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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 76-0892

JOAN E. WRIGHT, et al,
Appellants,

v.

THOMAS WALTER ORLOWSKI, et al,
Appellees.

JOINT APPENDIX

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VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

EDWARD R. WRIGHT, an infant,
who sues by his mother and next)
friend, Joan E. Wright,

Plaintiff,)

v.

THOMAS WALTER ORLOWSKI, an infant,)

and

)

EDWARD JOSEPH HENDRIX, an infant,

and)

RICHARD H. McCREA, JR., an infant, LAW DOCKET

)

and No. 15987

CONRAD J. LANDRY, an infant,)

and

)

MARK DOMBROWSKI, an infant,

and)

VICTORIA A. SIMON
(Last known address))
7731 Wild Plum Lane
University City, Missouri 63130,
and)

T. DAVID FITZ-GIBBON, Individually
and as a member of Board of Trustees)
of James Barry-Robinson Home for Boys,
313 51st Street
Virginia Beach, Virginia,)
and

JOHN JOSEPH BAECHER, Individually)
and as a member of Board of Trustees
of James Barry-Robinson Home for Boys,
612 Law Building, 147 Granby Street)
Norfolk, Virginia,
and

)

THOMAS E. McANDREWS, Individually
and as a member of Board of Trustees
of James Barry-Robinson Home for Boys,)
1400 Buckingham Avenue
Norfolk, Virginia,
and)

JAMES J. GARA, Individually and as
a member of the Board of Trustees)
of James Barry-Robinson Home for Boys,
7464 North Shore Road
Norfolk, Virginia)

and

NORMAN P. MOORE, Executor of the Estate of Harry P. Moore, Jr., Deceased, Individually and to the extent the decedent was a member of the Board of Trustees of James Barry-Robinson Home for Boys, 463 N. Military Highway Poplar Halls Professional Building Norfolk, Virginia,)

and

THE BOARD OF TRUSTEES JAMES BARRY-ROBINSON HOME FOR BOYS
Serve: T. David Fitz-Gibbon
Chairman of the Board
313 51st Street
Virginia Beach, Virginia,)

and

FRANCISCAN FRIARS, THIRD ORDER REGULAR, an unincorporated association,
Serve: Father Bonaventure Midili
James Barry-Robinson Home for Boys
443 Kempsville Road
Norfolk, Virginia,)

Defendants)

AMENDED MOTION FOR JUDGMENT

TAKE NOTICE, that plaintiff, by counsel, moves for judgment both jointly and severally against the defendants on the following grounds, to-wit:

1. That at all times hereinafter mentioned plaintiff was a paying student at the James Barry-Robinson Home for Boys, also known as James Barry-Robinson High School.

2. At all of the times hereinafter mentioned the said James Barry-Robinson Home for Boys, a/k/a James Barry-Robinson High School, was owned and/or operated by the Board of Trustees of James Barry-Robinson Home for Boys and/or the individual members of said Board of Trustees, being T. David Fitz-Gibbon, Chairman, John Joseph Baecher, Thomas E. McAndrews, James J. Gara, and Harry P. Moore, Jr. (now deceased), and/or was further owned and/or operated by the Franciscan Friars, Third Order Regular, and the very same Board of Trustees and/or the aforementioned individual members of the said

Board of Trustees above mentioned, and/or the Franciscan Friars, Third Order Regular, did employ and have as its agent, servant and employee at the said James Barry-Robinson Home for Boys, also known as James Barry-Robinson High School, a certain Victoria A. Simon who was employed as aforementioned as a teacher at the said James Barry-Robinson Home for Boys, also known as James Barry-Robinson High School, and at all times hereinafter mentioned the said Victoria A. Simon was otherwise acting in her individual capacity as well as in her capacity as an agent, servant and employee of the said Board of Trustees, James Barry-Robinson Home for Boys, and/or the aforementioned individual members of the said Board of Trustees and/or the Franciscan Friars, Third Order Regular.

3. That at all times hereinafter mentioned the defendants, Mark Dombrowski, Thomas Walter Orlowski, Edward Joseph Hendrix, Richard H. McCrea, Jr., and Conrad J. Landry were students at the James Barry-Robinson Home for Boys, also known as James Barry-Robinson High School.

4. That on or about the 30th day of October, 1970, the defendants, the Board of Trustees; James Barry-Robinson Home for Boys, and/or the aforementioned individually named members of said Board of Trustees, and/or the Franciscan Friars, Third Order Regular, as well as Victoria A. Simon in her capacity as an agent, servant and employee of the same, had the care, custody, control and safekeeping of the school property located at 443 Kempsville Road, Norfolk, Virginia, and the same said defendants further had the care, custody, control and safekeeping of children then and there attending the school at the same said location.

5. That on the same said date the defendant, Victoria A. Simon, individually and as an agent, servant and employee of the Board of Trustees, James Barry-Robinson Home for Boys, and/or the aforementioned individual members of said Board of Trustees and/or

the Franciscan Friars, Third Order Regular, had the care, custody, control, safekeeping and supervision of the children attending class as first-year students and, more particularly, attending homeroom for first-year students at the school above named.

6. That on or about October 30, 1970, it was the duty of the defendants, the Board of Trustees, James Barry-Robinson Home for Boys, and/or the individual members of said Board aforementioned, and/or the Franciscan Friars, Third Order Regular, and Victoria A. Simon, individually and as an agent, servant and employee as above-mentioned, to keep the said aforementioned school property, building, classroom and appurtenances thereto belonging in a reasonably safe condition so as not to endanger the safety of the children attending said school or to use said building, classroom and appurtenances while the same were in a dangerous condition.

7. That it was the same said duty of the same said defendants as mentioned in the preceding paragraph 6 to properly and adequately supervise those children using the aforesaid building, classroom and the appurtenances thereto belonging or to otherwise initiate or promulgate such rules and regulations as would establish adequate and proper supervision and to implement the same so as to provide adequate and proper supervision of the aforesaid children utilizing the school premises aforementioned.

8. That on or about the 30th day of October, 1970, while the plaintiff was on the premises of the aforementioned school and a student in the homeroom class of the defendant, Victoria A. Simon, and at a time when the said classroom for said class was unsupervised by the said Victoria A. Simon, individually and as an agent, servant and employee as aforementioned, and was further unsupervised by the defendants, the Board of Trustees, James Barry-Robinson Home for Boys, and/or the individually named members of said Board of Trustees aforementioned, and/or the Franciscan Friars, Third Order

Regular, through their lawful agents, servants and employees, the defendants, Mark Dombrowski, Thomas Walter Orlowski, Edward Joseph Hendrix, Richard H. McCrea, Jr., and Conrad J. Landry, did negligently, carelessly, and recklessly cause the plaintiff to be pushed out of an open window of the classroom which was used by first-year students as a homeroom aforementioned.

9. That on or about the 30th day of October, 1970, and for a period of time prior thereto, the defendants, the Board of Trustees, James Barry-Robinson Home for Boys, and/or the individually named members of said Board of Trustees aforementioned, and/or the Franciscan Friars, Third Order Regular, and Victoria A. Simon, individually and as an agent, servant and employee as aforementioned, permitted children, including the plaintiff, into the aforementioned homeroom without adequate and proper supervision prior to the start of morning classes; that the aforesaid defendants negligently permitted children into said classroom without adequate supervision, and/or the same said defendants knew, or in the exercise of reasonable care should have known, that there was attendant danger to the plaintiff and other children then and there in the classroom aforementioned because of the lack of said adequate supervision.

10. That the defendants aforementioned in the preceding paragraph 9 knew and negligently permitted an unsupervised condition to exist in the first-year homeroom classroom of the said school and knew and/or negligently allowed plaintiff to be inside said classroom with other children, all of whom were unsupervised, and the same said defendants negligently directed and permitted the plaintiff while attending said school to be inside the said homeroom with insufficient and/or improper supervision, although they, the defendants aforementioned, knew or should have known that such a condition was dangerous and/or liable to result in injury to the plaintiff and others.

11. That on or about the 30th day of October, 1970, and prior thereto, the defendants, the Board of Trustees, James Barry-Robinson Home for Boys, the individually named members of said Board of Trustees aforementioned, the Franciscan Friars, Third Order Regular, and Victoria A. Simon, individually and acting as an agent, servant and employee as aforementioned, negligently permitted students who were not authorized to be in the first-year students' homeroom to be in the same prior to the start of classes, and the same said defendants negligently failed to supervise said homeroom so as to prevent said unauthorized children to be in said homeroom, although the said defendants knew, or should have known, that said unauthorized students were undertaking acts of hazing which were and/or could be dangerous to the plaintiff's well-being.

12. That on or about the 30th day of October, 1970, and a few minutes before the start of the aforementioned homeroom class while plaintiff was lawfully in the first-year homeroom of said school, through the carelessness and negligence of the defendants, their agents, servants and employees, plaintiff was caused to fall from an open window of said classroom.

13. That on the same said date at a time set apart for the presence of such persons as the plaintiff to be in the said homeroom, plaintiff was negligently caused by the defendants, the Board of Trustees, James Barry-Robinson Home for Boys, the individually named members of said Board of Trustees, the Franciscan Friars, Third Order Regular, and Victoria A. Simon, individually and as an agent, servant and employee as aforementioned, to be instructed, required, trained and/or permitted to be in said homeroom without adequate and proper supervision.

14. As a proximate cause of any and/or all of the aforementioned acts of the defendants, constituting negligence, plaintiff was caused to be permanently disabled and crippled for life; that as

a further proximate cause of the negligence and/or aforesaid acts of the defendants, plaintiff was caused to become a quadruplegic and was caused extreme pain, suffering and mental anguish and will in the future so suffer; and also further the plaintiff was caused to lose the ability to be employed in the future and to be able to be gainfully employed, and said plaintiff was otherwise caused disfiguration, loss of use of his limbs, and will in the future so suffer and will be unable to undertake the normal and usual activities of a human being; and will otherwise incur upon maturity medical bills, including doctors, nurses and hospitalization costs as well as costs for various appliances to aid him; and said plaintiff was otherwise made sick, lame, disordered and permanently disabled.

WHEREFORE, plaintiff moves for judgment against the defendants both jointly and severally in the sum of Two Million ($2,000,000.00) Dollars.

EDWARD R. WRIGHT, an infant,
who sues by his mother and next
friend, Joan E. Wright

By: Joan E. Wright
Joan E. Wright

By: Wayne Lustig
Of Counsel

Campbell, Lustig & Hancock
1340 Virginia National Bank Building
Norfolk, Virginia 23510

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I certify that on _____ I mailed a copy of the foregoing pleading to each counsel of record.

_____

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

EDWARD R. WRIGHT, an infant,
who sues by his mother and next
friend, Joan E. Wright,)

v. Plaintiff,)

THOMAS WALTER ORLOWSKI, an infant,)

and

EDWARD JOSEPH HENDRIX, an infant,)

and

RICHARD H. McCREA, JR., an infant,)

and)

CONRAD J. LANDRY, an infant,)

and

MARK DOMBROWSKI, an infant,)

and

VICTORIA A. SIMON)
(Last known address)
7731 Wild Plum Lane
University City, Missouri 63130,
and)

T. DAVID FITZ-GIBBON, Individually
and as a member of Board of Trustees)
of James Barry-Robinson Home for Boys,
313 51st Street
Virginia Beach, Virginia,
and)

JOHN JOSEPH BAECHER, Individually)
and as a member of Board of Trustees
of James Barry-Robinson Home for Boys,
612 Law Building, 147 Granby Street)
Norfolk, Virginia,
and

THOMAS E. McANDREWS, Individually)
and as a member of Board of Trustees
of James Barry-Robinson Home for Boys,)
1400 Buckingham Avenue
Norfolk, Virginia,
and)

JAMES J. GARA, Individually and as
a member of the Board of Trustees)
of James Barry-Robinson Home for Boys
7464 North Shore Road
Norfolk, Virginia,)

LAW DOCKET

No. 15987

8

and

NORMAN P. MOORE, Executor of the)
Estate of Harry P. Moore, Jr.,
Deceased, Individually and to
the extent the decedent was a)
member of the Board of Trustees
of James Barry-Robinson Home
for Boys,)
Poplar Halls Professional Building
463 N. Military Highway
Norfolk, Virginia,)

and

THE BOARD OF TRUSTEES)
JAMES BARRY-ROBINSON HOME FOR BOYS
Serve: T. David Fitz-Gibbon
Chairman of the Board)
313 51st Street
Virginia Beach, Virginia,

and)

FRANCISCAN FRIARS, THIRD ORDER REGULAR,
an unincorporated association,)
Serve: Father Bonaventure Midili
James Barry-Robinson Home for Boys
443 Kempsville Road)
Norfolk, Virginia,

Defendants)

A F F I D A V I T

I, WAYNE LUSTIG, of the law offices of Campbell, Lustig & Hancock, after being first duly sworn, depose and say:

1. That the last known address of the defendant, Victoria A. Simon, now a nonresident of the State of Virginia, is 7731 Wild Plum Lane, University City, Missouri 63130.

2. That by this Affidavit plaintiff requests compliance by the Secretary of the Commonwealth with Title 8, Section 8-81.1-5 of the Code of Virginia in mailing to said nonresident defendant a copy of the pleadings in this action, served on the Secretary by the City Sheriff, City of Richmond.

Wayne Lustig

Wayne Lustig

Subscribed and sworn to before me this 6th day of March, 1974.

My commission expires: 2/21/76. Notary Public

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

JOAN E. WRIGHT,

Plaintiff,)

v.

THOMAS WALTER ORLOWSKI, an infant,)

and

EDWARD JOSEPH HENDRIX, an infant,)

and)

RICHARD H. McCREA, JR., an infant, LAW DOCKET

and) No. 15986

CONRAD J. LANDRY, an infant,)

and

MARK DOMBROWSKI, an infant,)

and)

VICTORIA A. SIMON
(Last known address))
7731 Wild Plum Lane
University City, Missouri 63130,
and)

T. DAVID FITZ-GIBBON, Individually
and as a member of Board of Trustees)
of James Barry-Robinson Home for Boys,
313 51st Street
Virginia Beach, Virginia,)
and

JOHN JOSEPH BAECHER, Individually)
and as a member of Board of Trustees
of James Barry-Robinson Home for Boys,
612 Law Building, 147 Granby Street)
Norfolk, Virginia,
and

)

THOMAS E. McANDREWS, Individually
and as a member of Board of Trustees
of James Barry-Robinson Home for Boys,)
1400 Buckingham Avenue
Norfolk, Virginia,
and)

JAMES J. GARA, Individually and as
a member of the Board of Trustees)
of James Barry-Robinson Home for Boys,
7464 North Shore Road
Norfolk, Virginia,)

10

NORMAN P. MOORE, Executor of the Estate of Harry P. Moore, Jr., Deceased, Individually and to the extent the decedent was a member of the Board of Trustees of James Barry-Robinson Home for Boys, Poplar Halls Professional Building 463 N. Military Highway Norfolk, Virginia,)

and

THE BOARD OF TRUSTEES JAMES BARRY-ROBINSON HOME FOR BOYS
Serve: T. David Fitz-Gibbon
Chairman of the Board
313 51st Street
Virginia Beach, Virginia,)

and

FRANCISCAN FRIARS, THIRD ORDER REGULAR, an unincorporated association,
Serve: Father Bonaventure Midili
James Barry-Robinson Home for Boys
443 Kempsville Road
Norfolk, Virginia,)

Defendants)

AMENDED MOTION FOR JUDGMENT

TAKE NOTICE, that plaintiff, by counsel, moves for judgment both jointly and severally against the defendants on the following grounds, to-wit:

1. That at all the time hereinafter mentioned plaintiff's son was a paying student at the James Barry-Robinson Home for Boys, also known as James Barry-Robinson High School.

2. At all of the times hereinafter mentioned the said James Barry-Robinson Home for Boys, a/k/a James Barry-Robinson High School, was owned and/or operated by the Board of Trustees of the James Barry-Robinson Home for Boys and/or the individual members of said Board of Trustees, being T. David Fitz-Gibbon, Chairman, John Joseph Baecher, Thomas E. McAndrews, James J. Gara, and Harry P. Moore, Jr. (now deceased), and/or was furthr owned and/or operated by the Franciscan Friars, Third Order Regular, and the very same Board of Trustees and/or the aforementioned individual members of the said

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Board of Trustees above mentioned, and/or the Franciscan Friars, Third Order Regular, did employ and have as its agent, servant and employee at the said James Barry-Robinson Home for Boys, also known as James Barry-Robinson High School, a certain Victoria A. Simon who was employed as aforementioned as a teacher at the said James Barry-Robinson Home for Boys, also known as James Barry-Robinson High School, and at all times hereinafter mentioned the said Victoria A. Simon was otherwise acting in her individual capacity as well as in her capacity as an agent, servant and employee of the said Board of Trustees, James Barry-Robinson Home for Boys, and/or the aforementioned individual members of the said Board of Trustees and/or the Franciscan Friars, Third Order Regular.

3. That at all times hereinafter mentioned the defendants, Mark Dombrowski, Thomas Walter Orlowski, Edward Joseph Hendrix, Richard H. McCrea, Jr., and Conrad J. Landry were students at the James Barry-Robinson Home for Boys, also known as James Barry-Robinson High School.

4. That on or about the 30th day of October, 1970, the defendants, the Board of Trustees, James Barry-Robinson Home for Boys, and/or the aforementioned individually named members of said Board of Trustees, and/or the Franciscan Friars, Third Order Regular, as well as Victoria A. Simon in her capacity as an agent, servant and employee of the same, had the care, custody, control and safekeeping of the school property located at 443 Kempsville Road, Norfolk, Virginia, and the same said defendants further had the care, custody, control and safekeeping of children then and there attending the school at the same said location.

5. That on the same said date the defendant, Victoria A. Simon, individually and as an agent, servant and employee of the Board of Trustees, James Barry-Robinson Home for Boys, and/or the aforementioned individual members of said Board of Trustees and/or

the Franciscan Friars, Third Order Regular, had the care, custody, control, safekeeping and supervision of the children attending class as first-year students and, more particularly, attending homeroom for first-year students at the school above named.

6. That on or about October 30, 1970, it was the duty of the defendants, the Board of Trustees, James Barry-Robinson Home for Boys, and/or the individual members of said Board aforementioned, and/or the Franciscan Friars, Third Order Regular, and Victoria A. Simon, individually and as an agent, servant and employee as above-mentioned, to keep the said aforementioned school property, building, classroom and appurtenances thereto belonging in a reasonably safe condition so as not to endanger the safety of the children attending said school or to use said building, classroom and appurtenances while the same were in a dangerous condition.

7. That it was the same said duty of the same said defendants as mentioned in the preceding paragraph 6 to properly and adequately supervise those children using the aforesaid building, classroom and the appurtenances thereto belonging or to otherwise initiate or promulgate such rules and regulations as would establish adequate and proper supervision and to implement the same so as to provide adequate and proper supervision of the aforesaid children utilizing the school premises aforementioned.

8. That on or about the 30th day of October, 1970, while plaintiff's son was on the premises of the aforementioned school and a student in the homeroom class of the defendant, Victoria A. Simon and at a time when the said classroom for said class was unsupervised by the said Victoria A. Simon, individually and as an agent, servant and employee as aforementioned, and was further unsupervised by the defendants, the Board of Trustees, James Barry-Robinson Home for Boys, and/or the individually named members of said Board of Trustees aforementioned, and/or the Franciscan Friars, Third Order

Regular, through their lawful agents, servants and employees, the defendants, Mark Dombrowski, Thomas Walter Orlowski, Edward Joseph Hendrix, Richard H. McCrea, Jr., and Conrad J. Landry, did negligently, carelessly, and recklessly cause the plaintiff's son to be pushed out of an open window of the classroom which was used by first-year students as a homeroom aforementioned.

9. That on or about the 30th day of October, 1970, and for a period of time prior thereto, the defendants, the Board of Trustees, James Barry-Robinson Home for Boys, and/or the individually named members of said Board of Trustees aforementioned, and/or the Franciscan Friars, Third Order Regular, and Victoria A. Simon, individually and as an agent, servant and employee as aforementioned, permitted children, including the plaintiff's son, into the aforementioned homeroom without adequate and proper supervision prior to the start of morning classes; that the aforesaid defendants negligently permitted children into said classroom without adequate supervision, and/or the same said defendants knew, or in the exercise of reasonable care should have known, that there was attendant danger to the plaintiff's son and other children then and there in the classroom aforementioned because of the lack of said adequate supervision.

10. That the defendants aforementioned in the preceding paragraph 9 knew and negligently permitted an unsupervised condition to exist in the first-year homeroom classroom of the said school and knew and/or negligently allowed plaintiff's son to be inside said classroom with other children, all of whom were unsupervised, and the same said defendants negligently directed and permitted the plaintiff's son while attending said school to be inside the said homeroom with insufficient and/or improper supervision, although they, the defendants aforementioned, knew or should have known that such a condition was dangerous and/or liable to result in injury to the plaintiff's son and others.

11. That on or about the 30th day of October, 1970, and prior thereto, the defendants, the Board of Trustees, James Barry-Robinson Home for Boys, the individually named members of said Board of Trustees aforementioned, the Franciscan Friars, Third Order Regular, and Victoria A. Simon, individually and acting as an agent, servant and employee as aforementioned, negligently permitted students who were not authorized to be in the first-year students' homeroom to be in the same prior to the start of classes, and the same said defendants negligently failed to supervise said homeroom so as to prevent said unauthorized children to be in said homeroom, although the said defendants knew, or should have known, that said unauthorized students were undertaking acts of hazing which were and/or could be dangerous to the plaintiff's son's well-being.

12. That on or about the 30th day of October, 1970, and a few minutes before the start of the aforementioned homeroom class while plaintiff's son was lawfully in the first-year homeroom of said school, through the carelessness and negligence of the defendants, their agents, servants and employees, plaintiff's son was caused to fall from an open window of said classroom.

13. That on the same said date at a time set apart for the presence of such persons as the plaintiff's son to be in the said homeroom, plaintiff's son was negligently caused by the defendants, the Board of Trustees, James Barry-Robinson Home for Boys, the individually named members of said Board of Trustees, the Franciscan Friars, Third Order Regular, and Victoria A. Simon, individually and as an agent, servant and employee as aforementioned, to be instructed, required, trained and/or permitted to be in said homeroom without adequate and proper supervision.

14. As a proximate cause of any and/or all of the aforementioned acts of the defendants, constituting negligence, plaintiff's son was caused to be permanently disabled and crippled for

life; that as a further proximate cause of the aforesaid acts and/or negligence of the defendants, plaintiff was caused to incur divers sums for medical, hospital, doctors and therapeutic treatment of her son aforementioned and will in the future be caused to incur divers sums for the same said care and treatment of her son, including and not limited to sums which will have to be paid for his constant care and medical treatment after he passes the age of majority.

WHEREFORE, plaintiff moves for judgment against the defendants both jointly and severally in the sum of Six Hundred Fifty Thousand ($650,000.00) Dollars.

By: Joan E. Wright
Joan E. Wright

By: W. Lustig
Of Counsel

Campbell, Lustig & Hancock
1340 Virginia National Bank Building
Norfolk, Virginia

I certify that on 3-6-74 I mailed a copy of the foregoing pleading to each counsel of record.

Wayne Lustig

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

JOAN E. WRIGHT,

Plaintiff,)

v.

THOMAS WALTER ORLOWSKI, an infant,)

and

EDWARD JOSEPH HENDRIX, an infant,)

and

RICHARD H. McCREA, JR., an infant,)

and

CONRAD J. LANDRY, an infant,)

and

MARK DOMBROWSKI, an infant,)

and

VICTORIA A. SIMON
(Last known address)
7731 Wild Plum Lane
University City, Missouri 63130,)

and

T. DAVID FITZ-GIBBON, Individually
and as a member of Board of Trustees
of James Barry-Robinson Home for Boys,
313 51st Street
Virginia Beach, Virginia,)

and

JOHN JOSEPH BAECHER, Individually
and as a member of Board of Trustees
of James Barry-Robinson Home for Boys,
612 Law Building, 147 Granby Street,
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THOMAS E. McANDREWS, Individually
and as a member of Board of Trustees
of James Barry-Robinson Home for Boys,
1400 Buckingham Avenue
Norfolk, Virginia,)

and

JAMES J. GARA, Individually and as
a member of the Board of Trustees
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7464 North Shore Road
Norfolk, Virginia,)

LAW DOCKET

No. 15986

17

NORMAN P. MOORE, Executor of the)
Estate of Harry P. Moore, Jr.,
Deceased, Individually and to
the extent the decedent was a)
member of the Board of Trustees
of James Barry-Robinson Home
for Boys,)
Poplar Halls Professional Building
463 N. Military Highway
Norfolk, Virginia,)
and

THE BOARD OF TRUSTEES)
JAMES BARRY-ROBINSON HOME FOR BOYS
Serve: T. David Fitz-Gibbon
Chairman of the Board)
313 51st Street
Virginia Beach, Virginia,
and)

FRANCISCAN FRIARS, THIRD ORDER REGULAR,
an unincorporated association,)
Serve: Father Bonaventure Midili
James Barry-Robinson Home for Boys
443 Kempsville Road)
Norfolk, Virginia,

Defendants)

A F F I D A V I T

I, WAYNE LUSTIG, of the law offices of Campbell, Lustig and Hancock, after being first duly sworn, depose and say:

1. That the last known address of the defendant, Victoria A. Simon, now a nonresident of the State of Virginia, is 7731 Wild Plum Lane, University City, Missouri 63130.

2. That by this Affidavit plaintiff requests compliance by the Secretary of the Commonwealth with Title 8, Section 8-81.1-5 of the Code of Virginia in mailing to said nonresident defendant a copy of the pleadings in this action, served on the Secretary by the City Sheriff, City of Richmond.

Wayne Lustig
Wayne Lustig

Subscribed and sworn to before me this 6th day of March, 1974.

Eileen G. Stewart
Notary Public

My commission expires
2/21/76.

I certify that on 3-6-74 I mailed a copy of the foregoing pleading to each counsel of record.
W Lustig

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

JOAN E. WRIGHT,

Plaintiff

v. LAW DOCKET NO. 15,986

THOMAS WALTER ORLOWSKI, et al,

Defendant

EDWARD R. WRIGHT, Infant, etc.,

Plaintiff

v. LAW DOCKET NO. 15,987

THOMAS WALTER ORLOWSKI, et al,

Defendant

MOTION TO DISMISS

Now comes defendant, Richard H. McCrea, Jr., and moves the Court to dismiss the above styled actions on the grounds that one or more of the alleged joint tort feasors have settled and compromised the claims of the plaintiffs for a consideration paid to the plaintiffs wherefore all defendants are released from the claims of the plaintiffs.

RICHARD H. McCREA, JR.

By _____ Of Counsel

PLEA OF RELEASE

Now comes defendant, Richard H. McCrea, Jr., and files this Plea of Release and alleges that the plaintiffs have executed releases with one or more of the defendants who are alleged to be joint tort feasors whereby all of the defendants are to be released and dismissed as parties defendant in these actions.

RICHARD H. McCREA, JR.

By _____ Of Counsel

NOTICE

TAKE NOTICE that the undersigned will appear in the Circuit Court of the City of Virginia Beach, Virginia at the courthouse thereof, at 9:00 a.m. on December 19, 1975 for argument upon the above motion and plea and for the entry of an order dismissing these actions as to this defendant and to all defendants.

RICHARD H. McCREA, JR.

By _____ Of Counsel

John F. Rixey
Rixey and Heilig
15 Stoney Point
700 Newtown Road
Norfolk, Virginia 23502

I hereby certify that on the 12 day of December, 1975 a copy of the foregoing pleading was mailed to all counsel of record.

_____

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

JOAN E. WRIGHT,

Plaintiff

v.

At Law No. 15,986

THOMAS WALTER ORLOWSKI,
et al,

Defendants

and

EDWARD R. WRIGHT, infant,
etc.,

Plaintiff

v.

At Law No. 15,987

THOMAS WALTER ORLOWSKI,
et al,

Defendants

PLEA OF RELEASE

Now come the Trustees, individually, of James Barry-Robinson Home for Boys, and join with Richard H. McCrea, Jr., in filing this Plea of Release for the reason that the plaintiffs have executed releases with at least two of the defendants who are alleged to have been joint tort feasors, whereby all defendants are released and dismissed in these actions.

T. DAVID FITZ-GIBBON, JOHN JOSEPH BAECHER, EVELYN W. PERRY, Executrix of the Estate of THOMAS E. McANDREWS, Deceased, JAMES J. GARA, NORMAN P. MOORE, Executor of the Estate of HARRY P. MOORE, Deceased, and the BOARD OF TRUSTEES, JAMES BARRY-ROBINSON HOME FOR BOYS

By _____
Counsel

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record this 16th day of December, 1975

Attorney at Law

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

JOAN E. WRIGHT,	:	
Plaintiff,	:	
vs.	:	AT LAW NO. 15,986
THOMAS WALTER ORLOWSKI, et al,	:	
Defendants.	:	
and	:	
EDWARD R. WRIGHT, Infant, etc.,	:	
Plaintiff,	:	
vs.	:	AT LAW NO. 15,987
THOMAS WALTER ORLOWSKI, et al,	:	
Defendants.	:	

PLEA OF RELEASE AND MOTION TO DISMISS

COMES NOW the Franciscan Friars, Defendant, by counsel, and pleads as follows:

1. That, since the filing of the hereinabove captioned action, the Plaintiff has released two of the Defendants herein who are alleged in the Motions for Judgment to be tort feasors jointly liable with this and other defendants;

2. That, by reason thereof, this and all other defendants are released from any liability to the plaintiff;

WHEREFORE, the Defendant, Franciscan Friars, by counsel, moves the Court to dismiss the Motions for Judgment.

23

FRANCISCAN FRIARS

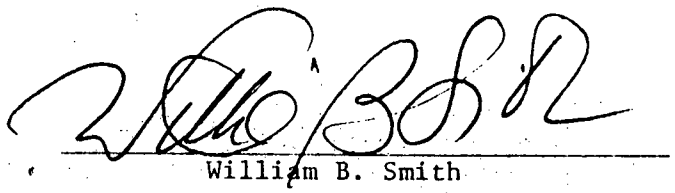
By _____
Of Counsel for Defendant

UY, CROMWELL, BETZ,
MITH, CULVERHOUSE
& DICKERSON
ATTORNEYS AT LAW

William B. Smith
GUY, CROMWELL, BETZ, SMITH, CULVERHOUSE & DICKERSON
Pembroke Office Park
Pembroke One - Suite 525
Virginia Beach, Virginia 23462
Of Counsel for Franciscan Friars, Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Plea of Release and Motion to Dismiss was mailed to all counsel of record this 17 day of December, 1975.



William B. Smith

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

JOAN E. WRIGHT, Plaintiff v. THOMAS WALTER ORLOWSKI, et al, Defendant	:	LAW DOCKET NO. 15,986
EDWARD R. WRIGHT, Inf., etc., Plaintiff v. THOMAS WALTER ORLOWSKI, et al, Defendant.	:	LAW DOCKET NO. 15,987

MOTION TO DISMISS

Now comes defendant, Mark Dombrowski, and moves the Court to dismiss the above-styled actions on the grounds that one or more of the alleged joint tort feasors have settled and compromised the claims of the plaintiffs for a consideration paid to the plaintiffs wherefore all defendants are released from the claims of the plaintiffs.

MARK DOMBROWSKI

BY _____
Of Counsel

PLEA OF RELEASE

24

Now comes defendant, Mark Dombrowski, and files this Plea of Release and alleges that the plaintiffs have executed releases with one or more of the defendants who are alleged to be joint tort feasors whereby all of the defendants are to be

released and dismissed as parties defendant in these actions.

MARK DOMBROWSKI

BY _____
Of Counsel

LAW OFFICES
PRESTON, PRESTON,
WILSON & LAMBERT
VA. BEACH, VA

PRESTON, PRESTON, WILSON & LAMBERT
992 First Colonial Road
Virginia Beach, Virginia 23454

I hereby certify that on the 18th day of December, 1975,

I mailed a true copy of the foregoing Motion to Dismiss and Plea of Release to all counsel of record herein.

_____

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

JOAN E. WRIGHT, Plaintiff, vs. THOMAS WALTER ORLOWSKI, et al, Defendants,	AT LAW NO. 15986
and EDWARD R. WRIGHT, infant, etc., Plaintiff, vs. THOMAS WALTER ORLOWSKI, et al, Defendants.	AT LAW NO. 15987

NOTICE OF MOTION
TO ALL COUNSEL OF RECORD

TAKE NOTICE that on Tuesday, December 23, 1975, at 9:30 A.M., or as soon thereafter as the undersigned may be heard, we will move the Court to dismiss the Motions for judgment filed herein for the reason stated in the Plea of Release and Motion to Dismiss heretofore filed on behalf of Franciscan Friars.

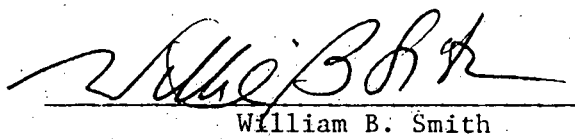
FRANCISCAN FRIARS

By _____
Of Counsel

William B. Smith
GUY, CROMWELL, BETZ, SMITH, CULVERHOUSE & DICKERSON
Pembroke Office Park
Pembroke One, Suite 525
Virginia Beach, Virginia 23462

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Motion was mailed to all counsel of record this 8th day of December, 1975.



William B. Smith

GUY, CROMWELL, BETZ, SMITH, CULVERHOUSE & DICKERSON
ATTORNEYS AT LAW

BS:rl:ks 121875

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

JOAN E. WRIGHT, Plaintiff, vs. CONRAD LANDRY, Defendants.	AT LAW NO. 15,986
and EDWARD R. WRIGHT, infant, etc., Plaintiff, vs. CONRAD LANDRY, et al, Defendants.	AT LAW NO. 15,987

PLEA OF RELEASE AND MOTION TO DISMISS

COMES NOW Conrad Landry, Defendant, by counsel, and pleads as follows:

1. That, since the filing of the hereinabove captioned action, the Plaintiff has released two of the Defendants herein who are alleged in the Motions for Judgement to be tort feasors jointly liable with this and other defendants;

2. That, by reason thereof, this and all other defendants are released from any liability to the plaintiff;

WHEREFORE, the Defendant, Conrad Landry, by counsel, moves the Court to dismiss the Motions for Judgement.

CONRAD LANDRY

By _____
Of Counsel for Defendant

Charles A. McDuffie
1020 Plaza One
Norfolk, Virginia

Charles A. McDuffie
ATTORNEY AT LAW
NORFOLK, VIRGINIA

V I R G I N I A :

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

JOAN E. WRIGHT,	:	
Plaintiff,	:	
v.	:	AT LAW NO. 15,986
THOMAS W. ORLOWSKI,	:	
Defendant.	:	
and	:	
EDWARD R. WRIGHT, infant, etc.,	:	
Plaintiff,	:	
v.	:	AT LAW NO. 15,987
THOMAS W. ORLOWSKI, et al,	:	
Defendant.	:	

PLEA OF RELEASE AND MOTION TO DISMISS

Now comes the Defendant, Thomas W. Orlowski, by his counsel, and says as follows:

1. That he has been released by the Plaintiff, who has also released one other alleged joint tort feasor.

WHEREFORE, the Defendant, Thomas W. Orlowski, moves the Court to dismiss the Motion for Judgment.

THOMAS W. ORLOWSKI

By _____
Of Counsel

JAMES A. GORRY, III, p.d.
Broyles, McKenry & Gorry
35th Street and Pacific Avenue
Virginia Beach, Virginia 23451

30

I hereby certify that a true copy of the foregoing Plea of Release and Motion to Dismiss was mailed to all counsel of record, this 16th day of January, 1976.

_____
James A. Gorry, III

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

JOAN E. WRIGHT, Plaintiff, vs. THOMAS WALTER ORLOWSKI, ET ALS., Defendants.	LAW NO. 15,986
EDWARD R. WRIGHT, INFANT, ETC., Plaintiff, vs. THOMAS WALTER ORLOWSKI, INFANT, ET ALS. Defendants.	LAW NO. 15,987

O P I N I O N

These cases are before the court on Special Pleas of Release filed by defendants McCrea, Landry, and Trustees for the Barry-Robinson School for Boys, counsel for other defendants having indicated similar pleas will be filed.

Statement of Facts

Government Employees and Stuyvesant Insurance Companies issued home owner's liability policies covering defendants Orlowski and Hendrix, respectively, and undertook to defend them in these two actions instituted by the plaintiffs for medical expenses and serious personal injuries sustained by the infant plaintiff Wright. The other defendants were sued as joint tortfeasors.

Geico and Stuyvesant each paid $25,000.00 to the two plaintiffs, the plaintiff Edward R. Wright having attained majority age since these actions were filed in September, 1972. In return, the plaintiffs executed agreements entitled "Covenant Not to Sue" to each of the insurance companies, but expressly reserving the right to proceed against all defendants including Orlowski and Hendrix. Despite the written agreements it appears that there was at least a tacit understanding between counsel for the plaintiffs and the two defendants that a non-suit would be taken as to the two defendants before the case went to the jury.

There is no question that counsel were acting in good faith in an attempt to avoid the transaction operating as a release of other joint tortfeasors. It appears undisputed that the injured plaintiff is a quadriplegic and that the attorneys retained by Geico and Stuyvesant felt it was in the best interest of both the respective defendants they represented and the insurance companies to pay over the policy limits as they did.

Conclusions of Law

Virginia has consistently adhered to the strict common law rule that accord and satisfaction with, and the release of, one joint tortfeasor releases all. In Cottman v. Whitehead, 209 Va. 377, p. 382 (1968) the Supreme Court of Virginia said:

> "We have recognized the conflict of authority on the rule and the criticisms of it ----, but we have declined to change the rule, and we decline to do so now."

The plaintiffs contend that Virginia recognizes covenants not to sue, citing the 1963 case of Lackey v. Brooks, Adm. 204 Va. 428 where it was said:

> "By the great weight of authority a covenant not to sue one joint tortfeasor, as distinguished from a release, does not operate to discharge the covenantor's claim against other joint tortfeasors. ---------
>
> "Upon the same principle a bare covenant not to sue the master for the tortious act of the servant is not a bar to an action against the servant for the latter's misconduct.----" (Emphasis supplied)

In Lackey the covenant not to sue was part of a lease agreement. At page 431 the court specifically pointed out:

> "While this provision partakes of the nature of a release, there is no claim that such was its purpose and effect. At the time the lease was entered into there was in existence no claim to be released. The provision clearly indicates the lessor's intention to refrain from enforcing against the lessee any claims for damages to the leased vehicles which might subsequently occur." (Emphasis supplied)

Thus analyzed, it becomes abundantly clear that in the Lackey case the covenant not to sue was executed before a claim for any wrong existed. No tortfeasor was in existence. There was no claim to be released. The decision in no way changed Virginia law as to the release of a joint tortfeasor so forcefully reiterated five years later in Cottman. Supra.

Plaintiffs also advance the argument that the covenant not to sue was an agreement with a third party - not a joint

tortfeasor. Any relationship between the plaintiffs and the insurance companies necessarily arose out of their claims against the insured defendants whom the companies were required to defend under the terms of their policies. The statutory law of Virginia, Sec. 38.1-380 of 1950 Code as amended, provides that no plaintiff may maintain an action against an insurer of a defendant until after judgment. Before judgment any defense to the claim can be made only in the name of the insured. As said in Employer's Liability v. Taylor, 164 Va. 103, p. 110:

> "The defense of the claim can only be made in the name of Bushnell (the insured), as the rule in this Commonwealth does not permit plaintiff, before reducing her claim to judgment, to maintain an action on the policy."

The right of the insurance companies to defend or settle the plaintiffs' claims prior to judgment can be allowed only in the name of, for and on behalf of their insureds.

Nor can there be any privity of contract between the parties. The liability of the insurer to the plaintiff is not fixed until it is made to appear that a judgment has been recovered against a party who comes within the provisions of the policy. State Farm Mut. Inc. Co. v. Justis, 168 Va. 158, p. 168.

Until judgment against the insured, which by statute enables the claimant to proceed against the insurer, the insurer's sole responsibility under the terms of its policy is to defend or settle in good faith on behalf and for the benefit of the insured. Only after judgment does the insurer have any liability exposure to the claimant.

In fact, the defendant Orlowski, with his parents, and Geico entered into a written agreement (Def. McCrea's Exh. 4) dated December 27, 1974, prior to the execution of the agreement entitled "Covenant Not to Sue" between Geico and the plaintiffs dated January 21, 1975. In explicit words the Orlowskis authorized Geico to tender the full $25,000.00 coverage to the plaintiffs "in settlement of all claims, demands, and causes of action which said Joan E. Wright and Edward R. Wright may have now or in the future, known or unknown, against Government Employees Insurance Company as the insurer of Thomas Walter Orlowski, <u>or any of us</u> which have arisen ---- out of the inciden occurring October 30, 1970, and which is the subject matter of suits now pending ----."

The agreement further provided that acceptance of the money by the Wrights "in discharge of all claim --- against Government Employees Insurance Company <u>or any of us</u> ----" would release Geico from any further obligation under the policy contract.

For the reason stated, it appears that under the law of Virginia the plaintiffs' transactions with the insurance companies resulting in the execution of the covenants not to sue must be held to be releases of the defendants they represented. The companies had no right to execute any agreement with the plaintiffs except in the name and for the benefit of the insured defendants. The covenants of the plaintiffs not to sue inured to the benefit of those defendants. One claim has been settled with two joint tortfeasors, resulting in the release of all

other joint tortfeasors.

As stated in Shortt v. Hudson Supply 191 Va. 306, p. 312;

> "----where two are jointly and severally liable in tort for an injury caused by, their negligence or misconduct, the satisfaction of the injured party's single cause of action by one discharges the other, since the transaction is similar in its operation to an accord and satisfaction. This is true, even though the parties did not intend to discharge the other joint wrongdoer."

Accordingly, the Special Pleas of Release, in the judgment of this court, should be sustained.

An appropriate order referring to the reasons stated in this opinion will be entered when presented with endorsements of all counsel and any exceptions which may be noted.

February 18, 1976

JUDGE

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

THIS 15 DAY OF March 1976

JOAN E. WRIGHT,

Plaintiff,

v. LAW DOCKET #15,986

THOMAS WALTER ORLOWSKI, etals,

Defendants.

EDWARD R. WRIGHT, infant, etc.,

Plaintiff,

v. LAW DOCKET #15,987

THOMAS WALTER ORLOWSKI, etals,

Defendants.

O R D E R

This day came the parties, by counsel, upon the Special Pleas of Release filed by defendants, Richard H. McCrae, Jr.; Conrad J. Landry; Mark Dombrowski; The Trustees, individually, of James Barry Robinson Home for Boys; and Franciscan Friars.

It appearing to the Court, after maturely considering the evidence presented and argument of counsel, that the transactions of the plaintiffs with Government Employees Insurance Company, insurer of Thomas Walter Orlowski, a defendant in these actions, and Stuyvesant Insurance Company, insurer of Edward Joseph Hendrix, a defendant in these actions, in the execution of written covenants not to sue, constituted releases of defendants Orlowski and Hendrix and, under the doctrine that the release of one joint tort feasor is a release of all joint tort feasors, all defendants were released from the claims of the plaintiffs, as recited in that certain written Opinion of the Court dated February 18, 1976;

NOW, THEREFORE, it is ADJUDGED, ORDERED and DECREED that the Special Pleas of Release be and the same hereby are sustained and that summary judgment upon said Special Pleas of Release is hereby entered in favor of all defendants in these actions, to all of which action of the Court the plaintiffs, by counsel, object and except.

WE ASK FOR THIS:

James A. Gorry, III
Counsel for Thomas Walter Orlowski

SEEN:

Robert G. Winters
Counsel for Edward Joseph Hendrix

John F. Rixey
Counsel for Richard H. McCrae, Jr.

Charles A. McDuffie
Counsel for Conrad J. Landry

John B. Preston
Counsel for Mark Dombrowski

Donnell P. Davis
Counsel for Trustees, individually, and Board of Trustees of James Barry Robinson Home for Boys

Nelson W. Coward
Counsel for Estate of Thomas E. McAndrews

Edward L. Breeden, III
Counsel for James J. Gara

Joseph A. Gawrys
Counsel for Est. of Harry P. Moore, Jr.

William B. Smith
Counsel for Franciscan Friars

SEEN AND EXCEPTIONS NOTED:

Wayne Lustig

Wayne Lustig
Counsel for Plaintiffs

ENTER:

Judge

A Copy Teste: John V. Fentress, Clerk
By Barbara A. Hall, D. C.

JOAN E. WRIGHT, Plaintiff, v. THOMAS WALTER ORLOWSKI, et al, Defendants.	:	LAW DOCKET NO. 15,986

* * * * * * * * *

EDWARD R. WRIGHT, Infant, etc., Plaintiff, v. THOMAS WALTER ORLOWSKI, et al, Defendants.	:	LAW DOCKET NO. 15,987

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

TAKE NOTICE that Joan E. Wright and Edward R. Wright do hereby file this Notice of Appeal of their intent to file an appeal from the Order of the Court entered in the above-styled causes on March 15, 1976 whereby these causes were dismissed upon summary judgment in favor of the defendants upon their Special Pleas of Release. As and for their Assignments of Error, plaintiffs state that the Court erred in entering said Order in that the same is contrary to both the law and the evidence in that:

1. The Court erred in finding that the transactions of the plaintiffs with Government Employees Insurance Company and Stuyvesant Insurance Company constituted releases of the defendants, Orlowski and Hendrix;

2. The Court erred in applying the doctrine of release of one joint tort feasor as a release of all joint tort feasors in the instant case;

3. The Court erred by entering up summary judgment in favor of all the defendants in light of the evidence and law presented.

Transcripts of two hearings held in this matter will be hereafter filed.

JOAN E. WRIGHT AND EDWARD R. WRIGHT

By _____
Of Counsel

Campbell, Lustig and Hancock
1340 Virginia National Bank Building
Norfolk, Virginia 23510

I hereby certify that a true copy of the foregoing Notice of Appeal and Assignments of Error was mailed to all counsel of record on this 23d day of March, 1976.

_____
Of Counsel for Plaintiffs

THE COURT: The covenant not to sue involving Geico will be received into evidence and marked Defendant McCrea's Exhibit 1 of this date. The covenant not to sue involving the Stuyvesant Insurance Company will be received in evidence and marked Defendant McCrea Exhibit 2 this date.

(So marked by the court.)

THE COURT: How old is the infant plaintiff at this time, Mr. Lustig?

MR. LUSTIG: If your honor please, he is over eighteen.

THE COURT: At this time?

MR. LUSTIG: Yes, sir.

THE COURT: And what is his date of birth?

MR. RIXEY: I think he was eighteen when these documents were executed, was he not, Mr. Lustig?

MR. LUSTIG: Yes, sir.

THE COURT: Can we stipulate that?

MR. RIXEY: Yes, sir, we certainly can.

MR. LUSTIG: Yes, sir, I believe that is true.

THE COURT: On the 7th day of January 1975, it is stipulated that the infant plaintiff

1 Wright was eighteen years of age or over.

2 MR. RIXEY: The Stuyvesant agreement

3 apparently was on the 7th of January and the

4 Geico agreement on the --

5 THE COURT: 21st of January.

6 MR. RIXEY: 31st -- 21st I suppose.

7 THE COURT: Looks like twenty-one.

8 MR. RIXEY: And, your honor, I don't

9 think that there is any question about the

10 authenticity of those signatures there. They

11 were furnished to me by Mr. Lustig, and I would

12 assume that he would stipulate that the signatures

13 are valid signatures.

14 MR. LUSTIG: Your honor, I would stipulate

15 to that and that I have every reason to believe

16 that the signatures of the representative of the

17 insurance company are also valid.

18 MR. RIXEY: Well, my copies do not carry

19 the signatures of the insurance carrier. That

20 would not be necessary, but in any event, it may

21 well be that they are on the originals with the

22 companies.

23 THE COURT: The copies that have been

24 presented to the court do not show a signature

25 of any representative of either insurance company.

1 MR. RIXEY: No, sir. I don't think that
2 there would be any question about the fact that
3 twenty-five thousand dollars was paid by each
4 carrier, and Mr. Lustig has freely admitted that
5 to me, as have attorneys Fears and Winters, and
6 so I assume that's not in issue here today.
7 THE COURT: Mr. Lustig?
8 MR. LUSTIG: Your honor please, in
9 accordance with the agreement between Stuyvesant
10 and the plaintiffs and Geico and the plaintiffs
11 twenty-five thousand dollars was paid for each
12 covenant not to sue.
13 THE COURT: All right, sir. So stipulated.
14 Mr. Rixey?
15 MR. RIXEY: Your honor, the balance of
16 my presentation today would be a review of the
17 documents and an argument upon the law applicable
18 to these documents, the Virginia law.
19 THE COURT: Am I correct in assuming the
20 question is whether or not a covenant not to sue
21 is the equivalent of a release?
22 MR. RIXEY: I think that's the basic
23 question before the court.
24 THE COURT: Do you agree that that is
25 the issue, Mr. Lustig?

1 MR. LUSTIG: No, sir, that is not the
2 basic issue in this case. It is a sub-issue.
3 The basic issue is whether or not a
4 payment by an insurance company under a covenant
5 not to sue agreement as set forth herein is the
6 release of a joint tort-feasor.
7 THE COURT: I think that you have defined
8 the question in more detail.
9 MR. LUSTIG: Yes, sir, but the essential
10 issue is is the -- in other words, if framed,
11 is the agreement in the form of and language as
12 set forth before you in the exhibits, is an
13 agreement by an insurance carrier as contained
14 in these documents, with an injured plaintiff,
15 the release of a joint tort-feasor for that
16 joint tort-feasor's negligence so as to then
17 bring into play the Virginia law that the release
18 of one joint-tort feasor for his negligence is
19 a release of all joint tort-feasors for their
20 negligence.
21 THE COURT: All right, sir. I think
22 that's probably refining the question more
23 definitively.
24 MR. LUSTIG: And our position, if your
25 honor please, in terms of opening statement is

1 THE COURT: It's been pending since
2 September 13, 1972. We should try to dispose
3 of this matter, and I do not want to continue
4 this case from the time it is now set to be
5 heard on its merits, but obviously, in view of
6 the developments this morning on the special plea
7 of release there is a lot of work that has to
8 be done.
9 Before the court at this time are the
10 two documents and Mr. Rixey has offered into
11 evidence what purports to be a copy of the
12 homeowners policy between the Orlowskis and the
13 Government Employes Insurance Company.
14 MR. LUSTIG: I have no objection to that,
15 your honor.
16 THE COURT: All right, sir. Well, we
17 will admit this in evidence as Defendant McCrea's
18 Exhibit 3 of this date.
19 (So marked by the court.)
20 MR. RIXEY: I also have this other
21 document which we have offered, your honor.
22 THE COURT: I don't believe that
23 Mr. Lustig has stipulated that this is --
24 MR. RIXEY: No, sir, he has not.
25 THE COURT: Although it may be offered

THE COURT: The case of Edward R. Wright, infant, versus Thomas Walter Orlowski and others, and Joan E. Wright versus Thomas Walter Orlowski and others.

Mr. Wayne Lustig for the plaintiffs and numerous attorneys for the various defendants.

Swear the court reporter.

(Whereupon the reporter was called up and first duly sworn.)

THE COURT: Mr. Rixey, are you representing the plaintiff?

MR. RIXEY: I represent one of the many defendants, Your Honor, and we were here before you back on December the 23rd on a plea of release and a motion to dismiss in both of these cases.

The hearing began and went on for an hour or so a little back and forth and, finally, the court, recognizing that the hour was getting late in terms of your other schedule -- and it was just before Christmas, et cetera -- we postponed the hearing to come back at a later time. The same day we chose today as the day to come back in.

THE COURT: The case was originally set

JAIME & BROWNING
CERTIFIED SHORTHAND REPORTERS
COURT REPORTERS
NORFOLK, VIRGINIA

for trial, I believe, today?

MR. RIXEY: Yes, sir. Mr. Lustig was kind enough to suggest that there was nothing inviolate about the trial date and we could have today to have the motions heard, but the future would be dictated by the rulings of the court.

THE COURT: Gentlemen, if you would just give me a few moments to review my notes that were taken at the hearing on December the 23rd.

MR. LUSTIG: Your Honor, there were also some exhibits that were presented to the court; the covenants not to sue and some other documents and an insurance policy.

THE COURT: Yes, sir.

Gentlemen, after refreshing my recollection, it appears that in the hearing on December 23rd the issue presented to the court was a special plea of release, the defendants claiming that two instruments executed by the plaintiffs with two insurance companies -- one, Government Employees Insurance Company, and the other, Stuyvesant Insurance Company -- and entitled "A covenant not to sue" were, in fact, releases, which operated to release other defendants which were alleged to be joint tort-feasors.

A number of cases were cited to substantiate that position, and Mr. Davis, I think, had something to say about --

MR. RIXEY: He represents one of the co-defendants.

THE COURT: -- about it had been held that it is immaterial whether or not the persons were joint tort-feasors under the Shortt versus Hudson Supply case and cited McLaughlin versus Seigel, 166 Virginia 374, for the proposition that even though an employer and employee may not be joint tort-feasors, they are, nevertheless, jointly and severally liable and that the claim cannot be divided.

Mr. Lustig took the position that the documents constituted agreements between the insurance company and the plaintiff, and that release of a stranger was not in privity of contract with the insurance company and did not amount to a release of a joint tort-feasor.

It was recognized, I believe, that Virginia adheres to the authority cited, which is contrary to the weight of authority elsewhere.

At the conclusion of the hearing, the case was continued until today for the purpose

of hearing additional evidence as to any agreements between the insurance companies and their insureds, and that discovery as requested was ordered, with the exception of those items which the court deleted.

Gentlemen, it seems to the court that it was quite material as to just exactly what any understanding between the insureds on behalf of whom these insurance companies settle these claims might have been.

MR. LUSTIG: If Your Honor --

THE COURT: I'm going to give you all a chance. I want you to know what's in the court's mind, whether it's right or wrong, and give you an opportunity to correct it.

MR. LUSTIG: I just wanted to make inquiry because we had a deposition that was taken on that point and I don't know if the deposition has been filed.

THE COURT: Wait a minute. I'll look. Just one minute.

It seems to the court that what was cited to the court -- I have not read these cases carefully -- that there might be a distinction between an insured settling with his own insurance

company under the terms of the contract and an insurance company carrier settling with a third party on behalf of the insured under the terms of a contract.

It seems to the court that might be an important distinction.

With that, Mr. Lustig, I'll be glad to hear from you. You inquired about certain depositions that were taken?

MR. LUSTIG: Yes, sir. A deposition was taken of Mr. Orlowski in December, I believe.

MR. RIXEY: Late December, yes.

MR. LUSTIG: Yes, sir.

MR. DAVIS: Twenty-ninth.

MR. LUSTIG: The deposition was divided in half. I took the deposition based upon the question of liability and then Mr. Davis proceeded to take a deposition concerning this question of release.

THE COURT: Who was the court reporter?

MR. LUSTIG: I didn't get --

MR. GORRY: Audrey Grizzle.

MR. LUSTIG: Apparently, counsel has a copy of it. I do not.

THE COURT: Gentlemen, when did you get the

copies of that deposition?

MR. DAVIS: Yesterday.

THE COURT: You might look over it and see --

MR. RIXEY: I don't know if it's particularly pertinent. It's all hearsay, is it not, Mr. Davis?

MR. DAVIS: As I recall, young Orlowski stated -- this is the boy -- one of the boys who allegedly participated. He admitted he participated. The only one, I think, who did.

MR. LUSTIG: This was one of the insured, Your Honor, and a portion of the deposition was taken by Mr. Davis, which would be my purpose, since we are having further testimony, to read into the record to the court the deposition that was taken by Mr. Davis of Orlowski on this issue concerning the release and his understanding. I would ask leave of the court to do so, and we ask that it be filed.

THE COURT: This Orlowski that you refer to was an infant at the time of the occurrence?

MR. LUSTIG: At the time of the occurrence, not at the time of the --

THE COURT: Not at the time the papers

1 were executed?

2 MR. LUSTIG: That's correct. And he was

3 the insured of Government Employees, one of the

4 two insurance companies with which the plaintiffs

5 entered into the covenants not to sue, which the

6 court has before it.

7 MR. COWARD: And his father was actually

8 the insured.

9 MR. LUSTIG: He is the named tort-feasor

10 in the case.

11 THE COURT: He is, also, under the policy

12 of the insured?

13 MR. LUSTIG: Yes, sir.

14 THE COURT: Gentlemen, are there two

15 depositions?

16 MR. DAVIS: No.

17 MR. LUSTIG: No, just one, Your Honor.

18 THE COURT: Let's recess briefly. I'd

19 like to have it, so I can follow along with you.

20 MR. DAVIS: I would, immediately before

21 recessing, like to call the court's attention to

22 the lower portion of Page 4.

23 There I asked the question of Thomas

24 Orlowski: "Now, subsequent to this accident,

25 do you recall entering into any type of agreement

with Government Employees Insurance Company whereby they were to pay some monies on this case?"

Answer: "I never handled none of that. That was discussed between Mr. Gorry and my father."

MR. LUSTIG: Continue reading, please.

MR. DAVIS: "I couldn't even tell you -- like I said" --

THE COURT: Wait till I get a copy, so I can follow you.

MR. DAVIS: I just wanted to call that to your attention.

MR. RIXEY: If Your Honor please, I would want the court to know that consistent with your previous suggestion, we were prepared to go ahead this morning with additional evidence, and I have Mr. Winters and Mr. Fears here, who are the attorneys who represented these two defendants involved in the covenants not to sue. They're here in the courtroom prepared to testify at the court's convenience.

THE COURT: All right, sir. I'm delighted that they're here as witnesses and not as counsel.

MR. WINTERS: Maybe we should have counsel,

Your Honor.

MR. RIKEY: It's a ticklish situation.

THE COURT: Off the record.

(Off-the-record discussion.)

THE COURT: Gentlemen, we found the copy of the depositions that were taken December 29th, 1975, of Thomas Walter Orlowski. They had just been received in the clerk's office and I will mark them filed at this time.

With that, Mr. Lustig, did you want to present any evidence?

MR. LUSTIG: That was the only evidence I had. I think the other side has some evidence, Your Honor.

THE COURT: Is there anything in this deposition that you wish to particularly call to the court's attention and argue?

MR. LUSTIG: Yes, sir. Yes, sir. I think the deposition is short and should be read in full by the court, but especially on Page 4 under the —

THE COURT: I know there is a motion on the other side and they have the initiative, but I think when we ended that you had the floor.

MR. LUSTIG: Yes, sir.

THE COURT: All right, sir.

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1 MR. LUSTIG: Orlowski was identified and
2 on Page 4 indicated -- was asked the question:
3 "Now, subsequent to this accident, do you recall
4 entering into any type of agreement with
5 Government Employees Insurance Company whereby
6 they were to pay some monies on this case?"
7 And his answer at the bottom: "I never
8 handled none of that. That was discussed between
9 Mr. Gorry and my father. I couldn't even tell
10 you -- like I said, I don't even know how much
11 the insurance covers or what the arrangement is
12 on the insurance, what kind of incident occurred."
13 Question: "In other words, your father
14 then would have been the one, along with
15 Mr. Gorry's advice, who would have handled the
16 discussion and so forth?"
17 Answer: "To the best of my knowledge,
18 him and my mother together, kind of business
19 partners in the deal."
20 Then a document, which has previously
21 been put in evidence, was identified, it being
22 an agreement -- a document marked "Agreement",
23 signed by the Orlowskis.
24 And then at the bottom of Page 5 it says:
25 "Who told you to sign this?"

1 Answer: "My parents. They told me
2 Mr. Gorry needed my signature on it. I remember
3 reading this, now that I look at it. It didn't
4 cross my mind."
5 Then he was asked to identify the signature
6 and he identified the signature, and it was made
7 an exhibit at the bottom of Page 6.
8 Then in the middle of Page 7, Mr. Davis
9 asked the question --
10 THE COURT: I guess this is the same as --
11 is this the covenant with --
12 MR. LUSTIG: No, sir. He never signed the
13 covenant. This is a separate document that was
14 tendered to the court last time.
15 MR. RIXEY: I have all the documents here,
16 and I wanted to get them straight with the court
17 at the proper time.
18 MR. LUSTIG: But this was a document.
19 THE COURT: It's filed with the depositions?
20 MR. LUSTIG: Yes, sir.
21 THE COURT: I think as Trustee's Exhibit
22 Number 1 for identification?
23 MR. LUSTIG: Yes, sir. That's signed by
24 the Orlowskis.
25 THE COURT: All right, sir.

1 MR. LUSTIG: And its language, of course,
2 is before the court in the document.
3 Then on Page 7, it says: "Now, have you
4 had any conversations with Mr. Gorry concerning
5 the execution of this agreement?"
6 "No, I didn't talk to him at all about
7 that. A couple of times I have been in the office
8 on other cases -- different things he handled
9 for me. I discussed how the other case is coming
10 out -- Wright case. He said nothing, at a
11 standstill. He explained a little to me about
12 what was happening. I knew some kind of knowledge,
13 that some insurance company was going to pay --
14 pay X number of dollars, instead of dragging
15 everybody through the court. Somebody like
16 legal officers was going to try a settlement,
17 instead of dragging everybody through it in the
18 United States."
19 "Who was present when you signed this?"
20 "My parents."
21 "Was Mr. Gorry present, also?"
22 "No."
23 "Was there any additional understanding
24 given to you, other than what language appears in
25 this agreement?"

1 "No, my parents just said they were going
2 to offer the insurance money -- the insurance money
3 was going to offer to pay this. Like I understood
4 it was something like a settlement out of court.
5 We'll pay so much for the damages -- whatever
6 occurred -- and that's it."
7 Question: "Well, was there any
8 understanding, to your knowledge, that as a result
9 of your insurance company paying this twenty-five
10 thousand dollars in discharge of all claims that
11 you would be dismissed from the suit?"
12 I tendered an objection, which the court
13 will find I later withdrew.
14 Answer: "The way I understood it, the
15 insurance company was going to propose or submit --
16 you know, throw it out there to be kicked around,
17 the twenty-five thousand dollars, if somebody
18 wanted to take it. If they didn't want to take
19 it -- whatever -- and at the time they decided
20 whether or not to take the money, that would
21 either have been like to the court trial and at
22 the end of the case or it meant like that the
23 insurance company, if they paid their twenty-five
24 thousand dollars, and they still, you know,
25 might say this thing went to court the way I

1 understood, if my portion or my whatever -- I
2 don't know how you call it. I don't know what
3 the word is -- say fifty thousand dollars, that
4 is the money turned out I had to pay, like found
5 against me, the insurance company would pay
6 twenty-five thousand dollars and they would be
7 off the hook. They would be out of the picture
8 and it would be up to me to come up with another
9 twenty-five thousand dollars."
10 I withdrew my objection and Mr. Smith
11 said, "Go ahead."
12 And he said, "Now, if the twenty-five
13 thousand dollars covered the whole settlement
14 or agreement, you know, like say it was only
15 twenty thousand dollars, then the number they
16 arrived with, the insurance company pay
17 twenty-five thousand dollars and that was the end
18 of the line. That was the end of the trial and
19 everything. Well, it was over with and that would
20 be it for me. Then I wouldn't have to pay no
21 money. But like I say, if it was thirty thousand
22 dollars or fifty thousand dollars or a hundred
23 thousand dollars, whatever the amount would be,
24 the insurance company was responsible for
25 twenty-five thousand dollars. When they paid the

first twenty-five thousand dollars or lesser amount, that cleared them in the case. And if twenty-five thousand dollars covered the whole amount, then we were both cleared. That's the way I understood it. That was the question I wanted to ask you."

Question: "You are being deposed."

Answer: "That is the way I understand it."

And then the balance is with reference to the document, Exhibit 1, and who paid the premium, that he was fifteen at the time this incident occurred, which occurred in 1970.

Question at the bottom of 10: "And as far as what was -- this was your parents' insurance. So did they, as you understand it, talk with Mr. Gorry about how to handle it and what to do about it?"

"Yes, they handled that part of it."

"And you were just asked to sign this, which you did?"

Answer: "Yes, I was told that. It was halfway explained to me or something. That's where I got the explanation I just gave to you."

Question: "And this is your best recollection?"

Answer: "And I read it. I never discussed it with Mr. Gorry. My parents discussed it with him and they told me what he said, and I was advised to sign it. He said sign this. That's where my faith is in Mr. Gorry, so I signed the thing."

"What you're telling us about the effect of it is just your best understanding of what other people have told you?"

Answer: "Yes, what I can put together."

THE COURT: All right, sir. Now, gentlemen, I understand that you wish to offer other evidence at this time?

MR. RIXEY: Yes, sir.

THE COURT: Parties who are going to testify, please stand and be sworn.

(Whereupon all witnesses were called up and first duly sworn.)

MR. RIXEY: If Your Honor please, before we get into that, may I just say a word or two?

First of all, John Preston represents Dombrowski, one of the defendants, and he's held over — held up in Norfolk on a carry-over jury case and will be here just as soon as that case permits, but he suggested that we not hold up this

1 hearing, but go ahead in his absence.

2 THE COURT: All right, sir.

3 MR. RIXEY: Number two, before we get to

4 the witnesses, I would want to be certain that we

5 have all of the documents before the court in

6 the matter of the Orlowskis, and I just don't

7 recall exactly all of the matters that you had

8 from the last hearing.

9 Do you have the agreement that was executed

10 by three Orlowskis and Mr. Gorry?

11 MR. LUSTIG: That's Deposition Exhibit

12 Number 1, Judge.

13 MR. RIXEY: I don't have one in the back

14 of my deposition.

15 THE COURT: Yes, sir. That is an

16 agreement dated the 27th day of December, 1974 --

17 MR. RIXEY: Yes, sir.

18 THE COURT: -- executed by Thomas Walter

19 Orlowski, Thomas K. Orlowski, Joan C. Orlowski

20 and Mr. James A. Gorry, III, counsel for Thomas

21 Walter Orlowski, Thomas K. Orlowski and Mrs.

22 Orlowski.

23 MR. RIXEY: I have another copy in the

24 event the court wants it separate and apart from

25 the deposition.

1 THE COURT: I think we better do that;
2 otherwise, the deposition will not appear to be
3 complete. This will be received in evidence at
4 this time.
5 This will be Orlowski document -- the only
6 other Orlowski document they've got --
7 MR. RIXEY: Is the covenant not to sue.
8 THE COURT: -- is the covenant not to sue.
9 MR. RIXEY: And on the back page is their --
10 THE COURT: This is executed by the Wrights.
11 MR. RIXEY: And is there a separate page
12 behind it, which is a receipt? It's not entitled
13 anything, but it's another document executed by
14 the Wrights.
15 THE COURT: Yes, sir.
16 MR. RIXEY: If you have those documents,
17 they are the Orlowski documents with reference
18 to Government Employees Insurance Company.
19 MR. LUSTIG: There is also one other
20 document, Your Honor, that is the insurance policy
21 of GEICO.
22 MR. RIXEY: That's right.
23 THE COURT: The document just referred to
24 by Mr. Rixey was received in evidence at the hearing
25 on December 23rd and was marked Defendant

1 McCrea's Exhibit 1 of that date.

2 The covenant not to sue executed by the
3 Wrights on the 7th day of January, 1975, with
4 attached identification agreement executed by
5 the same parties will be received in evidence
6 on the same date and marked Defendant McCrea's
7 Exhibit 2.

8 And then the copy of the Government
9 Employees Insurance Company policy Number H271648,
10 effective date 8/23/73, was received in evidence
11 on the same date and marked Defendant McCrea's
12 Exhibit 3.

13 MR. RIXEY: All right, sir. Now, in
14 reference to Hendrix and the Stuyvesant
15 Insurance Company.

16 THE COURT: And the agreement not to sue --
17 I have the agreement not to sue, which I have
18 already referred to, marked Defendant McCrea's
19 Exhibit Number 2 of December, '75.

20 MR. RIXEY: That deals with Stuyvesant.
21 You have one for Stuyvesant and one for GEICO
22 then?

23 THE COURT: That's correct.

24 MR. RIXEY: And that has the receipt? 64

25 THE COURT: Both of them seem to. Be sure

that's what you referred to as a receipt.

MR. RIXEY: That's correct, sir. That's right.

THE COURT: There was a similar one on the other document.

MR. RIXEY: In addition to Hendrix and Stuyvesant, Your Honor, we submit a copy of the draft, which was a draft for twenty-five thousand dollars payable to Edward R. Wright, Joan E. Wright and Wayne Lustig, their attorney.

We do not have a copy of the GRICO draft.

THE COURT: All right. A copy of the agreement introduced -- or tendered into evidence will be marked for identification as Trustee's Exhibit Number 1 at the depositions taken on December 29th, 1975, and which are in the depositions, will be received in evidence at this time and marked as Defendant McCrea's Exhibit 4 of this day.

(Received and marked in evidence by the court as Defendant McCrea's Exhibit Number 4.)

THE COURT: The draft referred to by Mr. Rixey, being draft Number 461273, dated December 27th, 1974, in the amount of twenty-five

1 thousand dollars, drawn to the order of Edward
2 R. Wright, Joan Z. Wright and Wayne Lustig,
3 their attorney, will be received in evidence and
4 marked Defendant McCrea's Exhibit 5 of this day.
5 (Received and marked in evidence by the
6 court as Defendant McCrea's Exhibit Number 5.)
7 THE COURT: All right, Mr. Rixey?
8 MR. RIXEY: Your Honor, we call Mr. Fears
9 to the stand.
10
11
12 ------oOo------
13
14
15 JOHN CARROLL FEARS, JR., called as a
16 witness on behalf of the defendant, having been first duly
17 sworn, was examined and testified as follows:
18
19 DIRECT EXAMINATION
20
21 BY MR. RIXEY:
22 Q Mr. Fears, for the record, would you state
23 your name and address, please?
24 A John Carroll Fears, 1440 Virginia National
25 Bank Building, Norfolk, Virginia.

1 Q And you are an attorney, are you not, sir?
2 A Yes, I am.
3 Q Were you the attorney of record at one
4 time for one of the defendants in these cases, Thomas Walter
5 Orlowski?
6 A I was one of the attorneys of record, yes.
7 Q All right. And who were you employed by
8 to represent Mr. Orlowski?
9 A Government Employees Insurance Company.
10 Q And are you familiar, Mr. Fears, with
11 the documents which have previously been referred to this
12 morning? They would be the covenant not to sue, which is
13 Defendant McCrea's Exhibit Number 1 --
14 A If you will let me see them, I can tell
15 you.
16 Q -- and a receipt of some other document,
17 which constitutes a fourth page thereof.
18 (Document handed to witness for
19 examination.)
20 A Yes, I'm familiar with this.
21 Q All right, sir. And are you familiar,
22 also, with Defendant McCrea's Exhibit Number 4, which is
23 an agreement between three Orlowskis and, also, executed
24 by Mr. Gerry?
25 (Document handed to witness for

1 examination.)

2 A Yes, but I don't believe this was acted

3 upon. I think there was a second agreement that was

4 entered into.

5 Q All right. Well, when those agreements

6 were executed, were you and Mr. Gorry co-counsel of

7 record for Orlowski?

8 A Yes.

9 Q And did you supervise or handle for the

10 Orlowskis the execution of these documents and arrange to

11 pay certain monies to Mr. Lustig?

12 A I think that's generally true, yes.

13 There were discussions between Mr. Gorry, myself and

14 plaintiff's counsel.

15 Q And did your company, GEICO, Government

16 Employees, issue a draft in the sum of twenty-five thousand

17 dollars to the Wrights and to Mr. Lustig pursuant to the

18 execution of these documents?

19 A Yes, that's true.

20 Q Now, Mr. Fears, were there any other

21 written agreements between any of these parties -- that

22 would be the Orlowskis and the Wrights -- that are not

23 presented -- have not been presented to you in the form

24 of exhibits today?

25 A As I said, I think there was -- I don't

1 have my file with me and it's in storage, but I think that --
2 Q If I might help you a little bit. It's
3 my understanding that there were two agreements and you don't
4 know whether this December 27, '74, one is the right one
5 or not?
6 A That's right. I do not. I think there
7 was a subsequent agreement.
8 Q And why would there have been two
9 agreements, Mr. Fears? What was the reason for that?
10 A I think the second agreement was so it
11 would clearly indicate that Government Employees was paying
12 the money itself, not on behalf of the Orlowskis, but so
13 that they would be released from the policy contract and
14 they would not have to continue to pay me.
15 In other words, they wanted to pay their
16 money and get out.
17 Q Well, in your negotiations and discussions
18 with counsel for the plaintiffs, was there a discussion as
19 to the form of these documents that you were drawing or that
20 were being drawn and what you were trying to avoid in terms
21 of a release?
22 A I think there was. The intent, at least,
23 was that the Orlowskis wouldn't be released.
24 In other words, it would not be a release
25 of any -- what you would say would be a tort-feasor. It

would be, simply, the insurance company paying the full amounts of its policies to the plaintiffs. Government Employees Insurance Company then would be discharged in its policy obligations and Mr. Orlowski would be very ably represented by Mr. Gorry.

Q And you subsequently did retire from the case as counsel of record for Orlowski?

A Yes, sir. I did.

Q Now, the twenty-five thousand dollars that Government Employees paid -- was that the full amount of its --

A Yes, sir.

Q -- coverage under its policy of insurance?

A Yes, it was.

Q Did you have discussions with Mr. Lustig as to the form of the documents in order that they would hopefully not constitute a release, but would constitute a covenant not to sue Government Employees?

A Well, I can't recall any specific conversation on that point, but that clearly was the intent of the documents -- to release GEICO only.

Q All right, sir. Now, in addition to these written documents, did you, as a counsel for Orlowski and representing Government Employees, have any verbal agreement or understanding with Mr. Lustig as to Mr. Orlowski being a

1 defendant in these cases?

2 A I don't know whether you want to call it

3 an agreement or not. I don't know whether I want to

4 characterize it as that or not, but we did have a discussion

5 about what Mr. Lustig would do with reference to Mr. Orlowski.

6 Q And what did he say he would do?

7 A He advised me that he would nonsuit the

8 case as to Mr. Orlowski prior to the time it went to the

9 jury.

10 Q And was this understanding that you had

11 with Mr. Lustig before the agreements were consummated

12 and the money was paid?

13 A Yes.

14 Q And as counsel for the insurance company

15 and Orlowski, did you so advise Mr. Gorry in writing of that

16 understanding with Mr. Lustig?

17 A Yes, I did, sir.

18 Q And have you and Mr. Lustig had any further

19 discussions on the subject to the contrary that that would

20 not -- did you subsequently have any conversations that

21 he would not nonsuit Orlowski in these cases?

22 A I don't recall any at the moment.

23 Q All right, sir. Are there any other --

24 were there any other verbal agreements between you and

25 Mr. Lustig representing your respective clients or any other

1 implied agreements that you haven't told us about?
2 A No, sir.
3 MR. RIXEY: That's all we have of
4 Mr. Fears. Thank you, Your Honor.
5
6 CROSS-EXAMINATION
7
8 BY MR. LUSTIG:
9 Q Mr. Fears, at all times that you were
10 negotiating with the documents referred to herein, were
11 you so negotiating with these documents as counsel for
12 GEICO?
13 A I was counsel for GEICO. That's true.
14 I guess I was counsel of record for Mr. Orlowski.
15 Q Right.
16 A Mr. Orlowski was individually represented
17 by Mr. Garry.
18 Q Right. I take it that your purpose, as
19 you previously indicated in the participation in these
20 discussions and in the evolvement of these documents, was
21 for the purpose of alleviating GEICO of the necessity
22 of continuing its policy coverage?
23 A That's generally true. When I first saw
24 this case, I recognized that Mr. Orlowski -- there was every
25 probability that he was going to be held in the case, and

1 Government Employees expressed their desire that they would
2 be able to pay their policy coverage and terminate all
3 further expenses. And consequently, that's what I endeavored
4 to do and did do.
5 Q You were aware, were you not, throughout
6 this period of time, that the plaintiff in this case so far
7 as the injuries were concerned had massive injuries equal
8 to being a quadraplegic?
9 A Yes, sir.
10 Q You were aware of that?
11 A Yes, sir.
12 Q I take it there was no question in your
13 mind insofar as your insurance coverage was concerned that
14 the insurance coverage which you had, twenty-five thousand
15 dollars -- you certainly expected to ultimately have
16 to pay that over on behalf of GEICO?
17 A Wasn't any question in my mind about it.
18 Q All right. I take it you were also aware
19 during this same period of time that the medical expenses
20 that had been incurred by Mrs. Wright had been substantial.
21 And were you, in fact, aware that they were in excess of
22 twenty thousand dollars?
23 A Yes. I was.
24 MR. LEWIS: I have no further questions.
25 MR. RIXEY: I have no further questions of

1 Mr. Fears, Your Honor.

2 THE COURT: Wait just a minute, Mr. Fears.

3 Mr. Fears, can you recall at what stage

4 of the negotiations that you were advised by

5 Mr. Lustig that he would not pursue the Wright's

6 claim as against the Orlowskis beyond the time

7 the case was sent to the jury?

8 THE WITNESS: You mean what time we

9 entered the negotiations?

10 THE COURT: That's right.

11 THE WITNESS: We discussed the question

12 of nonsuit? Well, I can't give you a particular

13 date, Your Honor, but it was before the documents

14 were executed.

15 THE COURT: All right, sir. Thank you.

16 Anything else, gentlemen?

17 MR. RIXEY: Nothing else, Your Honor.

18 THE COURT: May Mr. Fears be excused?

19 MR. LUSTIG: Yes, sir.

20 MR. RIXEY: Yes, sir.

21 MR. DAVIS: Wait just a minute, Judge.

22 THE COURT: I'm sorry. Beg your pardon.

23 MR. RIXEY: Mr. Davis has a question

24 he'd like to ask Mr. Fears, Your Honor. He also

25 has a number of the defendants having similar

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motions and pleas pending before the court.

CROSS-EXAMINATION

BY MR. DAVIS:

Q Mr. Fears, in line with your testimony concerning the verbal —

A You'll have to speak up. I'm getting hard of hearing.

Q In line with your testimony just now concerning the verbal agreement that you had with Mr. Gorry that the plaintiff would nonsuit —

MR. LUSTIG: Objection, Your Honor.

BY MR. DAVIS:

Q — Orlowski —

THE COURT: Sorry. There is an objection.

MR. LUSTIG: Been no testimony he had a verbal agreement with Mr. Gorry, as indicated in the testimony. The question was concerning a verbal agreement with Mr. Gorry. There was none — been none testified to.

BY MR. DAVIS:

75

Q With the plaintiffs Wright, then. Let me

1 correct that.

2 There was an agreement, was there not --

3 a verbal agreement that the plaintiff made that he would

4 nonsuit Orlowski at some stage?

5 THE COURT: Wait just a moment, concerning

6 Mr. Lustig. To your knowledge, was Mr. Lustig's

7 agreement not to sue the Orlowskis communicated

8 to the Orlowskis?

9 THE WITNESS: Yeah -- well, communicated

10 to their personal attorney, Mr. Gerry.

11 THE COURT: Objection overruled.

12

13 BY MR. DAVIS:

14 Q Was that communication also made in

15 writing?

16 A Yes, it was.

17 Q I show you this letter, which I have

18 already shown to Mr. Lustig. It bears the date of

19 December 18th, 1974. Can you identify that?

20 (Document handed to witness for

21 examination.)

22 A Yes, sir.

23 Q Tell the court what this letter is; who

24 wrote it and to whom.

25 A I wrote it to Gerry on December the 18th,

1974, and I believe that the second paragraph there was an objection to. I think it was this agreement here. This was -- this agreement was --

THE COURT: Witness is referring to the agreement, which has been marked Defendant McCree's Exhibit Number 4 of this date.

A (Continuing) That agreement was superceded, Your Honor, by another agreement.

BY MR. DAVIS:

Q Would you read to the court this second -- third paragraph, I believe, of this letter?

A "If the revised agreement is entered into between the Orlowskis and GEICO, then upon payment his clients will execute a covenant not to sue running to the benefit of GEICO only. Mr. Orlowski would remain a defendant. However, he will take a nonsuit as to Mr. Orlowski before the case is submitted to the jury. This same agreement is being entered into with Bob Winters' client. In this way plaintiffs could get the money immediately and still proceed against the other defendants."

MR. DAVIS: We would like this introduced into evidence, Your Honor.

THE COURT: All right, sir.

Was that agreement referred to in that

1 letter ever actually made, to your knowledge?
2 THE WITNESS: You mean the revised
3 agreement?
4 THE COURT: Yes, sir.
5 THE WITNESS: Yes, sir. I understood that
6 the revised agreement — I characterized it as
7 such — superseded the one that you have now as
8 an exhibit.
9 THE COURT: All right, sir.
10
11 BY MR. DAVIS:
12 Q And the portion of the letter that you
13 have just read to us —
14 THE COURT: Wait just a second, Mr. Davis.
15 The letter dated December 18th, 1974,
16 described by Mr. Fears will be received in evidence
17 and marked Defendant Trustees' Exhibit 6.
18 For the record, all the defendant's
19 exhibits, beginning with the hearing on last
20 December 23rd, will be marked in numerical sequence,
21 but it will be indicated as to which defendant
22 the exhibit was offered by.
23 This will be — you represent the trustees?
24 MR. DAVIS: Trustees, Your Honor. The
25 five individual trustees.

1 THE COURT: Trustees' 6.

2 MR. DAVIS: Or their administrators or

3 executors. A couple of them have since died.

4 (Received and marked in evidence by the

5 court as Defendant Trustees' Exhibit Number 6.)

6

7 BY MR. DAVIS:

8 Q Mr. Fears, one final question. This letter,

9 which is Trustees' Exhibit 6, that you have been testifying

10 concerning -- it's dated December 18th, 1974, and the

11 instrument subsequently executed -- I think it was nearly

12 a year later, in December?

13 A I don't recall the dates.

14 Q Right. But then this verbal agreement,

15 which you have characterized in the third paragraph of this

16 letter -- that was still -- it's your understanding that

17 was still in effect at the time the covenants and the

18 agreements and the other instruments were executed later?

19 A I assumed he would bypass that.

20 Q Nothing arrived from Mr. Lustig, you say?

21 A (Witness shakes head negatively.)

22 Q That was a part of your understanding when

23 you paid your policy of the twenty-five thousand dollars?

24 A Well, it had been discussed. Now, whether

25 -- as I say, it -- you know, the policy -- under Part 2

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1 Subsection E, or something like that, when the company has
2 paid its coverage, it is released of the further obligation
3 of defense.
4 The primary purpose of this was to —
5 Government Employees would pay their policy limits and then
6 they would be relieved of that obligation of continuing to
7 pay my fee when they felt that the outcome would be a verdict
8 against Mr. Orlowski.
9 Now, the discussion about the consult —
10 I can't say, Your Honor, truthfully, that that was a
11 primary consideration as far as GEICO was concerned because
12 they paid their money and they would be able to get out,
13 and it may have had some consideration so far as whether
14 the Orlowskis executed the agreement. Do you follow what
15 I say?
16 Q No.
17 A Well, I don't think — it's my recollection
18 of it — and I'd have to go back through my file — but I
19 don't think that the agreement, if you want to call it that,
20 to nonsuit was the primary consideration.
21 The primary consideration as far as
22 GEICO was concerned would be that they would be able to
23 pay their coverage limits and get out of the case without
24 any further expense because they were — the Orlowskis were
25 very ably represented by Mr. Gorry.

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1 Q Now, one sentence of your letter of
2 December 18th, 1974, says he will take a nonsuit as to
3 Mr. Orlowski before the case is submitted to the jury.
4 Who do you make reference to when you say
5 he?
6 A Mr. Lustig.
7 Q All right, sir. And that was obviously
8 an understanding that you had on December 18th, 1974?
9 A That's right.
10 Q It was never revoked or changed or altered,
11 was it?
12 A No, sir.
13 MR. DAVIS: I think that's all I have,
14 Your Honor.
15 MR. BIXBY: Your Honor, may I just ask
16 a question to clear up a few items.
17
18 REDIRECT EXAMINATION
19
20 BY MR. BIXBY:
21 Q First of all, about the nonsuit -- that
22 was a consideration, Mr. Fears, that you arranged in favor
23 of Orlowski when you were counsel for Orlowski and GEICO;
24 is that not correct?
25 A I thought it was certainly beneficial to

1 the Orlowskis, but as I told you earlier, and I advised
2 Mr. Gorry, that that would not prevent the codefendants
3 from seeking contributions from the Orlowskis in the event
4 there was a larger verdict.
5 Q Now, Mr. Fears, I know you want the record
6 to be accurate and we do, too, and the documents that we've
7 put in are the documents that were furnished to us by
8 Mr. Gorry.
9 To refresh your memory a little bit, and
10 you don't have your file with you, but if Mr. Gorry has in
11 his file the initial agreement, which was back in July of
12 '74, and then a letter of transmittal to you under date of
13 December the 26th; is that correct?
14 MR. GORRY: Second. It was the second.
15
16 BY MR. RIMEY:
17 Q But a transmittal letter of December the
18 26th, '74, sending you the second agreement to be executed
19 by the Orlowskis, would that refresh your memory to the
20 extent that this December 27th, '74, was the second agreement
21 or final agreement?
22 A It may. As I say, I'd have to resort to
23 my own file. I don't know what's in his file.
24 THE COURT: Mr. Rimey, can you show it to
25 Mr. Fears?

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1 MR. RIXEY: Yes, I think so. Mr. Gorry
2 can do it better than I can. It's his file.
3 Will you permit Mr. Gorry to show it to Mr. Fears?
4 THE COURT: Certainly.
5 MR. RIXEY: Show him whatever you've got,
6 just so we can get it straight as to whether the
7 December 27th document --
8 THE COURT: Is it the first or second
9 document?
10 MR. RIXEY: We want the record clear on
11 that.
12 MR. GORRY: Which file do you want?
13 (File handed to witness for examination.)
14 A (Continuing) That's the first agreement.
15 I remember now. That's the first agreement.
16 MR. GORRY: All right.
17 (Document handed to witness for
18 examination.)
19 A (Continuing) Well, I assume this is the
20 second.
21
22 BY MR. RIXEY:
23 Q Is that the December 22nd -- 27th?
24 A I assume it is. Now, as I said, without
25 resorting to my own file, I don't want to categorically

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1 state that it is, but it appears to be.

2 Q After refreshing your memory with looking

3 in Mr. Gorry's file, is it your present thinking that the

4 December 27th document was the final document -- agreement

5 between the Orlowskis and GEICO?

6 A It is, subject to my being corrected by

7 my file.

8 Q And would you be willing to examine your

9 file when you go back to the office?

10 A If it's not in storage. I did not intend

11 to go through the warehouse looking for that file today.

12 I just can't do it. I've got to be in Federal Court at

13 two o'clock.

14 Q At your earliest convenience, could you

15 advise us either verbally or in written form?

16 A I will do so.

17 MR. RIXEY: Thank you so much.

18 THE COURT: Mr. Lustig?

19

20 RECROSS-EXAMINATION

21

22 BY MR. LUSTIG:

23 Q Mr. Fears, when you discussed this

24 matter with counsel, you were asked whether or not there

25 was any verbal agreement, I think, with counsel for the

1 Wrights, Mr. Lustig. I think you said you couldn't exactly
2 categorize it as an agreement; is that not true?
3 A Yes.
4 Q All right. Now, is it not a fact that in
5 your discussions with Mr. Lustig concerning the question
6 of a nonsuit prior to the case going to the jury, that
7 Mr. Lustig indicated to you that he wanted no such
8 understanding and agreement?
9 A Well, perhaps it's a question of
10 semantics. It was my understanding that you would nonsuit
11 the matter before it came -- before it went to the jury
12 as to Mr. Orlowski. Now, whether or not that is an
13 agreement, I --
14 Q All right. Do you recall Mr. Lustig
15 stating to you specifically, "I do not want to agree to
16 this, but it is my intention to nonsuit the Orlowskis
17 prior to the case going to the jury"?
18 A I believe that is correct.
19 Q Is that the correct language of your
20 understanding between Mr. Lustig and yourself on that issue?
21 A Yes, I believe that's correct.
22 Q All right. Now, your letter to Mr. Gorry
23 -- Exhibit Number 5, I believe it is -- was written by
24 yourself?
25 A I dictated it.

1 Q I mean, without consultation with counsel
2 for Orlowski as far as the content of that letter is
3 concerned; is that not correct?
4 A That's true.
5 Q That's true. Any categorizations you
6 made in there -- categorizations which you yourself made
7 as of the time that you dictated this letter; is that not
8 true?
9 A You weren't party to the dictation. I
10 dictated whether I -- I don't think at the time I was being
11 careful about my choice of words, necessarily.
12 Q Fine.
13 A What I was trying to convey -- I want
14 everybody to know here what I was trying to convey to
15 Mr. Gorry, and that was that after long dealings with
16 Mr. Lustig in the past, I felt if he stated that it was
17 his intention to do it, that he would do it.
18 Q Now, with reference to the policy
19 provisions that you spoke of. I refer to Defendant's
20 Exhibit Number 3 -- McCrea Exhibit, I believe, you called
21 it.
22 THE COURT: Yes.
23
24 BY MR. LUSTIG:
25 Q And I ask you whether or not the policy

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1 section that you are referring to is in Section 2 on Page 3
2 HO-2?
3 A That's correct. Bottom of the page.
4 Q All right. And in making this agreement
5 with the Wrights that you made, were you looking to that
6 section and to a reading of that section in making the
7 agreement?
8 A Oh, yes. That was the foundation upon
9 which GEICO could -- at least I felt and Mr. Gerry agreed
10 that we could pay the twenty-five thousand dollars and,
11 once paid, we were not further obligated, but it was not
12 a question of just letting Mr. Orlowski float out to sea,
13 so to speak. He was represented by counsel, Mr. Gerry.
14 Q And, as I understand your answer, you
15 discussed that specific clause with Mr. Gerry incident
16 to the documents that were involved between you and Mr.
17 Gerry?
18 A That's true. In fact, it's my
19 recollection that I wrote Mr. Gerry and set forth that
20 particular paragraph in one of my letters to him.
21 Q Alerting him to it?
22 A Yes, sir.
23 Q All right. In terms of that paragraph,
24 and the rights of the company and the rights of the
25 insured under the policy, did it matter to GEICO whether

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1 or not, in fact, Orlowski was nonsuited prior to the case
2 going to the jury?
3 A No, I'm certain that that -- not under
4 the contract, I don't think so.
5 MR. LUSTIG: All right. I have no further
6 questions, Your Honor.
7 MR. RIXEY: We have no further questions
8 of Mr. Fears, Your Honor, and we would be happy
9 for him to be excused to get to that other court.
10 THE COURT: Wait just a minute, sir.
11 The sentence that you refer to appears
12 to read as follows: "This company" -- namely
13 GEICO -- "shall not be obligated to pay any
14 claim or judgment or to defend any suit after
15 the applicable limit of this company's liability
16 has been exhausted by payment of judgments or
17 settlements"?
18 THE WITNESS: Uh-huh.
19 THE COURT: Is that the sentence you
20 referred to?
21 THE WITNESS: Yes, sir.
22 THE COURT: Do I understand you construe
23 this sentence to mean that you could have paid
24 this money to the Wrights and their counsel and
25 have escaped any further liability, unless the

1 Orlowskis had agreed to it?

2 THE WITNESS: Oh, no. That's why I got

3 the agreement.

4 THE COURT: You recognized the obligation

5 to Orlowski was to settle the claim?

6 THE WITNESS: Sir?

7 THE COURT: To settle the claim, not to

8 pay the policy to some third party without

9 settling the claim against Orlowski?

10 THE WITNESS: That's the language of the

11 policy. Yes, sir.

12 THE COURT: Any other questions,

13 gentlemen?

14 MR. LUSTIG: Yes, one with reference to

15 the question that the court has just asked.

16

17 RECROSS-EXAMINATION

18

19 BY MR. LUSTIG:

20 Q It was not your understanding when you

21 got the agreement from the Orlowskis with the language of

22 that agreement that the Orlowskis were settling and being

23 released?

24 A Oh, no. As a matter of fact, the —

25 I thought I indicated previously that the intent of that

1 was -- at least the legal effect is for the court -- but the
2 intent of it was that GEICO would pay its policy limits
3 and certainly not with the idea of releasing anyone else.
4 GEICO wanted to pay its limits and if the Orlowskis agreed,
5 then we would do so. And they did so, and we paid the
6 money.
7 Q With the understanding that the Orlowskis
8 were not being released?
9 A That's right.
10 MR. LUSTIG: I have no further questions.
11 THE COURT: Thank you, Mr. Fears. You
12 are excused.
13 THE WITNESS: Thank you, sir.
14 MR. RIXEY: Your Honor, with some
15 reluctance, we had a subpoena issued for
16 Mr. Bob Winters. Mr. Winters is also counsel.
17 He's still counsel in the case for Mr. Hendrix,
18 and I would not ask him to testify unless he
19 indicated that he really wanted to testify in
20 this matter.
21 He handled the matter for Stuyvesant
22 Insurance Company in behalf of Hendrix. He's
23 here in the courtroom and he has indicated to me
24 that he's perfectly willing to testify, despite
25 the fact he's still counsel in the case.

1 MR. LUSTIG: I would like to have him
2 testify, if the court does not think it violates
3 any of the --
4 THE COURT: Gentlemen, the only --
5 MR. LUSTIG: He is not a party to the
6 release.
7 THE COURT: Gentlemen, the only reason
8 defending counsel from participating as both
9 witness and advocate is that it puts counsel in
10 a dual role of witness and advocate asking the
11 trier of the fact, be it the jury or the court,
12 to believe me as a witness.
13 I would take it that what Mr. Winters
14 will testify to is uncontroverted?
15 MR. RIXEY: I think that's correct.
16 THE COURT: And it would not seem to
17 the court that there is any violation of any
18 ethics involved.
19 MR. RIXEY: Thank you.
20 THE COURT: This is a matter for
21 Mr. Winters to determine.
22 MR. WINTERS: If I may respond from the
23 witness stand, or wherever, Your Honor.
24 Under the circumstances as it relates
25 to the testimony I'm requested to give here today,

I do not believe there is any conflict between me and my client, Mr. Hendrix, or the Stuyvesant Insurance Company.

MR. RIXEY: Fine. Then I call Mr. Winters to the stand, Your Honor.

---oOo---

ROBERT G. WINTERS, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. RIXEY:

Q Mr. Winters, would you state your name and address, please?

A Robert G. Winters, 906 Plaza One, Norfolk, Virginia.

Q Mr. Winters, are you counsel -- an attorney and also counsel of record for one of the defendants, a young man by the name of Hendrix, in these two cases?

A I am, sir.

Q Thank you. As counsel for Mr. Hendrix, I'm going to present to you certain documents, these documents being Defendant McCrea's Exhibit Number 2, a covenant not to sue, and Defendant McCrea's Exhibit Number 5, which is a copy of a draft, and ask you if you can identify those documents?

(Documents handed to witness for examination.)

A Without unduly delaying, it would appear to me that Defendant McCrea Exhibit 2 is a covenant not to sue, which I am familiar with, and attached thereto is a further indemnity agreement I'm familiar with. And McCrea 5, I'm familiar with that, too.

Q Fine. Were these documents executed under your supervision on behalf of Mr. Hendrix, one of the defendants?

A Mr. Hendrix was consulted prior to the preparation and execution of these documents. He was aware of their execution.

Q And you, as his counsel, arranged the financial transaction, did you not, Mr. Winters, whereby Stuyvesant Insurance Company paid the sum of twenty-five thousand dollars to Edward Wright and Joan Wright and Mr. Luetig, their attorney?

1 A The arrangements were made with his consent.
2 The way you asked the question, Mr. Rixey, I would have to
3 respond that I believe at the point in time that those
4 documents were prepared, I had a dual representation;
5 one of the Stuyvesant Insurance Company and one of
6 Mr. Hendrix.
7 Q All right. The covenant not to sue
8 has a place on it for Stuyvesant to sign it as seen and
9 agreed to. Did they so agree to that covenant not to sue?
10 A They did, sir.
11 Q All right. Now, in addition to these
12 documents, were there any other written documents evidenced
13 in your arrangements with Mr. Lustig?
14 A No, sir.
15 Q Were there any verbal or other agreements
16 between you, representing Hendrix and Stuyvesant Insurance
17 Company, and Mr. Lustig?
18 A No, sir.
19 Q Did you and Mr. Lustig have a conversation
20 or conversations before the execution of the covenant not
21 to sue with reference to a nonsuit being taken as to your
22 client, Hendrix?
23 A We did.
24 Q And on how many occasions?
25 A I would have to say, Mr. Rixey, more than

one, but I cannot tell you specifically how many or when they occurred.

Q All right, sir. As a result of those conversations, do you, as counsel for Mr. Hendrix, have reason to expect that Mr. Lustig will take a nonsuit as to your client, Hendrix, at some time before these cases would result in a jury verdict?

MR. LUSTIG: I tender an objection to what the witness expects, if Your Honor please, because I don't believe that's the question before the court, nor material or relevant to the issues in this case. He has indicated that there was no agreement, but I tender my objection for the record.

THE COURT: Mr. Lustig -- Mr. Bixey, see if you can rephrase your question.

MR. BIXEY: I'm not really pleased with the choice of words, but I'll try to rephrase it.

BY MR. BIXEY:

Q You've testified, Mr. Winters, there is no agreement between you and Mr. Lustig?

A No.

Q Were your conversations with him to the

1 extent that you were led to believe that Mr. Lustig would,
2 prior to these cases resulting in a jury verdict, take a
3 nonsuit as to your client, Mr. Hendrix?
4 A As the question is asked, Mr. Rixey,
5 I would have to answer no, but I don't believe that would
6 be quite fair.
7 If I understand what it was -- it was
8 my hope -- and I say hope -- more than anything else that
9 perhaps Mr. Lustig, who had the option, would find that
10 it would not be detrimental to the case of his client
11 and he would be able to take a nonsuit as to my client.
12 Q Did you have anything more than just a
13 hope that Mr. Lustig would take a nonsuit as to your client?
14 A No, sir, because I can specifically
15 remember that in the conversation I advised Mr. Lustig
16 that I understood that he was guided by whatever was in
17 the best interest of his client, and he'd have to proceed
18 accordingly.
19 Q All right. Did Mr. Lustig ever advise
20 you that he intended to take a nonsuit as to Mr. Hendrix
21 at any stage of the proceedings before the cases would
22 result in a jury verdict?
23 A I don't recall the use of those exact
24 words and I can't say that he said that he intended to do
25 it at any stage of the proceeding, and I don't recall that

he left me under the impression that he would definitely take a nonsuit. It was simply my understanding as outlined in the agreement that he would -- if he didn't find it detrimental to his client, he would take a nonsuit as to my client.

Q All right, sir. You heard the testimony of Mr. Fears here a few minutes ago?

A Yes, sir.

Q And did you know, prior to today, that Mr. Fears had similar conversations with Mr. Lustig whereby Mr. Lustig stated that he intended to take a nonsuit as to Defendant Orlowski? Did you know that before today?

A Yes, sir.

Q Well, did you and Mr. Fears discuss the nonsuit aspect of this entire matter before the documents were executed and the financial transaction was completed?

A Yes, sir.

Q Well, did you know that Mr. Fears was getting more of a firm commitment from Mr. Lustig than you were getting?

MR. LUSTIG: Objection, Your Honor, to the argumentation of the question.

MR. RIXEY: I don't see anything wrong with it.

THE COURT: Rephrase your question.

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1 BY MR. RIXEY:

2 Q Well, as a result of your conversations
3 with Mr. Fears and the discussions with you about his
4 nonsuit arrangements with Mr. Lustig and knowing, of course,
5 of your own nonsuit discussions with Mr. Lustig, did you
6 know, Mr. Winters, that Mr. Fears had a firmer commitment
7 regarding a nonsuit than you did for your client, Hendrix?

8 MR. LUSTIG: If Your Honor please, I still
9 think it's argumentative in terms of
10 categorization that something is a firmer
11 commitment.

12 THE COURT: Do you have any objection
13 if I ask the question?

14 MR. RIXEY: No, sir.

15 THE COURT: Mr. Winters, you have heard
16 what Mr. Fears testified to here today from the
17 witness stand?

18 THE WITNESS: Yes, sir.

19 THE COURT: Was your opinion -- would it
20 be fair to say that your agreement with
21 Mr. Lustig was not the same as Mr. Fears has
22 testified that his agreement with Mr. Lustig
23 was?

24 THE WITNESS: I believe so, Your Honor.

25 THE COURT: All right, sir. Now, where

1 do they differ? Satisfactory question?

2 MR. LUSTIG: If Your Honor please, I think

3 that calls for a conclusion of the witness as to

4 what the agreements were that Mr. Feare had with

5 Mr. Lustig.

6 THE COURT: Whatever they may have been --

7 MR. LUSTIG: Well, you're asking him to

8 give an opinion as to what he believes Mr. Feare'

9 testimony is as to an agreement and how his

10 arrangement then differs.

11 THE COURT: Don't answer the question.

12 Objection sustained.

13 Mr. Rixey, you may proceed.

14 MR. RIXEY: I was carrying on a dialogue

15 back here. He objection to the form --

16 THE COURT: He objected to the form of

17 the question asked by the court, and I saw fit

18 to rule on the objection to the question.

19

20 BY MR. RIXEY:

21 Q May I ask the same question that the court

22 asked? Let that be my question.

23 A Well, if you don't object --

24 MR. LUSTIG: I would object, if Your Honor

25 please.

THE COURT: Rephrase it, Mr. Rixey.

MR. RIXEY: I wish not to pursue the matter any further, Your Honor. That's all I have.

CROSS-EXAMINATION

BY MR. LUSTIG:

Q Mr. Winters -- and, Judge, maybe I can approach the issue in something that I would hope would not be objectionable.

Did the discussions which you had with Mr. Fears as to any situation concerning a nonsuit and the discussions you had with Mr. Lustig as to any situation concerning a nonsuit play any material part whatsoever in the determination of Stuyvesant to go forward with the agreements as are drafted in writing?

A None.

MR. LUSTIG: Fine. I have no further questions.

MR. RIXEY: I have one more question, Your Honor.

REDIRECT EXAMINATION

BY MR. RIXEY:

Q Mr. Winters, was it, however, addressed to you by Mr. Lustig that he would go forward with the cases as to the other defendants, except Hendrix and Orlowski?

A May I have the question read again?

Q All right, sir. Was it your understanding -- I'll rephrase it, Mr. Winters. Was it your understanding that Mr. Lustig intended to pursue the cases as to the other defendants to the fullest extent?

A My understanding was that Mr. Lustig intended to proceed on behalf of his client, to proceed against any and all of the defendants necessary in order to effect what he determined to be a full and complete recovery.

Q All right, sir.

A And, I mean, it wasn't that if he found that he could without damaging his client give some temporary consideration perhaps to one of the defendants who had paid the money at that time -- and when I say defendants, the insurance carrier is not the defendant. They might be the beneficiary -- then he would attempt to do that, but I think the agreement, as I understood it -- because this was the document that was executed after these things were signed -- specifically set forth what the understanding was, and I

can't say beyond that.

Q All right, Mr. Winters. Did you discuss this matter of a nonsuit with your client, Mr. Hendrix?

A I did.

Q What did you advise Mr. Hendrix?

A I advised Mr. Hendrix that there might be a possibility that a nonsuit would be taken against him, but I also advised him that it would be necessary that he continue to have counsel, that the Stuyvesant Insurance Company had advised me that they would continue to defend him in this matter, which had been a matter of great concern to him, and that -- I advised him that in the event any judgment was obtained against him in excess of twenty-five thousand dollars, he would have to make such arrangements to pay it or take such other actions as he could see fit because the agreement I had had on behalf of the Stuyvesant Insurance Company with Mr. Lustig and his clients was that they would simply credit the payment made against the judgment.

Q All right, sir. And do you, up to the present time, continue to act as counsel for Mr. Hendrix at the request of Stuyvesant Insurance Company and are you expecting to be paid by Stuyvesant Insurance Company?

A I do, sir.

MR. RIXEY: Thank you, Mr. Winters.

1 THE COURT: Mr. Winters, one question,
2 please, sir.
3 THE WITNESS: Yes, sir.
4 THE COURT: Why was this money paid to
5 Mr. Lustig and his clients by Stuyvesant Insurance
6 Company?
7 THE WITNESS: Your Honor, this was probably
8 one of the worst cases we'd been involved in from
9 the viewpoint of the injuries. We had a situation
10 in which the defense would be considered -- would
11 be considered very expensive. We hoped -- let me
12 say this: We recognized that in the payment of
13 the money, we would not be relieved of any
14 basic obligation as it related to our insured,
15 but we hoped that in payment of it, we might get
16 some personal benefit, no legal benefit from it.
17 THE COURT: Personal benefit for whom?
18 THE WITNESS: For my client.
19 THE COURT: Which one?
20 THE WITNESS: That is Mr. Hendrix, and
21 the personal benefit being that he was released
22 as an individual to the extent that some payment
23 had been made on his behalf toward these serious
24 injuries of this boy. Even though he still
25 contended he had nothing to do with it, my client

simply would like to have had the matter ended in any fashion that he could, but he recognized we couldn't obtain a release and he would like the money paid.

For a long time he resisted the payment of this money because he was definitely concerned that he would be left defenseless in the matter and, once it was made clear to him he was not, it seemed to lift the burden off of him and he wanted me to do it.

We saw no -- I don't know. It was just an indirect advantage. No direct or legal advantage whatsoever, sir.

THE COURT: Did you advise your client that by making the payment -- would you have done so unless your client, Mr. Hendrix, had agreed to it?

THE WITNESS: At that particular stage of the proceedings, I would not have. And the reason for that was that during part of the proceedings my client was an infant. When he became an adult and I could perhaps have explained it to him, I might have done it without his formal consent, but I never got to that.

THE COURT: How could you do it under the

1 terms of your policy?

2 THE WITNESS: Your Honor, the insurance

3 carrier is faced, as usual — and one of the things

4 that motivated me representing them is the fact

5 that this was a case — if I may back up. I gave

6 no consideration to making any kind of a payment

7 in this case until such time as it had been

8 determined by the witness of one of the other

9 defendants that my client was a direct, active

10 participant in the alleged act, which propelled

11 this plaintiff out of the window.

12 At that point in time it then was

13 determined by me that my client's liability

14 was going to the jury. I determined that if

15 he and the other boys were the only defendants

16 there, the verdict would be in excess of the

17 coverage.

18 Based on what I believed to be the best

19 interest of the Stuyvesant Insurance Company,

20 I attempted to figure out a way whereby they

21 could pay their coverage at the earliest possible

22 moment in order that they might avoid any claim

23 that they had not acted properly in an attempt

24 at the disposition of the matter as it related

25 to a suit for excess, and I felt that was the

1 principal advantage to Stuyvesant at this point.
2 And my client, as I indicated, persisted
3 in professing his innocence, but again, as I say,
4 when the money was paid he felt personally
5 relieved and I felt that was an advantage to him.
6 THE COURT: A copy of the Stuyvesant policy
7 in evidence?
8 THE WITNESS: I would say, Your Honor, that
9 the language read from the GEICO policy is identical
10 with the language contained in mine.
11 THE COURT: Standard language?
12 THE WITNESS: (Nods affirmatively.)
13 And I also advised my company that under this
14 document -- they inquired and I advised them that
15 in the absence of an agreement by Mr. Hendrix
16 to relieve them of the obligation to defend,
17 they still had that duty.
18 THE COURT: And you never got such an
19 agreement?
20 THE WITNESS: No, sir. He never had any
21 attorney, Your Honor, and as an infant his --
22 or before -- somewhere along in there, his parents
23 went to Okinawa and he was left here by himself,
24 and I seemed to be the inheritor of his protection
25 at that point.

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THE COURT: All right, sir. Anything else, Mr. Lustig?

MR. LUSTIG: Yes, if I may.

RECROSS-EXAMINATION

BY MR. LUSTIG:

Q Mr. Winters, you have practiced law how long now?

A Approximately twenty-seven years, I believe.

Q Principally in the defense field or what we term insurance representation in tort actions?

A A substantial portion of it. Yes, sir.

Q All right. You indicated in answer to one of the court's inquiries that you expected a substantial verdict in this case. To be fair, you said if the individual defendants were the only defendants, you expected a substantial verdict, expecting the matter to go to the jury as to your man, and that that would be in excess of the coverage; is that correct?

A His pro rata share, I believe, would be.

Q Right. And did you, in your own mind -- or did you suggest to the -- to your company, Stuyvesant, the range of the verdict that you would expect for a jury for which your man would have to pay a proportionate share?

1 A I never made a definitive guess. I simply
2 indicated it would be substantial and that it could have been
3 a record breaker.
4 Q A what?
5 A I considered it a record breaker.
6 Q And what did you consider, considering
7 your background in the field --
8 MR. COWARD: Your Honor, what is the
9 point in consideration as to what Mr. Winters
10 feels the verdict would be? I object.
11 THE COURT: Sustained.
12 The court has already heard testimony
13 that it would be substantial. He said it would
14 be substantial and he felt that his client's
15 exposure -- that the insured's exposure might
16 be greater. Is that sufficient?
17 MR. LUSTIG: Well, Your Honor, he also
18 talked in terms of relieving Stuyvesant of any
19 possible question on excess because of the fact
20 that they did not pay over monies, which is
21 part of his testimony on some question of excess.
22 I would like to try to establish, for the
23 record, what he contemplated might be the excess
24 amount that would be involved.
25 THE COURT: Objection sustained.

MR. LUSTIG: I have no further questions.

THE COURT: May the witness be excused?

Mr. McDuffie?

RECROSS-EXAMINATION

BY MR. McDUFFIE:

Q Mr. Winters, you discussed before you had Mr. Hendrix enter into this agreement the representation that he might be consulted, did you not?

A Yes, sir.

Q With him?

A Yes, sir.

Q But as I understand it, you told Mr. Hendrix that this was something the plaintiff might do, but he also might not?

A That's correct, sir.

Q Did you express an opinion to him as to the probability of whether he would or would not?

A I don't recall that I ever discussed the probability of it. I did discuss at one point in time the fact that it would be to his personal advantage at the moment if it were, but that that would not relieve him of liability to others.

Q Was this representation by Mr. Lustig,

which you communicated to Mr. Hendrix -- was that a factor which he considered in consenting to this arrangement?

A I think -- no. I don't believe it was. I think the fact that we were going to continue to defend him was his principal concern and the fact that this might get him some advantage, but he didn't know what -- we didn't know what.

Q All right. Now, Mr. Winters, you are continuing to defend Mr. Hendrix?

A Yes, sir.

Q Now, since -- during the last year you are aware of the fact that there have been numerous depositions taken and various court appearances in the case?

A Yes, sir.

Q But, yet, you have not participated in these, have you?

A I have not.

Q If you are, in fact, continuing to defend Mr. Hendrix without an expectation that he will be nonsuited, then how do you explain the fact that you have not made further appearances or participated in the case since that time?

A As it relates to the depositions which were taken of the defendants, I had information prior to the

time of the taking of their depositions, which indicated to me what their testimony would be as it relates to the further defense.

During the period of time you are referring to, my client's personal deposition was taken and I attended -- or he and I were together and we made preparations for his discovery and I attended the taking of his deposition.

Q But that's the only one you participated in?

A That is correct, sir.

MR. McDUFFIE: Thank you, sir.

MR. LUSTIG: No questions, Judge.

THE COURT: Thank you, Mr. Winters.

MR. SMITH: Excuse me, Judge. May I ask him some?

THE COURT: Mr. Smith.

RECROSS-EXAMINATION

BY MR. SMITH:

Q Mr. Winters, I understand the problem of an excess judgment against the company. Isn't -- doesn't that situation develop where the plaintiff says that he will settle within the policy limits and the company refuses to pay it?

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1 A Mr. —

2 MR. LUSTIG: If Your Honor please, I object.

3 I don't know the materiality at this point.

4 MR. SMITH: He said that's why the company

5 paid the money. I think he ought to.

6 THE COURT: I believe the question is

7 proper. You may answer.

8 A (Continuing) The — in response to the

9 question, most of the excess matters that are participated

10 in occur after a substantial judgment has been obtained

11 against a person who professed their innocence and then,

12 when they found out they were faced with a large judgment,

13 wanted the insurance company to extricate them from their

14 difficulties.

15 I could not necessarily predict how my

16 personal client would act in this — when I say personal,

17 I mean Mr. Hendrix — but I believe that by tendering it,

18 we had done all we could to prevent the plaintiff from

19 taking a position of personal animosity toward my client,

20 and I believe to that extent that I had afforded my company

21 some additional protection.

22 Q And as you have told us, you were

23 representing both your company and Mr. Hendrix?

24 A That is correct, sir.

25 Q And you were trying to, in good faith,

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1 discharge your responsibility to both of them?
2 A That is correct, sir.
3 Q And in doing that, you had talked to
4 Mr. Lustig and when you paid the money, could you think of
5 anything that might be detrimental to his client by him
6 taking a nonsuit as to Hendrix?
7 A No, sir.
8 Q Then in all probability, you thought he
9 would take a nonsuit, I take it?
10 A No, I did not. I could not respond as
11 to what the situation would be at the time we came to
12 a point where he might not want to take a nonsuit, but
13 I just saw some problems associated with it and I didn't
14 know what the response would be.
15 Q But you paid the money after the
16 discussions and when you could not think of anything that
17 might be detrimental that would lead him not to take a
18 nonsuit?
19 A I'm not sure I understand that one.
20 Q In other words, you're trying to protect
21 Stuyvesant and Hendrix?
22 A That's correct.
23 Q By paying the twenty-five thousand
24 dollars on the one hand to protect Stuyvesant against an
25 excess, weren't you also paying the twenty-five thousand

1 dollars, based on what Mr. Lustig had told you about a
2 nonsuit, and taking into account you couldn't see where it
3 would be detrimental to take the nonsuit?
4 A No, I didn't say that. I specifically
5 said he had all of the options, and I could see some
6 potential problems. Depending on the status of the case
7 at the time, he would have to take a nonsuit, if he was
8 going to take one.
9 Q Have you received any instructions from
10 Stuyvesant as to whether or not you should attend
11 depositions?
12 A I have been advised that I should do what
13 I feel is necessary to protect my client, subject to such
14 cooperation as I have been able to obtain from him at this
15 point.
16 Q Have you asked Stuyvesant for the authority
17 to occur any expenses in the defense, which was refused by
18 them?
19 A No, sir.
20 MR. SMITH: That's all.
21 THE COURT: I think that, now, Mr. Winters,
22 you can be excused. I think everybody has
23 exhausted their supply of questions.
24 MR. WINTERS: Thank you, sir.
25 THE COURT: Gentlemen, let's take about a

1 five-minute recess.

2 (Whereupon the court recessed at

3 12:35 p.m. At 12:40 p.m., the court reconvened,

4 and the following took place:)

5 THE COURT: Any other evidence to be

6 offered? Any other testimony or otherwise this

7 morning, Mr. Rixey?

8 MR. RIXEY: Finally, Your Honor, I would

9 ask the court to inquire of Mr. Lustig if he has

10 a statement or statements in his file, which

11 reflect the distribution of the funds which were

12 paid -- the twenty-five thousand dollars -- on

13 two separate occasions, and I mentioned this

14 to him at the recess and he apparently has these

15 statements. I don't want to call him as a witness,

16 but I think they should be part of the record.

17 THE COURT: May I ask --

18 MR. LUSTIG: I object.

19 THE COURT: Why is it pertinent,

20 Mr. Rixey?

21 MR. RIXEY: Well, it would --

22 THE COURT: You're wondering whether the

23 money has been paid over to the plaintiffs?

24 Is that all you want to know?

25 MR. RIXEY: Yes, sir.

THE COURT: Have any of the proceeds been paid over to the Wrights?

MR. LUSTIG: Monies from these monies?

THE COURT: Yes, sir.

MR. LUSTIG: Monies were paid over to the Wrights. Yes, sir.

THE COURT: Is that sufficient?

MR. LUSTIG: I would stipulate to that.

MR. RIXEY: And may I ask, also, if a fee was deducted by Mr. Lustig? I would assume that he did.

THE COURT: Off the record.

(Off-the-record discussion.)

THE COURT: Back on the record. It is stipulated by Mr. Lustig that proceeds from the two checks from Stuyvesant and GEICO have been paid over to the plaintiffs in these cases and that there was a fee taken out.

MR. RIXEY: And one more question, Your Honor.

THE COURT: Yes, sir.

MR. RIXEY: And would the court inquire of Mr. Lustig whether or not any funds were set aside to take care of costs — additional expenses in the prosecution of these cases, which I think is a

1 very key inquiry for the court.

2 THE COURT: Tell me, gentlemen, shall we

3 recess and let me talk to counsel in chambers

4 for a minute?

5 MR. LUSTIG: Yes, sir.

6 (The court recessed at 12:45 p.m. At

7 12:50 p.m., the court reconvened, and the following

8 took place:)

9 THE COURT: I think we're ready to proceed.

10 Let the record show that counsel for the plaintiffs

11 in these cases have stipulated that none of the

12 proceeds from the -- from either GEICO or the

13 Stuyvesant Insurance Company have been set aside

14 for the payment of any anticipated costs in the

15 case.

16 MR. LUSTIG: That is correct, Your Honor.

17 THE COURT: With that, that concludes the

18 taking of the evidence and we will now proceed

19 with argument on the motions on the special plea

20 of release.

21 Gentlemen, the court will be pleased to

22 hear argument in any order that's mutually

23 agreeable to counsel.

24 MR. RIKEY: If Your Honor please, if it's

25 all right, I'll just say a few words on behalf of

COVENANT NOT TO SUE

WHEREAS, Government Employees Insurance Company, by Policy No. H 27 16 48, has issued a policy of insurance to Thomas K. and Betty C. Orlowski, and WHEREAS, an additional insured under the said policy is Thomas Walter Orlowski; and

WHEREAS, the undersigned have filed suit in the Circuit Court of the City of Virginia Beach against the said Thomas Walter Orlowski for personal injuries and damages arising out of an accident occurring on or about the 30th day of October, 1970; and

WHEREAS, Government Employees Insurance Company desires to enter into this covenant as set forth below, NOW, THEREFORE, WITNESSETH:

KNOW ALL MEN BY THESE PRESENTS that the undersigned, Edward R. Wright and Joan E. Wright, for and in consideration of the sum of Twenty-five Thousand ($25,000.00) Dollars in hand paid by Government Employees Insurance Company, the receipt and sufficiency thereof being hereby acknowledged, do hereby now and forever covenant and agree not to sue Government Employees Insurance Company and to refrain forever from instituting, pressing, collecting or in anyway aiding or proceeding upon any and all claims, judgments, debts, costs of action, suits and proceedings of any kind at law or in equity which the undersigned ever had, now have, or may have against the said Government Employees Insurance Company or their successors or assigns, arising out of a certain accident

which occurred on the 30th day of October, 1970, at the James Barry Robinson Home for Boys, Norfolk, Virginia, in which accident the undersigned were injured or caused damages.

It is hereby expressly understood and agreed that the consideration of $25,000.00 has been received by the undersigned from Government Employees Insurance Company in full payment for this covenant not to use notwithstanding any injuries or damages sustained, whether known or unknown.

It is hereby expressly understood and agreed that this instrument is not intended nor in fact is a release or discharge of nor an accord or satisfaction with any person whomsoever, but only as a covenant not to sue and to the effect that Government Employees Insurance Company hereby purchases peace and is hereby given peace upon any and all claims and matters whatsoever which have been or may be made against Government Employees Insurance Company by the undersigned; and that Government Employees Company in making payment of said consideration for this covenant, has done so solely to obtain such peace and does not thereby admit any liability on account of any said claims or matters but expressly deny all of such liability whatsoever.

It is further expressly understood and agreed that the undersigned hereby expressly reserve the right to proceed against or sue any other person or persons against whom they may have or assert any claim on account of damages arising out of the above described accident.

It is further expressly understood and agreed that nothing herein contained shall in any way intend to release or discharge or shall in any way be construed as releasing or discharging Thomas Walter Orlowski or any other person or persons, firms or organizations against whom the undersigned may have or assert any claim on account of damages arising out of the above described accident. In the event any judgment shall be rendered in any court of competent jurisdiction in favor of the undersigned against the said Thomas Walter Orlowski, it is understood and agreed that the undersigned would credit against any such judgment the said sum of $25,000.00 received from Government Employees Insurance Company under the terms of this covenant.

The undersigned expressly reserve the right to proceed against Thomas Walter Orlowski and any other person or persons against whom they may have or assert any claim on account of damages arising out of the above described accident.

IN WITNESS WHEREOF, the undersigned have set their hands and seals this_____day of_____, 1975.

_____
EDWARD R. WRIGHT

_____
JOAN E. WRIGHT

SEEN AND AGREED TO:

GOVERNMENT EMPLOYEES INSURANCE COMPANY

BY:_____

COVENANT NOT TO SUE

WHEREAS, Stuyvesant Insurance Company, by Policy No. 2812012, has issued a policy of insurance to Harry J. and Betty J. Hendrix, and WHEREAS, an additional insured under the said policy is Edward Joseph Hendrix; and

WHEREAS, the undersigned have filed suit in the Circuit Court of the City of Virginia Beach against the said Edward Joseph Hendrix for personal injuries and damages arising out of an accident occurring on or about the 30th day of October, 1970; and

WHEREAS, Stuyvesant Insurance Company desires to enter into this covenant as set forth below, NOW, THEREFORE, WITNESSETH:

KNOW ALL MEN BY THESE PRESENTS that the undersigned, Edward R. Wright and Joan E. Wright, for and in consideration of the sum of Twenty-five Thousand ($25,000.00) Dollars in hand paid by Stuyvesant Insurance Company, the receipt and sufficiency hereof being hereby acknowledged, do hereby now and forever covenant and agree not to sue Stuyvesant Insurance Company and to refrain forever from instituting, pressing, collecting or in any way aiding or proceeding upon any and all claims, judgments, debts, costs of action, suits and proceedings of any kind at law or in equity which the undersigned ever had, now have, or may have against the said Stuyvesant Insurance Company or their successors or assigns, arising out of a certain accident which occurred on the 30th day of October, 1970, at the James Barry-

Robinson Home for Boys, Norfolk, Virginia, in which accident the undersigned were injured or caused damages.

It is hereby expressly understood and agreed that the consideration of $25,000.00 has been received by the undersigned from Stuyvesant Insurance Company in full payment for this covenant not to sue notwithstanding any injuries or damages sustained, whether known or unknown.

It is hereby expressly understood and agreed that this instrument is not intended nor in fact is a release or discharge of nor an accord or satisfaction with any person whomsoever, but only as a covenant not to sue and to the effect that Stuyvesant Insurance Company hereby purchases peace and is hereby given peace upon any and all claims and matters whatsoever which have been or may be made against Stuyvesant Insurance Company by the undersigned; and that Stuyvesant Insurance Company, in making payment of said consideration for this covenant, has done so solely to obtain such peace and does not thereby admit any liability on account of any said claims or matters but expressly deny all of such liability whatsoever.

It is further expressly understood and agreed that the undersigned hereby expressly reserve the right to proceed against or sue any other person or persons against whom they may have or assert any claim on account of damages arising out of the above described accident.

It is further expressly understood and agreed that nothing herein contained shall in any way intend to release or discharge or shall in any way be construed as releasing or discharging Edward Joseph Hendrix or any other person or persons, firms or organizations against whom the undersigned may have or assert any claim on account of damages arising out of the above described accident. In the event that any judgment shall be rendered in any court of competent jurisdiction in favor of the undersigned against the said Edward Joseph Hendrix, it is understood and agreed that the undersigned would credit against any such judgment the said sum of $25,000.00 received from Stuyvesant Insurance Company under the terms of this covenant.

The undersigned expressly reserve the right to proceed against Edward Joseph Hendrix and any other person or persons against whom they may have or assert any claim on account of damages arising out of the above described accident.

IN WITNESS WHEREOF the undersigned have set their hands and seals this 7th day of ~~December~~ January, 197~~4~~5.

Edward R. Wright

Edward R. Wright

Joan E. Wright

Joan E. Wright

Seen and agreed to:

STUYVESANT INSURANCE COMPANY

By: _____

The Stuyvesant Insurance Company

New York, New York

Draft No. 463273

Payable through The Merchants National Bank of Allentown, 702 Hamilton Street, Allentown, Pennsylvania upon acceptance by The Stuyvesant Insurance Company

Claim number	State	Corp/Agt	Branch/Spec Agt	Payment Final	Partial	Add'l	Expense	Res
1092932	46	099	000	x				01

Date December 27, 1974

TWENTY FIVE THOUSAND AND NO/100

Dollars $ 25,000.00

EDWARD R. WRIGHT, JOAN E. WRIGHT AND WAYNE LUSTIG, THEIR ATTORNEY

Insured
Harry J. & Betty J. Hendrix

Policy No. 2812012

Date of Loss 10/30/70

TIN

In full payment of
any and all claims under med pay coverage including bodily injury on or about 10/30/70. . .

Void after 90 days

Authorized Signature

⑈0313⑈0134⑈ 90 1001 8⑈

01-32-T 20 24 500.00
02-32-T 20 500.00
Adjuster #5253

Mr. Tzhalas has original 12-18-75

123

Endorsement and Release

All payees must endorse this draft. By endorsing this draft the payee(s) accept same in full settlement and release of all claims arising out of occurrence mentioned on the face hereof.

Edward [illegible] Wright

[illegible]

[illegible]

DEPOSIT TO THE ACCOUNT OF 3 2
CAMPBELL, [illegible] & HANCOCK

Endorsement of Payee(s)

JAN 1 1975

PAY ANY BANK, ETC.

A G R E E M E N T

We, Thomas Walter Orlowski, Thomas K. Orlowski and Joan C. Orlowski, hereby authorize and direct Government Employees Insurance Company to tender the full $25,000.00 coverage of Policy No. H-27-16-48 to Joan E. Wright and Edward R. Wright in settlement of all claims, demands and causes of action which said Joan E. Wright and Edward R. Wright may have now or in the future, known or unknown, against Government Employees Insurance Company as the insurer of Thomas Walter Orlowski, or any of us, which have arisen or may hereinafter arise out of the incident occurring October 30, 1970, and which is the subject of suits now pending in the Circuit Court of the City of Virginia Beach, Virginia, and being Law Actions No. 15,986 and No. 15,987, or, in the alternative, we authorize and direct Government Employees Insurance Company to deposit the sum of $25,000.00 with the Clerk of the Circuit Court of the City of Virginia Beach for the benefit of Joan E. Wright and/or Edward R. Wright to be held by the Clerk subject to further order or direction of the Court.

It is agreed by us, individually and collectively, that should Joan E. Wright and/or Edward R. Wright accept the sum of $25,000.00 in discharge of all claims either or both may have against Government Employees Insurance Company as the insurer of Thomas Walter Orlowski or any of us, arising out of the event of October 30, 1970, or, in the alternative, should Government Employees Insurance Company pay the sum of $25,000.00 to the Clerk of the Circuit Court of the City of Virginia Beach as above authorized and

directed, then Government Employees Insurance Company shall then and there be released of any further obligation under the policy contract or otherwise to pay any further sum whatever, or to further defend Thomas Walter Orlowski or any of us, in these actions presently pending or any action which hereinafter may be brought whether by Joan E. Wright or Edward R. Wright, or by any other individual, person, partnership, corporation, religious order, entity, board of trustees, association, and whether new actions or counterclaim, cross-claim, impleader, or actions for contribution or indemnity, which in any way arise or grow out of, directly or indirectly, the event of October 30, 1970, and/or the causes of actions of Joan E. Wright and/or Edward R. Wright above mentioned.

Dated this 27 of November, 1974.

Thomas Walter Orlowski

Thomas K. Orlowski

Joan C. Orlowski

Counsel for Thomas Walter Orlowski,
Thomas K. Orlowski and
Joan C. Orlowski

1 THOMAS WALTER ORLOWSKI, a defendant, having
2 been first duly sworn, was examined and testified as
3 follows:
4
5 BY MR. DAVIS:
6 Q. Tom, this is a new deposition so give me your
7 name and address again.
8 A. Thomas Walter Orlowski, 14203 Canterbury Lane,
9 Rockville, Maryland.
10 Q. Tom, at the time of this incident, October 30,
11 1970 I believe you were insured by GEICO, Government
12 Employees Insurance Company?
13 A. Yes, I was.
14 Q. Under your Homeowners.
15 A. My parents'.
16 Q. And you were a member of the household then.
17 A. Yes, I was.
18 Q. And they had limits of liability insurance
19 up to $25,000. Do you know that?
20 A. No, I never did discuss that with them.
21 Q. Now subsequent to this accident do you recall
22 entering into any type of agreement with Government Employees
23 Insurance Company whereby they were to pay some moneys on
24 this case?
25 A. I never handled none of that. That was

1 discussed between Mr. Gorry and my father. I couldn't even
2 tell you -- like I said, I don't even know how much the
3 insurance covers or what the arrangement is on the insurance,
4 what kind of incident occurred.

5 Q. In other words your father then would have
6 been the one along with Mr. Gorry's advice who would have
7 handled the discussion and so forth?

8 A. To the best of my knowledge, him and my
9 mother together, kind of business partners in the deal.
10 Q. I want to show you a piece of paper here and
11 ask if your signature appears on it.
12 MR. McKENRY: I don't want that introduced
13 because that is my only copy.
14 MR. DAVIS: It can be Xeroxed.
15 MR. McKENRY: I don't know, but I'll see if
16 I can make copies.
17 THE WITNESS: I do remember signing this now.
18 I received this in the mail on a weekend and they told
19 me to sign this.
20
21 BY MR. DAVIS:
22 Q. Who told you to sign this?
23 A. My parents, they told me Mr. Gorry needed my
24 signature on it. I remember reading this now that I look
25 at it. It didn't cross my mind.

1 Q. Do you want to look it over to refresh your
2 memory?
3 A. Yes, maybe I ought to.
4 Q. Tom, this piece of paper or instrument
5 consisting of two pages that has the word Agreement on top,
6 do you recognize this?
7 A. Yes, I do.
8 Q. And on the second page it shows the date of
9 December 27, 1974 and it appears to be the signature of
10 Thomas Walter Orlowski, Thomas K. Orlowski and Joan C. Orlowski
11 and also Mr. Gorry, your attorney. Is that true?
12 A. Yes, sir, that was when that paper was signed.
13 I believe I was on leave at the time or home on leave for
14 the Christmas holidays.
15 Q. Here at Virginia Beach?
16 A. Yes, my parents said Mr. Gorry wanted me to
17 sign this.
18 Q. Does your signature appear on there?
19 A. Yes, my signature is the first one appears on
20 there.
21 Q. Thomas Walter Orlowski.
22 A. Yes.
23 MR. DAVIS: If we can have another copy made
24 of this I will make this Trustees' Exhibit 1 for
25 identification.

1 MR. LUSTIG: I don't object to it for
2 identification purposes but as to any matters of
3 relevancy --
4 MR. DAVIS: All right.
5 MR. LUSTIG: I reserve objection.
6 (Whereupon, the foregoing document
7 consisting of two pages was marked
for identification as Trustees' Exhibit
1.)
8
9 BY MR. DAVIS:
10 Q. Now have you had any conversations with
11 Mr. Gorry concerning the execution of this agreement?
12 A. No, I didn't talk to him at all about that.
13 A couple of times I have been in the office on other cases,
14 different things he handled for me. I discussed how the
15 other case is coming out, Wright case. He said nothing, at
16 a stand still. He explained a little to me about what was
17 happening. I knew some kind of knowledge, that some insurance
18 company was going to pay, pay X number of dollars, instead of
19 dragging everybody through the court, somebody like Legal
20 Officers was going to try a settlement instead of dragging
21 everybody through it in the United States.
22 Q. Who was present when you signed this?
23 A. My parents.
24 Q. Was Mr. Gorry present also?
25 A. No.

1 Q. Was there any additional understanding given
2 to you other than what language appears in this agreement?
3 A. No, my parents just said they were going to
4 offer the insurance money, the insurance money was going to
5 offer to pay this. Like I understood it was something like
6 a settlement out of court, we'll pay so much for the damages,
7 whatever occurred and that's it.
8 Q. Well, was there any understanding to your
9 knowledge that as a result of your insurance company paying
10 this $25,000 in discharge of all claims that you would be
11 dismissed from the suit?
12 MR. LUSTIG: Objection. Go ahead.
13 THE WITNESS: The way I understood it, the
14 insurance company was going to propose or submit,
15 you know, throw it out there to be kicked around, the
16 $25,000 if somebody wanted to take it. If they
17 didn't want to take it, whatever, and at the time they
18 decided whether or not to take the money, that would
19 either have been like to the court trial and at the
20 end of the case or it meant like that the insurance
21 company if they paid their $25,000 and they still, you
22 know, might say this thing went to court the way I
23 understood, if my portion or my whatever - I don't know
24 how you call it, I don't know what the word is - say
25 $50,000, that is the money turned out I had to pay, like

found against me, the insurance company would pay $25,000 and they would be off the hook. They would be out of the picture and it would be up to me to come up with another $25,000.

MR. LUSTIG: Withdraw my objection.

MR. SMITH: Go ahead.

THE WITNESS: Now if the $25,000 covered the whole settlement or agreement, you know, like say it was only $20,000, then the number they arrived with, the insurance company paid $25,000 and that was the end of the line. That was the end of the trial and everything -- well, it was over with and that would be it for me. Then I wouldn't have to pay no money. But like I say, if it was $30,000 or $50,000 or $100,000, whatever the amount would be, the insurance company was responsible for $25,000. When they paid the first $25,000 or lesser amount that cleared them in the case. And if $25,000 covered the whole amount then we were both cleared. That's the way I understood it. That was the question I wanted to ask you.

BY MR. DAVIS:

Q. You are being deposed.

A. That is the way I understand it.

1 MR. DAVIS: That's all I have. Anybody else?
2
3 BY MR. SMITH:
4 Q. Tom, the document that you identified of
5 course is an agreement that the other lawyer, Mr. Davis,
6 referred to and it's going to be in evidence as your
7 exhibit, as part of this deposition, Exhibit 1.
8 Now the policy as I understand it was a
9 Homeowners Policy bought by your parents?
10 A. Uh-huh.
11 Q. They paid the premiums on it?
12 A. Yes, they pay, it's their insurance policy.
13 Q. And did you understand that you became
14 insured under that policy because you lived in your household
15 with your parents?
16 A. Yes, I understood that.
17 Q. As a matter of fact how old were you at the
18 time this occurred?
19 A. The incident itself?
20 Q. Yes.
21 A. Fifteen.
22 Q. And as far as what was -- this was your
23 parents' insurance so did they as you understand the talk
24 with Mr. Gorry about how to handle it and what to do about it?
25 A. Yes, they handled that part of it.

1 Q. And you were just asked to sign this, which
2 you did?
3 A. Yes, I was told that. It was halfway
4 explained to me or something. That's where I got the
5 explanation I just gave to you.
6 Q. And this is your best recollection?
7 A. And I read it. I never discussed it with
8 Mr. Gorry. My parents discussed it with him and they told
9 me what he said and I was advised to sign it. He said sign
10 this. That's where my faith is in Mr. Gorry, so I signed
11 the thing.
12 Q. What you're telling us about the effect of it
13 is, just your best understanding of what other people have
14 told you?
15 A. Yes, what I can put together.
16 MR. SMITH: All right. I believe that's all.
17 MR. McKENRY: The same thing on this, you
18 will waive your signature to this?
19 THE WITNESS: Yes.
20 (Witness excused.)
21
22 --------oOo--------
23
24
25

GOVERNMENT EMPLOYEES INSURANCE COMPANY

A CAPITAL STOCK COMPANY NOT AFFILIATED WITH THE U. S. GOVERNMENT · WASHINGTON, D. C.

1705 L STREET, N. W., WASHINGTON, D. C. 20036

MEMORANDUM OF

HOMEOWNERS POLICY

No. H- 27 16 48

DECLARATIONS

Named Insured and P.O. Address:
THOMAS K. ORLOWSKI AND
JOAN C. ORLOWSKI HUSBAND AND WIFE
504 NORTH BETHUNE DRIVE
VIRGINIA BEACH, VIRGINIA

FULL PREMIUM: 65.00

ANNUAL PREMIUM: 65.00

Policy Term: 8-23-73 (Inception (Mo., Day, Yr.)) 8-23-76 (Expiration (Mo., Day, Yr.)) 3 Years

The described residence premises covered hereunder is located at the above address, unless otherwise stated herein.

Insurance is provided only with respect to the following Coverages for which a limit of liability is specified, subject to all conditions of this policy.

COVERAGES	SECTION I: A. DWELLING	B. APPURTENANT STRUCTURES	C. UNSCHEDULED PERSONAL PROPERTY	D. ADDITIONAL LIVING EXPENSE	SECTION II: E. PERSONAL LIABILITY (Bodily Injury & Property Damage) Each Occurrence	F. MEDICAL PAYMENTS TO OTHERS: Each Person	Each Accident
LIMITS OF LIABILITY	$ 24,500	$ 2,450	$ 12,250	$ 4,900	$25,000	$ 500	$ 25,000
PREMIUM	BASIC POLICY PREMIUM	ADDITIONAL PREMIUMS: THEFT EXTENSION	OTHER	TOTAL PREPAID PREMIUM	PREMIUM IF PAID IN INSTALLMENTS	PAYABLE: AT INCEPTION (and)	AT EACH SUBSEQUENT ANNIVERSARY
	$ 195.00	$	$	$ 195.00	$195.00	$ 65.00	$ 65.00
	PREMIUM FOR SCHEDULED PERSONAL PROPERTY			$	$	$	$
				$	$	$	$
			COMBINED PREMIUM ▶	$	$	$	$

FORMS AND ENDORSEMENTS: Forms and endorsements made part of this policy at time of issue:
HO-25W(9/70) HO-181 (2/70) 370 (7/72)

DEDUCTIBLE SECTION I: Any loss by perils insured against under Section I of this policy is subject to a deductible. Exceptions, if any:
☐ Deductible applicable only to loss caused by the peril of windstorm or hail (Clause No. 1) ☐ Deductible applicable to loss caused by other perils (Clause No. 2) ☐ Deductible not applicable ☐ Special Loss Deductible Clause (Amount) $

SPECIAL STATE PROVISIONS: SOUTH CAROLINA: Valuation clause (Coverage A) $
DELAWARE: It is agreed between the Insurer and the Insured that the values of the real property insured under this policy are the sum of $ for Coverage A, and if there are appurtenant structures the sum of $ for Coverage B.
New York: Coinsurance Clause Applies ☐ Yes ☐ No

SECTION II—Additional residence premises, if any, located:

Rating Information Only Code (1) (3) (7) (7) (9) Deductibles: Type Code: Size Code:
Dwelling occupied by ☒ 1 ☐ 2 ☐ 3 ☐ 4 families. ☐ Tenant $ 50 All Perils $ Clause No. 1 $ Clause No. 2
Construction of dwelling: ☒ Frame Code (1) ☐ Brick, Stone or Masonry Veneer Code (2) ☐ Fire Resistive Code (4) ☐ Frame with aluminum or plastic siding Code (5) ☐ Brick, Stone or Masonry Code (3) Roof ☒ Approved ☐ Unapproved
Zone 5 Code Prot. Cl. 3 Code Not more than 1,000 feet from Hydrant Not more than miles from Fire Dept. Premium Group No. 19
Complete when Form HO-4 is made a part of this policy: Total Annual Fire and Extended Coverage Rate Number of Apartments in building
Southern States: ☒ Inside City Limits ☐ Inside Protected Suburban Area ☐ Inside Fire District Fire District Code:

(a) The described dwelling is not seasonal; (b) no business pursuits are conducted on the described premises; (c) the described premises is the only premises where the Named Insured or spouse maintains a residence other than business or farm properties; (d) the Insured has no full time residence employee(s); (e) the Insured has no outboard motor(s) or watercraft otherwise excluded under this policy for which coverage is desired. Exception, if any, to (a), (b), (c), (d) or (e)*

*Absence of an entry means "no exceptions".

MORTGAGEE
THE COUNTY TRUST COMPANY
64 NORTH BROADWAY
TARRYTOWN, NEW YORK 10591
LOAN #90-14964

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Agent
Date 7/23/73 JB

In Consideration of the Provisions and Stipulations Herein or Added Hereto and of the Premium Above Specified (or specified in endorsement(s) made a part hereof), this Company, for the **term shown above** from **inception date shown above** at noon (Standard Time) to **expiration date shown above** at noon (Standard Time) at location of property involved, to an amount not exceeding the limit of liability above specified, does insure **the Insured named in the Declarations above** and legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the Insured, against all DIRECT LOSS BY FIRE, LIGHTNING AND OTHER PERILS INSURED AGAINST IN THIS POLICY INCLUDING REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY, EXCEPT AS HEREINAFTER PROVIDED, to the property described herein while located or contained as described in this policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere.

This memorandum is for information only; it is not a contract of insurance but attests that a policy as numbered herein, and as it stands at the date of this certificate, has been issued by the Company. Said policy is subject to change by endorsement and to assignment and cancellation in accordance

INCLUDES STANDARD FIRE INSURANCE POLICY FOR MISSOURI

STATE EXCEPTIONS **Maine** — The words "twelve months" in line 161 of the numbered line provisions are changed to "twenty-four months". **North Dakota** — The words "twelve months" in line 161 of the numbered line provisions are changed to "thirty-six months".

Concealment, fraud. This entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

Uninsurable and excepted property. This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money or securities; nor, unless specifically named hereon in writing, bullion or manuscripts.

Perils not included. This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power; (h) order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, provided that such fire did not originate from any of the perils excluded by this policy; (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises; (j) nor shall this Company be liable for loss by theft.

Other Insurance. Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto.

Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring

(a) while the hazard is increased by any means within the control or knowledge of the insured; or

(b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days; or

(c) as a result of explosion or riot, unless fire ensue, and in that event for loss by fire only.

Other perils or subjects. Any other peril to be insured against or subject of insurance to be covered in this policy shall be by endorsement in writing hereon or added hereto.

Added provisions. The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy is subject to change.

Waiver provisions. No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this Company relating to appraisal or to any examination provided for herein.

Cancellation of policy. This policy shall be cancelled at any time at the request of the insured, in which case this Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by this Company by giving to the Insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

Mortgagee interests and obligations. If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the insured, such interest in this policy may be cancelled by giving to such mortgagee a ten days' written notice of cancellation.

If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within sixty (60) days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit. If this Company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

Pro rata liability. This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

Requirements in case loss occurs. The insured shall give immediate written notice to this Company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; **and within sixty days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss,** signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal. In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's options. It shall be optional with this Company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required.

Abandonment. There can be no abandonment to this Company of any property.

When loss payable. The amount of loss for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.

Subrogation. This Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this Company.

DEFERRED PREMIUM PAYMENT ENDORSEMENT

HO-181
(Ed. 2-70)

The Insured has elected to pay the premium in annual installments as specified in the Declarations of this policy, and the premium for this policy is hereby made so payable. In the event of any changes in the premiums, which are in effect for this Company and applicable to the insurance provided herein after the inception date of this policy, the Insured agrees to pay subsequent annual installments calculated at the annual premium then in effect.

HO-181
(Ed. 2-70)

Form No. 370
Virginia
(Ed. 7-72)

AMENDATORY CANCELLATION AND NON-RENEWAL ENDORSEMENT APPLICABLE TO OWNER-OCCUPIED DWELLINGS ONLY

The Cancellation Provisions of this policy are qualified only with respect to:

1. CANCELLATION FOR NON-PAYMENT OF PREMIUM:

   This policy may be cancelled by this Company at any time during the policy period for failure to pay any premium when due whether such premium is payable directly to this Company or its agent or indirectly under any premium finance plan or extension of credit by mailing or delivering to the Insured written notice stating when, not less than ten days thereafter, such cancellation shall be effective.

2. CANCELLATION OF POLICIES IN FORCE FOR 90 DAYS OR MORE AND RENEWAL POLICIES:

   If this policy:

   (a) has been in force for 90 days or more; or

   (b) if this is a renewal of a policy issued by this Company, effective immediately;

   It may be cancelled by this Company for one or more of the following reasons and then only by mailing or delivering to the Insured written notice stating when, not less than 30 days thereafter, such cancellation shall be effective:

   (1) Conviction of a crime arising out of acts increasing the hazard insured against;

   (2) Discovery of fraud or material misrepresentation;

   (3) Wilful or reckless acts or omissions increasing the hazard insured against as determined from a physical inspection of the insured premises; or

   (4) Physical changes in the property which result in the property becoming uninsurable as determined from a physical inspection of the insured premises.

3. NON-RENEWAL OF THE POLICY:

   The Company agrees that it will not refuse to renew or continue this policy unless a written notice of its intention not to renew or continue is mailed to the Insured named in the declarations, at the address shown in this policy, not less than 30 days prior to the expiration date. Such notice shall not be required:

   (1) If the insurer or its agent acting on behalf of the insurer has manifested its willingness to renew by issuing or offering to issue a renewal policy, certificate or other evidence of renewal, or has otherwise manifested such intention in writing to the Insured, or

   (2) If the named Insured has notified in writing the insurer or its agent that he wishes the policy to be cancelled, or that he does not wish the policy to be renewed, or if he fails to accept the offer of the insurer to renew the policy, or

   (3) If the named Insured fails to pay the premium as required by the Company for renewal or continuance of this policy.

   If this policy is written for a policy period of less than one year, this Company agrees that it will not refuse to renew except as of the expiration of a policy period which coincides with the end of an annual period commencing with its original effective date.

The mailing of notice as aforesaid shall be sufficient proof of notice. Delivery of such written notice by this Company shall be equivalent to mailing.

All other terms and conditions of this policy remain unchanged.

Note to Agents—The "attaching" portion may be torn off if form is attached when the policy is written.

Attached to and forming part of Policy No. .....

of the ..... (Name of Insurance Company)

Issued at its ..... (City or Town), Va. Agency.

Dated ....., 19..... ....., Agent.

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DESCRIPTION OF PROPERTY AND INTERESTS COVERED

COVERAGE A — DWELLING

This policy covers the described dwelling building, including additions in contact therewith, occupied principally as a private residence.

This coverage also includes:

1. if the property of the Insured and when not otherwise covered, building equipment, fixtures and outdoor equipment all pertaining to the service of the premises and while located thereon or temporarily elsewhere; and
2. materials and supplies located on the premises or adjacent thereto, intended for use in construction, alteration or repair of such dwelling.

COVERAGE B — APPURTENANT STRUCTURES

This policy covers structures (other than the described dwelling building, including additions in contact therewith) appertaining to the premises and located thereon.

This coverage also includes materials and supplies located on the premises or adjacent thereto, intended for use in construction, alteration or repair of such structures.

This coverage excludes:

1. structures used in whole or in part for business purposes; or
2. structures rented or leased in whole or in part or held for such rental or lease (except structures used exclusively for private garage purposes) to other than a tenant of the described dwelling.

COVERAGE C — UNSCHEDULED PERSONAL PROPERTY

This policy covers unscheduled personal property usual or incidental to the occupancy of the premises as a dwelling and owned or used by an Insured, while on the described premises and, at the option of the Named Insured, owned by others while on the portion of the premises occupied exclusively by the Insured.

This coverage also includes such unscheduled personal property while elsewhere than on the described premises, anywhere in the world:

1. owned or used by an Insured; or
2. at the option of the Named Insured,
   a. owned by a guest while in a residence occupied by an Insured; or
   b. owned by a residence employee while actually engaged in the service of an Insured and while such property is in the physical custody of such residence employee or in a residence occupied by an Insured;
3. but the limit of this Company's liability for the unscheduled personal property away from the premises shall be an additional amount of insurance equal to 10% of the amount specified for Coverage C, but in no event less than $1,000.

This coverage excludes:

1. animals, birds or fish;
2. motorized vehicles, except such vehicles pertaining to the service of the premises and not licensed for road use;
3. aircraft;
4. property of roomers and boarders not related to the Insured;
5. property carried or held as samples or for sale or for delivery after sale;
6. property rented or held for rental to others by the Insured, except property contained in that portion of the described premises customarily occupied exclusively by the Insured and occasionally rented to others or property of the Insured in that portion of the described dwelling occupied by roomers or boarders;
7. business property while away from the described premises;
8. any device or instrument for the recording, reproduction or recording and reproduction of sound which may be operated by power from the electrical system of a motor vehicle, or any tape, wire, record disc or other medium for use with any such device or instrument while any of said property is in or upon a motor vehicle; or
9. property which is separately described and specifically insured in whole or in part by this or any other insurance.

COVERAGE D — ADDITIONAL LIVING EXPENSE

If a property loss covered under this policy renders the premises untenantable, this policy covers the necessary increase in living expense incurred by the Named Insured to continue as nearly as practicable the normal standard of living of the Named Insured's household for not exceeding the period of time required:

1. to repair or replace such damaged or destroyed property as soon as possible; or
2. for the Named Insured's household to become settled in permanent quarters; whichever is less.

This coverage also includes:

1. the fair rental value of any portion of the described dwelling or appurtenant structures covered under this policy, as furnished or equipped by the Named Insured, which is rented or held for rental by the Named Insured. The fair rental value shall not include charges and expenses that do not continue during the period of untenantability. Coverage shall be limited to the period of time required to restore, as soon as possible, the rented portion to the same tenantable condition;
2. the period of time, not exceeding two weeks, while access to the premises is prohibited by order of civil authority, as a direct result of damage to neighboring premises by a peril insured against.

The periods described above shall not be limited by the expiration of this policy.

This coverage excludes expense due to cancellation of any lease, or any written or oral agreement.

SUPPLEMENTARY COVERAGES

The following supplementary coverages shall not increase the applicable limit of liability under this policy:

1. Automatic Removal: If, during the term of this policy, the Named Insured removes unscheduled personal property covered under Coverage C from the premises to another location within the Continental United States or the State of Hawaii, to be occupied as his principal residence, the limit of liability for Coverage C shall apply at each location in the proportion that the value at each location bears to the total value of all such property covered under Coverage C.

Property in transit shall be subject to the limit of liability for unscheduled personal property away from the premises.

This coverage shall apply only for a period of 30 days from the date removal commences and shall then cease.

2. Debris Removal: This policy covers expenses incurred in the removal of all debris of the property covered hereunder, occasioned by loss thereto for which coverage is afforded.

3. Fire Department Service Charge: This policy covers for an amount not exceeding $250 the Named Insured's liability, assumed by contract or agreement for fire department charges where fire department is called because of a fire in, on or exposing property insured hereunder, while located on the premises described. This coverage does not cover Named Insured's liability, by contract or otherwise, to indemnify either a city, municipality or fire protection district, or any other person, firm or corporation against loss, claim or liability arising by reasons of the movement or functioning of fire apparatus or members of a fire department; or by reason of any accident arising out of the performance of services by any fire department. Coverage afforded under this clause applies only if the property is not located within the limits of the city, municipality or fire protection district furnishing such fire department response.

DEDUCTIBLE

Loss Deductible Clause: With respect to loss covered under this policy, this Company shall be liable only when such loss in each occurrence exceeds $50. When loss is between $50 and $500 this Company shall be liable for 111% of loss in excess of $50 and when loss is $500 or more, this loss deductible clause shall not apply. This loss deductible clause shall not apply to Coverage D—Additional Living Expense or Fire Department Service Charge.

PERILS INSURED AGAINST

This policy insures against direct loss to the property covered by the following perils as defined and limited herein:

1. Fire or Lightning.

2. Removal, meaning direct loss by removal of the property covered hereunder from premises endangered by the perils insured against. The applicable limit of liability, had the property not been removed, applies pro rata for 30 days at each proper place to which any of the property shall necessarily be removed for preservation from or for repair of damages caused by the perils insured against.

3. Windstorm or Hail, excluding loss:

a. caused directly or indirectly by frost or cold weather or ice (other than hail), snow or sleet, all whether driven by wind or not;

b. to the interior of the building, or the property covered therein caused by rain, snow, sand or dust, all whether driven by wind or not, unless the building covered or containing the property covered shall first sustain an actual damage to roof or walls by the direct force of wind or hail and then this Company shall be liable for loss to the interior of the building or the property covered therein as may be caused by rain, snow, sand or dust, entering the building through openings in the roof or walls made by direct action of wind or hail; or

c. to watercraft (except rowboats and canoes on premises) including their trailers, furnishings, equipment and outboard motors while such property is not inside fully enclosed buildings.

d. to the following property unless liability therefor is assumed by endorsement hereon: (1) awnings including their supports; (2) fences; (3) seawall, property line and similar walls; (4) greenhouses, hothouses, slathouses, trellises, pergolas, cabanas and outdoor equipment pertaining to the service of the premises; (5) wharves, docks, piers, boathouses, bulkheads or other structures located over or partially over water and the property therein or thereon.

4. Explosion.

5. Riot or Civil Commotion, including direct loss from pillage and looting occurring during and at the immediate place of a riot or civil commotion.

6. Aircraft, including self-propelled missiles and spacecraft.

7. Vehicles, but excluding loss to fences, driveways and walks caused by any vehicle owned or operated by any occupant of the premises.

8. Sudden and accidental damage from smoke, other than smoke from agricultural smudging or industrial operations.

9. Vandalism or Malicious Mischief, meaning only the wilful and malicious damage to or destruction of the property covered, but excluding loss if the described dwelling had been vacant beyond a period of 30 consecutive days immediately preceding the loss.

10. Breakage of glass constituting a part of the building covered hereunder, including glass in storm doors and storm windows, but excluding loss if the building covered had been vacant beyond a peroid of 30 consecutive days, immediately preceding the loss.

11. Theft, meaning any act of stealing or attempt thereat, including loss of property from a known place under circumstances when a probability of theft exists.

Unscheduled personal property contained in any bank, trust or safe deposit company, public warehouse or occupied dwelling not owned or occupied by or rented to an Insured in which the property covered has been placed for safekeeping shall be considered as being on the described premises.

Upon knowledge of loss under this peril or of an occurrence which may give rise to a claim for such loss, the Insured shall give immediate notice to this Company or its authorized agents and also to the police.

a. General Theft Exclusions:

This policy does not apply to loss:

(1) if committed by an Insured;

(2) in or to a dwelling under construction or of materials or supplies therefor until completed and occupied;

(3) arising out of or resulting from the theft of any credit card or loss by forgery or alterations of any check, draft, promissory note, bill of exchange, or similar written promise, order or direction to pay a sum certain in money; or

(4) of a precious or semi-precious stone from its setting.

b. Theft Exclusions applicable while the described dwelling is rented to others:

This policy does not apply to loss from the described dwelling while the portion of the described dwelling customarily occupied exclusively by an Insured is rented to others:

(1) of money, bullion, numismatic property or bank notes;

(2) of securities, accounts, bills, deeds, evidences of debt, letters of credit, notes other than bank notes, passports, railroad and other tickets or stamps, including philatelic property;

(3) of jewelry, watches, necklaces, bracelets, gems, precious and semi-precious stones; articles of gold and platinum; or any article of fur or article containing fur which represents its principal value; or

(4) caused by a tenant, his employees or members of his household while renting the portion of the described dwelling customarily occupied exclusively by an Insured.

c. Theft Exclusions applicable to property away from the described premises:

This policy does not apply to loss away from the described premises of:

(1) property while in any dwelling or premises thereof, owned, rented or occupied by an Insured, except while an Insured is temporarily residing therein;

(2) property while unattended in or on any motor vehicle or trailer, other than a public conveyance, unless the loss is the result of forcible entry into such vehicle while all doors, windows or other openings thereof are closed and locked, provided there are visible marks of forcible entry upon the exterior of such vehicle or the loss is the result of the theft of such vehicle which is not recovered within 30 days, but property shall not be considered unattended when the Insured is required to surrender the keys of such vehicle to a bailee;

(3) property while unattended in or on private watercraft unless the loss is the direct result of forcible entry into a securely locked compartment and provided there are visible marks of forcible entry upon the exterior of such compartment;

(4) watercraft, their furnishings, equipment and outboard motors; or

(5) trailers, whether licensed or not.

12. Falling objects, but excluding loss to:

a. the interior of the building or the property covered therein, caused by falling objects unless the building covered or containing the property covered shall first sustain an actual damage to the exterior of the roof or walls by the falling object; and

b. outdoor equipment, awnings including their supports and fences.

13. Weight of ice, snow or sleet which results in physical damage to the building covered or to property contained in a building and then only if the weight of ice, snow or sleet results in physical damage to such building, but excluding loss to:

a. outdoor equipment, awnings including their supports and fences; and

b. fences, pavements, patios, swimming pools, foundations, retaining walls, bulkheads, piers, wharves or docks when such loss is caused by freezing, thawing or by the pressure or weight of ice or water whether driven by wind or not.

14. Collapse of buildings or any part thereof but excluding loss to outdoor equipment, awnings, fences, pavements, patios, swimming pools, underground pipes, flues, drains, cesspools and septic tanks, foundations, retaining walls, bulkheads, piers, wharves, or docks, all except as the direct result of the collapse of a building.

Collapse does not include settling, cracking, shrinkage, bulging or expansion.

15. Sudden and accidental tearing asunder, cracking, burning or bulging of a steam or hot water heating system or of appliances for heating water, but not including loss caused by or resulting from freezing.

16. Accidental discharge or overflow of water or steam from within a plumbing, heating or air conditioning system or from within a domestic appliance, including the cost of tearing out and replacing any part of the building covered necessary to effect repairs to the system or appliance from which the water or steam escapes, but excluding loss:

a. to the building caused by continuous or repeated seepage or leakage over a period of weeks, months or years;

b. if the building covered had been vacant beyond a period of 30 consecutive days immediately preceding the loss;

c. to the system or appliance from which the water or steam escapes; or

d. caused by or resulting from freezing.

17. Freezing of plumbing, heating and air conditioning systems and domestic appliances, but excluding loss caused by and resulting from freezing while the building covered is vacant or unoccupied, unless the Insured shall have exercised due diligence with respect to maintaining heat in the building, or unless the plumbing and heating systems and domestic appliances had been drained and the water supply shut off during such vacancy or unoccupancy.

18. Sudden and accidental injury from electrical currents artificially generated to electrical appliances, devices, fixtures and wiring, except tubes, transistors and similar electronic components.

COVERAGE F — MEDICAL PAYMENTS TO OTHERS

This Company agrees to pay all reasonable medical expenses, incurred within one year from the date of the accident, to or for each person who sustains bodily injury to which this insurance applies caused by an accident, while such person is:

1. on an insured premises with the permission of any Insured; or
2. elsewhere, if such bodily injury
   a. arises out of a condition in the insured premises or the ways immediately adjoining,
   b. is caused by the activities of any Insured, or by a residence employee in the course of his employment by any Insured,
   c. is caused by an animal owned by or in the care of any Insured, or
   d. is sustained by any residence employee and arises out of and in the course of his employment by any Insured.

EXCLUSIONS

This policy does not apply:

1. **Under Coverage E — Personal Liability and Coverage F — Medical Payments to Others:**
   a. to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of:
      (1) any aircraft; or
      (2) any motor vehicle owned or operated by, or rented or loaned to any Insured; but this subdivision (2) does not apply to bodily injury or property damage occurring on the residence premises if the motor vehicle is not subject to motor vehicle registration because it is used exclusively on the residence premises or kept in dead storage on the residence premises; or
      (3) any recreational motor vehicle owned by any Insured, if the bodily injury or property damage occurs away from the residence premises; but this subdivision (3) does not apply to golf carts while used for golfing purposes.

   This exclusion does not apply to bodily injury to any residence employee arising out of and in the course of his employment by any Insured except while such employee is engaged in the operation or maintenance of aircraft;

   b. to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of any watercraft:
      (1) owned by or rented to any Insured if the watercraft has inboard or inboard-outboard motor power of more than 50 horsepower or is a sailing vessel (with or without auxiliary power) 26 feet or more in overall length; or
      (2) powered by any outboard motor(s), singly or in combination of more than 25 total horsepower, if such outboard motor(s) is owned by any Insured at the inception of this policy and not endorsed hereon, unless the Insured reports in writing to this Company within 45 days after acquisition his intention to insure the outboard motor or combination of outboard motors, ownership of which was acquired prior to the policy term.

   This exclusion does not apply to (a) bodily injury or property damage occurring on the residence premises or (b) bodily injury to any residence employee arising out of and in the course of his employment by any Insured;

   c. to bodily injury or property damage arising out of the rendering of or failing to render professional services;
   d. to bodily injury or property damage arising out of business pursuits of any Insured except activities therein which are ordinarily incident to non-business pursuits;
   e. to bodily injury or property damage arising out of any premises, other than an insured premises, owned, rented or controlled by any Insured; but this exclusion does not apply to bodily injury to any residence employee arising out of and in the course of his employment by any Insured;
   f. to bodily injury or property damage which is either expected or intended from the standpoint of the Insured.
2. **Under Coverage E — Personal Liability**
   a. to liability assumed by the Insured under any contract or agreement not in writing or under any contract or agreement in connection with the Insured's business;
   b. to bodily injury to any person, including a residence employee, if the Insured has a policy providing workmen's compensation or occupational disease benefits for such bodily injury or if benefits for such bodily injury are in whole or in part either payable or required to be provided by the Insured under any workmen's compensation or occupational disease law;
   c. to property damage to property owned by the Insured;
   d. to property damage to property occupied or used by the Insured or rented to or in the care, custody or control of the Insured or as to which the Insured is for any purpose exercising physical control;
   e. to sickness, disease or death resulting therefrom of any residence employee unless written claim is made or suit is brought therefor against the Insured within 36 months after the end of the policy term.
3. **Under Coverage F — Medical Payments to Others**
   a. to bodily injury to any person, including a residence employee, if any person or organization has a policy providing workmen's compensation or occupational disease benefits for such bodily injury or if benefits for such bodily injury are in whole or in part either payable or required to be provided under any workmen's compensation or occupational disease law;
   b. to bodily injury to:
      (1) any Insured under parts (1) and (2) of the definition of "Insured",
      (2) any person, other than a residence employee, regularly residing on any part of the insured premises, or
      (3) any person while on the insured premises because a business is conducted or professional services are rendered thereon.

SUPPLEMENTARY COVERAGES

1. **Damage to Property of Others:** This Company will, at its option, either pay for the actual cash value of property damaged or destroyed during the policy period by any Insured, or repair or replace such property with other property of like quality and kind, but in no event shall this Company's limit of liability exceed $250 in any one occurrence.

   This coverage does not apply to damage to or destruction of property:
   a. caused intentionally by any Insured who has attained the age of 13;
   b. owned by or rented to any Insured, any tenant of any Insured or any resident of Named Insured's household;
   c. arising out of (1) any act or omission in connection with premises (other than the insured premises) owned, rented or controlled by any Insured, (2) business pursuits or professional services or (3) the ownership, maintenance, operation, use, loading or unloading of any land motor vehicle, trailer or semi-trailer, farm machinery or equipment, aircraft or watercraft;
   d. if insurance therefor is provided under Section I of this policy.
2. **Personal Liability Claim Expenses:** This Company will pay:
   a. all expenses incurred by this Company and all costs taxed against the Insured in any suit defended by this Company;
   b. all premiums on appeal bonds required in any such suit, premiums on bonds to release attachments in any such suit for an amount not in excess of the applicable limit of liability of this policy, and the cost of bail bonds required of the Insured because of accident or traffic law violation arising out of the use of any vehicle to which this policy applies, not to exceed $250 per bail bond, but this Company shall have no obligation to apply for or furnish any such bonds;
   c. all interest on the entire amount of any judgment which accrues after entry of the judgment and before this Company has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of this Company's liability thereon;
   d. reasonable expenses incurred by the Insured at this Company's request, including actual loss of earnings (but not loss of other income) not to exceed $25 per day because of his attendance at hearings or trials at such request.

   Any expenses incurred by this Company under this provision shall not reduce the applicable limit of liability.
3. **First Aid Expenses:** In addition to this Company's limit of liability, this Company will pay expenses incurred by the Insured for first aid to others at the time of an accident, for bodily injury to which this insurance applies.
4. **Property in Control of the Insured:** Such insurance as is afforded under Coverage E — Personal Liability, applies to property damage to any insured premises and to house furnishings therein if such property damage arises out of fire, explosion, or smoke or smudge caused by sudden, unusual and faulty operation of any heating or cooking unit. Exclusion 2.d. does not apply to this Supplementary Coverage.
5. **Construction of New Residence:** Such insurance as is afforded under Coverage E — Personal Liability, applies to bodily injury and property damage arising out of any vacant land owned by or rented to any Insured on which a one or two family dwelling is being constructed for use by any Insured as a residence. Such insurance as is afforded under Coverage F — Medical Payments to Others, applies to bodily injury sustained by any person while on such vacant land with the permission of any Insured. This coverage does not apply to bodily injury to any employee, other than a residence employee, of any Insured arising out of and in the course of his employment by any Insured. Exclusion 1.e. does not apply to this Supplementary Coverage.

ADDITIONAL DEFINITIONS

The following definitions apply only to coverage afforded under Section II of this policy.

1. **"bodily injury"**: means bodily injury, sickness or disease, including care, loss of services and death resulting therefrom.
2. **"medical expenses"**: means expenses for necessary medical, surgical, x-ray, dental services, including prosthetic devices, ambulance, hospital, professional nursing and funeral services.
3. **"motor vehicle"**: means a land motor vehicle, trailer or semi-trailer designed for travel on public roads (including any machinery or apparatus attached thereto) but does not include, except while being towed by or carried on a motor vehicle, any of the following: utility, boat, camp or home trailer, recreational motor vehicle, crawler or farm type tractor, farm implement or, if not subject to motor vehicle registration, any equipment which is designed for use principally off public roads.
4. **"property damage"**: means injury to or destruction of tangible property, including loss of use thereof.
5. **"occurrence"**: means an accident, including injurious exposure to conditions, which results, during the policy term, in bodily injury or property damage.
6. **"recreational motor vehicle"**: means (1) a golf cart or snowmobile or (2) if not subject to motor vehicle registration, any other land motor vehicle designed for recreational use off public roads.
7. **"residence employee"**: means an employee of any Insured whose duties are in connection with the maintenance or use of the insured premises, including the performance of household or domestic services, or who performs elsewhere duties of a similar nature not in connection with any Insured's business.

ADDITIONAL EXCLUSIONS

This policy does not insure against loss:

1. occasioned directly or indirectly by enforcement of any local or state ordinance or law regulating the construction, repair, or demolition of building(s) or structure(s) unless such liability is otherwise specifically assumed by endorsement hereon;
2. caused by, resulting from, contributed to or aggravated by any earth movement, including but not limited to earthquake, volcanic eruption, landslide, mudflow, earth sinking, rising or shifting; unless loss by fire, explosion or breakage of glass constituting a part of the building(s) covered hereunder, including glass in storm doors and storm windows, ensues, and this Company shall then be liable only for such ensuing loss, but this exclusion does not apply to loss by theft;
3. caused by, resulting from, contributed to or aggravated by any of the following:
   a. flood, surface water, waves, tidal water or tidal wave, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not;
   b. water which backs up through sewers or drains; or
   c. water below the surface of the ground including that which exerts pressure on or flows, seeps or leaks through sidewalks, driveways, foundations, walls, basement or other floors or through doors, windows or any other openings in such sidewalks, driveways, foundations, walls or floors;

   unless loss by fire or explosion ensues, and this Company shall then be liable only for such ensuing loss, but these exclusions do not apply to loss by theft;
4. caused by or resulting from power, heating or cooling failure, unless such failure results from physical damage to power, heating or cooling equipment situated on the premises, caused by a peril insured against.

ADDITIONAL CONDITIONS

1. Replacement Cost — Coverages A and B:
This condition shall be applicable only to a building structure covered hereunder excluding outdoor radio and television antennas and aerials, carpeting, awnings including their supports, domestic appliances and outdoor equipment, all whether attached to the building structure or not.

a. If at the time of loss the whole amount of insurance applicable to said building structure for the peril causing the loss is 80% or more of the full replacement cost of such building structure, the coverage of this policy applicable to such building structure is extended to include the full cost of repair or replacement (without deduction for depreciation).

b. If at the time of loss the whole amount of insurance applicable to said building structure for the peril causing the loss is less than 80% of the full replacement cost of such building structure, this Company's liability for loss under this policy shall not exceed the larger of the following amounts (1) or (2):

(1) the actual cash value of that part of the building structure damaged or destroyed; or

(2) that proportion of the full cost of repair or replacement without deduction for depreciation of that part of the building structure damaged or destroyed, which the whole amount of insurance applicable to said building structure for the peril causing the loss bears to 80% of the full replacement cost of such building structure.

c. This Company's liability for loss under this policy shall not exceed the smallest of the following amounts (1), (2), or (3):

(1) the limit of liability of this policy applicable to the damaged or destroyed building structure;

(2) the replacement cost of the building structure or any part thereof identical with such building structure on the same premises and intended for the same occupancy and use; or

(3) the amount actually and necessarily expended in repairing or replacing said building structure or any part thereof intended for the same occupancy and use.

d. When the full cost of repair or replacement is more than $1,000 or more than 5% of the whole amount of insurance applicable to said building structure for the peril causing the loss, this Company shall not be liable for any loss under paragraph a. or sub-paragraph (2) of paragraph b. of this condition unless and until actual repair or replacement is completed.

e. In determining if the whole amount of insurance applicable to said building structure is 80% or more of the full replacement cost of such building structure, the cost of excavations, underground flues and pipes, underground wiring and drains, and brick, stone and concrete foundations, piers and other supports which are below the under surface of the lowest basement floor, or where there is no basement, which are below the surface of the ground inside the foundation walls, shall be disregarded.

f. The Named Insured may elect to disregard this condition in making claim hereunder, but such election shall not prejudice the Named Insured's right to make further claim within 180 days after loss for any additional liability brought about by this policy condition.

2. Special Limits of Liability on Certain Property:

a. This Company shall be liable for loss to trees, shrubs, plants and lawns (except those grown for business purposes) only when the loss is caused by fire, lightning, explosion, riot, civil commotion, vandalism, malicious mischief, theft, aircraft, or vehicles not owned or operated by an occupant of the premises. This Company's liability for loss in any one occurrence under this provision shall not exceed in the aggregate for all such property 5% of the limit of liability of Coverage A, nor more than $250 on any one tree, shrub or plant, including expense incurred for removing debris thereof.

b. Under Coverage C, this Company shall not be liable for loss in any one occurrence with respect to the following property for more than:

(1) $100 in the aggregate on money, bullion, numismatic property and bank notes;

(2) $500 in the aggregate on securities, accounts, bills, deeds, evidences of debt, letters of credit, notes other than bank notes, passports, railroad and other tickets or stamps, including philatelic property;

(3) $1,000 on manuscripts;

(4) $500 in the aggregate for loss by theft of jewelry, watches, necklaces, bracelets, gems, precious and semi-precious stones, gold, platinum and furs including articles containing fur which represents its principal value;

(5) $500 in the aggregate on watercraft, including their trailers (whether licensed or not), furnishings, equipment and outboard motors; or

(6) $500 on trailers, not otherwise provided for, whether licensed or not.

3. Loss Clause: (Not applicable in Alabama and South Carolina)
Loss hereunder shall not reduce the applicable limit of liability under this policy.

4. Mortgage Clause — Coverages A and B only: (This entire clause is void unless name of mortgagee [or trustee] is inserted in the Declarations):
Loss, if any, under this policy, shall be payable to the mortgagee (or trustee), named on the first page of this policy, as interest may appear, under all present or future mortgages upon the property herein described in which the aforesaid may have an interest as mortgagee (or trustee), in order of precedence of said mortgages, and this insurance as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.
Provided also, that the mortgagee (or trustee) shall notify this Company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof, otherwise this policy shall be null and void.
This Company reserves the right to cancel this policy at any time as provided by its terms but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this Company shall have the right, on like notice to cancel this agreement.
Whenever this Company shall pay the mortgagee (or trustee) any sum for loss under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor existed, this Company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt; or may at its option pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage, with interest accrued and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of said mortgagee's (or trustee's) claim.

5. Unearned Premium Clause — (Applicable only in Alabama and South Carolina): If a loss is paid under this policy, the Named Insured shall be indemnified for loss of the pro rata unearned premium on the amount of such loss payment; however, this Company may elect by written notice within 60 days after time of loss to reinstate this policy in the amount of such loss and, in consideration of such reinstatement, make no payment to the Named Insured as otherwise provided by this clause.

6. Valuation Clause — (Applicable only in South Carolina): In so far as coverage against the perils of fire and lightning are concerned, the Insured and Insurer hereby agree that the value of the building(s) described herein is — and hereby fix the amount of insurance to be carried thereon (including this policy) — respectively as the amount inserted in the blank provided on the first page of this policy under this caption. The foregoing agreed values are established for insurance purposes only.

7. Occupancy Clause: It is a condition of this policy that if the described dwelling is associated with and in proximity to farming operations (1) the agricultural products produced on the land are incidental to the occupancy of the dwelling and are principally for home consumption, or (2) that the occupants of the dwelling and buildings appurtenant thereto are not engaged in the operation of the farm and said buildings are in addition to a complete set of farm buildings on the farm and are not exposed within 200 feet by any farm building.

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SECTION II
COVERAGES

COVERAGE E — PERSONAL LIABILITY
This Company agrees to pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury or property damage, to which this insurance applies, caused by an occurrence. This Company shall have the right and duty, at its own [illegible] account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, but may make such investigation and settlement of any claim or suit as it deems expedient. This Company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of this Company's liability has been exhausted by payment of judgments or settlements.

December 18, 1974

James A. Gorry, III, Esquire
Broyles, McKenry and Gorry
Attorneys at Law
Pacific Avenue and 35th Street
Virginia Beach, Virginia 23451

Re: Wright v. Orlowski, et al
Our File No. 7414

Dear Jay:

I am still trying to get this matter resolved between Mr. Orlowski and the Wrights.

Mr. Lustig, upon review of the Agreement between the Orlowskis and GEICO, objected to the underlined wording "in settlement of all claims, demands and causes of action which said Joan E. Wright and Edward R. Wright may have now or in the future, known or unknown, against Thomas Walter Orlowski, or any of us, ..." He is afraid to accept the money with the above phrase because it might possibly be construed as a release of Mr. Orlowski and thereby defeat his action against the co-defendants. Consequently, out of an abundance of caution, he has suggested that the underlined phrase be deleted and substituted therefor "against Government Employees Insurance Company as the insurer of Thomas Walter Orlowski, or any of us, ..."

If the revised agreement is entered into between the Orlowskis and GEICO, then upon payment his clients will execute a Covenant Not to Sue running to the benefit of GEICO only. Mr. Orlowski would remain a defendant. However, he will take a non-suit as to Mr. Orlowski before the case is submitted to the jury. This same agreement is being entered into with Bob Winters' client. In this way the plaintiffs could get the money immediately and still proceed against the other defendants.

As previously discussed, this would mean that GEICO would be released of any further liability under the policy and would not be requested to pay any further sums or to furnish Mr. Orlowski a defense from the date of payment of the money. On the other hand, it would relieve Mr. Orlowski of the exposure to a verdict for in excess of the policy limits.

I am enclosing the original and one copy of the revised Agreement. If you approve, please have the original executed by the same parties

Re: Wright v. Orlowski, et al

and returned to me so that I can proceed.

At this time I am also requesting GEICO to advise me if they approve this procedure. I assume that they will since it appears to be beneficial to all concerned.

With kindest regards,

J. Carroll Fears, Jr.

JCFJr:ef
Enc.

bc. GEICO - Frederick

Claim No. HO-18-14281
Insured: T. K. and J. C. Orlowski
Accident: October 30, 1970
Our File No. 7414