Insured shall cooperate with and assist the Company.

26 Massachusetts Exception

When this policy is issued in Massachusetts with respect to any automobile principally garaged in Massachusetts, exclusion "(s)" does not apply to any private passenger automobile which is owned by an individual or husband and wife and not used as a public or livery conveyance.

VIRGINIA,

IN THE CIRCUIT COURT OF BATH COUNTY

WALTER ENNIS ARMSTRONG,
Administrator of the Estate
of Shari Lane Armstrong,

Complainant

VS:

RICHARD A. MARTIN, an infant

Defendant

MOTION
FOR
JUDGMENT

TO: THE HONORABLE EARL L. ABBOTT, JUDGE OF SAID COURT:

Your plaintiff hereby moves the Circuit Court for the County of Bath, Virginia, for a judgment against the defendant, RICHARD A. MARTIN, in the sum of Seventy Five Thousand, Five Hundred Dollars (\$75,500.00) which sum is due by the Defendant for damages, wrongs and injuries resulting from his negligence as hereinafter set forth; to wit:

1) That your plaintiff, Walter Ennis Armstrog, is the duly qualified and appointed administrator of the Estate of Shari Lane Armstrong, deceased.

2) That on October 16, 1970 at about the hour of 8:30 P. M. the plaintiff's decedent Shari Lane Armstrong, a child of eight years of age, was attending a football

EXHIBIT B

game at Bath County High School, Bath County, Virginia, when a truck came off the hill overlooking the playing field striking the plaintiff's decedent causing injuries which resulted in her death.

3) The defendant parked a truck, belonging to his father but at that time under the defendant's sole control, approximately Three Hundred (300) feet above the playing field on a hill and had attempted to start said truck. Upon the failure of said truck to start the defendant negligently, carelessly and without regard to the said plaintiff's decedent, left said truck on the hill with the emergency brake off, out of gear and on an incline toward the field. As a result of these negligent actions the plaintiff's decedent was struck by said truck causing injuries resulting in her death.

4) The said truck came off the hill and was traveling at a high rate of speed when it struck the plaintiff's decedent.

5) That the defendant, Richard A. Martin was negligent in the following manner:

- (a) Failing to park said truck in a safe manner.
- (b) Failing to park said truck in a manner that would keep it from harming other persons.
- (c) Failing to have the emergency brake of said

truck on and failing to have said truck in gear.

(d) Failing to park said truck on level ground where it could not roll harming other persons.

(e) Failing to keep said truck under proper control so as not to injure or endanger the lives, persons or property of others.

All of which constituted the sole proximate cause of the accident which took place and the plaintiff's decedent was not contributory negligent.

6) That as a direct result of the accident caused by the defendant's negligence, the plaintiff's decedent suffered greivous wounds and bodily injuries which resulted in her death shortly following the accident.

7) That the injuries which the plaintiff's decedent received were the direct and proximate result of the negligence of the defendant, Richard A. Martin.

WHEREFORE, your plaintiff does hereby demand judgment in the amount of Seventy Five Thousand, Five Hundred (\$75,500.00) Dollars against the defendant, Richard A. Martin.

WALTER ENNIS ARMSTRONG,
Administrator of the Estate
of Shari Lane Armstrong.

BY /s/ Duncan M. Byrd, Jr.
Of Counsel

/s/ Duncan M. Byrd, Jr.
Duncan M. Byrd, Jr.
Attorney At Law
Warm Springs, Virginia 24484
Counsel for Plaintiff

It is therefore ADJUDGED, ORDERED and DECREED the plaintiff, WALTER ENNIS ARMSTRONG, ADMINISTRATOR OF THE ESTATE OF SHARI LANE ARMSTRONG recover judgement against RICHARD A. MARTIN for the sum of Twenty-Five Thousand Five Hundred Dollars with interest from November 1, 1970.

I ask for this

/s/ Duncan M. Byrd, Jr.
Duncan M. Byrd, Jr.
Attorney for the Plaintiff
Box 726
Hot Springs, Virginia

ENTER: November 1, 1971

/s/ Earl L. Abbott
JUDGE

Law Order Book 13

Page 308

VIRGINIA,

IN THE CIRCUIT COURT OF BATH COUNTY

Maryland Casualty Company)

Vs.)

Richard A. Martin, infant)
Steven Lee Brinkley, infant)
Darrell Chestnut, infant)
Creigh Deeds, infant)
Penny Bussard, infant)
Gary Smith, infant)
Jeffrey Lowry, infant)
Ennis Armstrong, Administrator of)
Shari Lane Armstrong, deceased)
Curtis Lowry, Administrator of)
Steven Lowry, deceased)
Ruth Dalton)
Charles Cauley)
Jackie L. Nelson, infant)

O R D E R

CASE NO. 267

This day came Maryland Casualty Company, by its attorney, and by leave of court filed its petition herein; then came Ennis Armstrong, Administrator of Shari Lane Armstrong, deceased, Curtis Lowry, in his own right and as administrator of Steven Lowry, deceased, Dorothy Lowry, Ralph L. Nelson, Jr., Ella L. Nelson, Wayne Brinkley, Dawn Brinkley, Rodney Chestnut, Reba M. Chestnut, Hugh Hicklin, Emma T. Hicklin, Roy Bussard, Myrtle Bussard, Godfrey Smith, Ruth M. Smith, Ruth Dalton and Charles Cauley and filed their answer to said petition; whereupon the Court doth appoint Duncan M. Byrd, Jr., a competent and discreet

EXHIBIT C

attorney at law, as guardian ad litem for the infant defendants to said petition, Richard A. Martin, Steven Lee Brinkley, Darrell Chestnut, Creigh Deeds, Penny Bussard, Gary Smith, Jackie L. Nelson and Jeffrey Lowry and said guardian ad litem did thereupon file his sworn answer, on his behalf and on behalf of said infant defendants, to said petition.

Then again came said parties and said guardian ad litem and the Court heard evidence in open court in reference to the matters set out in said petition; and it appearing to the Court that the proposed payment by Maryland Casualty Company into court of the \$50,000.00 coverage of its policy number 3-0567337, issued to Charles A. Martin, in full settlement and satisfaction of all claims against Maryland Casualty Company for injuries, damages and expenses arising out of accident of October 16, 1970, at Bath County High School, and of all duties and obligations under said policy of insurance to defend any action against Richard A. Martin as a result of said accident, now pending or hereafter instituted; and it further appearing to the Court that the other parties to this proceeding have agreed that they will not enforce payment of any judgment that may be rendered against Richard A. Martin for injuries and damages from said accident, beyond any

available liability insurance coverage by said Maryland Casualty Company or any other insurance company; it is accordingly ORDERED that said proposed payment by Maryland Casualty Company of said sum of \$50,000.00 be authorized and approved and that upon payment of said sum to the Clerk of this Court by Maryland Casualty Company, for distribution as the Court may hereafter direct, the said Maryland Casualty Company shall be and it hereby is released and discharged of any and all other duties, obligations and liabilities under its policy number 3-0567337, issued to Charles A. Martin, and that Richard A. Martin be thereby released of any liability for claims for injuries, damages and expenses by any other party to this proceeding in excess of any other liability coverage that may be available to said Richard A. Martin.

It is further ORDERED that any portion of said sum of \$50,000.00 directed herein to be paid to the Clerk of this Court, apportioned to or for the benefit of Ruth Dalton, shall be subject to the subrogation claim in the amount of \$4,052.01 of Maryland Casualty Company as Workmen's Compensation insurer of the Bath County School Board and shall be repaid to said Maryland Casualty Company from said share of said Ruth Dalton of said fund.

And this proceeding shall stand continued pending further order of this Court.

ENTER: October 1, 1971

/s/ Earl L. Abbott
Judge

Law Order Book 13

Page 294

EXHIBIT C

VIRGINIA,

IN THE CIRCUIT COURT OF BATH COUNTY

MARYLAND CASUALTY COMPANY

COMPLAINANT)

VS:

) ORDER CASE

STEVEN LEE BRINKLEY, infant

DEFENDANTS)

) NO. 267

DARRELL CHESTNUT, infant

CREIGH DEEDS, infant

PENNY BUSSARD, infant

GARY SMITH, infant

JEFFREY LOWRY, infant

ENNIS ARMSTRONG, Administrator of

SHARI LANE ARMSTRONG, deceased

CURTIS LOWRY, Administrator of

STEVEN LOWRY, deceased

RUTH DALTON

CHARLES CAULEY

JACKIE L. NELSON, infant

This day came the defendants, by their attorneys, and it appearing to the Court that the Maryland Casualty Company has paid Fifty Thousand (\$50,000.00) Dollars to the Clerk of the Circuit Court of Bath County for distribution as the Circuit Court of Bath County may direct; and it further appearing to the Court that the defendants have agreed to accept the following sum of money for their share in the said Fifty Thousand (\$50,000.00) Dollars:

STEVEN LEE BRINKLEY, infant	<u>\$5,532.36</u>
DARRELL CHESTNUT, infant	<u>\$5,532.36</u>
CREIGH DEEDS, infant	<u>\$5,532.36</u>
PENNY BUSSARD, infant	<u>\$5,532.36</u>

GARY SMITH, infant	<u>\$5,532.36</u>
JEFFREY LOWRY, infant	<u>\$5,532.36</u>
ENNIS ARMSTRONG, Administrator of Shari Lane Armstrong, deceased	<u>\$5,532.36</u>
CURTIS LOWRY, Administrator of Steven Lowry, deceased	<u>\$5,532.36</u>
RUTH DALTON	<u>\$5,532.36</u>
CHARLES CAULEY	<u>0.00</u>
JACKIE L. NELSON, infant	<u>\$ 100.00</u>
ERWIN S. SOLOMON (court costs)	<u>\$ 62.50</u>
DUNCAN M. BYRD, JR. (court costs)	<u>\$ 46.25</u>

THEREFORE, it is Adjudged, Ordered and Decreed that the Clerk of the Circuit Court of Bath County pay the above sums of money wherein the infant defendants are involved to the General Receiver of the Circuit Court of Bath County, The Mountain National Bank, Clifton Forge, Virginia, with the exception of the One Hundred (\$100.00) Dollars that is to be paid directly to Jackie L. Nelson; the above mentioned sums that are due the adults shall be paid directly by the Clerk of the Circuit Court of Bath County, except the amount due Ruth Dalton, the Clerk shall hold until the further order of this Court, And this cause is continued.

ENTER: October 6, 1971

/s/ Earl L. Abbott
Judge

VIRGINIA,

IN THE CIRCUIT COURT OF BATH COUNTY

Maryland Casualty Company)
V.) ORDER
Richard A. Martin, an infant, et als) CASE NO. 267

This day came Maryland Casualty Company, by its attorney, and Ruth Dalton, by her attorney, and represented to the Court that the payments to date made by Maryland Casualty Company to or on behalf of Ruth Dalton, as Workmen's Compensation benefits due her from the Bath County School Board, amount to medical expenses in the sum of One Thousand Six Hundred Seventy-seven Dollars and Eighty Cents (\$1,677.80) and Workmen's Compensation benefits in the amount of Seven Hundred Sixty-one Dollars and Seventy-one Cents (\$761.71), or a total Two Thousand Four Hundred Thirty-nine Dollars and Fifty-one Cents (\$2,439.51) and that further payments of Workmen's Compensation benefits to the said Ruth Dalton will be terminated by virtue of her participation in the settlement arising out of this proceeding, it is ORDERED that the Clerk of this Court do pay from the funds in his hands the sum of Two Thousand Four Hundred Thirty-nine Dollars and Fifty-one Cents (\$2,439.51) to Maryland Casualty Company or its attorney,

Wayt B. Timberlake, Jr., and that the balance of the share of Ruth Dalton, amounting to Three Thousand Ninety-two Dollars and Eighty-five Cents (\$3,092.85), be paid to her.

And it appearing that, after the payments herein directed to be made, the funds coming into the hands of the Clerk of this Court by virtue of the Fifty Thousand Dollar (\$50,000.00) payment made by Maryland Casualty Company will have been fully disbursed and distributed, this proceeding shall stand dismissed and be stricken from the docket.

ENTER: February 7, 1972

/s/ Earl L. Abbott
Judge

Please enter:

/s/ Erwin S. Solomon
Attorney for Ruth Dalton

/s/ Wayt B. Timberlake, Jr.
Attorney for Maryland Casualty
Company

Law Order Book 13

Page 332

Maryland Casualty Company v. Richard A. Martin, infant,
et al (Case No. 267).

Executed this 27th day of March, 1973 by the
parties hereto through their respective counsel.

WALTER ENNIS ARMSTRONG, Adm'r.
of the Estate of Shari Lane
Armstrong

BY: DUNCAN M. BYRD, JR.
Duncan M. Byrd, Jr.,
Counsel

NATIONWIDE MUTUAL INSURANCE
COMPANY

BY: ROBERT J. ROGERS
Robert J. Rogers, Counsel

VIRGINIA,

IN THE CIRCUIT COURT OF BATH COUNTY

Maryland Casualty Company)

VS.)

Richard A. Martin, infant)
Steven Lee Brinkley, infant)
Darrell Chestnut, infant)
Creigh Deeds, infant)
Penny Bussard, infant)
Gary Smith, infant)
Jeffrey Lowry, infant)
Ennis Armstrong, Administrator)
of the Estate of Shari)
Lane Armstrong, deceased)
Curtis Lowry, Administrator of)
the Estate of Steven Lowry,)
deceased)
Ruth Dalton)
Charles Cauley)
Jackie L. Nelson, infant)

PETITION

TO: THE HONORABLE EARL L. ABBOTT, JUDGE OF SAID COURT:

Your petitioner, Maryland Casualty Company,
respectfully represents:

(1) That is engaged in the insurance business
and, in connection therewith, prior to the 16th day of
October, 1970, issued a certain automobile liability in-
surance policy to one Charles A. Martin on his 1955 Chev-
rolet pickup truck, with limits of \$25,000.00 for any one
claim for personal injuries and \$50,000.00 for all claims

arising out of any one accident;

(2) That on the 16th day of October, 1970, while said policy was outstanding, Richard A. Martin, the infant son of Charles A. Martin, while operating said pickup truck with the permission of said insured, on the premises of Valley High School in Bath County, Virginia, permitted said pickup truck, while unoccupied, to roll down a hill or decline and strike a group of persons on said premises;

(3) That as a result of said happening Shari Lane Armstrong and Steven Lowry were fatally injured, Ennis Armstrong having since qualified as administrator of the estate of Shari Lane Armstrong and Curtis Lowry having qualified as administrator of the estate of Steven Lowry; further, Steven Lee Brinkley, age 8, son of Wayne Brinkley and Dawn Brinkley, Darrell Chestnut, age 10, son of Rodney Chestnut and Reba M. Chestnut, Creigh Deeds, age 12, son of Hugh Hicklin and Emma T. Hicklin, Penny Bussard, age 10, daughter of Roy Bussard and Myrtle Bussard, Gary Smith, age 15, son of Godfrey Smith and Ruth M. Smith, Jeffrey Lowry, age 9, son of Curtis Lowry and Dorothy Lowry, Ruth Dalton and Charles Cauley suffered personal injuries and were required to undergo medical and hospital care and treatment for same;

(4) That Shari Lane Armstrong died unmarried and without issue, leaving her father, Ennis Armstrong, and her mother, Crystal Hooker Armstrong, and no brothers or sisters; and Steven Lowry died unmarried and without leaving issue, leaving his father, Curtis Lowry, his mother, Dorothy Lowry, and one brother, Jeffrey Lowry, age 9;

(5) That petitioner desires to pay the said sum of Fifty Thousand Dollars (\$50,000.00) into Court for future distribution among said injured parties under the direction of this Court, said payment to be in full settlement of all duties and obligations under the afore-said policy of insurance, it being policy number 3-0567337, arising out of said accident, including the duty to defend any pending actions against said Richard A. Martin or any actions hereafter instituted against him for injuries, death or damages arising out of this accident; and

(6) That the said Ruth Dalton suffered her said injuries in the course of her employment by the Bath County School Board and has been or will be paid a total of \$4,052.01 by your petitioner as Workmen's Compensation insurer of the Bath County School Board, as to which petitioner is entitled to a refund out of Ruth Dalton's distributive share of said \$50,000.00 fund, under and by virtue of its statutory right of subrogation.

Wherefore, petitioner prays that said Richard A. Martin, Steven Lee Brinkley, Dawn Brinkley, Wayne Brinkley, Darrell Chestnut, Rodney Chestnut, Reba M. Chestnut, Creigh Deeds, Hugh Hicklin, Emma T. Hicklin, Penny Bussard, Roy Bussard, Myrtle Bussard, Gary Smith, Godfrey Smith, Ruth M. Smith, Jeffrey Lowry, Curtis Lowry, in his own right and as Administrator of the Estate of Steven Lowry, deceased, Dorothy Lowry, Ennis Armstrong in his own right and as administrator of the Estate of Shari Lane Armstrong, deceased, Crystal Hooker Armstrong, Ruth Dalton and Charles Cauley be made parties defendant to this petition; that the adult defendants be required to answer same but not under oath, oath being waived; that a competent and discreet attorney at law or attorneys at law be appointed guardian ad litem for the infant defendants and be required to answer this petition under oath on their behalf; that the Court hear evidence in regard to the said accident and resulting injuries of the various victims hereinbefore named; that the proposed payment into Court of \$50,000.00 to be made by petitioner as hereinabove set out in full settlement of all duties, liabilities and obligations of petitioner under its aforesaid policy of automobile liability insurance issued to Charles A. Martin, arising out of said accident of October 16, 1970 be rati-

fied, approved, confirmed and made binding upon all parties to this proceeding; and that the subrogation rights of your petitioner as to the Ruth Dalton share of said fund be protected and refund to petitioner be ordered as to same.

Respectfully submitted,

MARYLAND CASUALTY COMPANY

BY COUNSEL

Timberlake, Smith, Thomas & Moses

by: /s/ Wayt B. Timberlake, Jr.
First Virginia Bank Building
Staunton, Virginia

Counsel

VIRGINIA,

IN THE CIRCUIT COURT OF BATH COUNTY

Maryland Casualty Company)

VS.)

Richard A. Martin, infant)

Steven Lee Brinkley, infant)

Darrell Chestnut, infant)

Creigh Deeds, infant)

Penny Bussard, infant)

Gary Smith, infant)

Jeffrey Lowry, infant)

Ennis Armstrong, Administrator of)

Shari Lane Armstrong, deceased)

Curtis Lowry, Administrator of)

Steven Lowry, deceased)

Ruth Dalton)

Charles Cauley)

Jackie L. Nelson, infant)

A N S W E R

The answer of Ennis Armstrong, Administrator of Shari Lane Armstrong, deceased; Curtis Lowry, in his own right and as Administrator of Steven Lowry, deceased, and Dorothy Lowry; Wayne Brinkley, Dawn Brinkley; Rodney Chestnut and Reba M. Chestnut; Hugh Hicklin and Emma T. Hicklin; Roy Bussard and Myrtle Bussard; Godfrey Smith and Ruth M. Smith; Curtis Lowry and Dorothy Lowry; Ruth Dalton; and Charles Cauley to a petition filed against them and others in the Circuit Court of Bath County, Virginia, by Maryland Casualty Company:

For answer to said petition, the undersigned answer and say that they admit the allegations contained therein and concur in the prayer of said petition.

Respectfully submitted,

/s/ Ennis Armstrong
Ennis Armstrong, Admr. of
Shari Lane Armstrong, deceased

/s/ Rodney Chestnut
Rodney Chestnut

/s/ Curtis Lowry
Curtis Lowry, in his own
right and as Admr. of
Steven Lowry, deceased

/s/ Reba M. Chestnut
Reba M. Chestnut

/s/ Wayne Brinkley
Wayne Brinkley

/s/ Hugh Hicklin
Hugh Hicklin

/s/ Dawn Brinkley
Dawn Brinkley

/s/ Emma T. Hicklin
Emma T. Hicklin

/s/ Myrtle Bussard
Myrtle Bussard

/s/ Roy Bussard
Roy Bussard

/s/ Godfrey Smith
Godfrey Smith

/s/ Dorothy Lowry
Dorothy Lowry

/s/ Ruth M. Smith
Ruth M. Smith

/s/ Ruth Dalton
Ruth Dalton

/s/ Ralph L. Nelson, Jr.
Ralph L. Nelson, Jr.

/s/ Charles Cauley
Charles Cauley

/s/ Ella L. Nelson
Ella L. Nelson

Filed: October 1, 1971

Earl L. Abbott, Judge

VIRGINIA,

IN THE CIRCUIT COURT OF BATH COUNTY

Maryland Casualty Company)

VS.)

Richard A. Martin, infant)

Steven Lee Brinkley, infant)

Darrell Chestnut, infant)

Creigh Deeds, infant)

Penny Bussard, infant)

Gary Smith, infant)

Jeffrey Lowry, infant)

Ennis Armstrong, Administrator)

of Shari Lane Armstrong, deceased)

Curtis Lowry, Administrator of)

Steven Lowry, deceased)

Ruth Dalton)

Charles Cauley)

Jackie L. Nelson, infant)

A N S W E R

The answer of Richard A. Martin, Steven Lee Brinkley, Darrell Chestnut, Creigh Deeds, Penny Bussard, Gary Smith, Jeffrey Lowry and Jackie L. Nelson, infants under twenty-one years of age, by Duncan M. Byrd, Jr., guardian ad litem appointed to defend them in this proceeding and the answer of said guardian ad litem to a petition filed against said infants and others in the Circuit Court of Bath County, Virginia, by Maryland Casualty Company.

For answer to said petition, these defendants, by their said guardian ad litem, answer and say that they

are of tender years and do not know their rights in the subject matter of this proceeding; they pray the protection of the Court; and they ask that no order be entered to their prejudice.

Respectfully submitted,

Richard A. Martin

Creigh Deeds

by /s/ Duncan M. Byrd, Jr. by /s/ Duncan M. Byrd, Jr.
Guardian Ad Litem Guardian Ad Litem

Steven Lee Brinkley

Penny Bussard

by /s/ Duncan M. Byrd, Jr. by /s/ Duncan M. Byrd, Jr.
Guardian Ad Litem Guardian Ad Litem

Darrell Chestnut

Gary Smith

by /s/ Duncan M. Byrd, Jr. by /s/ Duncan M. Byrd, Jr.
Guardian Ad Litem Guardian Ad Litem

Jeffrey Lowry

Jackie L. Nelson

by /s/ Duncan M. Byrd, Jr. by /s/ Duncan M. Byrd, Jr.
Guardian Ad Litem Guardian Ad Litem

/s/ Duncan M. Byrd, Jr.
GUARDIAN AD LITEM

Subscribed and sworn to before me this 1st day
of October, 1971.

/s/ Earl L. Abbott
JUDGE

OFFICE OF THE CLERK OF THE CIRCUIT COURT
BATH COUNTY

ACCOUNT
NUMBER

AMOUNT

OFFICIAL RECEIPT

WARM SPRINGS, VIRGINIA, October 1, 1971
Received of Maryland Casualty Co.
Fifty thousand & no/100 Dollars
For the account of.....

WRIT TAX AND DEPOSIT IN THE FOLLOWING CHANCERY CAUSE OR ACTION AT LAW

Plaintiff Maryland Casualty Co.

Defendant Richard A Martin, infant et al.

T
A
X

103 Chy

104 Law

D
E
P.

0 Chy.

7 Law

F
E
E

303 Chy.

304 Law

O
T
H
E
R

Total

50,000 00

No 169

Docket
No.

267 L

W. CLAUDE DODSON
Clerk

Patricia Block
Deputy Clerk

VIRGINIA,

IN THE CIRCUIT COURT OF BATH COUNTY

Maryland Casualty Company)

VS:)

Richard A. Martin, infant)

Steven Lee Brinkley, infant)

Darrell Chestnut, infant)

Creigh Deeds, infant)

Penny Bussard, infant)

Gary Smith, infant)

Jeffrey Lowry, infant)

Ennis Armstrong, Administrator of)

Shari Lane Armstrong, deceased)

Curtis Lowry, Administrator of)

Steven Lowry, deceased)

Ruth Dalton)

Charles Cauley)

Jackie L. Nelson, infant)

O R D E R

CASE NO. 267

This day came Maryland Casualty Company, by its attorney, and by leave of court filed its petition herein; then came Ennis Armstrong, Administrator of Shari Lane Armstrong, deceased; Curtis Lowry, in his own right and as administrator of Steven Lowry, deceased; Dorothy Lowry; Ralph L. Nelson, Jr., Ella L. Nelson; Wayne Brinkley, Dawn Brinkley; Rodney Chestnut, Reba M. Chestnut; Hugh Hicklin, Emma T. Hicklin; Roy Bussard, Myrtle Bussard; Godfrey Smith, Ruth M. Smith; Ruth Dalton and Charles Cauley and filed their answer to said petition; whereupon the Court doth appoint Duncan M. Byrd, Jr., a Com-

petent and discreet attorney at law, as guardian ad litem for the infant defendants to said petition, Richard A. Martin, Steven Lee Brinkley, Darrell Chestnut, Creigh Deeds, Penny Bussard, Gary Smith, Jackie L. Nelson and Jeffrey Lowry and said guardian ad litem did thereupon file his sworn answer, on his behalf and on behalf of said infant defendants, to said petition.

Then again came said parties and said guardian ad litem and the Court heard evidence in open court in reference to the matters set out in said petition; and it appearing to the Court that the proposed payment by Maryland Casualty Company into court of the \$50,000.00 coverage of its policy number 3-0567337, issued to Charles A. Martin, in full settlement and satisfaction of all claims against said Maryland Casualty Company for injuries, damages and expenses arising out of accident of October 16, 1970 at Bath County High School, and of all duties and obligations under said policy of insurance to defend any action against Richard A. Martin as a result of said accident, now pending or hereafter instituted; and it further appearing to the Court that the other parties to this proceeding have agreed that they will not enforce payment of any judgment that may be rendered against Richard A. Martin for injuries and damages from said accident, beyond any available liability insurance coverage

by said Maryland Casualty Company or any other insurance company; it is accordingly ORDERED that the said proposed payment by Maryland Casualty Company of said sum of \$50,000.00 be authorized and approved and that upon payment of said sum to the Clerk of this Court by Maryland Casualty Company, for distribution as the Court may hereafter direct, the said Maryland Casualty Company shall be and it hereby is released and discharged of any and all other duties, obligations and liabilities under its policy number 3-0567337, issued to Charles A. Martin, and that Richard A. Martin be thereby released of any liability for claims for injuries, damages and expenses by any other party to this proceeding in excess of any other liability insurance coverage that may be available to said Richard A. Martin.

It is further ORDERED that any portion of said sum of \$50,000.00 directed herein to be paid to the Clerk of this Court which may be, by future order of this Court, apportioned to or for the benefit of Ruth Dalton, shall be subject to the subrogation claim in the amount of \$4,052.01 of Maryland Casualty Company as Workmen's Compensation insurer of the Bath County School Board and shall be repaid to said Maryland Casualty Company from said share of said Ruth Dalton of said fund.

And this proceeding shall stand continued pending

further order of this Court.

ENTER: October 1, 1971

/s/ Earl L. Abbott
Judge

Law Order Book 13

Page 294

VIRGINIA,

IN THE CIRCUIT COURT OF BATH COUNTY

MARYLAND CASUALTY COMPANY

COMPLAINANT

VS:

STEVEN LEE BRINKLEY, infant
DARRELL CHESTNUT, infant
CREIGH DEEDS, infant
PENNY BUSSAR, infant
GARY SMITH, infant
JEFFREY LOWRY, infant
ENNIS ARMSTRONG, Administrator of
SHARI LANE ARMSTRONG, deceased
CURTIS LOWRY, Administrator of
STEVEN LOWRY, deceased
RUTH DALTON
CHARLES CAULEY
JACKIE L. NELSON, infant

DEFENDANTS

ORDER CASE NO. 267

This day came the defendants, by their attorneys,
and it appearing to the Court that the Maryland Casualty
Comapny has paid Fifty Thousand (\$50,000.00) Dollars to
the Clerk of the Circuit Court of Bath County for distri-
bution as the Circuit Court of Bath County may direct;
and it further appearing to the Court that the defendants
have agreed to accept the following sums of money for
their share in the said Fifty Thousand (\$50,000.00) Dollars:

Steven Lee Brinkley, infant \$5,532.36

Darrell Chestnut, infant \$5,532.36
Creigh Deeds, infant \$5,532.36
Penny Bussard, infant \$5,532.36
Gary Smith, infant \$5,532.36
Jeffrey Lowry, infant \$5,532.36
Ennis Armstrong, Administrator
of Shari Lane Armstrong, Dec'd \$5,532.36
Curtis Lowry, Administrator of
Steven Lowry, Dec'd. \$5,532.36
Ruth Dalton \$5,532.36
Charles Cauley 0.00
Jackie L. Nelson, infant \$100.00
Erwin S. Solomon \$62.50 Court Costs
Duncan M. Byrd, Jr. \$46.25 Court Costs

THEREFORE, it is Adjudged, Ordered and Decreed that the Clerk of the Circuit Court of Bath County pay the above sums of money wherein the infant defendants are involved to the General Receiver of the Circuit Court of Bath County, The Mountain National Bank, Clifton Forge, Virginia, with the exception of the One Hundred (\$100.00) Dollars that is to be paid directly to Jackie L. Nelson; the above mentioned sums that are due the adults shall be paid directly by the Clerk of the Circuit Court of Bath County, except the amount due Ruth Dalton, the Clerk shall hold until the further order of this Court and this

cause is continued.

ENTER: October 6, 1971

/s/ Earl L. Abbott
Judge

Law Order Book 13

Page 297

VIRGINIA,

IN THE CIRCUIT COURT OF BATH COUNTY

MARYLAND CASUALTY COMPANY)

V.)

RICHARD A. MARTIN, an infant, et als)

O R D E R

CASE NO. 267

This day came Maryland Casualty Company, by its attorney, and Ruth Dalton, by her attorney, and represented to the Court that the payments to date made by Maryland Casualty Company to or on behalf of Ruth Dalton, as Workmen's Compensation benefits due her from the Bath County School Board, amount to medical expenses in the sum of One Thousand Six Hundred Seventy-seven Dollars and Eighty Cents (\$1,677.80) and Workmen's Compensation benefits in the amount of Seven Hundred Sixty-one Dollars and Seventy-one Cents (\$761.71), or a total of Two Thousand Four Hundred Thirty-nine Dollars and Fifty-one Cents (\$2,439.51) and that further payments of Workmen's Compensation benefits to the said Ruth Dalton will be terminated by virtue of her participation in the settlement arising out of this proceeding, it is ORDERED that the Clerk of this Court do pay from the funds in his hands the sum of Two Thousand Four Hundred Thirty-nine Dollars and Fifty-one Cents

(\$2,439.51) to Maryland Casualty Company or its attorney, Wayt B. Timberlake, Jr., and that the balance of the share of Ruth Dalton, amounting to Three Thousand Ninety-two Dollars and Eight-five Cents (\$3,092.85), be paid to her.

And it appearing that, after the payments herein directed to be made, the funds coming into the hands of the Clerk of this Court by virtue of the Fifty Thousand Dollar (\$50,000.00) payment made by Maryland Casualty Company will have been fully disbursed and distributed, this proceeding shall stand dismissed and be stricken from the docket.

ENTER: February 7, 1972

/s/ Earl L. Abbott
Judge

Please enter:

/s/ Erwin S. Solomon
Attorney for Ruth Dalton

/s/ Wayt B. Timberlake, Jr.
Attorney for Maryland
Casualty Company

Law Order Book 13

Page 332

VIRGINIA:

IN THE CIRCUIT COURT OF BATH COUNTY

WALTER ENNIS ARMSTRONG,)
Administrator of the Estate of)
Shari Lane Armstrong,)

Plaintiff)

v.)

NATIONWIDE INSURANCE)
COMPANY,)

Defendant)

MEMORANDUM OF DEFENDANT

VIRGINIA:

IN THE CIRCUIT COURT OF BATH COUNTY

WALTER ENNIS ARMSTRONG,)	
Administrator of the Estate of)	
Shari Lane Armstrong,)	
	)	Chancery Case No. 93
Plaintiff)	
	)	MEMORANDUM OF DEFENDANT
v.)	
)	
NATIONWIDE INSURANCE)	
COMPANY,)	
)	
Defendant)	

Comes now defendant, Nationwide Insurance Company, by counsel, and files herewith its memorandum in support of its amended answer.

MATERIAL PROCEEDINGS

A. Instant Proceedings.

This is an equity proceeding commenced in April, 1972, in which plaintiff seeks declaratory judgment that defendant, by virtue of a certain insurance policy issued to one Richard A. Martin, is liable for a judgment obtained by plaintiff against Martin in the sum of \$25,500. For reasons elaborated hereafter, defendant has denied any liability.

B. Previous Proceedings.

Previous proceedings in this court followed an accident on October 16, 1970 at a local high school football game in Bath County. At

that time, a 1955 Chevrolet pick-up truck owned by Charles A. Martin, which had been parked by his 18 year old son Richard A. Martin, rolled down a hill and struck plaintiff's decedent, a spectator, causing injuries from which she died. The run-away truck also struck a number of other spectators, causing injury and/or death to them.

Two weeks after the accident, on October 30, 1970, plaintiff filed a wrongful death action against Richard A. Martin, Law No. 245. Service of process was effected by delivery of the suit papers to the defendant's father on November 4, 1970. No answer or appearance was made by Richard A. Martin. On November 30, 1970, Richard A. Martin joined the United States Navy and has been in the military service ever since.

The death action brought by plaintiff remained dormant until November 1, 1971. On that date, an order was entered appointing a guardian ad litem for Martin, and the guardian ad litem filed his answer. At the same time, judgment was rendered against Martin in the sum of \$25,500, with interest from November 1, 1970, by an order reciting the elapse of 21 days after service of process without appearance or answer by defendant.

Both Martin and his father knew of the death action filed by plaintiff. However, neither was aware of any developments in that action, including the judgment of November 1, 1971, until depositions taken in the instant cause on December 28, 1972. (Depositions 11, 31)

On October 1, 1971, during the pendency of the wrongful death action and prior to the judgment order against Martin, proceedings were filed in this court by Maryland Casualty Company, which provided liability insurance coverage on the pick-up truck involved in the accident. Both the plaintiff and Martin were named as defendants in that proceeding, case No. 267, along with other parties injured or killed in the accident.

An order entered October 1, 1971 in that proceeding recites payment into court by Maryland Casualty of its \$50,000 coverage. The order further recites that the payment is made in full settlement of all claims against Maryland Casualty because of the accident, and in full settlement "of all duties and obligations under said policy of insurance to defend any action against Richard A. Martin as a result of said accident, now pending or hereafter instituted...." The order further recites that the parties to the proceeding have agreed that they will not enforce payment of any judgment that might be rendered against Martin because of the said accident "beyond any available liability insurance coverage by the said Maryland Casualty or any other insurance company...." Finally, the order decrees:

"...that Richard A. Martin be thereby released of any liability for claims for injuries, damages and expenses by any party to this proceeding in excess of any other liability insurance coverage that may be available to the said Richard A. Martin."

An order entered in the proceedings on October 6, 1971, distributed the proceeds of the Maryland Casualty policy among the various claimants, including plaintiff. The judgment thereafter entered against Martin on November 1, 1971, remains unsatisfied of record.

INSURANCE COVERAGE

A. Pick-up Truck.

As indicated above, Maryland Casualty Insurance Company provided \$50,000 liability insurance coverage on the 1955 Chevrolet pick-up truck which was involved in the accident. This truck was titled in the name of Charles A. Martin, father of Richard A. Martin.

B. Volkswagen.

At the time of the accident, Nationwide Mutual Insurance Company provided liability insurance coverage to a 1963 Volkswagen titled in the name of Richard A. Martin. A true copy of the policy which carried coverage of \$15,000/\$30,000, is contained in the court papers.

FACTS

Richard A. Martin was born on August 25, 1952. Until he went in the military service on November 30, 1970, he resided with his parents, Mr. & Mrs. Charles A. Martin, in Mountain Grove, Bath County, Virginia.

In the summer of 1969 Martin was compelled to go to high school in the summer, and his father purchased a 1951 Chevrolet to provide the

necessary transportation. A contract of liability insurance for this vehicle was provided by defendant, Nationwide Mutual Insurance Company.

Martin graduated from high school in June, 1970, and obtained employment with the Hot Springs Company. On June 29, 1970, the 1951 Chevrolet was traded in on a 1963 Volkswagen, and an endorsement was added to the insurance policy to show the change of vehicles. As a result of the change, a compact car discount was allowed and resulted in a lower premium.

The Volkswagen vehicle was titled in Martin's name, although the note which financed the vehicle was signed by his parents. Because he had employment, he made the payments on the vehicle, and also provided for the gas and maintenance.

Martin had the Volkswagen vehicle for only a week. At this time, around the first week in July, 1970, a valve popped off, went through the piston and tore the motor up. (Depositions 29). The VW vehicle was then towed to a service station in Covington, Virginia, with the hope that it might be repaired there. As Martin put it,

"I took it to a boy in Covington, Robert Moore, to see if he could fix it."

Moore was not a licensed mechanic, nor was the service station a regular repair garage. (Deposition 23, 24).

The Volkswagen vehicle was never repaired. It stayed at Robert Moore's place for about six months, and it was subsequently towed back to

the Martin farm. It was never restored to use following the engine blow-up during the first week of July, 1970.

At the time Martin towed the VW vehicle to Moore's, he had no idea when, if ever, the vehicle would be returned to him. (Deposition 24). He thought that his loss of the vehicle would be a temporary arrangement, which would not extend to six months, but while he hoped to get the vehicle back soon, he realized that it might take longer than six months. (Depositions 26). In essence, at the time the VW vehicle was delivered to Moore, Martin did not know how long the repair work would take. He responded to the questioning of plaintiff's counsel in this manner:

"Q. At the time you took the car down to Mr. Moore, what type of, well, did he give you any type of estimate as to how long it would take him to have the car repaired?

A. No; he just said he would do it when he could, when he got time." (Depositions 20)

The same sentiment was echoed by Martin's father in responding to questions by plaintiff's counsel:

"Q. Now, after Richard, when he put his car in the garage [sic], at this time did you understand that this would be a temporary arrangement that he was going to be out of the use of the car?

A. Well, we didn't know how long it would take to fix it. It is hard to get parts for a Volkswagen.

Q. Did you have any idea how long it would take?

A. No, sir.

Q. Did you think it would take as long as six months?

A. Yes, sir.

Q. You thought at that time it would be that much?

A. Yes, sir." (Depositions 33)

There is no question that following the demise of the Volkswagen vehicle, the father's pick-up truck subsequently involved in the accident was furnished for Richard's regular use. Martin said that during the time between the VW breakdown and the accident, the truck was furnished for his use on a regular basis. (Depositions 9, 22 and 23). This arrangement was confirmed by the father's testimony. (Depositions 30).

ARGUMENT

A. Nationwide's coverage.

Nationwide submits that its policy issued to Martin did not extend to the accident for a number of reasons.

The law is clear that in the absence of a provision extending coverage of an automobile liability policy to automobiles other than that described in the policy, the insurer does not cover the insured's liability resulting from the use of such other automobiles. Commercial Insurance Company of Newark v. Gardner, 233 F. Supp. 884 (E. P. S. C. 1964). It follows from the foregoing that the insurer has the right to impose conditions and limitations in the extension of such coverage.

In the policy under consideration, Nationwide limited coverage extended to automobiles not described in the policy. Paragraph V (d) (1)

expressly provides that the insuring agreement does not apply to any automobile furnished for the named insured's regular use. As observed in the recital of facts, there is no question but that the pick-up truck involved in the accident was furnished for Martin's regular use. Hence the coverage of his policy with Nationwide was expressly excluded as to the truck.

The reasoning is well described in Quesenberry v. Nichols and Erie, 208 Va. 667, 159 S.E. 2d 636 (1968). The court used this language in describing the policy under consideration:

"The policy involved here is basically not unlike a standard automobile liability policy. The general purpose and effect of such a policy is to protect the insured against liability arising from the use of his automobile, and in addition, from the infrequent or casual use of automobiles other than the one described in the policy. Usually excluded is protection against liability with respect to the insured's frequent use of another automobile." (208 Va. 672)

Plaintiff seeks to avoid the express exclusion by contending that the pick-up truck was a temporary substitute automobile to replace Martin's Volkswagen vehicle. However, the section (paragraph IV (a)), providing for substitute vehicle is restricted by its own language, "except where stated to the contrary." Thus, the definition of temporary substitute automobile is restricted by the contrary provision in paragraph V (d) (1), the express exclusion of a regularly furnished automobile. If Martin on the night of the

accident had been using as substitute transportation a vehicle not furnished for his regular use, plaintiff's position would be stronger. However, the clear language excluding the policy's application to a vehicle furnished for the insured's regular use restricts the extension of coverage to a temporary substitute automobile, as evidenced by the words in IV (a), "except where stated to the contrary."

Moreover, a substitute automobile cannot be covered where a time more than reasonable elapses before the disabled vehicle is returned to normal use. Otherwise, the intention of the policy provision would be defeated entirely.

In the instant case, Martin hoped that the vehicle would be repaired soon, but acknowledged his realization that it might take more than six months. Indeed, the car was never returned to normal use. Having reduced the amount of the premium to the insurance company through acquisition of a smaller car, it would be grossly inequitable to permit the insured to maintain full coverage on a different, larger vehicle furnished for his regular use.

B. Effect of the Judgment.

Even if it be assumed that Nationwide's coverage on the Volkswagen vehicle did extend to the truck furnished for Martin's regular use, Nationwide clearly has no responsibility to plaintiff in this matter.

In the Maryland Casualty proceedings in October, 1971, which occurred prior to the so-called judgment of November 1, 1971, plaintiff released Martin of all liability because of the accident in question. Plaintiff will concede, as indicated in the order, that he intended to and did in fact discharge Martin personally from any further liability. Although not intended, this action also released Nationwide, as Martin's liability insurance carrier, from any further responsibility. It was impossible to release Martin without also releasing Nationwide, and the attempt to limit the release to Martin personally was totally ineffective.

The principal is stated in Couch on Insurance, 2d, §4528:

"As a general rule, an insurer is not liable when... the insured is not liable.... This is based upon the rationale that the liability of the insurer cannot be any greater than that of the insured. A fortiori, where the action is dismissed as to the insured, no liability attaches against the insurer."

By way of example, where a claimant is not entitled to recover from an insured because of the latter's governmental immunity, he cannot maintain an action against the insurer. An instance more pertinent to the case at bar occurred in Young v. State Farm Mutual Automobile Insurance Company, 267 N.C. 339, 148 S.E. 2d 226 (1966). There, A and B collided in an automobile accident and sustained injuries. A sued B, and B counter-claimed. B's insurance carrier subsequently paid A, and an order was

entered dismissing the case with the recital that all matters in controversy had been settled by the parties. Subsequently, the judgment order was amended to recite that the dismissal was without prejudice to B's counter-claim, and B thereafter obtained judgment against A on the counter-claim. Suit to collect the judgment was then brought by B against A's insurance carrier.

Holding that B could not maintain the action against the carrier, the court stated as follows:

"Having compromised and settled their adverse claims against each other upon the basis of Young's insurer having paid off Moore's claim, this conduct absolved Moore's insurer from liability. Thereafter, by changing the judgment, the parties did not restore this defendant's liability which had been terminated by the settlement. The defendant's liability having terminated, the parties could not restore it, enabling Young to collect from Moore's insurer. The law does not look with favor on liability created by manipulation. (148 S.E. 2d 229, emphasis supplied)

Nationwide's liability, if any, was strictly derivative. Its obligation is set forth in Coverage G of the insuring agreement:

"To pay on behalf of the Insured all sums which the insured should become legally obligated to pay [etc.]. . . ."

Plaintiff's release of Martin from legal obligation to him extinguished any responsibility Nationwide might otherwise had had; its liability terminated with that event and nothing occurring thereafter could restore it.

The proceedings which followed the settlement amounted to a sham and illustrated the manipulative process frowned upon in Young v. State Farm, supra. One month after releasing Martin, plaintiff took default judgment against him. Because he was an infant, a guardian ad litem was appointed for him, but the guardian's appointment and answer occurred on the same day of the judgment. No Plea of Release or other defense was asserted on Martin's behalf, although the guardian ad litem was involved in the earlier proceedings in which the release was executed. Neither Martin, who was a member of the military service at the time of the judgment, nor his father, who was then residing in the court's jurisdiction, was ever informed of the release in favor of Martin or the judgment against him, until so advised at the time of their depositions in this proceeding.

The procedure following the release was an obvious effort to create liability on the part of Nationwide as Martin's liability insurer. However, the effort was unsuccessful as Nationwide's responsibility had already been extinguished. The release of Martin terminated Nationwide's liability, which could not thereafter be restored through the sham judgment.

C. Soldiers and Sailors Civil Relief Act.

Nationwide submits that the foregoing discussion makes unnecessary an extensive discussion of the Soldiers and Sailors Civil Relief Act of 1940 (50 U.S.C. App. §520) as related to the judgment of November 1, 1971. That statute provides that if there is default of appearance by a defendant,

plaintiff before entering judgment shall file an affidavit establishing that defendant is not in military service. In the absence of such an affidavit, the statute prohibits entry of judgment if defendant is in military service until an attorney has been appointed to represent his interest. The statute further provides that no such attorney shall have power to waive any rights of the defendant or bind him by his acts.

It is clear that the foregoing provisions were not satisfied in the order of November 1, 1971, which recites defendant's failure of appearance, but makes no reference to his military service.

Paragraph (4) of §520 does not relieve plaintiff of the foregoing obligations. That paragraph is supplemental to these obligations and gives a military defendant the further right to open a judgment where his ability to defend was prejudiced by his military service.

CONCLUSION

Plaintiff here seeks to impose liability upon defendant on the basis of the insurance policy issued to Richard A. Martin.

However, plaintiff has failed to establish the application of the policy to the accident which caused the death of his decedent. And even if the coverage had been applicable, defendant was relieved of responsibility by plaintiff's conduct in releasing Martin of any legal obligation because of the accident.

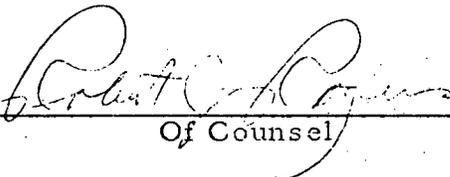
Plaintiff cannot expect support for his effort to re-create liability on the defendant after it had been discharged of obligation. The release of its insured terminated defendant's responsibility finally, and the judgment secured thereafter had no effect as to defendant.

Moreover, a court of equity will not countenance the conduct of a party taking default judgment against a defendant he has previously released. If the party obtains the judgment solely to create liability on the defendant's insurer, the judgment is a sham. In any event, the method and purpose of the judgment do not permit a clean hands conclusion, and plaintiff accordingly has no standing to seek equitable relief. Defendant respectfully submits that under the pleadings and evidence in this cause the same should be dismissed.

Respectfully,

NATIONWIDE MUTUAL INSURANCE COMPANY

By

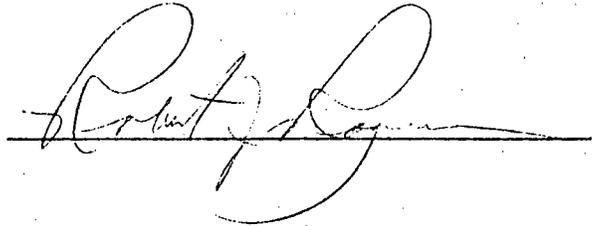

Of Counsel

Woods, Rogers, Muse, Walker & Thornton
105 Franklin Road, S.W.
Roanoke, Virginia 24004

Counsel for Nationwide Mutual Insurance Company

CERTIFICATE

I, Robert J. Rogers, of counsel for defendant, Nationwide Mutual Insurance Company, certify that I mailed true copy of the foregoing Memorandum of Defendant to Duncan M. Byrd, Jr., Box 726, Hot Springs, Virginia, counsel of record for plaintiff, this 13th day of April, 1973.

A handwritten signature in cursive script, appearing to read "Robert J. Rogers", is written over a horizontal line.

FILED IN THE
Circuit Court July 27, 1973
Duncan M. Byrd, Jr.

VIRGINIA:

IN THE CIRCUIT COURT OF BATH COUNTY

WALTER ENNIS ARMSTRONG,
Administrator of the Estate of
Shari Lane Armstrong,

Plaintiff

v.

NATIONWIDE INSURANCE
COMPANY,

Defendant

MEMORANDUM OF PLAINTIFF

VIRGINIA,

IN THE CRICUIT COURT OF BATH COUNTY

WALTER ENNIS ARMSTRONG,
Administrator of the Estate of
Shari Lane Armstrong,
Plaintiff

v.

NATIONWIDE INSURANCE
COMPANY,
Defendant

Chancery Case No. 93

MEMORANDUM OF PLAINTIFF

Comes now plaintiff, Walter Ennis Armstrong, Administrator of the Estate of Shari Lane Armstrong, by counsel, and files herewith its memorandum in support of its motion for declaratory judgement.

MATERIAL PROCEEDINGS

A. Instant Proceedings.

This is an equity proceeding commenced in April, 1972, in which the plaintiff seeks declaratory judgement that the defendant, by virtue of a certain insurance policy issued to one Richard A. Martin, is liable, to the extent of the policy limits for a judgement obtained by the plaintiff against Martin in the sum of \$25,500.00.

B. Previous proceedings.

Previous proceedings in this court followed an accident on October 16, 1970, at a local high school football game in Bath County. At that time, a 1955 Chevrolet pick-up truck owned by Charles A. Martin, which had been parked by his 18 year old son Richard A. Martin, rolled down a hill and struck plaintiff's

decedent, a spectator, causing injuries from which she died. The run-away truck also struck a number of other spectators, causing injury and/or death to them.

Two weeks after the accident, on October 30, 1970, plaintiff filed a wrongful death action against Richard A. Martin, Law No. 245. Service of process was effected by delivery of the suit papers to the defendant's father on November 4, 1970. No answer or appearance was made by Richard A. Martin. On November 30, 1970, Richard A. Martin joined the United States Navy and has been in the military service ever since.

The death action brought by plaintiff remained dormant until November 1, 1971. On that date, an order was entered appointing a guardian ad litem for Martin, and the guardian ad litem filed his answer. At the same time, judgment was rendered against Martin in the sum of \$25,500.00, with interest from November 1, 1970, by an order reciting the elapse of 21 days after service of process without appearance or answer by defendant.

On October 1, 1971, during the pendency of the wrongful death action and prior to the judgment order against Martin, proceedings were filed in this court by Maryland Casualty Company, which provided liability insurance coverage on the pick-up truck involved in the accident. Both the plaintiff and Martin were named as defendants in that proceeding, case No. 267, along with other parties injured or killed in the accident.

An order entered October 1, 1971 in that proceeding recites payment into court by Maryland Casualty of its \$50,000.00 coverage. The order further recites that the payment is made in full settlement of all claims against Maryland Casualty because of the accident, and in full settlement "of all duties and obligations under said policy of insurance to defend any action against Richard A. Martin as a result of said accident, now pending or hereafter instituted...." The order further recites that the parties to the proceeding have agreed that they will not enforce payment of any judgment that might be rendered against Martin because of the said accident "beyond any available liability insurance coverage by the said Maryland Casualty or any other insurance company...." Finally, the order decrees:

"... that Richard A. Martin be thereby released of any liability for claims for injuries, damages and expenses by any party to this proceeding in excess of any other liability insurance coverage that may be available to the said Richard A. Martin."

An order entered in the proceedings on October 6, 1971, distributed the proceeds of the Maryland Casualty policy among the various claimants, including plaintiff. The judgment thereafter entered against Martin on November 1, 1971, remains unsatisfied of record.

INSURANCE COVERAGE

A. Pick-up Truck.

As indicated above, Maryland Casualty Insurance Company provided \$50,000.00 liability insurance coverage on the

1955 Chevrolet pick-up truck which was involved in the accident. This truck was titled in the name of Charles A. Martin, father of Richard A. Martin.

B. Volkswagen.

At the time of the accident, Nationwide Mutual Insurance Company provided liability insurance coverage to a 1963 Volkswagen titled in the name of Richard A. Martin. A true copy of the policy which carried coverage of \$15,000/\$30,000, is contained in the court papers.

FACTS

Richard A. Martin was born on August 25, 1952. Until he went in the military service on November 30, 1970, he resided with his parents, Mr. & Mrs. Charles A. Martin, in Mountain Grove, Bath County, Virginia.

Since shortly after Richard A. Martin reached the age of 16 years and obtained his operators license there were 3 automobiles in the Martin family. One automobile furnished for and used primarily by the mother of Richard A. Martin, one automobile furnished for and used primarily by Charles A. Martin, Richard's father, and an automobile used primarily by Richard. The first such automobile furnished for Richard was a 1951 Chevrolet which was purchased by Richard's father. This automobile was used by Richard primarily up until June of 1970. (See depositions Page 17-18.) Despite the fact that the two automobiles which were regularly used by the mother and father were available to Richard, it was only on very infrequent occasions that

he used either the father's pick-up truck or the mother's car. (See depositions Page 20).

Martin had the Volkswagen for approximately one week when it developed mechanical trouble. The Volkswagen vehicle was then towed to a service station in Covington, Virginia for the purpose of repair. Robert Moore was to do the repair and although not a licensed mechanic he did automobile repair work as a side line. At the time that Richard towed the Volkswagen vehicle to Moores he had no idea that it would take 6 months to fix the car (see depositions Page 21), but thought it would only be a temporary arrangement that he would be without his Volkswagen (see depositions Page 21). In fact at all times from the time of the breakdown up until the night of the accident in question, Richard Martin felt that this was a temporary situation and felt that he would get his Volkswagen back shortly. The fact Richard felt this is further evidenced by the fact that Richard stated that if he had known this was not a temporary situation he would have gone out and purchased himself another automobile (see depositions Page 21).

ARGUMENT

A. Nationwide's Coverage.

In the policy under consideration, Section (paragraph IV) is sub-titled "Automobile Defined", Trailers, Private Passenger Automobiles, Two or More Automobiles, including Automatic Insurance". Sub-paragraph (a), defines an automobile as follows: Except where stated to the contrary the word automobile

means (sub-paragraph (a) (3)) "Temporary substitute automobile- an automobile not owned by the named insured, or his spouse, if a resident of the same household, while temporarily used as a substitute for the described automobile (the described automobile in this case being the 1963 Volkswagen) when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction."

The factual situation as set forth in this case clearly places the pick-up truck in the accident within the provisions and coverage of this Section. The automobile in question had broken down and was withdrawn from normal use because of same and the automobile (pick-up truck) being used was being used temporarily as a substitute for the described automobile (1963 Volkswagen). The defendant argues that the pick-up was not a temporary substitute. But the court should not consider temporary by virtue of a time lapse looking in retrospect but instead should consider whether or not it was temporary based on the factual situation existing when the automobile was withdrawn from normal use. The facts clearly show that this was intended to be a temporary situation.

The defendant argues that coverage under this section is excluded because of the exclusion contained in Section (paragraph V) (d) (1) dealing with the use of other automobiles. Clearly this insurance agreement is separate and apart from the insurance agreement applicable to the insured automobile as set forth in Section (paragraph IV) (a) (3).

The coverage under the temporary automobile Section covers a very special factual situation. But when these facts are applicable, as they are here by definition, then the coverage is applicable under section (Paragraph IV (a) (3)) and is not excluded under Section (paragraph V (d) (1)).

The defendant states that the language/coverage of section (paragraph IV (a)) is restricted by its own language, "except where stated to the contrary". The exclusion set forth in section (paragraph V (d) (1)) is applicable only to coverage of "other automobiles" as set forth in paragraph V but is not applicable or contrary to the limited situation/coverage of a temporary substitute automobile under section (paragraph IV (a) (3)).

These same arguments, here made by the defendant are rejected by the holding in Lewis V. Bradley 97 N. W. 2d, 408, 411, 412 dealing with a policy of insurance similar, if not an exact replica, to the policy in question and a similar factual situation (see transcript of hearing, March 27, 1973, pages 18 and 19 for a brief of facts in this case). There the court held that the truck (here the pick-up truck involved in the accident) was a temporary substitute automobile within the clause of liability (here section (paragraph IV (a) (3)). There the court held that the two insuring agreements section (paragraph IV) and section (paragraph V) refer to entirely different factual situations that the temporary substitute coverage is expressly limited to include only an automobile substituted for one owned by the

insured, or his spouse if a member of the same household. The use of other automobiles as set forth in Section (paragraph V) applies to a situation where the car is not a substitute automobile and such coverage is expressly limited to exclude an automobile owned by or furnished for the regular use to the named insured or any member of the same household. These arguments of the defendant are likewise rejected by the holding in (Lumberman's Mutual Casualty Co. V. Harleystown Mutual Ins. Co., C. A. Virginia 367 F. 2d, 250 at 254, U. S. Court of Appeals Fourth Circuit) a federal case in Virginia (see transcript pages 20 and 21 for factual brief and holding).

EFFECTIVE OF JUDGMENT

The plaintiff argues that assuming that Nationwide's coverage on the Volkswagen vehicle did extend to the truck involved in the accident that Nationwide had no responsibility to the plaintiff in this matter. This argument first states that Martin was released of all liability because of the accident in question. This argument is without merit. The judgment in question was fully contemplated at the time in which the order in the Maryland Casualty proceedings was drafted by Maryland Casualty and was drafted with the courts supervision with this very type of proceeding in mind.

At that time although Nationwide had notice of the proceedings, up until that point they had failed to acknowledge liability or in any way take part in the proceedings. Because

of the fact that there were some immediate expenses pressing the injured parties it was felt in the best interests of the parties that the funds available through the Maryland Casualty policy should be disbursed. Of course Maryland Casualty having some obligation to protect its client, Richard Martin, insisted that further proceedings be limited to exhausting coverage from further liability insurance policies and that if and in the event that all other avenues of possible liability insurance were explored and that there was no further coverage then there could be no personal judgment against Martin. And so therefore Martin was not released but there was a condition precedent. The condition being that there be no other liability insurance coverage available. He (Martin) was released only to the extent of any excess judgment over and above other possible liability insurance coverage. Therefore to the extent that Nationwide could be held responsible under its liability policy issued to Richard Martin, Martin was not released.

The case of Young V. State Farm Mutual Automobile Insurance Company, 267 N. C. 339, 148 S. E. 2d 226 (1966), see page 10 of Defendant's Memorandum, is clearly not applicable to this factual situation. In that case there was an order saying that all matters of controversy had been settled by the parties. Here clearly there was no such release. There were controversies unsettled, specifically the Nationwide liability coverage the application and exhaustion of which was fully contemplated at the time of said release. Again clearly in this case there

was no intent to release Martin to the extent that other liability coverage be exhausted. This being true, the arguments dealing with the release of Martin releasing Nationwide are without merit.

C. The Soldier and Sailor Civil Relief Act.

By virtue of the SOLDIERS AND SAILORS CIVIL RELIEF ACT of 1940 (50 U. S. C. APP. § 520) the defendant argues that the judgment entered against Martin is void and therefore if the judgment is void then the motion for declaratory judgment cannot be maintained. The plaintiff argues that even if it were conceded, which it does not, that the judgment is void that there is a justiciable issue upon which a suit for declaratory judgment can be maintained by virtue of the fact, that all the proceedings as a whole considered, that the conditional release of Martin, conditioned that all other available liability insurance be exhausted and the denial of Nationwide of liability coverage in this case presents a sufficient justiciable issue to give the court jurisdiction to act on the motion for declaratory judgment in this cause.

However aside from this, the plaintiff maintains that by virtue of the aforesaid Article 520 that this judgment is not void but merely voidable. Section 520 sub-heading reads: Default, Judgment, Affidavit, Bonds, Attorneys for persons in service. The first section states in essence that no judgment shall be entered when it shall appear that a defendant is in military service until an attorney is appointed to protect his interest

and a bond is posted by the plaintiff to indemnify the defendant in the event that such judgment is later set aside, in whole or in part. In this case although the record does not mention that the defendant was in service there was a guardian ad litem appointed for the defendant (an attorney) to protect his interests and the order in the Maryland Casualty proceeding provides that to the extent that Martin is not protected by liability insurance that he was released. Therefore the plaintiff argues that although Section (1) has not been strictly complied with that those interests which were intended to be protected by this Section were in fact protected in this case.

Section 520 must be read and considered as a whole. Section (1) by its own language contemplates that there will be in some instances judgments rendered against persons in service even though there are attorneys present. This is the reason for the provision for the indemnifying bond to protect the defendant in the event that the judgment is later set aside. Section (4) provides the manner in which the defendant shall go about setting aside the judgment and it states that if any judgment shall be rendered in any action or proceeding against a person in military service or within 30 days thereafter and it appears that he was prejudiced by reason of his military service in making his defence thereto such judgment may, upon application made by such person or his legal representative not later than 90 days after termination of such service, be opened by the court rendering the

same and such defendant or his legal representative let in to defend provided it is made to appear that the defendant had a meritorious or legal defense to the action or any part thereof.

Reading Section 520 as a whole the judgment in this case is not void but merely voidable and in order for the defendant to come in and have this judgment set aside that he must first show that he was prejudiced in his defense by reason of his military service and that he had a meritorious or legal defense to the action or part thereto. Therefore Section 520 does not operate to render this judgment void.

CONCLUSION

The plaintiff has clearly established the application of the Nationwide policy to the accident which caused the death of his decedent and that the defendant was not relieved of responsibility by virtue of a conditional release of Martin in the Maryland Casualty proceedings. Nor can the defendant deny responsibility by virtue of the fact of his military service.

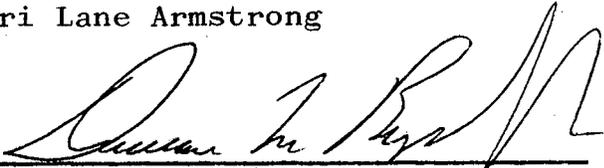
The judgment in the case at hand was not a sham. This action was fully contemplated throughout the proceedings against Martin, And it was not the result of any unclean conduct on the part of the plaintiff. On the contrary it was the defendant's failure to acknowledge its insuring agreement to Martin that made this action necessary. Because Nationwide had denied coverage under the policy and had not participated in the proceedings the plaintiff was without any other adequate procedure whereby it could establish the defendant's liability and is entitled to have

this motion resolved in his favor.

The plaintiff respectfully submits that in the pleadings and evidence of this cause that it at all times acted with clean hands and that this motion should be rendered in favor of the plaintiff establishing liability on the part of the defendant, Nationwide, under the provisions of the liability policy in question.

Respectfully,

WALTER ENNIS ARMSTRONG,
Administrator of the Estate of
Shari Lane Armstrong

By 
Of Counsel

Duncan M. Byrd, Jr.
Box 726
Hot Springs, Virginia 24445
Counsel for Plaintiff

CERTIFICATE

I, Duncan M. Byrd, Jr, of counsel for plaintiff, Walter Ennis Armstrong, Administrator of the Estate of Shari Lane Armstrong, certify that I mailed true copy of the foregoing Memorandum of Plaintiff to Robert J. Rogers, Woods, Rogers, Muse, Walker & Thornton, 105 Franklin Road, S. W., Roanoke, Virginia 24404, counsel of record for defendant, this 4th day of May, 1973.



Filed in the Clerk's Office of Bath County

Circuit Court

July 27, 1973

Duncan M. Byrd, Jr. Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF BATH COUNTY

WALTER ENNIS ARMSTRONG,)
Administrator of the Estate of)
Shari Lane Armstrong,)
)
Plaintiff)
)
)
v.)
)
)
NATIONWIDE INSURANCE)
COMPANY,)
)
Defendant)

REPLY MEMORANDUM OF DEFENDANT

VIRGINIA:

IN THE CIRCUIT COURT OF BATH COUNTY

WALTER ENNIS ARMSTRONG,)	
Administrator of the Estate of)	
Shari Lane Armstrong,)	
	)	REPLY MEMORANDUM
Plaintiff	)	OF DEFENDANT
)	
v.	)	Chancery Case No. 93
)	
NATIONWIDE INSURANCE)	
COMPANY,)	
)	
Defendant)	

Comes now defendant, Nationwide Mutual Insurance Company, by counsel, and as permitted by the Court, files herewith its Reply Memorandum in support of its amended answer.

The memoranda heretofore submitted by the parties present their position fully, and no response is required here except as to that portion of the argument relating to the release and the judgment.

I. Nature of the Release.

Other issues in this proceeding will become moot if recovery is barred by plaintiff's action in accepting the Maryland Casualty money and releasing Nationwide's insured Martin.

While plaintiff's memorandum alludes to a condition in the release, it is clear that no condition or restriction attached to the release of

Martin himself. The memoranda and the record demonstrate that Martin was discharged fully and finally of all liability to plaintiff. As plaintiff correctly notes, Maryland Casualty, as insurer of the truck involved in the accident, had primary responsibility to the driver, Martin, with Nationwide being excess coverage only. Maryland Casualty had a duty to pay any judgment rendered against Martin, and also had the duty of defending the wrongful death action brought against him. For these reasons, Maryland Casualty quite properly insisted on full release of liability as to Martin as well as itself in consideration of its payment to plaintiff. In the words of plaintiff's memorandum, "...there could be no personal judgment against Martin." (p. 9)

The condition claimed by the plaintiff was directed not to Martin, but to "any other liability insurance coverage" that might be available to him. In other words, plaintiff said to Martin, you are relieved of all liability to me, but I want to reserve the right to pursue any other insurance coverage that might be available to you.

Plaintiff's attempt to reserve a right against other insurance coverage while releasing the insured met the same fate of a similar effort in a joint tortfeasor situation in Shortt v. Hudson Supply, etc., Co., 191 Va. 306, 60 S.E. 2d 900 (1950). There, plaintiff, a fireman employed by a railroad, executed a covenant not to sue the railroad in consideration of a sum paid by it. Although relieving the railroad of further responsibility, the plaintiff expressly reserved his right to sue the owner of a truck and

estate of its driver which collided with the train occupied by plaintiff.

In denying plaintiff's action, the Court used the following language at page 313:

"The plaintiff, having effected an accord and satisfaction with one tort-feasor, his claim against the others responsible for his injuries was discharged, notwithstanding his attempted reservation of the right to sue the latter. The satisfaction of the claim by the wrongdoer, and not the form of the instrument executed by the plaintiff, extinguished the claim of the latter."

To the same effect, see Bland v. Warwickshire, 160 Va. 131, 168 S.E. 443 (1933).

The obvious point from these cases is that it is the act of the release and acceptance of consideration which produce the effect, and the same result occurs notwithstanding language intended to reserve additional rights. The language described by plaintiff as a condition precedent had no more effect than the attempted reservation in the joint tort-feasor cases. Plaintiff's acceptance of consideration for the release of Martin totally extinguished his claim against other insurance companies (including Nationwide) notwithstanding the reservation effort. Their responsibility was based upon his liability, and his discharge relieved them of any further obligation.

II. Nature of the Judgment.

Whether the judgment sought to be enforced in this cause is considered a sham, or the result of fraud or collusion, there is no question

but that it was contrived for the purpose of creating liability upon a company or companies not party to the proceeding in which it was entered.

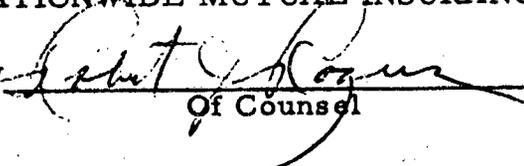
Plaintiff candidly admits that the judgment was part and parcel of the Maryland Casualty proceedings. Plaintiff concedes that the judgment against Martin was fully contemplated at the time the accord and satisfaction of plaintiff's claim against him. The papers (including the judgment order itself) filed in the wrongful death action after the release were obviously designed to lend validity to the proceedings. In truth, these papers were nothing more than empty gestures in a procedure clearly intended to manipulate liability. Such mis-use of the court process is rejected universally:

"Courts are constituted to decide actual questions existing between real parties involved in a real controversy, and the submission of anything but a real controversy is recognized judicially as a fraud upon the court." 46 Am. Jur. 2d, Judgments, §709, p. 863.

The judgment on which this suit is based was a contrivance by plaintiff's own admission. Plaintiff has no standing to ask a court of equity to give its blessing to such a procedure. The Bill of Complaint should accordingly be dismissed.

Respectfully,

NATIONWIDE MUTUAL INSURANCE COMPANY

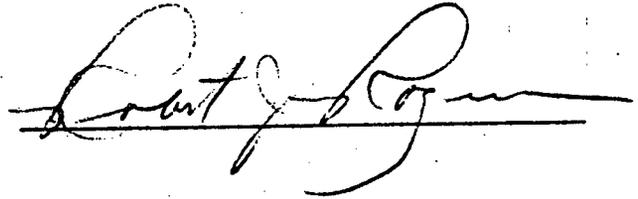
By  _____
Of Counsel

Woods, Rogers, Muse, Walker & Thornton
105 Franklin Road, S.W.
Roanoke, Virginia 24004

Counsel for Nationwide Mutual Insurance Company

CERTIFICATE

I, Robert J. Rogers, of counsel for defendant, Nationwide Mutual Insurance Company, certify that I mailed true copy of the foregoing Reply Memorandum of Defendant to Duncan M. Byrd, Jr., Box 726, Hot Springs, Virginia, counsel of record for plaintiff, this 9th day of May, 1973.

A handwritten signature in cursive script, appearing to read "Robert J. Rogers", written over a horizontal line.

Filed to the Clerk's Office of Bath County
Circuit Court July 27 1973
Dennis M. Tucker Clerk

Fairfax County Courthouse
Fairfax, Virginia 22030
July 25, 1973

Mr. Robert J. Rogers,
Attorney at Law,
Woods, Rogers, Mize, Walker & Thornton,
105 Franklin Road, S. W.,
Roanoke, Virginia. 24404

Mr. Duncan M. Byrd, Jr.,
Attorney at Law,
Box 726,
Hot Springs, Virginia. 24445

In re: Walter Ennis Armstrong, Admr. of the
estate of Shari Lane Armstrong v.
Nationwide Insurance Company;
In Chancery No. 93.

Gentlemen:

I am of the opinion that the plaintiff administrator cannot prevail against Nationwide in these proceedings. This decision is made without reaching the disturbing factor involving the manner in which judgment was taken against a minor defendant in his absence on the same day a guardian ad litem was appointed for him and on the day upon which the guardian ad litem filed his answer, all without notice to or knowledge on the part of the minor. However, I do not know that this is a matter properly cognizable in these proceedings and its resolution is unnecessary for reasons following.

Under the circumstances outlined it is my opinion that the truck used to replace Martin's Volkswagen was not a temporary substitute vehicle covered under the Nationwide policy, and it is further my opinion that the attempt to release Martin from

personal liability but holding his insurer was ineffective and that the release of Martin effected the release of Nationwide.

I shall appreciate it if counsel will please prepare and submit the necessary decree.

With kind regards to each of you, I am,

Very truly yours,

Arthur W. Sinclair.

AWS:alc

VIRGINIA: IN THE CIRCUIT COURT OF BATH COUNTY

WALTER ENNIS ARMSTRONG, Administrator of the Estate of
Shari Lane Armstrong

V.

Case No. 93

NATIONWIDE MUTUAL INSURANCE COMPANY

Transcript of hearing on a motion for
declaratory judgment, held at Warm Springs, Virginia, on
March 27, 1973, before the Honorable Judge Sinclair.

The following was recorded and reduced to
typescript by the undersigned reporter and is hereby certi-
fied to be a correct and accurate transcript of said pro-
ceeding.

SHENANDOAH REPORTING SERVICE

BY:

Gail M. Hogg, Notary Public
Commonwealth of Virginia
At Large

FOR THE PLAINTIFF: DUNCAN M. BYRD, JR., ESQUIRE

FOR THE DEFENDANT: ROBERT J. ROGERS, ESQUIRE

1 MR. ROGERS: If the Court please, I would like to sub-
2 mit an observation, so that I would be in agreement with
3 Plaintiff's counsel. I understand that the stipulation which
4 has been signed by counsel has been filed by the Court.

5
6 COURT: The stipulation has been marked filed.

7
8 MR. ROGERS: Thank you, sir. It is my understanding
9 that the Court may consider as evidence the depositions of
10 Richard Arrington and Charles Arrington which have been taken
11 and filed with the papers, and also consider as evidence all
12 the papers which are filed in the proceedings of Law 245,
13 Armstrong, Administrator, vs. Martin, and Case No. 267, which
14 is Maryland Casualty vs. Richard Martin. And I have indicated
15 to the Court that I will work with the clerk to get you a
16 copy of all of those papers. I think it might be well, for
17 the record, so there will be no question about it, to stipu-
18 late, or at least have it clear, that the same parties,
19 Mr. Byrd, in those other cases, are the same parties here.
20 The Walter Ennis Armstrong who is the Plaintiff in the instant
21 case was also the Plaintiff in the case Law No. 245 vs.
22 Richard Martin.

23
24 MR. BYRD: I will so stipulate.
25

1 MR. ROGERS: I don't think there was any question
2 about it, but I think we ought to have that on the record.
3 And, also, the Richard A. Martin who is the Defendant in
4 both of those cases, Law 245, and Case 267, was the same
5 witness whose deposition was taken in the instant case, and
6 whose deposition we have stipulated will be read as evidence
7 in the case. I think that's all I wanted to recite for the
8 record. May I make one other notation, Judge. The Answer,
9 my Answer, I noted last night, referred to 50 USC and some-
10 how a "1" got added to my Answer, which should not have been.
11 On Page 3, in Paragraph 3, where I make reference to 50 USC
12 app. Section 5201, that should be Section 520. I have a copy
13 of the Section if the Court would like to have it for the file.

14
15 COURT: An amended Answer to Section 520 instead of
16 5201, and I have so noted.

17
18 MR. ROGERS: Thank you, sir.

19
20 COURT: What is the status, Mr. Rogers, of your motion
21 to quash process in this case?

22
23 MR. ROGERS: Judge, that motion was cured. The pro-
24 ceedings were reinstated, as I recall, weren't they? The
25 motion to quash process . . .

1 MR. BYRD: That's correct; we corrected the . . .
2 the original motion was corrected by proper service.

3

4 MR. ROGERS: Yes, sir; there's no question about that,
5 Judge. The posture of the case, as I understand it, and
6 Mr. Byrd can correct me if I'm wrong, is that this is a suit
7 on the basis of the judgment which the Plaintiff obtained in
8 the earlier action of Armstrong, Administrator, vs. Martin,
9 Law No. 245. This is an effort to, in effect, secure enforce-
10 ment of that judgment, or at least a portion of that judgment,
11 on the basis of the insurance contract issued by my client,
12 Nationwide. And Nationwide, as my Answer indicates, is
13 defending on a number of grounds which are set forth in the
14 Answer. As we have indicated to the Court, they are essen-
15 tially legal issues, and the Court may want us to provide
16 memoranda; I'm not sure how the Court wishes to make its
17 decision.

18

19 COURT: I may well because, very frankly, I have not
20 been faced with this exact situation before. I will go ahead
21 and be glad to hear you gentlemen, whatever you may have by
22 way of argument this morning.

23

24

25

MR. ROGERS: All right. Do you want me to go ahead?

1 COURT: Whichever way you want to proceed, gentlemen.

2

3 MR. ROGERS: I have no predilection one way or the
4 other.

5

6 COURT: If you want to, suppose you go ahead.

7

8 MR. BYRD: That's fine.

9

10 MR. ROGERS: If the Court will get the policy, maybe
11 we can get into this matter. Let me explain, Judge, the facts
12 a little bit to you briefly. I realize you have reviewed
13 the file, and I don't want to repeat, but . . .

14

15 COURT: My review was very hurried, I can assure you.

16

17 MR. ROGERS: One, namely Richard Martin, who was the
18 Defendant in the earlier proceeding referred to in the stipu-
19 lation, had been operating a truck, a pickup truck, which was
20 owned by his father, Charles Martin. This situation involved
21 a tragic occurrence on October 16, 1970. At that time, the
22 young man, Richard Martin, who was then age twenty and under
23 the law at that time an infant, I believe he was younger than
24 that, but in any event he was an infant under the laws that
25 existed at that time, had gone to a football game here in Bath

1 County. He was driving a truck which was titled in his
2 father's name and, unfortunately, something happened. The
3 brake of the truck was left off instead of being on, and
4 the truck was allowed to roll down a hill, and struck a num-
5 ber of people, including a number of children, killed several
6 and injured some badly. It was a very bad catastrophe, for
7 Bath County or any other county. It turned out that the
8 truck, titled in his father's name, was insured by Maryland
9 Casualty. Maryland Casualty had fifty thousand dollars limitary.
10 Maryland Casualty apparently, and I'm just assuming this from
11 the record that the Court can read, decided that because of
12 the extensive injuries involved, all of its policy limits
13 would be paid and, through its counsel from Staunton, insti-
14 tuted proceedings in this Court, paying fifty thousand dollars
15 into Court, in effect, and in the process Maryland Casualty
16 took a release by virtue of an order which is included in
17 my Answer, part of Nationwide's Answer in the instant case.
18 The order recites that the payment by Maryland Casualty of the
19 fifty thousand dollars coverage under its policy released it
20 of all duties and obligations under the policy of insurance
21 with respect to Richard A. Martin. And the Court will under-
22 stand that since Richard A. Martin was operating the truck
23 titled in the father's name and with the father's permission,
24 he became an insured under the Maryland Casualty policy. And,
25 as such, Maryland Casualty had some obligations to Richard A.

SHENANDOAH REPORTING SERVICE

A DIVISION OF S.I.A., INC.
P.O. BOX 2435
STAUNTON, VIRGINIA

1 Martin as the insured. In paying the fifty thousand dollars,
2 Maryland Casualty, under the language of the order, obtained
3 a release of all duties and obligations under this policy
4 toward Richard Martin, including any duty to defend in any
5 proceedings brought against him. Maryland Casualty further
6 obtained a release from any obligations to anyone, any claim-
7 ants or plaintiffs who were in it who were made parties in the
8 Maryland Casualty case. And in that case, all of the claim-
9 ants, that is the persons who had been injured or the estates
10 of the deceased, were named as parties. Richard Martin was
11 also named as a party. It provided in the order that Richard
12 Martin would be released from all liability for claims for
13 injuries and damages by any other parties to that proceeding,
14 which would, of course, include the Plaintiff in the instant
15 case. The Plaintiff in the instant case was a party to that
16 proceeding. It released him, or sought to release Richard
17 Martin, of all claims in, and I am quoting now, "in excess of
18 any other liability insurance coverage that might be available
19 to him." Apparently, the effort there was to release Richard
20 Martin of any liability, but not to release any other coverage,
21 insurance coverage, available, including my clients, Nation-
22 wide, if it should become available. Now, after this order
23 was entered, judgment was entered against Richard Martin in
24 the amount of twenty-five thousand five hundred dollars. And
25 that is the effort in this case, to secure judgment enforcement

1 against Nationwide of that judgment. Nationwide had a policy,
2 had issued a policy, to a 1963 Volkswagen vehicle which Richard
3 Martin had bought. I am referring to the young man now who
4 had been the driver of the truck. Richard Martin bought a
5 1963 Volkswagen in June of 1970, on June 29. And bear in
6 mind that the accident happened in October, so this is some
7 six months, five or six months prior to the accident. Unfor-
8 tunately for Richard, that Volkswagen was not a good buy and
9 it broke down the week after he had it. And in the first week-
10 end in July of 1970, he hauled the Volkswagen to a friend, an
11 individual by the name of Robert Moore, who tinkered with
12 vehicles. He was not a licensed mechanic, but he took it
13 over to see if Robert might be able to put it back together,
14 trying to restore Humpty-Dumpty, so to speak. There was no
15 time limitation. I think the evidence will indicate that
16 Richard did not know how long it would take. In any event,
17 the Volkswagen was never restored to use and, to this day,
18 that same Volkswagen has never been used by Richard since
19 July of 1970. In the meanwhile, Richard had to have trans-
20 portation. He had a job. He was living, at the time, on the
21 farm of his father, Mr. Charles Martin. And he drove the same
22 pickup truck which was subsequently involved in the accident.
23 I think the testimony will show to you that this truck was fur-
24 nished for his regular use by his parents. The parents, I
25 think, at that time, had three vehicles. They had a Chevrolet

SHENANDOAH REPORTING SERVICE

A DIVISION OF S.I.A., INC.
P.O. BOX 2435
STAUNTON, VIRGINIA

1 truck, a Pontiac and a Chevrolet automobile. And the, Richard
2 was allowed to use any of them and all of them were furnished
3 for his regular use as he needed. Nationwide took the position
4 that because the truck which was involved in the accident
5 had been furnished for his regular use, the coverage under
6 the Nationwide policy, which was intended to cover the Volks-
7 wagen vehicle, did not extend coverage under the express pro-
8 visions of the policy, did not extend coverage to the operation
9 of the truck. To refer the point now to the policy . . . I
10 realize I am going fast, Judge; I'm trying to put it in some
11 kind of chronological order for you, and I'm sure you will
12 have some questions. But if you'll just bear with me a little
13 bit further. If you will look on the . . . We'll start with
14 the policy definition, first, of the insured, on Page 1. You
15 will see a Roman numeral III. Now this talks in terms of the
16 insured as being the named insured; and that, of course,
17 would have been Richard Martin himself. You might want to
18 follow this one, Judge, it's a little bit easier to follow.
19 You will see on the first page Roman numeral III refers to
20 the, simply defines insured, and there it is talking about the
21 insured as being the named insured. And it refers to the named
22 insured while operating the automobile. Now, if you will turn
23 and look at the next page, you will see under paragraph 5,
24 use of other automobiles. And this extends liability insur-
25 ance coverage to the insured, that is the named insured, when

SHENANDOAH REPORTING SERVICE

A DIVISION OF S.I.A., INC.
P.O. BOX 2435
STAUNTON, VIRGINIA

1 he is using other automobiles under certain circumstances.
2 The paragraph little "d" under Roman numeral V, which is
3 the second column, Judge, on the right side of the page there,
4 if you'll see a little "d", you will note that it says: "This
5 insuring agreement does not apply. . ." and then little "1" in
6 parentheses "to any automobile owned by or furnished for reg-
7 ular use to either the named insured or a member of the same
8 household," etc. Nationwide's position was that the truck
9 which was involved in the accident had been furnished for the
10 regular use of Richard Martin and, did not, for this reason,
11 become an automobile under the coverage of the policy. And
12 the coverage simply did not extend; the coverage extended to
13 the named insured while operating his own automobile, or the
14 automobile, but it did not extend to the truck owned by his
15 father because it was furnished for his regular use.

16
17 COURT: Because of the exclusion of d-1?
18

19 MR. ROGERS: Yes, sir. I think the Court will under-
20 stand the rationale behind that particular provision. Obviously,
21 if I had three automobiles, and I insured one, it would be
22 unfair for me, by paying a premium on one, to obtain coverage
23 on two others that I either owned or were furnished to me for
24 my regular use, just by paying one premium. So that's really
25 the basis of the provision as I understand it, to prohibit

1 people from obtaining extra coverage for vehicles that have
2 not been named in the policy, you understand. And the other
3 provision that would be applicable from the viewpoint of the
4 Plaintiff is also on the same page you are looking at, and
5 that is under the definition of automobile, which is at the
6 top left-hand column where it says, "automobile defined."
7 An automobile there is defined, of course it includes the
8 described automobile, which would have been the 1963 Volks-
9 wagen. And, in addition, under little "a" 3, it describes or
10 defines an automobile as including a temporary substitute
11 automobile. And as I understand the Plaintiff's position, the
12 Plaintiff is contending that the truck that was titled in the
13 father's name, Mr. Charles Martin, was a temporary substitute
14 automobile in so far as the son, Richard Martin, was concerned.
15 And that, I think, is going to be a legal question, Judge,
16 under the facts. Mr. Byrd can straighten me out on his client's
17 position in that regard, but that is my understanding. Essen-
18 tially, Judge, the two principal points that we raise, that
19 Nationwide raises, is the fact that there was no coverage of
20 Richard Martin to begin with, simply because of the fact that
21 nothing under his policy extended coverage to the truck that
22 was involved in the accident. It's not so much a matter of
23 exclusion so much as that the policy simply did not extend
24 coverage to that truck. It was not an automobile as described
25 in the policy. And then the second principal point relied

1 upon by Nationwide is that the release which the Plaintiff in
2 this instant case gave to Martin, that is Richard Martin,
3 Nationwide's insured, in effect released any obligation on the
4 part of Nationwide, also, that the release of Richard Martin
5 constituted a release of any obligations or contractual respon-
6 sibility on the part of Nationwide. Nationwide is saying,
7 in effect, that the action is not against us directly to begin
8 with, we are responsible for his liability. If he is released
9 from liability, we cannot be liable for any excess. And we
10 say that when you release him, you release us, and notwith-
11 standing the purported effort to condition or restrict that
12 release to his own personal rights. Among other things, and
13 again I think the Court would want to have some law on this
14 subject, Nationwide, of course, being a secondary or excess
15 carrier in this case, would rely upon Maryland Casualty, of
16 course, to defend in the action brought against Richard Martin.
17 Maryland Casualty, of course, having obtained a release of
18 any obligations under this proceeding, of course did not have
19 any duty to defend Richard Martin. And I think the law is
20 rather clear that, even though the primary carrier is willing
21 to give up all its coverage, it still has a duty to defend the
22 insured and the secondary carrier, the excess carrier, has the
23 right to expect the primary carrier; so, in any event, the
24 release of Maryland Casualty would have certainly prejudiced
25 the rights of Nationwide in that respect. This is particularly

SHENANDOAH REPORTING SERVICE

A DIVISION OF S.I.A., INC.
P.O. BOX 2435
STAUNTON, VIRGINIA

1 significant in light of the fact that there was pending, at
2 the time of the proceedings by Maryland Casualty, there was
3 pending a law action of Armstrong, Administrator, vs. Martin.
4 That action was filed on October 30, 1970, shortly after the
5 accident, but judgment was not rendered in that case until
6 October 1, 1971, which followed the Nationwide proceedings.
7 Now there are some other points, Judge, that I will mention
8 briefly for the consideration the Court might care to give
9 them. This involves the Soldiers and Sailors Civil Relief
10 Act of 1940. The citation is contained in the amended Answer
11 filed by Nationwide. Nationwide takes the position that a
12 default judgment should not be issued against a serviceman, a
13 man in military service, except as provided under that statute.
14 Without going into detail there, we are contending that that
15 statute was not complied with. A guardian ad litem was appointed,
16 Mr. Solomon was appointed in that case; the record will show
17 that he never talked to the Defendant. As a matter of fact,
18 the Defendant was not aware of any judgment being entered
19 against him until the date of the depositions which are filed
20 in this case.

21
22 COURT: Where does the evidence or will the evidence
23 show that he was, the youngster, in service?
24

25 MR. ROGERS: Yes, sir, he . . .

1 COURT: Out of the country, in the country, or . . .

2

3 MR. ROGERS: Judge, I think the evidence shows simply
4 that he was in the military service and does not show where.
5 And, quite frankly, I do not know. He is in the Navy and is
6 still in the Navy and is assigned to an aircraft carrier. He
7 operates out of Norfolk and he could have been both in and out
8 of the country, I really just don't know exactly. There was
9 another point, also, Judge, that I want to call to your
10 attention. Nationwide also takes the position that the judgment
11 which the Plaintiff seeks to enforce against Nationwide here,
12 that the judgment rendered against Richard Martin was void
13 for the reasons cited in the Answer, one of which is that
14 service was improper. Now, at the time suit was filed in
15 that case--I'm referring to the law action of Armstrong,
16 Administrator, vs. Richard Martin--shortly after the accident,
17 October 30, 1970, Richard Martin was living at home with his
18 parents in Bath County. However, service was not effected
19 until almost a year later, on November 4, 1970. And at that
20 time, and I think that at that time the papers were served on
21 the boy's father, and actually at that time, the record will
22 show he was in the Navy. And we take the position that his
23 residence was not with his father, and that some other method
24 of service should have been obtained to secure valid judgment.
25 We would also raise the point--we would want to check the dates,

SHENANDOAH REPORTING SERVICE

A DIVISION OF S.I.A., INC.
P.O. BOX 2435
STAUNTON, VIRGINIA

-156-

1 quite frankly on this, Judge, as to whether or not it was
2 proper even to render a judgment more than a year after the
3 papers had been served. There is a rule, as the Court knows,
4 that a judgment will not be rendered in proceedings where the
5 suit papers are filed more than one year, or are served more
6 than one year after they are filed. I want to check the dates
7 on that, I am a little uncertain if . . .

8
9 COURT: Where process has been outstanding for a year?

10
11 MR. ROGERS: Yes, sir.

12
13 COURT: Without execution, or words to that effect?

14
15 MR. ROGERS: Yes, sir, that's correct. I just want to
16 check the dates. If I'm correct on the dates that the papers
17 were filed on October 30, and not served until November 4, 1970,
18 it would have been more than a year. And I want to preserve
19 the point, but I would like also to check the file on that, on
20 those papers. And then, finally, Judge, we take the position
21 that the Plaintiff in this case, this is a chancery case, of
22 course, and we take the position that the Plaintiff has no
23 right to ask equitable relief if his hands are in any way un-
24 clean. And we point out to the Court that the Plaintiff, having
25 agreed to release Richard Martin, an infant, in the Maryland

1 Casualty proceedings, nevertheless proceeded to obtain judgment
2 against the same man shortly thereafter, shortly after those
3 proceedings, and obtained judgment in an amount exceeding the
4 coverage even afforded by Nationwide. And there has been on
5 the records, as far as I know, and still exists, an outstanding
6 judgment against Richard A. Martin in the sum of twenty-five
7 thousand five hundred dollars, which does in fact exceed the
8 Nationwide coverage of twenty thousand. Judge, I think that
9 pretty well exhausts the points in my Answer. I'll be glad
10 to try to answer any questions that the Court may have.
11

12 COURT: All right, Mr. Rogers. Mr. Byrd?
13

14 MR. BYRD: Thank you. First, taking it in approxi-
15 mately the same order that Mr. Rogers has taken, I will first
16 approach the factual situation concerning whether or not
17 there is in fact coverage under the Nationwide policy. I
18 think that the facts and depositions will show that the Defen-
19 dant, Richard A. Martin, has since he was licensed at age
20 sixteen had a car furnished for his regular use by his parents.
21 So, in other words, there was a car furnished for his regular
22 use alone; and there were also two other automobiles in the
23 family, one a car used primarily by the mother and a truck used
24 primarily by the father. It is true that Richard, on occasion,
25 he had the use of these other automobiles, but that their

1 primary and they were furnished for the regular use of, in
2 other words, the car was furnished for the regular use for
3 the mother, the truck for the father; and they maintained a
4 1951 Chevrolet for Richard's regular use. And then, upon his
5 graduation in June of 1970, at Richard's insistence, they
6 traded. Mr. Martin traded the 1951 Chevrolet for the Volks-
7 wagen, the 1963 Volkswagen in question. At this time, of
8 course, the use of the automobiles didn't really change; there
9 was still an automobile here furnished for Richard's regular
10 use, in this case the Volkswagen, which he was to use pri-
11 marily, the mother to use the car primarily, the father the
12 pickup truck primarily. And that the depositions will further
13 show that, as Mr. Rogers pointed out, approximately a week
14 later, the engine blew up in the Volkswagen. The car was taken
15 to one Robert Moore who, as Mr. Rogers said, is not a licensed
16 mechanic but yet is a freelancer or whatever you want to call
17 it, a person who does fix automobiles. As it turned out,
18 looking back in retrospect, the time involved here from July
19 until October was approximately four months. I think you can
20 find from the depositions of Mr. Martin, Richard Martin, that
21 when he took the automobile there that he felt like that this
22 was going to be a temporary arrangement and that he would have
23 his Volkswagen back on the road in a short time. And there is
24 further testimony by Richard Martin that, if he had known that
25 it was going to be more than a temporary time, that he would,

SHENANDOAH REPORTING SERVICE

A DIVISION OF S.I.A., INC.

P.O. BOX 2435

STAUNTON, VIRGINIA

1 in fact, probably have gone out and bought another automobile.
2 So, from that standpoint, this gives you the factual situation
3 as to the use of the particular automobiles. Now, we take the
4 position that the two insurance agreements here are completely
5 different type coverages. The use of other automobiles, a non-
6 owned automobile in some other policies--anyway, we are talking
7 about the same thing--where you are using a non-owned auto-
8 mobile, there is an exclusion if that non-owned automobile is
9 owned by a member of the same household or furnished for his
10 regular use. We are talking now about, we are seeking coverage
11 under the first section, which covers the automobile or an
12 automobile not owned by the named insured while temporarily
13 used as a substitute for the described automobile when it is
14 withdrawn from normal use because of its breakdown, repair,
15 service, and so forth. This, and there is nothing here to
16 exclude the fact that Richard was a member of the same house-
17 hold, or even that this truck, although we don't concede this
18 fact, that it was furnished for his regular use. We take the
19 position that it was available, he could use it, but that it
20 was not used regularly by him. And, in support of that, Your
21 Honor, I would like to cite two cases, the first of which is
22 Lewis vs. Bradley, from the Supreme Court of Wisconsin. The
23 site of that is 97 Northwest second 408, 411, and 412. In
24 that case, the Defendant, Raymond Bradley, lived with his
25 parents on their farm. He had another job, as in this case,

1 but he did do some work at home and he lived at home primarily.
2 In that case, there was a truck, a farm truck, which belonged
3 to, was owned by the father, and was used, although the Defen-
4 dant had the permission to use it, he didn't use it as his
5 regular vehicle. He had his own vehicle. On the particular
6 day in question, the parents had gone to church in the family
7 automobile, and the Defendant, Raymond Bradley, went up to
8 get in his car and it wouldn't start. And so he took this
9 farm truck. And the Court held in that particular case that
10 where the farm truck of the insured's parents normally used
11 by the insured solely for farm purposes was used by the insured
12 on Sunday afternoon for a pleasure trip, when the insured's
13 automobile, normally used to go to and from work and for
14 transportation, for pleasure purposes, would not start, that
15 the farm truck was a substitute automobile within the clause
16 of liability policy protecting the insured. While he was
17 using the substitute automobile, when his car had been with-
18 drawn from normal use because of its breakdown, an insured
19 was liable for injuries resultant from the negligence of the
20 insured in driving the truck, and the truck was not merely
21 an alternate other automobile because of the fact that the keys
22 to it were available at all times to the insured, and the
23 insured had at all times the right to use the truck. The
24 Plaintiff, the insurance company in that case, contended that
25 the, since the Defendant owned the, the father owned the truck

SHENANDOAH REPORTING SERVICE

A DIVISION OF S.I.A., INC.
P.O. BOX 2435
STAUNTON, VIRGINIA

1 and was a member of the same household, that the truck was not
2 covered because of this same exclusion here about him being a
3 member of the same household. The Court held, after defining
4 what a substitute automobile was, says, "We cannot agree."
5 The two insuring agreements refer to entirely different
6 factual situations. The temporary substitute coverage is
7 expressly limited to include only an automobile substituted
8 for one owned by the insured. And this policy was very similar
9 to the one in question. The use of other automobiles, or non-
10 owned automobiles, as it may be, applies to a situation where
11 the car is not a substituted automobile, and such coverage
12 is expressly limited to exclude an automobile furnished for
13 the regular use of the named insured. This case has been
14 followed in that particular circuit. Another case, arising
15 out of a Virginia factual situation was Lumbermen's Mutual
16 Casualty Company vs. Harleysville Mutual Insurance Company.
17 This is cited in 367 Federal 2nd, 250 at 254. In this case,
18 the United States Court of Appeals for the Fourth Circuit
19 overruled the District Court case decided in 1966. Facts in
20 that case: On September 1, 1959, William Dalton was the owner
21 of a 1954 Ford and on that same date, Ray Dalton, his son,
22 owned a 1955 Ford and had no liability insurance policy on
23 that automobile. Dalton was unmarried, living at the home of
24 his father in Pulaski County, Virginia, a very similar factual
25 situation to what we have here. Both worked at the same place.

1 The son and the others generally rode to work with the father
2 in the father's automobile for pay. On the day in question,
3 the father's car would not start, and so he asked the son to
4 take his automobile and the father stayed home to repair his
5 automobile.

6
7 COURT: And that automobile, you say, was uninsured?
8 The son's?

9
10 MR. BYRD: The son's automobile was uninsured. Acting
11 at the, in other words, the son, acting at the father's request,
12 carried the passengers. The son was negligent, an accident
13 occurred, with personal injury. The Court held, overruled
14 the District Court, that the son's 1955 Ford was a substitute
15 automobile with coverage under the father's liability policy.
16 Under these facts, he was driving, the car he was driving
17 was a temporary substitute under this father's State Farm
18 liability policy. This case cited cases in several other cir-
19 cuits. So the factual situation, Your Honor, that we have
20 in this case, quoted in those two decisions, I think, is
21 very similar to show coverage under this particular section.
22 And now we get to the issue raised by Mr. Robert Rogers of
23 if we assume, or assuming that there is liability coverage,
24 then has the, has Nationwide Mutual been released by virtue
25 of this order in Case 245? We take the position, Your Honor,

SHENANDOAH REPORTING SERVICE

A DIVISION OF S.I.A., INC.
P.O. BOX 2435
STAUNTON, VIRGINIA

1 that this is not the case, that, in fact, the very opposite.
2 At the time this order was entered--and I might add that
3 Nationwide had notice of all those proceedings and they chose
4 not to defend the action, they chose not to be there; there
5 wasn't anything that was tried to be done under the table
6 so no one would have notice--but, at the time the order was
7 written up with this very same question, because at the time
8 we had sent notice of the 245 to Nationwide, but the people,
9 the parents, the injured did have the need for immediate
10 funds, Maryland Casualty was willing to pay in the limits of
11 their policy. And so, this order was drafted with this very
12 situation in mind. It was a conditional release. Richard
13 Martin was not released of liability; he was released of
14 liability in excess of any other possible liability insurance
15 coverage, exactly what we've got here; at least, actually,
16 what we are trying to show in this case. The other area is
17 that, assuming coverage and assuming that Nationwide is not
18 released by virtue of this previous order, then we have the
19 issue of whether or not the Plaintiff is estopped, by virtue
20 of the fact that the judgment may be void or because of his
21 conduct. And I think that the best way to treat that is to go
22 item by item from Mr. Rogers's Answer. The Defendant claims
23 that this judgment is null and void for the following reasons.
24 We take the position that, even if the judgment is void, that
25 there is still sufficient issue in this case upon which to

SHENANDOAH REPORTING SERVICE

A DIVISION OF S.I.A., INC.
P.O. BOX 2435
STAUNTON, VIRGINIA

1 base a declaratory judgment suit, that there is a justiciable
2 issue, by virtue of the fact that the suit was filed in it and
3 a judgment was rendered, that even if it is void, that we still
4 have sufficient issue upon which the Court can determine
5 whether or not there is liability under this policy. But we
6 do not concede that it is void. The first issue raised by the
7 Defendant is that there was no valid service of process.
8 And Mr. Rogers pointed out these particular dates. I believe
9 that he is in error here. The suit was filed . . .

10

11 MR. ROGERS: Judge, I will stipulate. I don't mean
12 to cut you off, but you are right. I have checked the papers
13 since then, Judge; I indicated I wanted to check . . .

14

15 COURT: Yes, sir.

16

17 MR. ROGERS: . . . and I was wrong about that. The
18 suit papers that involved the judgment which is sought to be
19 enforced here were actually filed on October 30, 1970, and
20 they were served in November, on November 4, 1970. For some
21 reason, I had written that November 4, 1971. Mr. Byrd is
22 exactly right, and I was in error.

23

24 COURT: All right. That takes care of that point then.

25

1 MR. BYRD: The depositions will show that Mr. Martin,
2 in fact, entered the service on November 30, 1970, and the
3 papers were, of course, served on the fourth. There was no
4 Answer filed in this suit, whether through the error of Mary-
5 land Casualty or whether . . . I don't know. But there was
6 no Answer filed in this particular case. So this would mean
7 that twenty-one days later, on November 25, five days before
8 Mr. Martin entered the service, that the Plaintiff would have
9 been entitled, had he so moved, that he would have been
10 entitled to some of the judgment, all things, other things
11 remaining settled. Now, it is true that, well, let me dis-
12 regard that. Then you go to Number Two. This being true
13 that the service was valid, then Mr. Rogers's second objection,
14 that the Court had no jurisdiction over Martin's person, is
15 likewise invalid, because there was proper service had on
16 November 4. The third issue raised is this item of Soldiers
17 and Sailors Civil Relief of 1940, which states in essence
18 that, dealing with the default judgment. Now, the section,
19 Your Honor, the position we take is that it does provide for
20 certain relief against default judgments, but the section
21 quoted there, 520, doesn't go far enough. If you go on to
22 Section 5204, it doesn't say that the judgment is void.

23
24 COURT: 5204, or 524?
25

1 MR. BYRD: 5204; it's in the same page there that
2 Mr. Rogers had. It states, now this is a paraphrase of the
3 section, I'm not quoting it verbatim, it says that if a judg-
4 ment shall be rendered in any action or proceeding against a
5 person in the military service, or within ninety days there-
6 after . . .

7
8 MR. ROGERS: It's thirty days thereafter.

9
10 MR. BYRD: . . . okay, thirty days, and it appears that
11 such person was prejudiced by reason of his military service
12 in making a defense thereto, such judgment may, upon appli-
13 cation made by such person or his legal representative not
14 later than ninety days--is that supposed to be thirty also?--
15 not later than ninety days after the termination of such ser-
16 vice, it may be opened by the Court rendering same, and such
17 Defendant or his legal representative let in to defend, pro-
18 vided it is made to appear that the Defendant had a meritorious
19 or legal defense to the action or any part thereof. So, the
20 position of the Plaintiff is that this judgment, by virtue
21 of this section, is not void, but it is voidable if the Defen-
22 dant can come in and show that he had a meritorious defense
23 or legal defense to the action. Now, all these things consid-
24 ered, we are dealing now with a declaratory judgment suit. We
25 have a voidable judgment, possibly. We have, the Court, at

1 this time, I feel, has a justiciable issue upon which it can
2 render judgment in the particular case at hand. The Defendant
3 has not shown that he had a meritorious defense or legal
4 defense. So that then, Your Honor, is our answer to that.
5 I think that is all. I think that covers everything.

6
7 MR. ROGERS: If Your Honor please, I am not really
8 prepared at this time to cite to the Court particular cases.
9 I would like to, if the Court would allow me, submit a memor-
10 andum dealing with some of the aspects which have been
11 raised by opposing counsel. I would point out that the
12 cases which have been cited involve situations in which prob-
13 ably there were coverages under temporary substitute auto-
14 mobiles in the sense that there was a temporary breakdown of
15 an automobile. We take the position in this case that this
16 Volkswagen had been out of commission for so long that you've
17 got to draw the line somewhere as to how long a car can be out
18 of commission before you can get into a temporary substitute
19 situation.

20
21 COURT: Let me ask a question in that connection. Will
22 the deposition of this youngster show what his intention was,
23 his belief was, or words to that effect, about the prognosis
24 of his Volkswagen?
25

1 MR. ROGERS: I think so, Judge.

2

3 MR. BYRD: We both went into that very extensively,
4 Your Honor.

5

6 MR. ROGERS: His testimony is going to indicate that
7 he thought that it would be just a temporary matter.

8

9 COURT: In other words, there is evidence there from
10 which I can make a determination?

11

12 MR. ROGERS: Yes, sir, I think so, Judge. I think
13 that evidence can be argued, but I think there is sufficient
14 testimony for your purposes there. There is some law, and if
15 the Court will allow me to submit a memorandum, I would like
16 to call the Court's attention to some cases in which the
17 Court has put a reasonable limitation on the amount of time;
18 normally the breakdown you are talking about is the situation
19 where if my car breaks down and I take it to the garage, it
20 might be three or four days, or some sort of limitation. In
21 the instance here, the father and the son, it has been cited
22 to you, I think the car was just out of commission for a day
23 or two. And that is principally our point, it is a question
24 of time. The deposition will be sufficient, I believe, for
25 the Court to make a determination in that regard. On the other

SHENANDOAH REPORTING SERVICE

A DIVISION OF S.I.A., INC.
P.O. BOX 2435
STAUNTON, VIRGINIA

1 points, again, Judge, I think it might be well if I cover
2 those in a memorandum without taking the Court's time. If
3 the default judgment business, we take the position that
4 under the Soldiers and Sailors Civil Relief Act, the law is
5 rather clear that no default judgment shall be entered period
6 in the event of a person in military service, except as pro-
7 vided under this statute. And we say that those conditions
8 have not been complied with. The paragraph that was read to
9 you by Mr. Byrd, we say would apply to any judgment, whether
10 it was default or otherwise, that where a young man in the
11 military service felt that he had been aggrieved by a judgment,
12 whether it be default or otherwise, would have the right to
13 apply to have it vacated under certain conditions. The other
14 matters, Judge, I really think we can cover better in the
15 memorandum. I will point out, and I apologize for my error
16 with respect to the matter of service, where I got confused
17 was that the suit papers were filed in October of 1970, and
18 they were in fact served within four or five days after that,
19 but judgment was not entered until approximately a year later.

20
21 COURT: How much time, Mr. Rogers, do you want to sub-
22 mit a memorandum? Time is not of an essence as far as I'm
23 concerned.

24
25 MR. ROGERS: Judge, that's always a dangerous question

SHENANDOAH REPORTING SERVICE

A DIVISION OF S.I.A., INC.

P.O. BOX 2435

STAUNTON, VIRGINIA

-170-

1 as Your Honor knows to ask a lawyer, but as much time as the
2 Court would give me. I realize Mr. Byrd would like to have
3 some kind of approximate
4

5 COURT: I will put the question to Mr. Byrd.
6

7 MR. ROGERS: I would prefer you do that, and let him
8 carry the ball.
9

10 MR. BYRD: Your Honor, this matter has been pending
11 there, as you can see, for, it will be three years in November.
12

13 COURT: We will give Mr. Rogers a specific time, and
14 then give you time, of course, to file a reply. Twenty-one
15 days, Mr. Rogers, three weeks?
16

17 MR. ROGERS: All right, sir.
18

19 COURT: A similar period, Mr. Byrd? Or less, of course,
20 if you desire less time.
21

22 MR. BYRD: That's fine, I think three weeks
23

24 COURT: Three weeks and three weeks, all right.
25

1 MR. ROGERS: Judge, I don't know that I would need
2 it, but would it be inappropriate, since I am filing first,
3 to allow me to have ten days after Mr. Byrd, if I see fit to
4 respond?

5
6 COURT: That would be perfectly all right.

7
8 MR. ROGERS: I hope that, in light of his fine presen-
9 tation here, I doubt that it is going to be necessary; but
10 if the Court could . . .

11
12 COURT: Suppose you gentlemen do this, with the Clerk's
13 permission, before I receive, or before the time has passed
14 to receive the memoranda, I will take these files with me and
15 if you will mail your memoranda to me at the Court House in
16 Fairfax, and then, of course, I will decide it and let you
17 know by letter. If you will just address it to me at Fairfax
18 County Court House, 4000 Chain Bridge Road, Fairfax, Virginia,
19 22020, I believe that's it.

20
21 MR. BYRD: Your Honor, this bit about the ten days.
22 I am the Plaintiff; the Plaintiff usually gets the last say . . .

23
24 MR. ROGERS: Suppose you submit your memorandum first.
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. BYRD: No, I would rather do it the way we have it.

Filed in the Clerk's Office of Bath County
Circuit Court July 27, 1973
Blanche M. O'Leary, Clerk

SHENANDOAH REPORTING SERVICE
A DIVISION OF S.R.A., INC.
P.O. BOX 2435
STAUNTON, VIRGINIA

VIRGINIA,

IN THE CIRCUIT COURT OF BATH COUNTY

WALTER ENNIS ARMSTRONG,
Administrator of the
Estate of Shari Lane
Armstrong, Deceased

COMPLAINANT

V.

NATIONWIDE MUTUAL INSURANCE
COMPANY

DEFENDANT

FINAL DECREE

CASE NO. 93

THIS CAUSE came on to be heard upon the papers filed herein, including the pleadings, exhibits and depositions as stipulated by the parties, and including papers filed in companion proceedings which are described in the Stipulation of the parties.

And the Court having carefully considered the same, and having also carefully considered oral argument and written briefs of counsel, and being of the opinion that defendant, Nationwide Insurance Company is not liable to the Complainant for the reasons stated in the Court's letter of July 25, 1973, a copy of which is hereby made a part of the record, it is so ADJUDGED, ORDERED and DECREED, and it is further ORDERED that this cause be,

and the same hereby is, dismissed.

The Clerk will furnish certified copies hereof to counsel for the parties.

Enter this 29th day of August,
1973.

/s/ Arthur W. Sinclair
Arthur W. Sinclair, Judge Designate

Seen: and respectfully except to the Courts ruling

/s/ Duncan M. Byrd, Jr.
Counsel for Complainant

/s/ Robert J. Rogers
Counsel for Defendant

Chancery Order Book 12

Page 74

A Copy--Teste:

/s/ W. Claude Dodson
Clerk

Volkswagon was not a "temporary substitute automobile" under the provisions of the Nationwide Policy which is the subject of this suit.

2. That the Court erred in ruling that the order entered by this Court on October 1, 1971 in Law Case No. 267 and duly of record in Law Order Book 13, Page 294 effected the release of Nationwide as to liability coverage which is the subject of this suit.

Respectfully,

WALTER ENNIS ARMSTRONG,
Administrator of the Estate
of Shari Lane Armstrong

BY: DUNCAN M. BYRD, JR.
Of Counsel

DUNCAN M. BYRD, JR.

Duncan M. Byrd, Jr.
Box 726
Hot Springs, Virginia 24445
Counsel for Complainant

CERTIFICATE

I, Duncan M. Byrd, Jr., of counsel for Complainant, Walter Ennis Armstrong, Administrator of the Estate of Shari Lane Armstrong, certify that I mailed a true copy of the foregoing Memorandum of Complainant to Robert J. Rogers,

of Woods, Rogers, Muse, Walker & Thornton, 105 Franklin
Road, S. W., Roanoke, Virginia 24404, counsel for Defen-
dant, this 28 day of September, 1973.

DUNCAN M. BYRD, JR.

VIRGINIA,

IN THE CIRCUIT COURT OF BATH COUNTY

WALTER ENNIS ARMSTRONG,)	
Administrator of the Estate of)	
Shari Lane Armstrong, deceased)	
	)	NOTICE MAKING
Complainant)	
	)	TRANSCRIPT PART
v.)	
	)	OF RECORD
NATIONWIDE MUTUAL INSURANCE)	
COMPANY,)	
)	
Defendant)	

TO: W. CLAUDE DODSON, CLERK OF SAID COURT:

The Complainant, WALTER ENNIS ARMSTRONG, Administrator of the estate of Shari Lane Armstrong hereby gives notice pursuant to Rule 5:9 (b) of the Rule of the Supreme Court of Virginia that a transcript of hearing on a motion for declaration judgment, held at Warm Springs, Virginia, on March 27, 1973, before the Honorable Arthur W. Sinclair in the above styled case is hereby made a part of the record of this action. Said transcript was prepared by GAIL M. HGG of SHENANDOAH REPORT SERVICE and filed with the Clerk of the Circuit Court of Bath County, Virginia on July 27, 1973.

Respectfully,

WALTER ENNIS ARMSTRONG,
Administrator of the Estate
of Shari Lane Armstrong

BY: D. M. BYRD, JR.
OF COUNSEL

DUNCAN M. BYRD, JR.

Duncan M. Byrd, Jr.
Box 726
Hot Springs, Virginia 24445
Counsel for Complainant

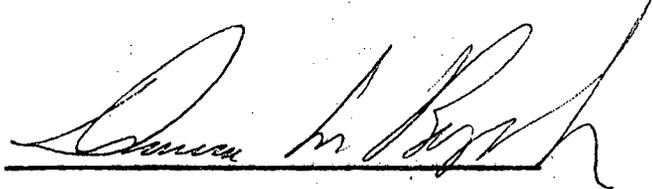
CERTIFICATE

I, Duncan M. Byrd, Jr., of counsel for Complainant, Walter Ennis Armstrong, Administrator of the Estate of Shari Lane Armstrong, certify that I mailed a true copy of the foregoing Memorandum of Complainant to Robert J. Rogers of Woods, Rogers, Muse, Walker & Thornton, 105 Franklin Road, S. W., Roanoke, Virginia, 24404, counsel of record for Defendant, this 25 day of October, 1973.

DUNCAN M. BYRD, JR.

CERTIFICATE UNDER RULE 5:49

I, Duncan M. Byrd, Jr., of counsel for plaintiff, Walter Ennis Armstrong, Administrator of the Estate of Shari Lane Armstrong, certify that I filed Twenty-five copies of this Appendix To Brief this 26th day of April, 1974 in the office of the Clerk of the Supreme Court of Virginia and that three copies of this Appendix To Brief were mailed to James F. Johnson of Woods, Rogers, Muse, Walker & Thornton, 105 Franklin Road, S. W., Roanoke, Virginia, 24404, counsel of record for defendant, this 26th day of April, 1974.


Duncan M. Byrd, Jr.