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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

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IN THE

# Supreme Court of Virginia

AT RICHMOND

RECORD NO. 790877

UTICA MUTUAL INSURANCE COMPANY,
*Appellant,*

v.

TRAVELERS INDEMNITY COMPANY
AND
ELIZABETH (GILBERT) JENNELLE,
*Appellees.*

## APPENDIX

WM. W. ESKRIDGE
WADE W. MASSIE
PENN, STUART, ESKRIDGE & JONES
208 East Main Street
Abingdon, Virginia 24210
*Counsel for Appellant*

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[Filed November 2, 1977]

## COMPLAINT

TO: HONORABLE WAYNE L. BELL, JUDGE OF SAID COURT:

Your complainant, Utica Mutual Insurance Company, would respectfully represent unto the Court the following:

I.

### THE PARTIES

That Utica Mutual Insurance Company (hereinafter called "Utica"), Travelers Indemnity Company (hereinafter called "Travelers"), Fireman's Fund Insurance Company (hereinafter called "Fireman's Fund") and American Inter-Insurance Exchange (hereinafter called "AIE") are all insurance companies doing business in Virginia; that defendants Elizabeth Jennelle, Elizabeth Ann Gilbert, Nelson Jennelle and Shirley L. Gray all were injured or claim to have been injured as a result of the hereinafter described motor vehicle collision; and that defendants Gorman Gilbert, Ronald E. Bailey, Norman Gilbert, Tivis Gilbert, Doug Wright and Enos Blankenship have been named as defendants in litigation arising out of said collision, and are expected to be named as defendants in future litigation arising out of the same collision.

II.

### THE COLLISION

The collision which gave rise to the present controversy occurred on December 6, 1975 on U.S. Route 19 in Washington County, Virginia when a 1969 Chevrolet station wagon operated by Shirley Louise Gray was allegedly forced off the road by a 1969 Chevrolet four-door sedan owned by defendant Tivis Gilbert. The 1969 Chevrolet station wagon operated by Shirley L. Gray was

occupied by Elizabeth Gilbert (now known as Elizabeth Jennelle), Elizabeth Ann Gilbert, an infant, and Nelson Jennelle. The 1969 Chevrolet four-door sedan which allegedly forced the vehicle operated by Shirley L. Gray off the road was occupied by defendants Gorman Gilbert, Ronald E. Bailey, Norman Gilbert, Tivis Gilbert, Doug Wright and Enos Blankenship, and was operated by one of said individuals.

III.

THE TRAVELERS POLICY ISSUED TO TIVIS GILBERT

At the time of the collision in controversy, the 1969 Chevrolet four-door sedan owned by Tivis Gilbert was insured under a policy of automobile liability insurance issued by Travelers, being policy number PQMV-1718373. Said policy provided bodily injury liability coverages in the amount of $25,000.00 for each person injured as a result of a single accident, and $50,000.00 coverage for all persons injured as a result of a single accident, and had effective dates of from 10-30-75 to 10-30-76.

The aforesaid policy issued to Tivis H. Gilbert was certified by or on behalf of Travelers to the Virginia Division of Motor Vehicles pursuant to the Virginia Motor Vehicle Financial Responsibility Act effective from 5:30 p.m. on October 30, 1975 until cancelled or terminated in accordance with the financial responsibility laws and regulations of the State of Virginia. Complainant files herewith as Exhibit 1 a form SR-22 issued by Travelers with respect to said policy and said vehicle. Such certification of financial responsibility remained in full force and effect until it was terminated as of February 27, 1976 at 12:01 a.m. by the filing of a form SR-26 by Travelers, a true

copy of which is attached hereto as Exhibit 2. The same policy was further certified to the Virginia Division of Motor Vehicles as proof of financial responsibility for the future by the filing of additional form SR-22's after the termination which was effective on February 27, 1976.

IV.

THE TRAVELERS INDEMNITY COMPANY POLICY
ISSUED TO NORMAN GILBERT

At the time of the collision in controversy, Norman Gilbert was insured under a policy of automobile liability insurance issued by Travelers, being policy number PQMV-1712800, effective dates from 7-26-75 to 7-26-76, which policy provided limits of bodily injury liability coverage in the amount of $25,000.00 per each person injured as a result of a single accident and $50,000.00 for all persons injured as a result of a single accident. Said policy provided Norman Gilbert coverage for liability arising out of the ownership, maintenance or use of non-owned vehicles and had been certified to the Virginia Division of Motor Vehicles as proof of financial responsibility for the future pursuant to the Virginia Motor Vehicle Responsibility Act. Attached hereto as Exhibit 3 is a form SR-22 making such certification effective from 9-9-75 until terminated in accordance with the financial responsibility laws and regulations of this state. Attached hereto as Exhibit 4 is a form SR-22 making such certification effective from 10-22-75 until terminated in accordance with the financial responsibility laws of this state. Attached hereto as Exhibit 5 is a form SR-22 making such certification effective from 11-25-75 until terminated in accordance with the financial responsibility laws of this state,

including certification for Broad Form Coverage. The certifications evidenced by Exhibits 3, 4, and 5 had not been cancelled or terminated in accordance with the financial responsibility laws of the State of Virginia prior to or as of the date of the collision in controversy.

V.

THE FIREMAN'S FUND POLICY

On the date of the collision in controversy Fireman's Fund had in full force and effect a policy of automobile liability insurance issued to John Collier, Arlington, Virginia, being policy number AF7984363 upon the 1969 Chevrolet station wagon operated by Shirley Gray at the time of the collision, which policy provided uninsured motorist coverage in the amount of $20,000/$40,000 upon said vehicle.

VI.

THE UTICA POLICY

At the time of the collision in controversy Utica Mutual Insurance Company had in full force and effect a policy of automobile liability insurance issued to Shirley Gray, being policy number 721334, which policy insured two automobiles and provided for uninsured motorist coverage on said automobiles in the amount of $20,000/$40,000 on each automobile.

VII.

THE AMERICAN INTER-INSURANCE EXCHANGE POLICY

At the time of said collision AIE had issued its automobile liability policy number 2-255-211 to Elizabeth Gilbert (now known as Elizabeth Jennelle), which policy provided uninsured motorist coverage in the amount of $20,000/$40,000 upon the insured automobile.

VIII.

THE PREVIOUS LITIGATION

On or about April 5, 1976, Elizabeth Gilbert filed an action at law in this Court styled Elizabeth Gilbert v. Gorman Gilbert and John Doe seeking money damages for injuries allegedly sustained as a result of said collision. On or about September 9, 1976 Elizabeth Gilbert, pursuant to leave of Court, filed an Amended Motion for Judgment styled Elizabeth Gilbert v. Gorman Gilbert, et al, a copy of which is attached hereto as Exhibit 6 and incorporated herein by reference.

Said action was tried on July 5, 1977 and July 6, 1977, and on August 10, 1977 this Court entered judgment in favor of plaintiff in said action in the amount of $30,000.00 for compensatory damages against all defendants therein, in the amount of $2,000.00 punitive damages each against Gorman Gilbert, Doug Wright, Enos Blankenship and Ronald Bailey; and in the amount of $15,000.00 punitive damages against Tivis Gilbert. A copy of the Order entering said judgment is attached hereto as Exhibit 7 and incorporated herein by reference.

IX.

THE PRESENT LITIGATION

(a) On or about October 3, 1977 Elizabeth Gilbert filed in this Court an action at law against Fireman's Fund, Utica, AIE and Travelers seeking to collect said judgment from Fireman's Fund, Utica and AIE pursuant to the uninsured motorist coverages of said policies or, in the alternative, to collect said judgment from Travelers under its liability coverages. A copy of the Motion for Judgment in said action is attached hereto as Exhibit 8 and incorporated herein by reference.

(b) On or about October 5, 1977, Shirley Gray filed in this Court an action at law styled Shirley Gray v. Gorman Gilbert, et al seeking money damages for injuries allegedly sustained as a result of said collision. A copy of the Motion for Judgment in said action is attached hereto as Exhibit 9 and incorporated herein by reference. Copies of the process in said action have been served upon AIE and Fireman's Fund and process has been issued for service upon Utica.

X.

THREATENED LITIGATION

(a) Counsel for Elizabeth Ann Gilbert, an infant, has indicated that an action will eventually be filed in this Court styled Elizabeth Ann Gilbert, a minor who sues by her mother and next friend, Elizabeth Jennelle v. Gorman Gilbert, et al. A copy of the proposed Motion for Judgment in said action, which has been supplied to counsel for Utica, is attached hereto as Exhibit 10 and incorporated herein by reference. Said proposed Motion for Judgment indicates that it is to be served upon Utica, Fireman's Fund and AIE.

(b) Counsel for Nelson Jennelle has indicated that a similar case will be filed on behalf of Nelson Jennelle seeking money damages for personal injuries allegedly received in said accident. Attached hereto as Exhibit 11 is a copy of a letter dated September 28, 1977 from Thomas G. Harrigan to William W. Eskridge, et al, indicating that said suit will be filed at a later date.

## XI.

## REASONS FOR EQUITABLE RELIEF

By reason of the aforesaid circumstances, Utica is threatened with the burden of defending a multiplicity of suits to determine the existence and priority of uninsured motorist coverage for the four individuals who claim to have been injured in the collision in controversy. The personal injury suits are being filed seriatim to avoid the possibility that the actions might be consolidated for trial, with the result that Utica and the remaining uninsured motorist carriers are subjected to multiple and vexatious litigation. The attempted denial of coverage by Travelers under its policies subjects Utica, Fireman's Fund and American Inter-Insurance Exchange to the threat of inconsistent determinations of their respective liabilities by reason of the possible inconsistent determinations of the existence of liability coverage under the Travelers policies in successive suits. Utica, Fireman's Fund and AIE are further subjected to the threat of inconsistent and inequitable results if they should be required to pay under their uninsured motorist coverages, which have limits in excess of all available liability coverages, and it should later be determined that either or both of the Travelers liability policies were applicable to the collision in controversy. The resulting litigation unreasonably burdens the Courts, as well as causing unnecessary expense to the individual litigants. Utica is threatened with irreparable injury in being threatened with exposure under its uninsured motorist coverage for which it would have no effective recourse if it should later be determined that the motor vehicle at fault in the collision was not an uninsured motor vehicle. By reason of the foregoing circumstances, Utica has no adequate remedy at law. All parties

in interest are parties to this suit and all issues affecting coverage can more conveniently be determined in this proceeding than in separate proceedings.

WHEREFORE, Utica prays that the Court grant the following relief:

1. That a guardian ad litem be appointed to answer and defend for Elizabeth Ann Gilbert, an infant, and that the parties be convened;

2. That the Court enjoin or stay the further prosecution of the action in this Court styled Elizabeth Gilbert v. Fireman's Fund Insurance Company, et al in order that all questions pertaining to coverage may be determined in this suit, in which all parties in interest are before the Court;

3. That the Court enjoin or stay the further prosecution of the action in this Court styled Shirley Gray v. Gorman Gilbert, et al pending the final resolution of the existence and priorities of the uninsured motorist coverages and liability coverages of the insurance carriers which are parties to this cause;

4. That the Court enjoin or stay prosecution of any actions which may be instituted in this Court by Nelson Jennelle and by Elizabeth Ann Gilbert, an infant, for injuries allegedly received in the collision in controversy;

5. That the Court adjudicate and declare the rights of the parties with respect to the following questions, as to which an actual and genuine controversy exists among the parties to this cause:

(A) Whether the Travelers policy issued to Tivis Gilbert provided coverage to the operator of the motor vehicle which allegedly ran the vehicle operated by Shirley Gray out of the road at the time of the collision;

(B) Whether the Travelers policy issued to Norman Gilbert provided liability coverage to Norman Gilbert with respect to the liability of Norman Gilbert for the operation of the Tivis Gilbert vehicle at the time of the collision in controversy;

(C) If either of the foregoing questions is answered in the affirmative, that the uninsured motorist coverages of the Utica, Fireman's Fund and AIE policies are inapplicable to claims for injuries received in the collision by occupants of the Shirley Gray vehicle;

(D) If it is determined that the vehicle which allegedly ran the Shirley Gray vehicle off the road was an "uninsured motor vehicle,":

(i) To determine, declare and adjudicate that the primary uninsured motorist coverage available to satisfy claims from occupants of the Shirley Gray vehicle is under the Fireman's Fund policy insuring the vehicle being operated by Shirley Gray, and to declare and determine the amount of such coverage;

(ii) To determine, declare and adjudicate whether Elizabeth Gray Gilbert was a resident of the household of Shirley Gray at the time of the collision and therefore entitled to the benefit of the uninsured motorist coverages under the Utica policy;

(iii) To determine, declare and adjudicate whether Elizabeth Ann Gilbert, an infant, was a resident of the household of Shirley Gray at the time of the collision, and therefore entitled to the benefit of the uninsured motorist coverage of the Utica policy, or a resident of the household of Elizabeth Gray Gilbert, and entitled to the benefit of the uninsured motorist coverage under the AIE policy, or was a resident of neither household, or was a resident of both households;

(iv) To determine, declare and adjudicate whether Nelson Jennelle was a resident of the household of Shirley Gray, a resident of the household of Elizabeth Gilbert, a resident of the household of neither, or a resident of the household of both at the time of the collision in controversy.

(v) To determine and adjudicate that the judgment in the action in this Court styled Elizabeth Gilbert v. Gorman Gilbert, et al is void as against Doug Wright and Enos Blankenship for lack of effective service of

process, and that Utica, Fireman's Fund and AIE have no liability for such judgment as to said defendants;

(vi) To declare and determine that Utica and AIE must contribute in proportion to the amounts of their respective uninsured motorist coverages to satisfy any judgments in excess of the primary uninsured motorist coverage with Fireman's Fund, and to determine the amounts of such coverages.

6. Utica asks that it be granted such further and additional relief as may seem to the Court to be just and proper.

UTICA MUTUAL INSURANCE COMPANY

By Counsel

[Exhibit 1 to Complaint]

SR-22 AAMVA UNIFORM FINANCIAL RESPONSIBILITY FORM ORIGINAL

Insured
Name GILBERT, Tivis H.
Last First Middle
Address Haysi, Va 24256

| Case Number | Driver's License Number | Birth Date | Social Security Number |
|---|---|---|---|
| | 223 72 5362 | 1/12750 | 223 72 5362 |

Current Policy Number 739 221 Effective From 5:30 PM 10/30/75

This certification is effective from 5:30 PM 10/30/75 and continues until cancelled or terminated in accordance with the financial responsibility laws and regulations of this State.
The insurance hereby certified is provided by an:

☒ OWNER'S POLICY: Applicable to (a) the following described vehicle(s), (b) any replacement(s) thereof by similar classification, and (c) any additionally acquired vehicles of similar classification for a period of at least 30 days from the date of acquisition.

| Model Year | Trade Name | Identification Number | |
|---|---|---|---|
| 1969 | Chevrolet | 164399Y001723 | UMV-7/74 Alexandria |
| BROAD FORM COVERAGE | | | |

☒ OPERATOR'S POLICY: Applicable to any non-owned vehicle.

VIRGINIA (State) FINANCIAL RESPONSIBILITY INSURANCE CERTIFICATE

The company signatory hereto hereby certifies that it has issued to the above named insured a motor vehicle liability policy as required by the financial responsibility laws of this State, which policy is in effect on the effective date of this certificate.

Name of Insurance Company Travelers Indemnity Company

Date November 3, 1975 By R. D. Spaulding
Signature of Authorized Representative

IRB 3541B

[Exhibit 2 to Complaint]

SR-26 AAMVA UNIFORM FINANCIAL RESPONSIBILITY FORM (Original)

Insured
Name GILBERT, TIVIS H.
Last First Middle
Address HAYSI, VA. 24256

| Case Number | Driver's License Number | Birth Date | Social Security Number |
|---|---|---|---|
| | 223 72 5362 | M110250 | |

Current Policy Number PQMV1718373 Effective From 10-30-75 to 10-30-76

Effective date of cancellation or termination 2-27-76 at 12:01 A.M.:

(check whichever is applicable)

XXXX ☐ Financial Responsibility Insurance Certificate — SR-22

☐ Financial Responsibility Notice for Fleets — SR-23

VA. (State) FINANCIAL RESPONSIBILITY NOTICE OF CANCELLATION OR TERMINATION

The company signatory hereto hereby gives notice that its Certificate or Notice as indicated above, heretofore filed on behalf of the named insured, is cancelled or terminated as of the effective date stated above.

TRAVELERS IND. CO.
Name of Insurance Company

Date 2-5-76LA By Mary Frank
Signature of Authorized Representative

R1307 (Ed. 6-71) UNIFORM PRINTING & SUPPLY DIV. IRB 3544B

[Exhibit 6 to Complaint]

VIRGINIA:

IN THE CIRCUIT COURT OF WASHINGTON COUNTY

ELIZABETH GILBERT

Plaintiff

vs.

GORMAN GILBERT
a/k/a Garman Gilbert
Star Route, Box 347
Dante, Virginia

and

RONALD E. BAILEY, a minor
Route #1
Abingdon, Virginia

and

NORMAN GILBERT
Route 19
Council, Virginia
(Buchanan County)

and

TIVIS GILBERT (Last Known Address)
c/o Virginia Rachel Ray
12858 S. W. 55th Street
Miami, Florida 33165

Please Serve: Commissioner of Motor Vehicles
Richmond, Virginia

and

DOUG WRIGHT
Last Known Address Unknown

Please Serve: Commissioner of Motor Vehicles
Richmond, Virginia

and

ENOS BLANKENSHIP
Last Known Address Unknown

LAW NO._____

Please Serve: Commissioner of Motor Vehicles )
Richmond, Virginia )
)
)

Defendants

AMENDED MOTION FOR JUDGMENT

COMES NOW, the plaintiff, Elizabeth Gilbert, by counsel and files this Amended Motion for Judgment against the defendants, Gorman Gilbert, Ronald E. Bailey, Norman Gilbert, Tivis Gilbert, Doug Wright and Enos Blankenship for $100,000.00 compensatory damages and $100,000.00 punitive damages against all defendants, both jointly and severally and in support thereof states as follows:

COUNT I.

1. That on or about December 6, 1975 at approximately 11:00 a.m., Elizabeth Gilbert was a passenger in a 1969 Chevrolet Station Wagon proceeding North on U.S. Highway, Route 19, Washington County, Virginia.

2. That Mrs. Shirley Gray, plaintiff's mother, was the operator of the 1969 Chevrolet Station Wagon in which plaintiff was a passenger, and was operating said car with the permission and consent of its owner John W. Collier.

3. That on December 6, 1975 and prior to the accident hereinafter described the defendants Gorman Gilbert, Norman Gilbert, Tivis Gilbert, Ronald E. Bailey, Doug Wright and Enos Blankenship entered into an agreement whereby they agreed to act in concert and as the agent of each other for the purpose of finding and stopping the vehicle in which plaintiff was a passenger, for the purpose of allegedly taking plaintiff's infant baby.

4. That pursuant to the agreement and in furtherance of said agreement the defendants committed the following overt acts

(a) All of the defendants agreed to act in concert and as the agent of each other to accomplish the above purpose.

(b) The defendant Tivis Gilbert offered money to all the other defendants and all agreed to accept money for their participations in accomplishing the above stated purposes.

(c) All the defendants acting in concert proceeded in a brown Chevrolet to find the car in which plaintiff was a passenger in furtherance with their agreement.

(d) The defendants removed the license plate from their automobile to reduce the chance of being identified by witnesses when they caught the automobile in which plaintiff was a passenger.

(e) That Gorman Gilbert, Norman Gilbert, Ronald Bailey and Tivis Gilbert all took turns driving in furtherance of the purpose heretofore stated.

(f) The defendants with Norman Gilbert driving attempted to stop the automobile in which plaintiff was a passenger by pulling in front of plaintiff's car and travelling at a speed of 55 miles per hour did violently slam on the brakes with the intent of having plaintiff's car crash into the rear of their auto.

(g) The operator of the car in which the plaintiff was a passenger was forced to violently put on her brakes in order to avoid a collision and came to a stop in the highway.

(h) The defendants acting in concert attempted to mechanically disable the car in which plaintiff was a passenger but were not successful.

(i) Plaintiff's automobile pulled around the defendants' car and proceeded North on Route 19, Washington County, Virginia.

(j) The defendants acting in concert pursued plaintiff's car, pulled along side of plaintiff's automobile and on two successive occasions did negligently and violently strike the automobile in which plaintiff was a passenger and cause said auto to run off the highway and crash into a culvert.

(k) The defendants did pursuant to their agreement leave the scene of the accident without stopping to aid the plaintiff and the other injured persons in plaintiff's car.

5. Plaintiff contends that the defendant Gorman Gilbert acting for and on behalf of himself and the other defendants was the driver of the brown Chevrolet when it violently crashed into plaintiff's automobile causing it to run off the road and crash.

6. At all times mentioned herein the defendant Tivis Gilbert was the owner of the car in which the defendants were riding and all persons driving the car did so with his consent and all acts done were approved, ratified and committed at the instigation of Tivis Gilbert.

7. At all times mentioned herein the driver of the automobile in which the defendants were riding and the other defendants all of which were acting in concert had a duty to

(1) maintain proper control of their vehicle (2) maintain a proper lookout, (3) to maintain their car in its proper lane (4) to not intentionally or negligently crash into plaintiff's automobile which was lawfully in its proper lane, and (5) not to run plaintiff's car off the highway.

8. The defendant driver and the other defendants breached the above duties and as a direct and proximate result of their acts caused the plaintiff to sustain mental anguish, serious, painful and permanent physican injuries. Further said conduct of the defendants put her in fear that the defendants were attempting to kill or maim both her and her baby and the others in her automobile, thus subjecting her to a terrorizing ordeal.

9. That as a direct and proximate result of the striking referred to in paragraph 4, the plaintiff has expended substantial amounts of money for doctors, hospital, and other medically related expenses and will incur such expenses in the future. In addition, the plaintiff has sustained pain and mental suffering in the past and will suffer the same in the future. Plaintiff has sustained loss of income in the past and will sustain loss of income in the future and her injuries will materially impair her ability to secure certain types of employment in the future, all to her damage in the amount of $100,000.00.

10. That the aforementioned actions of defendants were malicious, reckless, willful, wanton and in gross disregard of the rights of the plaintiff, Elizabeth Gilbert. That said

actions endangered the life and physical well being of the plaintiff and were so calculated to do her serious bodily harm that she is entitled to exemplary damages in the amount of $100,000.00.

COUNT II.

1. Paragraphs 1, 2, 3, 4, 6, 7, 8 and 10, are incorporated herein as if fully pleaded.

2. On information it is contended that the defendant Ronald E. Bailey acting in his own behalf and on behalf of the other defendants was the operator of the defendants' motor vehicle and caused the car to violently crash into plaintiff's automobile causing plaintiff's automobile to run off the road and crash.

COUNT III.

1. Paragraphs 1, 2, 3, 4, 6, 7, 8, 9 and 10 are incorporated herein as if fully pleaded.

2. That the defendant, Ronald E. Bailey acting on his own behalf and on behalf of the other defendants was driving the defendant's car when it pulled alongside of plaintiff's automobile. The defendant Tivis Gilbert who was sitting in the front seat beside the defendant Bailey grabbed the steering wheel with the defendant Bailey's consent and drove their automobile violently into plaintiff's car on two successive occasions causing plaintiff's car to run off the road and crash.

WHEREFORE, Plaintiff prays that the Court award judgment against the defendants jointly and severally in the amount of $100,000.00 compensatory damages and $100,000.00

punitive damages, plus costs and interest from the date of judgment.

Elizabeth Gilbert
by Counsel

HARRIGAN AND ARTZ

By Thomas J. Harrigan
Attorney for Plaintiff

[Exhibit 7 to Complaint]

VIRGINIA:

IN THE CIRCUIT COURT OF WASHINGTON COUNTY

ELIZABETH GILBERT

Plaintiff

vs. **O R D E R**

GORMAN GILBERT, et al

Defendants

On July 5, 1977, came the plaintiff, in person and by her attorney, the defendant Norman Gilbert, in person and by his attorney, and the Firemen's Fund Insurance Company by its attorney, Thomas G. Hodges. The court reporter was sworn.

It appearing to the court that the following defendants, Gorman Gilbert, Ronald Lee Bailey, (sometimes referred to as Ronald E. Bailey), Tivis Gilbert, Doug Wright, and Enos Blankenship are in default, not having answered or otherwise pleaded, on motion of the plaintiff it is ordered that plaintiff have judgment against these five defendants, the amount of which shall be referred to a jury for determination.

The plaintiff likewise moved the court to strike that portion of the grounds of defense of Norman Gilbert denying agency on the ground that such denial is not under oath. It appearing to the court that plaintiff has not heretofore objected to lack of verification, the court is of the opinion that the objection is waived under Rule 1:10 and said motion is overruled.

Thereupon a jury of seven persons, free from exceptions, was impaneled, consisting of: Ralph L. Puckett, Dennis A. Poston,

Ernest Wayne Montgomery, Kenneth Ray Rowe, Gilbert G. Grubb, Jesse Overbay and Ernest G. Graybeal.

Counsel for plaintiff, defendant Norman Gilbert and Fireman's Fund Insurance Company made opening statements.

The plaintiff thereupon introduced her evidence. During such evidence it appeared that the defendant, Ronald Lee Bailey, was an infant, being born July 23, 1959, and that he was not represented by counsel nor a guardian ad litem. At the conclusion of her evidence plaintiff advised the court that she was relying only on conspiracy in her claim against the defendant Norman Gilbert.

At the conclusion of plaintiff's evidence the defendant Norman Gilbert moved the court to strike plaintiff's evidence for the reasons set forth in the transcript, which motion was overruled.

Thereupon the defendant Norman Gilbert advised the court that he had no evidence to introduce.

The court adjourned for the day, after first cautioning the jury not to discuss the case with anyone nor among themselves, and not to visit the scene of the accident.

The next day came the same parties and attorneys. Defendant Norman Gilbert renewed his motion to strike plaintiff's evidence which motion was overruled.

Thereupon the court instructed the jury as to the law, and submitted to the jury three special verdicts. The attorneys

argued the case to the jury, which then retired to consider the special verdicts, later returning with the following three special verdicts:

1. Do you find from the evidence and the instructions of the court that Norman Gilbert is liable to the plaintiff for the injuries received in the accident?

   Yes x

   No _____

2. In what amount do you fix compensatory damages to the plaintiff for injuries received in the accident?

   $ 30,000.00

3. If from the evidence and the instructions of the court you decide to award plaintiff punitive damages against any defendant, write the amount of any such punitive damages opposite that defendant's name:

| | |
|---|---|
| Norman Gilbert | $2000.00 |
| Gorman Gilbert | $2000.00 |
| Tivis Gilbert | $15,000.00 |
| Ronald Bailey | $2000.00 |
| Douglas Wright | $2000.00 |
| Enos Blankenship | $2000.00 |

/S/ Ralph L. Puckett
Foreman

Thereupon counsel for Norman Gilbert moved the Court to set aside the verdict of the jury as to said defendant and requested leave to file his grounds in writing, which request was granted. Thereafter said defendant filed his written Motion to set aside the verdict, which Motion is a part of the record in this case. Thereafter the Court directed counsel for plaintiff to send written notices pursuant to Section 8-140.3 of the Code of Virginia to

defendants Gorman Gilbert, Tivis Gilbert, Ronald Bailey, Doug Wright and Enos Blankenship, returnable to this Court on August 10, 1977, at 9:00 a.m. to show cause, if they could, why default judgments and a Final Order should not be entered against them.

Thereafter, on August 10, 1977, came the plaintiff, by her counsel; defendant Norman Gilbert, in person and by his counsel; defendants Gorman Gilbert, Ronald Bailey and Enos Blankenship, all in person; Utica Mutual Insurance Company, Firemen's Funds Insurance Company and American Inter-Insurance Exchange, all by their respective counsel. Thereupon counsel for the respective parties presented their views to the Court with regard to Norman Gilbert's Motion to set aside the verdict and as to the other legal issues in the case, and defendants Gorman Gilbert, Ronald Bailey and Enos Blankenship were given an opportunity to offer the Court any reason that a default judgment and Final Order should not be entered against them.

It being the opinion of the Court that Section 8-140.3 of the Code of Virginia has now been substantially complied with, and that defendant Norman Gilbert's Motion to set aside the verdict is not well taken and should be overruled, it is accordingly ORDERED that plaintiff do have and recover judgment against the defendants, Norman Gilbert, Gorman Gilbert, Tivis Gilbert, Ronald Bailey, Doug Wright, and Enos Blankenship, jointly and severally, in the sum of THIRTY THOUSAND and NO/100 ($30,000.00) DOLLARS as and for compensatory damages, the sum of TWO THOUSAND and NO/100

($2,000.00) DOLLARS as and for punitive damages against Gorman Gilbert, Doug Wright, Enos Blankenship and Ronald Bailey severally; and the sum of FIFTEEN THOUSAND and NO/100 ($15,000.00) DOLLARS as and for punitive damages against defendant Tivis Gilbert, together with lawful interest and taxable costs.

Counsel for Norman Gilbert duly objected and excepted to the foregoing ruling of the Court.

The Clerk shall certify copies of this Order to all counsel of record.

Seen:

ATTORNEY FOR PLAINTIFF

ATTORNEY FOR NORMAN GILBERT

ATTORNEY FOR FIREMEN'S FUNDS INSURANCE COMPANY

ATTORNEY FOR UTICA MUTUAL INSURANCE COMPANY

ATTORNEY FOR AMERICAN INTER-INSURANCE EXCHANGE

ENTER, this 10th day of August, 1977.

JUDGE

[Filed November 16, 1977]

REQUEST FOR PRODUCTION OF DOCUMENTS

TO: ROBERT J. INGRAM
Gilmer, Sadler, Ingram, Sutherland
and Hutton
Attorneys at Law
Midtown Office Building
Pulaski, Virginia
Counsel for Travelers Indemnity Company

You are hereby requested to produce and file with the Clerk of this Court, for inspection and copying by counsel for complainant and other interested parties, not later than twenty-one (21) days from the date of service of this Request, the following documents:

* * *

IV.

A complete and certified copy, reconstructed from company records, of the Travelers Indemnity Company policy number PQMV-1718373 issued to Tivis H. Gilbert, effective dates from 10/30/75 to 10/30/76;

V.

A copy of all certificates filed by or on behalf of Travelers Indemnity Company with the Virginia Division of Motor Vehicles with respect to said policy, whether filed before or after the collision in controversy in this case.

VI.

A complete copy of the underwriting file of Travelers Indemnity Company with respect to said policy to the extent that the contents of said file have not been completely disclosed in response to Requests I and II.

[Filed November 16, 1977]

REQUESTS FOR ADMISSIONS

Utica Mutual Insurance Company requests that Travelers Indemnity Company admit the truthfulness of the following statements of fact within twenty-one (21) days from the date of service hereof:

I.

That the policy issued by Travelers Indemnity Company to Tivis H. Gilbert, being policy PQMV-1718373, had been certified to the Virginia Division of Motor Vehicles as proof of the financial responsibility of Tivis H. Gilbert for the future pursuant to the Virginia Motor Vehicle Financial Responsibility Act prior to December 6, 1975, the date of the collision in controversy.

II.

That said certification had not been cancelled or annulled on or before December 6, 1975;

* * *

[Filed December 6, 1977]

ANSWER OF FIREMAN'S FUND INSURANCE COMPANY

The undersigned, Fireman's Fund Insurance Company, for Answer to the Complaint filed against it and others, says:

(1) Fireman's Fund admits the allegations contained in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the Complaint filed against it.

(2) Fireman's Fund joins in the reasons for equitable relief described in Paragraph 11 of the Complaint filed against it. Fireman's Fund is also threatened with the burden of defending the multiplicity of suits to determine the existence ~~of~~ and priority of uninsured motorist coverage for the four individuals who claim to be injured in the collision in the controversy. Fireman's Fund is also threatened with irreparable damage and being threatened with exposure under its uninsured motorist coverage for which it would have no effective recourse if it should later be determined that the motor vehicle at fault in the collision was not an uninsured motor vehicle. Fireman's Fund has no adequate remedy at law.

(3) Fireman's Fund joins in the prayer for the relief contained in the Complaint filed against it with the exception of 5(D)(i) in Paragraph 11, wherein it states:

> "To determine, declare and adjudicate that the primary uninsured motorist coverage available to satisfy claims from occupants of the Shirley Gray vehicle is under the Fireman's Fund policy insuring the vehicle being operated by Shirley Gray, and to declare and determine the amount of such coverage."

(4) Fireman's Fund would pray the Court to first determine who has the primary uninsured motorist coverage available to satisfy claims of occupants of the Shirley Gray vehicle and upon determining that fact, to declare and determine the amount of such coverage.

Respectfully,

FIREMAN'S FUND INSURANCE COMPANY

By Counsel

[Filed December 16, 1977]

ANSWER

COMES NOW, Elizabeth Jennelle, Nelson Jennelle and Shirley Gray and for answer to the Complaint for a Declaratory Judgment states as follows:

1. Paragraph I is admitted.

2. Paragraph II is admitted.

3. The allegations in Paragraph III are believed to be factual as to the fact that Tivis Gilbert and Tivis H. Gilbert each had a policy with Travelers Insurance Company.

4. These defendants are without knowledge as to the factual allegations in Paragraph IV.

5. Paragraph V is admitted.

6. Paragraph VI is admitted.

7. Paragraph VII is admitted.

8. Paragraph VIII is admitted but it is further alleged a judgment for $2,000 punitive damages against Norman Gilbert was received.

9. Paragraph IX is admitted.

10. Paragraph X is admitted.

11. The allegation that declaratory judgment is warranted is admitted.

WHEREFORE these defendants pray that the Court decide the questions submitted on the Complaint.

Elizabeth Jennelle
Nelson Jennelle
Shirley Gray

By Counsel

[Filed December 16, 1977]

ANSWER OF INFANT ELIZABETH ANN GILBERT BY HER GUARDIAN AD LITEM AND GUARDIAN AD LITEM

COMES NOW, Elizabeth Ann Gilbert, infant by her guardian ad litem and Thomas J. Harrigan, Guardian Ad Litem and for Answer to the suit for declaratory relief states as follows:

1. The allegations presented and the request for declaratory relief present a controversy that should be decided by the Court.

WHEREFORE, this defendant by her guardian ad litem prays no decree be entered to her prejudice.

ELIZABETH ANN GILBERT, INFANT

By [signature]
Thomas J. Harrigan
Guardian Ad Litem

[Filed February 17, 1978]

RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS

* * *

IV.

The undersigned, Travelers Indemnity Company, in response to Request for Production of Documents, files herewith a complete and certified copy of the Travelers Indemnity Company's policy number PQMV-1718373 issued to Tivis H. Gilbert, effective dates from 10/30/75 to 10/30/76.

V.

The undersigned, Travelers Indemnity Company, in response to Request for Production of Documents, files herewith copies of all those certificates currently in its possession filed with the Virginia Division of Motor Vehicles with respect to policy number PQMV-1718373 issued to Tivis H. Gilbert.

VI.

The defendant does not at this time possess a complete copy of the underwriting file of Travelers Indemnity Company with respect to said policy; however, defendant objects to plaintiff's Request for Production of Documents #6 in that it requests information which is irrelevant and immaterial to the issues raised in the present litigation and is therefore burdensome and oppressive for the defendant to comply with same; and defendant further objects in that it requests documents which contain the work products of the defendant and is therefore not subject to plaintiff's Request for Production of Documents.

[Filed February 17, 1978]

RESPONSE TO REQUESTS FOR ADMISSIONS

I.

The undersigned, Travelers Indemnity Company, in response to Requests for Admissions, admits that the policy issued by Travelers Indemnity Company to Tivis H. Gilbert, being policy number PQMV-1718373, had been certified to the Virginia Division of Motor Vehicles as proof of the financial responsibility of Tivis H. Gilbert for the future pursuant to the Virginia Motor Vehicle Financial Responsibility Act as shown by the Forms SR-22 contained in defendant's response to plaintiff's Request for Production of Documents #5.

II.

The undersigned, Travelers Indemnity Company, in response to Requests for Admissions, states that based on that information which defendant is currently in possession of said certification had not been cancelled or annulled on or before December 6, 1975.

* * *

REQUEST FOR PRODUCTION OF
DOCUMENTS #4

BASIC AUTOMOBILE LIABILITY AND PHYSICAL DAMAGE POLICY

# THE TRAVELERS INSURANCE COMPANIES

Hartford, Connecticut

THIS POLICY, THE DECLARATIONS AND ALL COVERAGE PARTS AND ENDORSEMENTS ISSUED TO FORM A PART HEREOF, CONSTITUTE THE ENTIRE INSURANCE POLICY.

# The Travelers Insurance Companies

**Hartford, Connecticut**

(Each a Stock Insurance Company)

In consideration of the payment of the premium, in reliance upon the statements in the declarations made a part hereof and subject to all the terms of this policy, the member of The Travelers Insurance Companies designated in the declarations as the insurer (herein called the company) agrees with the *named insured* as follows:

## Section A—Basic Automobile Liability Insurance

### I. COVERAGE A—BODILY INJURY LIABILITY
### COVERAGE B—PROPERTY DAMAGE LIABILITY

The company will 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* and arising out of the ownership, maintenance or use, including loading and unloading, for the purposes stated as applicable thereto in the declarations, of an *owned automobile* or of a *temporary substitute automobile*, and the company shall have the right and duty to defend any suit against the *insured* seeking damages on account of such *bodily injury* or *property damage*, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

**Exclusions**

This insurance does not apply:

(a) to liability assumed by the *insured* under any contract or agreement;

(b) to any obligation for which the *insured* or any carrier as his insurer may be held liable under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law;

(c) to *bodily injury* to any employee of the *insured* arising out of and in the course of his employment by the *insured* or to any obligation of the *insured* to indemnify another because of damages arising out of such injury; but this exclusion does not apply to any such injury arising out of and in the course of domestic employment by the *insured* unless benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law;

(d) to *property damage* to
  (1) property owned or being transported by the *insured*, or
  (2) property 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, other than *property damage* to a residence or private garage by a *private passenger automobile* covered by this insurance;

(e) to *bodily injury* or *property damage* due to war, whether or not declared, civil war, insurrection, rebellion or revolution or to any act or condition incident to any of the foregoing, with respect to expenses for first aid under the Supplementary Payments provision;

(f) to *bodily injury* or *property damage* arising out of the ownership, maintenance, operation, use, loading or unloading of any *owned automobile* or *temporary substitute automobile* while such *automobile* is being used as a public or livery conveyance, unless such use is specifically declared and described in the declarations;

(g) to *bodily injury* or *property damage* arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

### II. SUPPLEMENTARY PAYMENTS

The company will pay, in addition to the applicable limit of liability:

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

(b) premiums on appeal bonds required in any such suit, premiums on bonds to release attachments 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 the company shall have no obligation to apply for or to furnish any such bonds;

(c) expenses incurred by the *insured* for first aid to others at the time of an accident, for *bodily injury* to which this policy applies;

(d) reasonable expenses incurred by the *insured* at the company's request in assisting the company in the investigation or defense of any claim or suit, including actual loss of earnings not to exceed $25 per day.

### III. PERSONS INSURED

Each of the following is an *insured* under this insurance to the extent set forth below:

(a) the *named insured;*

(b) any partner or executive officer thereof, but with respect to a *temporary substitute automobile* only while such *automobile* is being used in the business of the *named insured;*

(c) any other person while using an *owned automobile* or a *temporary substitute automobile* with the permission of the *named insured*, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, but with respect to *bodily injury* or *property damage* arising out of the loading or unloading thereof, such other person shall be an *insured* only if he is:
  (1) a lessee or borrower of the *automobile*, or
  (2) an employee of the *named insured* or of such lessee or borrower;

(d) any other person or organization but only with respect to his or its liability because of acts or omissions of an *insured* under (a), (b) or (c) above.

None of the following is an *insured:*

(i) any person while engaged in the business of his employer with respect to *bodily injury* to any fellow employee of such person injured in the course of his employment;

(ii) except as stated under (b) above, the owner of a *temporary substitute automobile*, or any agent or employee of such owner;

(iii) any person or organization, other than the *named insured*, with respect to:
  (1) a motor vehicle while used with any *trailer* owned or hired by such person or organization and not covered by like insurance in the company (except a *trailer* designed for use with a four wheel *private passenger automobile* and not being used for business purposes with another type motor vehicle), or
  (2) a *trailer* while used with any motor vehicle owned or hired by such person or organization and not covered by like insurance in the company;

(iv) any person while employed in or otherwise engaged in duties in connection with an *automobile business*, other than an *automobile business* operated by the *named insured*.

### IV. LIMITS OF LIABILITY

Regardless of the number of (1) *insureds* under this policy, (2) persons or organizations who sustain *bodily injury* or *property damage*, (3) claims made or suits brought on account of *bodily injury* or *property damage* or (4) *automobiles* to which this policy applies, the company's liability is limited as follows:

Coverage A—The limit of *bodily injury* liability stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, because of *bodily injury* sustained by one person as the result of any one *occurrence;* but subject to the above provision respecting "each person", the total liability of the company for all damages, including damages for care and loss of services, because of *bodily injury* sustained by two or more persons as the result of any one *occurrence* shall not exceed the limit of *bodily injury* liability stated in the declarations as applicable to "each *occurrence*".

Coverage B—The total liability of the company for all damages because of all *property damage* sustained by one or more persons or organizations as the result of any one *occurrence* shall not exceed the limit of *property damage* liability stated in the declarations as applicable to "each *occurrence*".

The Travelers Indemnity Company

Hartford, Connecticut

DECLARATIONS — Automobile Policy

The insurance afforded is only with respect to such of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all the terms of this policy having reference thereto.

POLICY NO. PQMV-1718373

ISSUE DATE 12-20-76PA

Section 2—This Declarations page, with "Policy Provisions—Section 1", and any endorsement issued to form a part hereof, completes the above numbered policy.

**Item 1.** Named Insured: TIVIS H GILBERT

Address (No., street, town, county, state): HAYSI, VA. 24256

The automobile will be principally garaged in the above town, county and state, unless otherwise stated herein:

Occupation of the named insured is

**Item 2.** Policy Period: From 10-30-75 to 10-30-76 **

**Item 3.** Description of the automobile: #1 1A-4+10 69 CHEV S#1643994001723

#2

| Item 4. Coverages | Limits of Liability | Premiums‡ |
|---|---|---|
| A. Bodily Injury Liability | each person $ 25,000 / each accident $ 50,000 | $ 159 |
| B. Property Damage Liability | each accident $ 5,000 | $ 72 |
| C. Automobile Medical Payments | each person $ 2,000 | $ 21 |
| D. Comprehensive—Loss of or Damage to the Auto., except by Collision | $ | $ |
| E. Collision or Upset | ACV Less $ Deductible | $ |
| F. Fire, Lightning and Transportation | $ | $ |
| G. Theft (Broad Form) | $ | G. $ |
| H. Windstorm, Hail, Earthquake or Explosion | | H. $ |
| Symbol numbers of endorsements forming a part of this policy on its effective date: 11110,4168A,A913,9270,17802-4, 24590,8000 | | $ 252. Total Premium |

If the premium is payable in instalments (not applicable in Texas): *$ _____ instalment payment premium charge included.

Premium Payable:
$ _____ on _____
$ _____ on _____
and _____

‡The absence of an entry in any premium space shall mean that insurance is not afforded with respect to the coverage opposite such premium space. The letters "ACV" in any Limits of Liability space shall mean "Actual Cash Value." Any entries in the declarations designated by "#1" or "#2" do not apply to the automobile or trailer not similarly designated in Item 3. If "#1" or "#2", but not both, is entered in the Limits of Liability space for any coverage, such coverage does not apply to the automobile or trailer not similarly designated in Item 3.

**Item 5.** The purposes for which the automobile is to be used are

("Pleasure and Business," unless otherwise stated above; "C" means "Commercial.")

M11250 TIVIS H GILBERT
223-72-5362
A082100 S044100 M (U/M)

**Item 6.** The automobile is unencumbered unless otherwise stated herein:

Encumbrance $ Any loss under Coverages D, E, F, G and H is payable as interest may appear to the named insured and (Name and Address)

**Item 7.** Designation of insured for purposes of division 2 of Coverage C, if required by Insuring Agreement III:

HAYSI INSURANCE AGENCY OCT.

**Item 8.** Except with respect to bailment lease, conditional sale, purchase agreement, mortgage or other encumbrance, the named insured is the sole owner of the automobile, unless otherwise stated herein:

**Item 9.** During the past three years no insurer has canceled insurance, issued to the named insured, similar to that afforded hereunder, unless otherwise stated herein:

**12:01 A.M., standard time at the address of the named insured as stated herein.

"THIS IS TO CERTIFY THAT THIS POLICY IS A FULL, TRUE AND COMPLETE COPY OF THE ORIGINAL POLICY AS ISSUED BY THIS COMPANY. NO INSURANCE IS AFFORDED HEREUNDER".

Countersigned by _____ Resident Licensed Agent

AUTHORIZED REPRESENTATIVE

DUPLICATE

Effective from 3-8-76 (At 12:01 A.M. Standard Time)

Issued to TIVIS H GILBERT

It is agreed that as of the effective date hereof the policy is amended with respect to such of the following particulars as are indicated by specific entry in connection therewith:

1. Name of insured to read _____

   Address of named insured to read _____

   The owned automobile will be principally garaged in the above town, county and state, unless otherwise stated herein: _____

   Occupation of the named insured to read _____

2. To afford insurance with respect to the automobile or trailer described below, subject to all the terms of the policy except as specifically amended in this endorsement:

Description of the owned automobile or trailer:

| Year of Model 19- | Trade Name | Model; Body Type | Identification Number; Motor Number; Serial Number |
|---|---|---|---|
| | | | |

| Purchased | | F.O.B. List Price or Delivered Price at Factory | |
|---|---|---|---|
| Month—Year | New (N) or Used (U) | | |
| | | $ | |

Any loss under any property coverages afforded by the policy is payable, as interest may appear, to the named insured and _____

(Name and Address)

3. To discontinue insurance with respect to the automobile or trailer described below:

| Year of Model 19- | Trade Name | Identification Number; Motor Number; Serial Number |
|---|---|---|
| | | |

Note: If automobile or trailer is added, Item 2 is to be completed; if automobile or trailer is eliminated, Item 3 is to be completed; if automobile or trailer is substituted for an automobile or trailer described in the policy, Items 2 and 3 are to be completed.

4. The premium for Coverages _____ and the total premium are _____ as stated in the schedule.
5. The limits of liability for Coverages _____ are amended in amounts only to read as stated in the schedule.
6. To include Coverages _____. Limits of liability to read as stated in the schedule.
   If Coverage D or E is indicated above as included, the insured for the purpose of such coverage is as follows:
   Coverage D _____ Coverage E _____
7. To eliminate Coverages _____. 8. Rating classification to read _____.
9. The instalment premiums are amended to read: $ on ; $ on and
10. ADD SR-22 & BROAD FORM 4046A

Any additional or return premium because of any amendment effected hereby is stated in the schedule below.

SCHEDULE

| Symbol | Coverages | Limits of Liability | | Additional Premiums | Return Premiums |
|---|---|---|---|---|---|
| A. | Bodily Injury Liability | each person<br>each occurrence | $ 25,000<br>$ 50,000 | $ | $ |
| B. | Property Damage Liability | each occurrence | $ 5,000 | $ | $ |
| C. | Medical Payments | each person | $ 2,000. | $ | $ |
| D. | Total Disability | weekly indemnity | $ | $ | $ |
| E. | Death Indemnity | principal sum | $ — | $ | $ |
| F. | Family Protection | each person<br>each accident | $ ,000<br>$ ,000 | $ | $ |
| G. | (1) Comprehensive—excluding collision<br>(2) Personal Effects | Actual Cash Value<br>$ 100 | | $ | $ |
| H. | Collision | Actual Cash Value Less $ Deductible | | $ | $ |
| I. | Towing and Labor Costs | per disablement | $ | $ | $ |
| | | | | $ | $ |
| | | Total Premium | | $ | $ |

Date of Issue 12-21-76PA

4072E Amending Policy No. PQMV-1718373 This endorsement is executed on the reverse side hereof.

| POLICY EXPIRES | OFFICE AND NAME OF AGENT |
|---|---|
| 10-30-76 | RICH 179 HAYSI INS. AGCY. 000005 |

## ASSISTANCE AND COOPERATION OF THE INSURED
## (AUTOMOBILE LIABILITY INSURANCE)
## (VIRGINIA)

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

THE TRAVELERS INDEMNITY COMPANY

*Secretary*

THE CHARTER OAK FIRE INSURANCE COMPANY

*Secretary*

I-4195 8-66 PRINTED IN U.S.A. N.S. (A877)

9270

## AUTOMOBILE ASSIGNED RISK – VIRGINIA

In the event of cancellation of this policy by either the insured or the company, the earned premium calculated in accordance with the cancellation condition of the policy, shall be subject to a minimum of $10.00 as provided in Section 18 of the Virginia Automobile Insurance Plan.

THE TRAVELERS INDEMNITY COMPANY

*Secretary*

THE CHARTER OAK FIRE INSURANCE COMPANY

*Secretary*

C-11888 REV. 2-71 PRINTED IN U.S.A.

11110

## PROTECTION AGAINST UNINSURED MOTORISTS INSURANCE

(Automobile Bodily Injury Liability and Property Damage Liability)
(Virginia)

Effective from _____ Amending Policy numbered _____

At 12:01 A.M. Standard Time

Issued to _____

The additional premium for this endorsement is $ _____

(The information provided for above is required to be stated only when this endorsement is issued for attachment to the policy subsequent to its effective date.)

It is agreed that the following provisions of this endorsement replace the provisions of the policy pertaining to Family Protection Coverage or Protection Against Uninsured Motorists Coverage.

In consideration of the payment of the premium for this endorsement, the company agrees with the named insured, subject to the limits of liability, exclusions, conditions and other terms of this endorsement and to the applicable terms of the policy:

### SCHEDULE

Limits of Liability:

| | | |
|---|---|---|
| Bodily Injury | $20,000 each person; | $40,000 each accident |
| Property Damage | $5,000 each accident | |

### INSURING AGREEMENTS

I. **Damages for Bodily Injury and Property Damage Caused by Uninsured Automobiles**

To pay, in accordance with Section 38.1-381 of the Code of Virginia and all Acts amendatory thereof or supplementary thereto, all sums which the Insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of:

(a) bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury", sustained by the Insured;

(b) injury to or destruction of (1) an insured automobile owned by the named Insured or his spouse if a resident of the same household and the contents of such automobile, and (2) any other property (except an automobile) owned by an Insured and located in Virginia, hereinafter called "property damage";

caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile.

II. **Definitions**

(a) **Insured.** The unqualified word "Insured" means:

(1) the named Insured and, while residents of the same household, his spouse and the relatives of either;

(2) any other person while occupying an insured automobile; and

(3) any person, with respect to damages he is entitled to recover for care or loss of services because of bodily injury to which this endorsement applies.

The insurance applies separately with respect to each Insured hereunder, but neither this provision nor application of the insurance to more than one Insured shall operate to increase the limits of the Company's liability.

(b) **Insured Automobile.** The term "insured automobile" means an automobile registered in Virginia with respect to which the bodily injury and property damage liability coverages of the policy apply.

(c) **Uninsured Automobile.** The term "uninsured automobile" means:

(1) an automobile with respect to the ownership, maintenance or use of which there is, in the amounts specified in the Virginia Motor Vehicle Safety Responsibility Act, neither (i) cash or securities on file with the Virginia Commissioner of Motor Vehicles nor (ii) a bodily injury and property damage liability bond or insurance policy, applicable at the time of the accident with respect to any person or organization legally responsible for the use of such automobile, or with respect to which there is such a bond or insurance policy applicable at the time of the accident but the company writing the same is or becomes insolvent or denies coverage thereunder; or

(2) a hit-and-run automobile as defined;

but the term "uninsured automobile" shall not include:

(i) an automobile which is owned or operated by a self-insurer within the meaning of the Virginia Motor Vehicle Safety Responsibility Act or any motor carrier law or similar law;

(ii) an automobile which is owned by the United States of America, the State of Virginia, a political subdivision thereof, or an agency of any of the foregoing;

*(Continued on Page 2)*

17802

| For Company Use Only | DATE OF EXPIRATION | MODE OF ADJUSTMENT | LOCATION OF RISK | OFFICE AND NAME OF AGENT |
|---|---|---|---|---|
| | | | | |

(iii) a vehicle operated on rails or while located for use as a residence or premises and not as a vehicle; or

(iv) a vehicle or other equipment designed for use principally off public roads, except while actually upon public roads

(d) **Hit-and-Run Automobile.** The term "hit-and-run automobile" means an automobile which causes an accident resulting in bodily injury to an Insured or property damage, provided: (i) there cannot be ascertained the identity of either the operator or the owner of such "hit-and-run automobile"; and (ii) the Insured or someone on his behalf shall have reported the accident within 5 days or as soon as practicable to the Commissioner of Motor Vehicles.

(e) **Occupying.** The word "occupying" means in or upon or entering into or alighting from.

III. **Policy Period, Territory**

This endorsement applies only to accidents which occur on and after the effective date hereof, during the policy period and within the United States of America, its territories or possessions, or Canada.

## EXCLUSIONS

This endorsement does not apply:

(a) to bodily injury to an Insured while occupying an automobile (other than an insured automobile) owned by the named Insured or his spouse, if a resident of the same household, or through being struck by such an automobile;

(b) to bodily injury to an Insured, care or loss of services recoverable by an Insured or injury to or destruction of property of an Insured, with respect to which such Insured or his legal representative shall, without written consent of the Company, make any settlement with any person or organization who may be legally liable therefor;

(c) to the first two hundred dollars of the total amount of all property damage as the result of any one accident;

(d) so as to inure directly or indirectly to the benefit of any insurer of property.

## CONDITIONS

1. **Policy Provisions.** None of the Insuring Agreements, Exclusions, Conditions or Other Provisions of the policy shall apply to the insurance afforded by this endorsement except the Conditions "Notice" or "Notice of Accident," "Subrogation," "Changes," "Assignment," "Cancellation" and "Declarations."

2. **Premium.** If during the policy period the number of automobiles owned by the named Insured or spouse and registered in Virginia or the number of Virginia dealer's license plates issued to the named Insured changes, the named Insured shall notify the Company during the policy period of any change and the premium shall be adjusted in accordance with the manuals in use by the Company. If the earned premium thus computed exceeds the advance premium paid, the named Insured shall pay the excess to the Company; if less, the Company shall return to the named Insured the unearned portion paid by such Insured.

3. **Proof of Claim.** As soon as practicable, the Insured or other person making claim shall give to the Company written proof of claim, under oath if required, including full particulars of the nature and extent of the injuries, treatment, and other details entering into the determination of the amount payable hereunder. Proof of claim shall be made upon forms furnished by the Company unless the Company shall have failed to furnish such forms within 15 days after receiving notice of claim.

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

   The Insured or other person making claim for damage to property shall file proof of loss with the Company within sixty days after the occurrence of loss, unless such time is extended in writing by the Company, in the form of a sworn statement setting forth the interest of the Insured and of all others in the property affected, any encumbrances thereon, the actual cash value thereof at time of loss, the amount, place, time and cause of such loss, and the description and amounts of all other insurance covering such property. Upon the Company's request, the Insured shall exhibit the damaged property to the Company.

   With respect to claims alleged to have arisen out of the ownership, maintenance or use of a hit-and-run automobile if the insured has not obtained a judgment against John Doe, the liability of the uninsured motorist may be established, as between the insured and the company, by filing with the company within a reasonable time after the accident a statement under oath that the insured or his legal representative has a cause or causes of action arising out of such accident for damages against a person or persons whose identity is unascertainable, setting forth the facts in support thereof, and shall present clear and convincing evidence that there was a hit-and-run automobile involved in the accident.

4. **Notice of Legal Action.** If, before the Company makes payment of loss hereunder, the Insured or his legal representative shall institute any legal action for bodily injury or property damage against any person or organization legally responsible for the use of an automobile involved in the accident, a copy of the summons and complaint or other process served in connection with such legal action shall be forwarded immediately to the Company by the Insured or his legal representative.

5. **Limits of Liability.** (a) The limit of bodily injury liability stated in the schedule as applicable to "each person" is the limit of the Company's liability for all damages, including damages for care or loss of services, because of bodily injury sustained by one person as the result of any one accident and, subject to the above provision respecting each person, the limit of such liability stated in the schedule as applicable to "each accident" is the total limit of the Company's liability for all damages, including damages for care or loss of services, because of bodily injury sustained by two or more persons as the result of any one accident.

(Continued on Page 3)

(b) The limit of property damage liability stated in the schedule as applicable to "each accident" is the total limit of the Company's liability for all damages arising out of injury to or destruction of all property of one or more Insureds as a result of any one accident.

(c) If claim is made hereunder and claim is also made against any person who is an Insured under the Bodily Injury Liability or Property Damage Liability coverages of the policy because of bodily injury or property damage sustained in an accident by a person who is an Insured hereunder, any payment made hereunder to or for any such person shall be applied in reduction of any amount which he may be entitled to recover from any person who is an Insured under the Bodily Injury Liability or Property Damage Liability coverages.

(d) Any amount payable hereunder because of bodily injury or property damage sustained in an accident by a person who is an insured under this coverage shall be reduced by all sums paid on account of such injury or damage by or on behalf of the owner or operator of the uninsured automobile.

(e) Any amount recoverable as damages because of bodily injury or property damage sustained in an accident by a person who is an insured under this coverage shall be reduced by all sums paid on account of such injury or damage by or on behalf of any person or persons jointly or severally liable together with the owner or operator of the uninsured automobile for such injury or damage including all sums paid under the Bodily Injury Liability or Property Damage Liability coverages of the policy.

6. **Other Insurance.** With respect to bodily injury to an insured while occupying an automobile not owned by the named Insured, the insurance hereunder shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile as primary insurance.

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

   With respect to property damage, the insurance hereunder shall apply only as excess insurance over any other valid and collectible insurance of any kind applicable to such property damage.

7. **Payment of Loss by the Company.** Any amount due hereunder is payable to the Insured or his legal representative.

THE TRAVELERS INDEMNITY COMPANY

M. H. Beach

*President*

PL-1017 NEW 1-73 PRINTED IN U.S.A. 1073 N.S. (A5998)

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## OUT-OF-STATE INSURANCE ENDORSEMENT

### AUTOMOBILE

It is agreed that, subject to all the provisions of the policy except where modified herein, the following provision is added:

> If, under the provisions of the motor vehicle financial responsibility law or the motor vehicle compulsory insurance law or any similar law of any state or province, a non-resident is required to maintain insurance with respect to the operation or use of a motor vehicle in such state or province and such insurance requirements are greater than the insurance provided by the policy, the limits of the company's liability and the kinds of coverage afforded by the policy shall be as set forth in such law, in lieu of the insurance otherwise provided by the policy, but only to the extent required by such law and only with respect to the operation or use of a motor vehicle in such state or province; provided that the insurance under this provision shall be reduced to the extent that there is other valid and collectible insurance under this or any other motor vehicle insurance policy; In no event shall any person be entitled to receive duplicate payments for the same elements of loss.

THE TRAVELERS INDEMNITY COMPANY

*Secretary*

THE CHARTER OAK FIRE INSURANCE COMPANY

*Secretary*



PL-1410 6-73 PRINTED IN U.S.A.

## NUCLEAR ENERGY LIABILITY EXCLUSION ENDORSEMENT

(Broad Form)

It is agreed that the policy does not apply:

I. Under any Liability Coverage, to injury, sickness, disease, death or destruction

(a) with respect to which an insured under the policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability; or

(b) resulting from the hazardous properties of nuclear material and with respect to which (1) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (2) the insured is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.

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

III. Under any Liability Coverage, to injury, sickness, disease, death or destruction resulting from the hazardous properties of nuclear material, if

(a) the nuclear material (1) is at any nuclear facility owned by, or operated by or on behalf of, an insured or (2) has been discharged or dispersed therefrom;

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

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

IV. As used in this endorsement:

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

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

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

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

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

"nuclear facility" means

(a) any nuclear reactor,

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(Continued on reverse side)

(b) any equipment or device designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or utilizing spent fuel, or (3) handling, processing or packaging waste,

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

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

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

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

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

This endorsement is executed by The Travelers Insurance Company as respects insurance afforded by that company only; it is executed by The Travelers Indemnity Company as respects insurance afforded by that company only.

THE TRAVELERS INSURANCE COMPANY

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Secretary

THE TRAVELERS INDEMNITY COMPANY

Secretary

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**Coverages A and B**—For the purpose of determining the limit of the company's liability, all *bodily injury* and *property damage* arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one *occurrence*.

### V. POLICY TERRITORY

This insurance applies only to *bodily injury* or *property damage* which occurs within the *policy territory*.

### VI. DEFINITIONS

When used in this policy (including endorsements forming a part hereof):

**"automobile"** means a land motor vehicle, trailer or semitrailer designed for travel on public roads (including any machinery or apparatus attached thereto), but does not include *mobile equipment;*

**"bodily injury"** means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom;

**"insured"** means any person or organization qualifying as an insured in the "Persons Insured" provision of the applicable insurance coverage. The insurance afforded applies separately to each *insured* against whom claim is made or suit is brought, except with respect to the limits of the company's liability;

**"mobile equipment"** means a land vehicle (including any machinery or apparatus attached thereto), whether or not self-propelled, (1) not subject to motor vehicle registration, or (2) maintained for use exclusively on premises owned by or rented to the *named insured*, including the ways immediately adjoining, or (3) designed for use principally off public roads, or (4) designed or maintained for the sole purpose of affording mobility to equipment of the following types forming an integral part of or permanently attached to such vehicle: power cranes, shovels, loaders, diggers and drills; concrete mixers (other than the mix-in transit type); graders, scrapers, rollers and other road construction or repair equipment; air-compressors, pumps and generators, including spraying, welding and building cleaning equipment; and geophysical exploration and well servicing equipment;

**"named insured"** means the person or organization named in Item 1. of the declarations of this policy;

**"occurrence"** means an accident, including continuous or repeated exposure to conditions, which results in *bodily injury* or *property damage* neither expected nor intended from the standpoint of the *insured;*

**"policy territory"** means:

(1) the United States of America, its territories or possessions, or Canada, or

(2) international waters or air space, provided the *bodily injury* or *property damage* does not occur in the course of travel or transportation to or from any other country, state or nation;

**"property damage"** means (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an *occurrence* during the policy period;

### VII. ADDITIONAL DEFINITIONS (Automobile Liability Insurance)

When used in reference to this insurance (including endorsements forming a part of the policy):

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

**"owned automobiles"** means either

(a) an *automobile* which is owned by the *named insured* and described in the declarations; or

(b) an *automobile* ownership of which is newly acquired by the *named insured* during the policy period, provided

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

(ii) the company insures all *automobiles* owned by the *named insured* on the date of such acquisition and the *named insured* notifies the company within 30 days thereafter of his election to make this and no other policy issued by the company applicable to such *automobile* and pays any additional premium required therefor;

and *"owned automobile"* includes a *trailer* not described in this policy, if designed for use with a four wheel *private passenger automobile* and if not being used for business purposes with another type *automobile;*

**"private passenger automobile"** means a private passenger or station wagon type *automobile* and any *automobile* the *purpose of use* of which is stated in the declarations as *pleasure and business;*

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

**"trailer"** includes semitrailer but does not include *mobile equipment;*

and as to *"purpose(s) of use":*

**"commercial"** means use principally in the business occupation of the *named insured* as stated in the declarations including occasional use for personal, pleasure, family and other business purposes;

**"pleasure and business"** means personal, pleasure, family and business use.

### VIII. ADDITIONAL CONDITIONS

**A. Other Insurance—Temporary Substitute and Newly Acquired Automobiles**

With respect to a *temporary substitute automobile*, this insurance shall be excess insurance over any other valid and collectible insurance available to the *insured*.

With respect to an *owned automobile* ownership of which is newly acquired by the *named insured* during the policy period and not described in the declarations, this insurance shall not apply if any other valid and collectible insurance is available to the *named insured*.

**B. Out of State Insurance**

If, under the provisions of the motor vehicle financial responsibility law or the motor vehicle compulsory insurance law or any similar law of any state or province, a non-resident is required to maintain insurance with respect to the operation or use of a motor vehicle in such state or province and such insurance requirements are greater than the insurance provided by the policy, the limits of the company's liability and kinds of coverage afforded by the policy shall be as set forth in such law, in lieu of the insurance otherwise provided by the policy, but only to the extent required by such law and only with respect to the operation or use of a motor vehicle in such state or province; provided that the insurance under this provision shall be reduced to the extent that there is other valid and collectible insurance under this or any other motor vehicle insurance policy. In no event shall any person be entitled to receive duplicate payments for the same elements of loss.

## Section B—Automobile Medical Payments Insurance

### I. COVERAGE C—AUTOMOBILE MEDICAL PAYMENTS

The company will pay all reasonable *medical expenses* incurred within one year from the date of the accident:

**Division 1.** to or for each person who sustains *bodily injury*, caused by accident, while *occupying* a *designated automobile* which is being used by a person for whom *bodily injury* liability insurance is afforded under this policy with respect to such use;

**Division 2.** to or for each *insured* who sustains *bodily injury*, caused by accident, while *occupying* or, while a pedestrian, through being struck by a *highway vehicle*.

**Exclusions**

This insurance does not apply:

(a) to *bodily injury* to any person or *insured* while employed or otherwise engaged in duties in connection with an *automobile business*, if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law;

(b) to *bodily injury* due to war; whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing;

(c) under Division 1. to *bodily injury* to any employee of the *named insured* arising out of and in the course of employment by the *named insured*, but this exclusion does not apply to any such *bodily injury* arising out of and in the course of domestic employment by the *named insured* unless benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law;

(d) under Division 2. to *bodily injury* sustained while *occupying* a *highway vehicle* owned by any *insured*, or furnished for the regular use of any *insured* by any person or organization other than the *named insured*.

### II. PERSONS INSURED—DIVISION 2.

Each of the following is an *insured* under this insurance to the extent set forth below:

(a) any person designated as *insured* in the Schedule;

(b) while residents of the same household as such designated person, his spouse and the relatives of either;

and if such designated person shall die, any person who was an *insured* at the time of such death shall continue to be an *insured*.

### III. LIMIT OF LIABILITY

Regardless of the number of (1) persons or organizations who are insureds under this policy, (2) persons who sustain *bodily injury*, (3) claims made or suits brought on account of *bodily injury*, or (4) *designated automobiles* to which this policy applies, the limit of liability for medical payments stated in the declarations as applicable to "each person" is the limit of the company's liability for all expenses incurred by or on behalf of each person who sustains *bodily injury* as the result of any one accident.

When more than one medical payments coverage afforded by this policy applies to the loss, the company shall not be liable for more than the amount of the highest applicable limit of liability.

### IV. ADDITIONAL DEFINITIONS

The additional definitions applicable to *automobile bodily injury* liability insurance also apply to this insurance; and when used in reference to this insurance (including endorsements forming a part of the policy):

**"designated automobile"** means an *automobile* designated in the schedule and includes:

(a) an *automobile* not owned by the *named insured* while temporarily used as a substitute for an *owned automobile* designated in the schedule when withdrawn from normal use for servicing or repair or because of its breakdown, loss or destruction; and

(b) a trailer designed for use with a *private passenger automobile*, if not being used for business purposes with another type *automobile* and if not a home, office, store, display or passenger trailer;

**"highway vehicle"** means a land motor vehicle or trailer other than

(a) a farm type tractor or other equipment designed for use principally off public roads, while not upon public roads,

(b) a vehicle operated on rails or crawler-treads, or

(c) a vehicle while located for use as a residence or premises;

**"medical expense"** means expenses for necessary medical, surgical, x-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services;

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

### V. POLICY PERIOD; TERRITORY

This insurance applies only to accidents which occur during the policy period within the *policy territory*.

### VI. ADDITIONAL CONDITIONS

**A. Medical Reports; Proof and Payment of Claim**

As soon as practicable the injured person or someone on his behalf shall give to the company written proof of claim, under oath if required, and shall, after each request from the company, execute authorization to enable the company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the company when and as often as the company may reasonably require. The company may pay the injured person or any person or organization rendering the services and such payment shall reduce the amount payable hereunder for such injury. Payment hereunder shall not constitute an admission of liability of any person or, except hereunder, of the company.

**B. Excess Insurance**

Except with respect to an *owned automobile*, the insurance under Division 1. shall be excess insurance over any other valid and collectible automobile medical payments or automobile *medical expense* insurance.

The insurance under Division 2. shall be excess insurance over any other valid and collectible automobile medical payments or automobile *medical expense* insurance available to the *insured* under any other policy.

**C. Non-Applicability of Subrogation Condition**

The Subrogation Condition does not apply to the Automobile Medical Payments Coverage.

# Section C—Uninsured Motorists Insurance

### I. COVERAGE D—UNINSURED MOTORISTS (Damages for Bodily Injury)

The company will pay all sums which the *insured* or his legal representative shall be legally entitled to recover as damages from the owner or operator of an *uninsured highway vehicle* because of *bodily injury* sustained by the *insured*, caused by accident and arising out of the ownership, maintenance or use of such *uninsured highway vehicle;* provided, for the purposes of this coverage, determination as to whether the *insured* or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the *insured* or such representative and the company or, if they fail to agree, by arbitration.

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

**Exclusions**

This insurance does not apply:

(a) to *bodily injury* to an *insured* with respect to which such *insured*, his legal representative or any person entitled to payment under this insurance shall, without written consent of the company, make any settlement with any person or organization who may be legally liable therefor;

(b) to *bodily injury* to an *insured* while *occupying* a *highway vehicle* (other than an *insured highway vehicle*) owned by the *named insured*, any *designated insured* or any relative resident in the same household as the *named* or *designated insured*, or through being struck by such a vehicle, but this exclusion does not apply to the *named insured* or his relatives while *occupying* or if struck by a *highway vehicle* owned by a *designated insured* or his relatives;

(c) so as to inure directly or indirectly to the benefit of any workmen's compensation or disability benefits carrier or any person or organization qualifying as a self-insurer under any workmen's compensation or disability benefits law or any similar law.

### II. PERSONS INSURED

Each of the following is an *insured* under this insurance to the extent set forth below:

(a) the *named insured* and any *designated insured* and, while residents of the same household, the spouse and relatives of either;

(b) any other person while *occupying* an *insured highway vehicle;* and

(c) any person, with respect to damages he is entitled to recover because of *bodily injury* to which this insurance applies sustained by an *insured* under (a) or (b) above.

The insurance applies separately with respect to each *insured*, except with respect to the limits of the company's liability.

### III. LIMITS OF LIABILITY

Regardless of the number of (1) persons or organizations who are *insureds* under this policy, (2) persons who sustain *bodily injury*, (3) claims made or suits brought on account of *bodily injury*, or (4) *highway vehicles* to which this policy applies:

(a) The limit of liability stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages because of *bodily injury* sustained by one person as the result of any one accident and, subject to the above provision respecting "each person" the limit of liability stated in the declarations as applicable to "each accident" is the total limit of the company's liability for all damages because of *bodily injury* sustained by two or more persons as the result of any one accident.

(b) Any amount payable under the terms of this insurance because of *bodily injury* sustained in an accident by a person who is an *insured* under this coverage shall be reduced by

(1) all sums paid on account of such *bodily injury* by or on behalf of

(i) the owner or operator of the *uninsured highway vehicle* and

(ii) any other person or organization jointly or severally liable together with such owner or operator for such *bodily injury*,

including all sums paid under the *bodily injury* liability coverage of the policy, and

(2) the amount paid and the present value of all amounts payable on account of such *bodily injury* under any workmen's compensation law, disability benefits law or any similar law.

(c) Any payment made under this insurance to or for any *insured* shall be applied in reduction of the amount of damages which he may be entitled to recover from any person or organization who is an *insured* under the *bodily injury* liability coverage of the policy.

(d) The company shall not be obligated to pay under this insurance that part of the damages which the *insured* may be entitled to recover from the owner or operator of an *uninsured highway vehicle* which represents expenses for medical services paid or payable under the medical payments coverage of the policy.

## IV. POLICY PERIOD; TERRITORY

This insurance applies only to accidents which occur during the policy period and within the United States of America, its territories or possessions, or Canada.

## V. ADDITIONAL DEFINITIONS

When used in reference to this insurance (including endorsements forming a part of the policy):

**"designated insured"** means an individual named in the schedule under *Designated Insured;*

**"highway vehicle"** means a land motor vehicle or trailer other than

(a) a farm type tractor or other equipment designed for use principally off public roads, while not upon public roads,

(b) a vehicle operated on rails or crawler-treads, or

(c) a vehicle while located for use as a residence or premises;

**"hit-and-run vehicle"** means a *highway vehicle* which causes *bodily injury* to an *insured* arising out of physical contact of such vehicle with the *insured* or with a vehicle which the *insured* is *occupying* at the time of the accident, provided:

(a) there cannot be ascertained the identity of either the operator or owner of such *highway vehicle;*

(b) the *insured* or someone on his behalf shall have reported the accident within 24 hours to a police, peace or judicial officer or to the Commissioner of Motor Vehicles, and shall have filed with the company within 30 days thereafter a statement under oath that the *insured* or his legal representative has a cause or causes of action arising out of such accident for damages against a person or persons whose identity is unascertainable, and setting forth the facts in support thereof; and

(c) at the company's request, the *insured* or his legal representative makes available for inspection the vehicle which the *insured* was *occupying* at the time of the accident;

**"insured highway vehicle"** means a *highway vehicle:*

(a) described in the schedule as an *insured highway vehicle* to which the *bodily injury* liability coverage of the policy applies.

(b) while temporarily used as a substitute for an *insured highway vehicle* as described in subparagraph (a) above, when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction;

(c) while being operated by the *named* or *designated insured* or by the spouse of either if a resident of the same household;

but the term "*insured highway vehicle*" shall not include:

(i) a vehicle while used as a public or livery conveyance, unless such use is specifically declared and described in this policy;

(ii) a vehicle while being used without the permission of the owner;

(iii) under subparagraphs (b) and (c) above, a vehicle owned by the *named insured*, any *designated insured* or any resident of the same household as the *named* or *designated insured;* or

(iv) under subparagraphs (b) and (c) above, a vehicle furnished for the regular use of the *named insured* or any resident of the same household;

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

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

**"uninsured highway vehicle"** means:

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

(b) a *hit-and-run vehicle;*

but the term "*uninsured highway vehicle*" shall not include:

(i) an *insured highway vehicle,*

(ii) a *highway vehicle* which is owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law or any similar law,

(iii) a *highway vehicle* which is owned by the United States of America, Canada, a *state*, a political subdivision of such government or an agency of any of the foregoing.

## VI. ADDITIONAL CONDITIONS

### A. Premium

If during the policy period the number of *insured highway vehicles* owned by the *named insured* or spouse or the number of dealer's license plates issued to the *named insured* changes, the *named insured* shall notify the company during the policy period of any change and the premium shall be adjusted in accordance with the manuals in use by the company. If the earned premium thus computed exceeds the advance premium paid, the *named insured* shall pay the excess to the company; if less, the company shall return to the *named insured* the unearned portion paid by such *insured.*

### B. Proof of Claim; Medical Reports

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

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

### C. Assistance and Cooperation of the Insured

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

### D. Notice of Legal Action

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

### E. Other Insurance

With respect to *bodily injury* to an *insured* while *occupying* a *highway vehicle* not owned by the *named insured*, this insurance shall apply only as excess insurance over any other similar insurance available to such *insured* and applicable to such vehicle as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance. Except as provided in the foregoing paragraph, if the *insured* has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable for a greater proportion of any loss to which this coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.

### F. Arbitration

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

### G. Trust Agreement

In the event of payment to any person under this insurance:

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

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

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

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

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

H. Payment of Loss by the Company

Any amount due hereunder is payable

(a) to the *insured*, or

(b) if the *insured* be a minor to his parent or guardian, or

(c) if the *insured* be deceased to his surviving spouse, otherwise

(d) to a person authorized by law to receive such payment or to a person legally entitled to recover the damages which the payment represents;

provided, the company may at its option pay any amount due hereunder in accordance with division (d) hereof.

# Section D—Automobile Physical Damage Insurance (Non-Fleet)

## I. COVERAGE AGREEMENTS

1. The company will pay for *loss* to *covered automobiles* under Coverage:

E. COMPREHENSIVE —from any cause except *collision;* but, for the purpose of this coverage, breakage of glass and *loss* caused by missiles, falling objects, fire, theft or larceny, windstorm, hail, earthquake, explosion, riot or civil commotion, malicious mischief or vandalism, water, flood, or colliding with a bird or animal, shall not be deemed *loss* caused by *collision;*

F. COLLISION —caused by *collision;*

G. FIRE, LIGHTNING OR TRANSPORTATION —caused by
(a) fire or lightning,
(b) smoke or smudge due to a sudden, unusual and faulty operation of any fixed heating equipment serving the premises in which the *covered automobile* is located, or
(c) the stranding, sinking, burning, collision or derailment of any conveyance in or upon which the *covered automobile* is being transported;

H. THEFT —caused by theft or larceny;

I. COMBINED ADDITIONAL —caused by
(a) windstorm, hail, earthquake or explosion,
(b) riot or civil commotion,
(c) the forced landing or falling of any aircraft or its parts or equipment,
(d) malicious mischief or vandalism,
(e) flood or rising waters, or
(f) external discharge or leakage of water;

provided that, with respect to each *covered automobile*,

(i) under the Comprehensive coverage (except as to *loss* from any of the causes described in the Fire, Lightning or Transportation coverage) and under the Collision coverage, such payment shall be only for the amount of each *loss* in excess of the deductible amount, if any, stated in the declarations as applicable thereto;

(ii) under the Combined Additional coverage, $25 shall be deducted from the amount of each *loss* caused by malicious mischief or vandalism.

2. The company will pay, under:

J. TOWING COVERAGE—for towing and labor costs necessitated by the disablement of *covered automobiles*, provided the labor is performed at the place of disablement.

3. SUPPLEMENTARY PAYMENTS

In addition to the applicable limits of liability, the company will:

(a) with respect to such transportation insurance as is afforded herein, pay general average and salvage charges for which the *named insured* becomes legally liable;

(b) reimburse the *named insured*, in the event of a theft covered by this insurance of an entire *covered automobile* of the *private passenger type* (not used as a public or livery conveyance and not, at time of theft, being held for sale by an automobile dealer), for expense incurred for the rental of a substitute for such *covered automobile* during the period commencing 48 hours after such theft has been reported to the company and the police and terminating, regardless of expiration of the policy period, when such *covered automobile* is returned to use or the company pays for the *loss;* but, as to any one such theft, such reimbursement shall not exceed $10 for any one day nor $300 total.

4. Such insurance as is afforded under each coverage applies separately to each *covered automobile*, and a land motor vehicle and one or more trailers or semitrailers attached thereto shall be held to be separate *covered automobiles* as respects limits of liability and any deductible provisions applicable thereto.

Exclusions

This insurance does not apply:

(a) to any *covered automobile* while used as a public or livery conveyance, unless such use is specifically declared and described in the declarations;

(b) to damage which is due and confined to:
(i) wear and tear, or
(ii) freezing, or
(iii) mechanical or electrical breakdown or failure,
unless such damage is the result of other *loss* covered by this insurance;

(c) to tires, unless
(i) *loss* be coincident with and from the same cause as other *loss* covered by this insurance; or
(ii) damaged by fire, by malicious mischief or vandalism, or stolen and, as to the *covered automobile*, *loss* caused by such damage or theft is covered by this insurance;

(d) to *loss* due to
(i) war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing;
(ii) radioactive contamination;

(e) to *loss* to
(i) any device or instrument designed for the recording, reproduction, or recording and reproduction of sound unless such device or instrument is permanently installed in the *covered automobile;*
(ii) any tape, wire, record disc or other medium for use with any device or instrument designed for the recording, reproduction, or recording and reproduction of sound;

(f) to *loss* to a *camper body* designed for use with a *covered automobile* and not designated in the declarations and for which no premium has been charged if such *camper body* was owned at the inception of the policy period or the inception of any renewal or extension period thereof;

(g) under the Comprehensive and Theft coverages, to loss or damage due to conversion, embezzlement or secretion by any person in possession of a *covered automobile* under a bailment lease, conditional sale, purchase agreement, mortgage or other encumbrance;

(h) under the Collision coverage, to breakage of glass if insurance with respect to such breakage is otherwise afforded herein;

(i) under the Windstorm, Hail, Earthquake or Explosion and Combined Additional coverages, to *loss* resulting from rain, snow or sleet, whether or not wind-driven.

## II. LIMIT OF LIABILITY

The limit of the company's liability for *loss* to any one *covered automobile* shall not exceed the least of the following amounts:

(a) the actual cash value of such *covered automobile*, or if the *loss* is to a part thereof the actual cash value of such part; at time of *loss;* or

(b) what it would then cost to repair or replace such *covered automobile* or part thereof with other of like kind and quality, with deduction for depreciation; or

(c) the limit of liability stated in the declarations applicable to each *covered automobile* under the coverage afforded for the *loss* to such *covered automobile*, provided that if such limit of liability is expressed as a stated amount it shall, with respect to a *covered automobile* newly acquired during the policy period and not described in the declarations, be deemed as having been replaced by "actual cash value".

## III. POLICY PERIOD; TERRITORY; PURPOSES OF USE

This insurance applies only to *loss* which occurs during the policy period, while the *covered automobile* is within the United States of America, its territories or possessions, or Canada, or is being transported between ports thereof and, if a *covered automobile* described in the declarations, is maintained and used for the purposes stated therein as applicable thereto.

## IV. DEFINITIONS

When used in reference to this insurance (including endorsements forming a part of the policy):

**"camper body"** means a body designed to be mounted upon a *covered automobile* and equipped as sleeping or living quarters;

**"collision"** means (i) collision of a *covered automobile* with another object or with a vehicle to which it is attached, or (ii) upset of such *covered automobile;*

**"covered automobile"** means a land motor vehicle, trailer or semitrailer, including its equipment and other equipment permanently attached thereto (but not including robes, wearing apparel or personal effects), which is either

(a) designated in the declarations, by description, as a *covered automobile* to which this insurance applies and is owned by the *named insured;* or

(b) if not so designated, such vehicle is newly acquired by the *named insured* during the policy period provided, however, that:

(i) it replaces a described *covered automobile*, or as of the date of its delivery this insurance applies to all *covered automobiles*, and

(ii) the *named insured* notifies the company within 30 days following such delivery date;

but *"covered automobile"* does not include a vehicle owned or registered in the name of any individual partner or executive officer of the *named insured*, unless specifically stated otherwise by endorsement forming a part of the policy;

**"loss"** means direct and accidental loss or damage;

**"named insured"** means the person or organization named in Item 1 of the declarations of this policy;

**"private passenger type"** means a 4-wheel land motor vehicle of the passenger or station wagon type;

as to *"purposes of use"*:

**"commercial"** means use principally in the business occupation of the *named insured*, as stated in the declarations, including occasional use for personal, pleasure, family and other business purposes;

**"pleasure and business"** means personal, pleasure, family and business use.

## V. CONDITIONS

None of the Conditions of the policy shall apply to this insurance except "Premium", "Subrogation", "Changes", "Assignment", "Cancellation", and "Declarations". This insurance shall also be subject to the following additional Conditions:

### 1. Named Insured's Duties in Event of Loss

In the event of *loss* the *named insured* shall:

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

(b) give notice thereof as soon as practicable to the company or any of its authorized agents and also, in the event of theft or larceny, to the police;

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

(d) cooperate with the company and, upon the company's request, shall assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the *named insured* because of *loss* with respect to which this insurance applies; and shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses;

but the *named insured* shall not, except at his own cost, voluntarily make any payment, assume any obligation, offer or pay any reward for recovery of stolen property or incur any expense other than as specifically provided in this insurance.

### 2. Payment for Loss

With respect to any *loss* covered by this insurance, the company may pay for said *loss* in money, or may:

(a) repair or replace the damaged or stolen property, or

(b) return at its expense any stolen property to the *named insured*, with payment for any resultant damage thereto, at any time before the *loss* is so paid or the property is so replaced, or

(c) take all or any part of the damaged or stolen property at the agreed or appraised value,

but there shall be no abandonment to the company.

### 3. Appraisal

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

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

### 4. Action Against Company

No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this insurance nor until 30 days after proof of *loss* is filed and the amount of *loss* is determined as provided in this insurance.

### 5. Other Insurance

If the *named insured* has other insurance against a *loss* covered by this insurance, the company shall not be liable under this insurance for a greater proportion of such *loss* than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such *loss;* provided, however, with respect to any *covered automobile* newly acquired during the policy period and not described in the declarations, this insurance shall not apply to any *loss* against which the *named insured* has other valid and collectible insurance.

### 6. No Benefit to Bailee

None of the provisions of this insurance shall inure directly or indirectly to the benefit of any carrier or other bailee for hire.

# Conditions

### 1. Premium

All premiums for this policy shall be computed in accordance with the company's rules, rates, rating plans, premiums and minimum premiums applicable to the insurance afforded herein.

Premium designated in this policy as "advance premium" is a deposit premium only which shall be credited to the amount of the earned premium due at the end of the policy period. At the close of each period (or part thereof terminating with the end of the policy period) designated in the declarations as the audit period the earned premium shall be computed for such period and, upon notice thereof to the *named insured*, shall become due and payable. If the total earned premium for the policy period is less than the premium previously paid, the company shall return to the *named insured* the unearned portion paid by the *named insured*.

The *named insured* shall maintain records of such information as is necessary for premium computation, and shall send copies of such records to the company at the end of the policy period and at such times during the policy period as the company may direct.

2. Inspection and Audit

The company shall be permitted but not obligated to inspect the *named insured's* property and operations at any time. Neither the company's right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking, on behalf of or for the benefit of the *named insured* or others, to determine or warrant that such property or operations are safe or healthful, or are in compliance with any law, rule or regulation.

The company may examine and audit the *named insured's* books and records at any time during the policy period and extensions thereof and within three years after the final termination of this policy, as far as they relate to the subject matter of this insurance.

3. Financial Responsibility Laws

When this policy is certified as proof of financial responsibility for the future under the provisions of any motor vehicle financial responsibility law, such insurance as is afforded by this policy for *bodily injury* liability or for *property damage* liability shall comply with the provisions of such law to the extent of the coverage and limits of liability required by such law. The *insured* agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

4. Insured's Duties in the Event of Occurrence, Claim or Suit

(a) In the event of an *occurrence*, written notice containing particulars sufficient to identify the *insured* and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the *insured* to the company or any of its authorized agents as soon as practicable.

(b) If claim is made or suit is brought against the *insured*, the *insured* shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

(c) The *insured* shall cooperate with the company and, upon the company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the *insured* because of injury or damage with respect to which insurance is afforded under this policy, and the *insured* shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The *insured* shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of accident.

5. Action Against Company

No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the *insured's* obligation to pay shall have been finally determined either by judgment against the *insured* after actual trial or by written agreement of the *insured*, the claimant and the company.

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

6. Other Insurance

The insurance afforded by this policy is primary insurance, except when stated to apply in excess of or contingent upon the absence of other insurance. When this insurance is primary and the *insured* has other insurance which is stated to be applicable to the loss on an excess or contingent basis, the amount of the company's liability under this policy shall not be reduced by the existence of such other insurance.

When both this insurance and other insurance apply to the loss on the same basis, whether primary, excess or contingent, the company shall not be liable under this policy for a greater proportion of the loss than that stated in the applicable contribution provision below:

(a) Contribution by Equal Shares If all of such other valid and collectible insurance provides for contribution by equal shares, the company shall not be liable for a greater proportion of such loss than would be payable if each insurer contributes an equal share until the share of each insurer equals the lowest applicable limit of liability under any one policy or the full amount of the loss is paid, and with respect to any amount of loss not so paid the remaining insurers then continue to contribute equal shares of the remaining amount of the loss until each such insurer has paid its limit in full or the full amount of the loss is paid;

(b) Contribution by Limits If any of such other insurance does not provide for contribution by equal shares, the company shall not be liable for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

7. Subrogation

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

8. Changes

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

9. Assignment

Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon. If, however, the *named insured* shall die, such insurance as is afforded by this policy shall apply (1) to the *named insured's* legal representative, as the *named insured*, but only while acting within the scope of his duties as such, and (2) with respect to the property of the *named insured*, to the person having proper temporary custody thereof, as *insured*, but only until the appointment and qualification of the legal representative.

10. Cancellation

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

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

11. Declarations

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

In witness whereof, the company has caused this policy to be signed by its President and Secretary at Hartford, Connecticut, and countersigned on the declarations page by a duly authorized agent of the company.

M. H. Beach
*Chairman of the Board and President*

*Secretary*

REQUEST FOR PRODUCTION OF DOCUMENTS #5

SR-22 AAMVA UNIFORM FINANCIAL RESPONSIBILITY FORM (Original)

Insured
Name: Gilbert, Tivis H. (Last, First, Middle)
Address: Haysi, Va. 24256

| Case Number | Driver's License Number | Birth Date | Social Security Number |
|---|---|---|---|
| | 223-72-5362 | M110250 | |

Current Policy Number PCMV-1718373 Effective From 10-30-75

This certification is effective from 2-27-76 and continues until cancelled or terminated in accordance with the financial responsibility laws and regulations of this State.

The insurance hereby certified is provided by an:

☒ OWNER'S POLICY: Applicable to (a) the following described vehicle(s), (b) any replacement(s) thereof by similar classification, and (c) any additionally acquired vehicles of similar classification for a period of at least 30 days from the date of acquisition.

| Model Year | Trade Name | Identification Number | |
|---|---|---|---|
| 69 | Chev | 164399Z001723 | Acc. to Dmv 2-74 |
| | | | |

☐ OPERATOR'S POLICY: Applicable to any non-owned vehicle.

Va (State) FINANCIAL RESPONSIBILITY INSURANCE CERTIFICATE

The company signatory hereto hereby certifies that it has issued to the above named insured a motor vehicle liability policy as required by the financial responsibility laws of this State, which policy is in effect on the effective date of this certificate.

Name of Insurance Company: The Travelers Ind. Co

Date 2-26-76 By Mary Francis (Signature of Authorized Representative)

R1302 (Ed. 6-71) UNIFORM PRINTING & SUPPLY DIV. IRB 3541B

SR-26 AAMVA UNIFORM FINANCIAL RESPONSIBILITY FORM (Original)

Insured
Name: GILBERT, TIVIS H. (Last, First, Middle)
Address: HAYSI, VA. 24256

| Case Number | Driver's License Number | Birth Date | Social Security Number |
|---|---|---|---|
| | 223 72 5362 | M110250 | |

Current Policy Number PCMV1718373 Effective From 10-30-75 to 10-30-76

Effective date of cancellation or termination 2-27-76 at 12:01 A.M.:

(check whichever is applicable)

XXXX ☐ Financial Responsibility Insurance Certificate — SR-22

☐ Financial Responsibility Notice for Fleets — SR-23

VA. (State) FINANCIAL RESPONSIBILITY NOTICE OF CANCELLATION OR TERMINATION

The company signatory hereto hereby gives notice that its Certificate or Notice as indicated above, heretofore filed on behalf of the named insured, is cancelled or terminated as of the effective date stated above.

TRAVELERS IND. CO. (Name of Insurance Company)

Date 2-5-76LA By Mary Francis (Signature of Authorized Representative)

R1307 (Ed. 6-71) UNIFORM PRINTING & SUPPLY DIV. IRB 3544B

SR-22 AAMVA UNIFORM FINANCIAL RESPONSIBILITY FORM (Copy)

Insured
Name GILBERT, TIVIS H
Last First Middle
Address HAYSI VA 24256

| Case Number | Driver's License Number | Birth Date | Social Security Number |
|---|---|---|---|
| | 223725362 | M11250 | |

Current Policy Number PQMV1718373 Effective From 10-30-75

This certification is effective from 3-8-76 and continues until cancelled or terminated in accordance with the financial responsibility laws and regulations of this State.

The insurance hereby certified is provided by an:

XXOWNER'S POLICY: Applicable to (a) the following described vehicle(s), (b) any replacement(s) thereof by similar classification, and (c) any additionally acquired vehicles of similar classification for a period of at least 30 days from the date of acquisition.

| Model Year | Trade Name | Identification Number | |
|---|---|---|---|
| 69 | CHEV | 164399400123 | UMV ACC 5-74 |
| EXTENDED NON OWNERS | | | |

☐ OPERATOR'S POLICY: Applicable to any non-owned vehicle.

VA. FINANCIAL RESPONSIBILITY INSURANCE CERTIFICATE
(State)

The company signatory hereto hereby certifies that it has issued to the above named insured a motor vehicle liability policy as required by the financial responsibility laws of this State, which policy is in effect on the effective date of this certificate.

Name of Insurance Company TRAVELERS IND CO

Date 9-21-76LA By May Gfrom
Signature of Authorized Representative

R1302 (Ed. 6-71) UNIFORM PRINTING & SUPPLY DIV. IRB 3541B

SR-22 AAMVA UNIFORM FINANCIAL RESPONSIBILITY FORM ORIGINAL

Insured
Name GILBERT, Tivis H.
Last First Middle
Address Haysi, Va 24256

| Case Number | Driver's License Number | Birth Date | Social Security Number |
|---|---|---|---|
| | 223 72 5362 | M-1/12750 | 223 72 5362 |

Current Policy Number 739 221 Effective From 5:30 PM 10/30/75

This certification is effective from 5:30 PM 10/30/75 and continues until cancelled or terminated in accordance with the financial responsibility laws and regulations of this State.

The insurance hereby certified is provided by an: SR 26 U/1/91 10 2475

☒ OWNER'S POLICY: Applicable to (a) the following described vehicle(s), (b) any replacement(s) thereof by similar classification, and (c) any additionally acquired vehicles of similar classification for a period of at least 30 days from the date of acquisition.

| Model Year | Trade Name | Identification Number | |
|---|---|---|---|
| 1969 | Chevrolet | 164399Y001723 | UMV-7/74 Alexandria |
| BROAD FORM COVERAGE | | | |

☒ OPERATOR'S POLICY: Applicable to any non-owned vehicle.

VIRGINIA FINANCIAL RESPONSIBILITY INSURANCE CERTIFICATE
(State)

The company signatory hereto hereby certifies that it has issued to the above named insured a motor vehicle liability policy as required by the financial responsibility laws of this State, which policy is in effect on the effective date of this certificate.

Name of Insurance Company Travelers Indemnity Company

Date November 3, 1975 By R.D. Spaulding
Signature of Authorized Representative

IRB 3541B

SR-22 AAMVA UNIFORM FINANCIAL RESPONSIBILITY FORM (Copy)

Insured
Name GILBERT (Last) TIVIS (First) H (Middle)
Address HAYSI VIRGINIA 24256

| Case Number | Driver's License Number | Birth Date | Social Security Number |
|---|---|---|---|
| | [illegible] | [illegible] | [illegible] |

Current Policy Number PCNV1718373 Effective From 10-30-75

This certification is effective from 3-8-76 and continues until cancelled or terminated in accordance with the financial responsibility laws and regulations of this State.

The insurance hereby certified is provided by an:

☐ OWNER'S POLICY: Applicable to (a) the following described vehicle(s), (b) any replacement(s) thereof by similar classification, and (c) any additionally acquired vehicles of similar classification for a period of at least 30 days from the date of acquisition.

| Model Year | Trade Name | Identification Number | |
|---|---|---|---|
| 69 | CHEV | 16439940 1723 | UMV ACC 5-74 |
| | | | |

☐ OPERATOR'S POLICY: Applicable to any non-owned vehicle.

VIRGINIA (State) FINANCIAL RESPONSIBILITY INSURANCE CERTIFICATE

The company signatory hereto hereby certifies that it has issued to the above named insured a motor vehicle liability policy as required by the financial responsibility laws of this State, which policy is in effect on the effective date of this certificate.

Name of Insurance Company TRAVELERS INDEMNITY COMPANY

Date 9-27-75 By Mary French
Signature of Authorized Representative

R1302 (Ed. 6-71) UNIFORM PRINTING & SUPPLY DIV. IRB 3541B

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SR-22 AAMVA UNIFORM FINANCIAL RESPONSIBILITY FORM (Copy)

Insured
Name GILBERT, TIVIS H (Last, First, Middle)
Address HAYSI VA 24256

| Case Number | Driver's License Number | Birth Date | Social Security Number |
|---|---|---|---|
| | 223725362 | 111250 | - |

Current Policy Number PCNV1718373 Effective From 10-30-75

This certification is effective from 3-8-76 and continues until cancelled or terminated in accordance with the financial responsibility laws and regulations of this State.

The insurance hereby certified is provided by an:

XX ☐ OWNER'S POLICY: Applicable to (a) the following described vehicle(s), (b) any replacement(s) thereof by similar classification, and (c) any additionally acquired vehicles of similar classification for a period of at least 30 days from the date of acquisition.

| Model Year | Trade Name | Identification Number | |
|---|---|---|---|
| 69 | CHEV | 16439940 01723 | UMV ACC 5-74 |
| | EXTENDED NON OWNERS | | |

☐ OPERATOR'S POLICY: Applicable to any non-owned vehicle.

VA. (State) FINANCIAL RESPONSIBILITY INSURANCE CERTIFICATE

The company signatory hereto hereby certifies that it has issued to the above named insured a motor vehicle liability policy as required by the financial responsibility laws of this State, which policy is in effect on the effective date of this certificate.

Name of Insurance Company TRAVELERS IND CO

Date 9-27-76LA By Mary French
Signature of Authorized Representative

R1302 (Ed. 6-71) UNIFORM PRINTING & SUPPLY DIV. IRB 3541B

[Filed April 7, 1978]

MOTION FOR SUMMARY JUDGMENT

The complainant, Utica Mutual Insurance Company, moves the Court for summary judgment against Travelers Indemnity Company for the relief requested in the Bill of Complaint in this cause.

* * *

UTICA MUTUAL INSURANCE COMPANY

By Counsel

[Filed April 17, 1978]

AMENDED ANSWER

Comes now the defendant, Travelers Indemnity Company, by counsel, and for answer to the Bill of Complaint filed against it by the complainant says:

I. Paragraph I is admitted.

II. Defendant specifically denies the allegations set forth in Count II of the complainant's complaint that the 1969 Chevrolet, four-door sedan was occupied by Norman Gilbert at the time of the incident. The remaining portions of paragraph II are admitted.

III. Defendant admits that it has issued the insurance policy specified in Count III of complainant's complaint in the amount named. However, defendant specifically denies that any coverage existed for Tivis Gilbert resulting from the incidents recited in complainant's complaint. The remainder of Count III is admitted.

IV. Defendant admits that it issued the insurance policy named in Count IV in the amounts named. However, defendant specifically denies that any coverage existed for Norman Gilbert under said policy for those incidents set forth in complaint's complaint. Travelers admits that the said policy contained an endorsement providing for the use of any other automobiles, but denies that any coverage was provided for non-owned vehicles. The remaining portions of Count IV are admitted.

V. The defendant believes that the facts set forth in paragraph V are correct.

VI. The defendant believes that the facts set forth in paragraph VI are correct.

VII. The defendant believes that the facts set forth in paragraph VII are correct.

VIII. Paragraph VIII is admitted.

IX. (a) Defendant admits that an action was filed by Elizabeth Gilbert in this Court naming Travelers as a defendant. However, pursuant to defendant's demurrer, which is currently under advisement before this Court, it is alleged that no where in the action filed by Elizabeth Gilbert does Elizabeth Gilbert allege that Travelers is liable since Elizabeth Gilbert has not, in fact, pleaded in the alternative.

(b) Defendant admits the allegations in paragraph (b).

X. Defendant admits the allegations contained in Count X.

XI. Defendant admits the allegations contained in paragraph XI that this declaratory judgment action is appropriate and warranted under the circumstances.

WHEREFORE, the defendant, Travelers Indemnity Company, prays that this honorable Court declare and adjudge that the insurance policies issued to the said Tivis Gilbert and Norman Gilbert by the defendant, Travelers Indemnity Company, provided no coverage for the acts of the said Tivis Gilbert and Norman Gilbert, which form the basis of this litigation, and further pray that this honorable Court dismiss the defendant, Travelers Indemnity Company as party to this action.

Respectfully submitted,

TRAVELERS INDEMNITY COMPANY

By Counsel

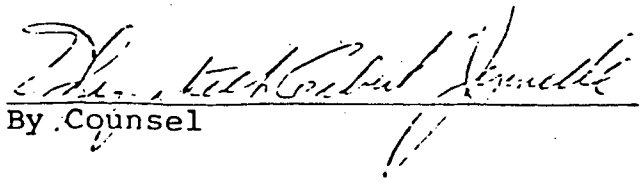
[Filed April 17, 1978]

MOTION FOR SUMMARY JUDGMENT

COMES NOW the Defendant, Elizabeth Gilbert Jennelle, formerly, Elizabeth Gilbert, and moves the Court for Summary Judgment against Utica Mutual Insurance Company, Fireman's Fund Insurance Company and American Inter-Insurance Exchange, and a final order establishing their liability to pay the judgment received by Elizabeth Gilbert on August 10, 1977.

* * *

ELIZABETH GILBERT JENNELLE



By Counsel

[Filed April 19, 1978]

MOTION FOR SUMMARY JUDGMENT

Your Defendant, Fireman's Fund Insurance Company, joins with Utica Mutual Insurance Company in moving the Court for summary judgment against Travelers Indemnity Company, and requests relief sought in the bill of complaint in this cause.

* * *

FIREMAN'S FUND INSURANCE COMPANY

By Counsel

[Filed April 26, 1978]

MOTION FOR SUMMARY JUDGMENT

The defendant, Travelers Indemnity Company, moves this Court for summary judgment against Utica Mutual Insurance Company for the relief requested in the Amended Answer filed in this cause.

TRAVELERS INDEMNITY COMPANY

By Counsel

[Filed and Entered July 6, 1978]

MEMORANDUM OPINION

RE: Utica Mutual Insurance Company
v.
Travelers Indemnity Company, et al
Circuit Court of Washington County
File No. 5142

In this cause there are three basic issues pending for decision by the Court. The Court will take up each issue separately.

I

MOTION FOR ATTORNEYS FEES AND EXPENSES FILED BY UTICA MUTUAL INSURANCE COMPANY PURSUANT TO RULES OF COURT 4:12 (4)

The Court will first look to the pending motion for award of expenses and attorneys fees filed by Utica Mutual Insurance Company on February 10, 1978. A hearing was held on February 17, 1978 on this motion as well as other motions filed by Utica Mutual Insurance Company asking that discovery be compelled of Travelers Indemnity Company based on certain discovery motions previously filed.

The original Bill of Complaint in this matter was filed on November 2, 1977. On November 16, 1977 certain discovery requests were filed by Utica including requests for production of documents, requests for admissions, and interrogatories, all directed to Travelers. Order was entered on December 7, 1977 allowing

Travelers two additional weeks to answer and respond to interrogatories. On December 13, 1977 Travelers filed its answer to the Bill of Complaint and also filed on the same day its answer to interrogatories, answer to requests for admissions, and answer to request for production of documents. On December 15, 1977 counsel for Utica sent a letter to Travelers asking for more responsive answers. Counsel for Travelers indicated by letter of December 19, 1977 that "we do not at this point have the necessary information in order to fully answer your request for production of documents, requests for admissions and interrogatories. However, I am today contacting Travelers in hope that we may be able to obtain this information at the earliest possible time. As soon as we receive this information, I will certainly forward it to you and I trust that this will be in the near future." Counsel for Travelers next sent a letter dated December 28, 1977 to counsel for Utica indicating that certain information had already been sent to counsel for Utica, the implication being that certain documents, apparently requested in the request for production of documents, were already in the possession of counsel for Utica and filing of those documents thus was unnecessary. On December 30, 1977 counsel for Utica replied to Travelers' letter of December 28 indicating that "the principle purpose of the request for production of documents, requests for admissions, interrogatories, etc., is not to obtain

information for my own benefit but to get the pertinent facts into the court file and before the Court. It is my belief that there should be very few genuine issues of fact in the declaratory judgement suit and perhaps no issues of fact which would bear on the question of coverage under the Travelers' policies." The tenor of the letter of December 30, 1977 from Utica to Travelers was to again ask Travelers to respond to the discovery requests then pending.

Nothing further happened until February 9 at which time Utica mailed to the Court for filing certain motions asking that discovery be compelled of Travelers. These motions were filed with the Court on February 10, 1978. Included in those motions was one asking for an award of expenses and attorneys fees pursuant to Rule 4:12 (4) of the Rules of Court. On or about February 13, 1978, counsel for Travelers apparently telephoned counsel for Utica and advised that Travelers was prepared to file new responses to the discovery pleadings and indicated their intention to file those responses within the week. At that time they advised that a hearing which was then scheduled for February 17, 1978 on the discovery motions then pending would not be necessary. At that time, apparently, counsel for Utica advised counsel for Travelers that there may be other matters to be taken up on February 17 and the hearing was not cancelled. Counsel for Travelers hand-delivered its new responses

to the Court and to counsel for Utica at the hearing on February 17, 1978.

The matters of discovery have now been completed but there remains the issue of whether or not Utica is entitled to attorneys fees and expenses by reason of having to compel discovery of Travelers. Utica primarily relies on the chronology of events for the substance of its request for attorneys fees and expenses.

There seems to be little question that there was considerable delay by Travelers in providing the information requested by Utica and that such information was critical to the law suit. Counsel for Travelers states in its letter memorandum of February 28, 1978 as follows:

> In light of the importance of the pleadings and responses of the discovery responses, it became incumbent upon Travelers in December, 1977, to fully investigate its files and the files of other agencies, such as the Division of Motor Vehicles, in order to fully respond to complainant's Bill of Complaint and discovery pleadings. Due to the crucial nature and potential legal effect of all documents relating in this case, all diligence was necessary in order to identify and locate these documents in their entirety prior to the filing of any responses on behalf of Travelers.

Travelers goes on to say in its letter of February 28 that there was some difficulty in locating certain records. The letter states as follows:

> It is unclear as to precisely why Travelers had

> been unable to locate its own records. Requests for these records must be channeled through Travelers' Roanoke office and then must be forwarded to their Richmond office where these records are stored. Even prior to the time these requests were made, however, as Mr. Eskridge pointed out to the Court on February 17, Travelers did not have a comprehensive file on SR 22's filed, and these had to be obtained by Mr. Eskridge from the Division of Motor Vehicles.

The letter goes on to say,:

> The nature of the documents was so crucial to the central issues of this case that it was necessary to affirm the completeness of this information, rather than filing it in a piece mill fashion, without some verification. It was during this period that Utica filed its motions to compel discovery.

As counsel for Utica points out in its letter of February 28, 1978, the new responses filed on February 17 still did not in all respects comply with the discovery requests. Some of the responses were hedged with qualifying language which left open the question as to whether or not there was any additional information Travelers might provide as might relate to that specific request. There was a request for the Travelers underwriting file and this request was objected to by Travelers and the Court eventually ruled on that matter. The delay in providing information in the Travelers underwriting files is not a consideration upon the issue of whether or not attorneys fees and expenses will be awarded since such request was properly objected to.

It appears to the Court that there was undue delay by Travelers in providing the information to Utica that was requested back in December of 1977. There is no question that some of the information requested was very crucial to what will ultimately be the disposition of the declaratory judgement suits. However, what was requested were simply documents, answers to certain interrogatories, and requests for certain admissions. The fact that these particular facts and documents were crucial to the case should not, by virtue of that fact alone, cause delay in providing such documents and facts to the Court. Those documents and facts are what they are, and nothing can change whether they are true or not true or how they might affect the law suit. Thus, the critical nature of the documents and the facts do not in the Court's mind justify a delay in filing same. Moreover, once the motion to compel discovery was filed, Travelers apparently was able to gather together rather quickly the information it needed to substantially comply with the various discovery requests. This fact alone would indicate some unreasonable delay in providing the information to Utica as requested. In fact, it was not until Travelers sent a letter to the Court dated May 10, 1978 that the record was finally conclusive as to whether or not all of the information requested was in fact supplied. Apparently on or about May 5, 1978 it was concluded

that the Travelers' files contained no other information pertinent to the law suit. It is not clear to the Court why a thorough search could not have been made in December of 1977 and the same reported to the Court at that time.

Therefore, the Court is of the opinion that the motion for attorneys fees and expenses filed by Utica as a result of having to compel discovery of Travelers is well taken and should be granted. The Court will request counsel for Utica to prepare a billing for its expenses and reasonable attorneys fees for approval by the Court.

II

MOTION FOR SUMMARY JUDGEMENT FILED BY
ELIZABETH GILBERT JENNELLE

Even though this issue (II) may be rendered somewhat moot by virtue of the rulings of the Court in part III of this opinion, nevertheless, it may have application to the cases pending arising out of the same incident.

The incident which gives rise to the issue involved in this part II occurred on December 6, 1975 on U. S. Route 19 in Washington County, Virginia. The plaintiff, Elizabeth Gilbert, was a passenger in an automobile being driven by one Shirley Gray, which automobile was forced off the highway by the driver of another vehicle, a brown chevrolet owned by one Tivis Gilbert. Elizabeth Gilbert and others in the automobile

suffered injuries as a result of the accident. The passengers in the Gray vehicle brought suit to recover damages for their personal injuries. Elizabeth Gilbert's suit was tried first by the Court with the defendants being Tivis Gilbert, Gorman Gilbert, Norman Gilbert, Ronald Bailey, Doug Wright and Enos Blankenship. She alleged that the defendants entered into a conspiracy to stop the Gray vehicle and remove therefrom the infant child of Elizabeth Gilbert, which child was a passenger in the Gray automobile at the time. Trial was held on July 5 and 6, 1977 in the Circuit Court of Washington County with Norman Gilbert being the only defendant who both answered and appeared. He was represented and defended at trial by counsel for Travelers Indemnity. The case was tried and submitted to the jury on agency and conspiracy principles, the evidence showing that all the defendants had agreed to act each as the agent of the other and that the Gray vehicle was forced from the highway in furtherance of the agreement or conspiracy. The testimony was in conflict as to who was actually driving the Tivis Gilbert automobile at the time the Gray vehicle was forced from the road. There was also some conflict in the evidence as to the whereabouts of Norman Gilbert at the time of the collision, that is, whether or not Norman Gilbert was in the automobile or not at the time the collision occurred.

A verdict was returned in favor of Elizabeth Gilbert for

compensatory damages in the amount of $30,000.00. A verdict of punitive damages was also returned as follows:

| | | |
|---|---|---|
| Tivis Gilbert | - $15,000.00 | punitive damages |
| Gorman Gilbert | - $ 2,000.00 | punitive damages |
| Norman Gilbert | - $ 2,000.00 | punitive damages |
| Ronald Bailey | - $ 2,000.00 | punitive damages |
| Doug Wright | - $ 2,000.00 | punitive damages |
| Enos Blankenship | -$ 2,000.00 | punitive damages |

The total verdict was $55,000.00.

Travelers Indemnity Company had a policy of liability insurance on the brown chevrolet automobile owned by Tivis Gilbert and used in the conspiracy. It has been admitted that this policy was in effect on the day of the collision, and that the limits of the policy were $25,000.00 for each person and $50,000.00 for each incident. Travelers has also admitted that prior to the accident this policy had been certified to the Virginia Division of Motor Vehicles as proof of the financial responsibility of Tivis Gilbert for the future. Such certification was evidenced by the filing of a form SR-22. Travelers also had a policy of liability insurance with Norman Gilbert. This policy had also been certified to the Virginia Division of Motor Vehicles as proof of financial responsiblity for the future by the filing of a form SR-22. This policy and the filing of the SR-22 has been admitted by Travelers through discovery procedures. The Travelers policy with Tivis Gilbert was an "owner's policy". It is in dispute as to whether Norman Gilbert's policy with Travelers was an "operator's policy" or "owner's policy". It

has been admitted, however, that the Travelers policy with Norman Gilbert contained a non-owned vehicle rider.

Utica Mutual Insurance Company, Fireman's Fund Insurance Company, and American Inter-Insurance Exchange all had policies with different individuals which served as uninsured motorist coverage to the injured parties should the Tivis Gilbert vehicle be found to have been an uninsured motor vehicle.

Other facts which are not in dispute are that Elizabeth Gilbert, in her suit against Tivis Gilbert, et als, served a copy of the motion for judgement on Utica Mutual Insurance Company, Fireman's Fund Insurance Company and American Inter-Insurance Exchange, the uninsured motorist carriers involved. Furthermore, all uninsured motorist carriers filed answers and were represented by counsel in the Elizabeth Gilbert suit. Furthermore, Travelers Indemnity Company, by letter dated September 30, 1976, expressly denied coverage under the Tivis Gilbert policy for various alleged policy defenses, to-wit: "lack of notice, failure to cooperate, failure to forward suit papers, commission of intentional act and possibly further breaches of the policy conditions." Further, Travelers Indemnity Company, expressly denied coverage under the Norman Gilbert policy.

The plaintiff, Elizabeth Gilbert, filed her motion for Summary Judgement asking that the uninsured motorist carrier pay the judgement obtained and that any coverage question

between the liability carrier and the uninsured motorist carrier is a separate matter between the insurance companies and should not be a cause of delay to the plaintiff in receiving her payment. Utica, the uninsured motorist carrier, argues that, because the judgement to be paid exceeds the coverage provided by the liability carrier, all issues in the matter need to be resolved to avoid potentially inequitable results.

The issues raised by the briefs appear as follows:

(1) Can the plaintiff, Elizabeth Gilbert, collect on her judgement from the uninsured motorist insurance carriers, even if the primary carrier's (Travelers) denial of coverage is found to be without merit?

(2) If the uninsured motorist carrier is required to pay a judgement in excess of the liability carrier's coverage, is the liability carrier liable to the uninsured motorist carrier for such excess, when the liability carrier has improperly denied coverage?

The first question seems clear in Virginia law and is not significantly challenged by the uninsured motorist carrier in this action except as it mingles with question (2). The applicable statutes are §38.1-381 (b) and (c). The read as follows:

> (b) Except as provided in paragraph (j) of this section, no such policy or contract relating to ownership, maintenance or use

> of a motor vehicle shall be so issued or delivered unless it contains an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within the limits which shall be no less than the requirements of §46.1-1 (8)...
>
> (c) As used in this section...the term uninsured motor vehicle means a motor vehicle as to which there is (i) bodily injury liability insurance and property damage liability insurance both in the amount so specified by §46.1-1 (8), as amended from time to time, or (ii) there is such insurance but the insurance company writing the same denies coverage thereunder for any reason whatsoever including failure or refusal of the uninsured to cooperate with such company...
>
> (e 1) Any insured intending to rely on the coverage required by paragraph (b) of this section shall, if any action is instituted against the owner or operator of an uninsured motor vehicle, serve a copy of the process upon the insurance company issuing the policy in the manner prescribed by law, as though such insurance company were a party defendant; such company shall thereafter have the right to file pleadings and take other action allowable by law in the name of the owner or operator of the uninsured motor vehicle or in its own name;...
>
> (f) Any insurer paying a claim under the endorsement or provisions required by paragraph (b) of this section shall be subrogated to the rights of the insured to whom such claim was paid against the person causing such injury, death or damage and such person's insurer notwithstanding that it may deny coverage for any reason, to the extent that payment was made...

Based on the applicable statutes, set out above, together

with the case law [see for example Midwest Mutual Insurance Company v. The Aetna Casualty Surety Company, 216 Va. 926 (1976)], three things must come together in order to bring into effect uninsured motorist vehicle coverage, namely, the defendant's vehicle must be an uninsured motor vehicle, copies of the motion for judgement must have been served on each uninsured motorist insurance carrier, and the plaintiff's claim must be reduced to judgement against the defendant. All three of these elements have been met in the present case. The facts, which are basically undisputed, show that Travelers Indemnity Company, the defendant's liability insurance carrier denied coverage and, in fact, continues to deny coverage to the defendant. The reason for denying coverage is immaterial as can be clearly seen by a reading of §38.1-381 (c). The undisputed facts also show that copies of the motion for judgement have been served on the uninsured motorist insurance carriers. Thirdly, the plaintiff's claim has been reduced to a judgement by virtue of a final order entered in this case on August 10, 1977. There seems little question, therefore, and in fact, it is almost conceded by Utica's brief, that once these three elements come together the coverage of the motorist carrier is applicable. Whether or not the liability insurance carrier properly denied coverage is immaterial insofar as the payment of judgement to the plaintiff by the uninsured motorist by virtue of the fact that the uninsured motorist carrier is

subrogated to the rights of the insured to whom the claim was paid against the person causing the injury as well as such person's insurer.

Having concluded that the uninsured motorist carrier is liable on its coverage, it must next be determined if it must pay the entire amount of the judgement or only the limit of the liability carrier's coverage until all issues are resolved.

As stated above, there is little question in the Court's mind that once the three criteria for invoking uninsured motorist protection have been met, then the full force and effect of the contractual and statutory provision of the uninsured motorist coverage come into play and must be met. In invoking the uninsured motorist coverage a separate contract emerges between the uninsured motorist carrier and the insured (the plaintiff in this case). To that extent, Utica, in this case, does not stand in the shoes of the uninsured motorist. Its uninsured motorist policy does not insure the defendant against liability, but rather insures Mrs. Gilbert and others protected under her policy against inadequate compensation. Utica's liability to its insured is contractual, even if it is based upon the happening of a contingent event to bring it into effect. Once that event happens (that is a defendant is declared an uninsured motorist), then the contract in all its force and effect is

applicable. Therefore, in requiring payment of the judgement in this case the Court does not look to the provisions and terms of the liability insurance contract (Travelers' policy), but rather looks to the terms and provisions of the uninsured motorist coverage. Therefore, the uninsured motorist carrier in this case is required to pay the $55,000.00 judgement to the plaintiff if it is within its coverage limits.

Procedurally, Utica registers no concern with this procedure where, as is the usual case, the judgement obtained is within the limits of both the liability insurance carrier's policy and the uninsured motorist coverage.

Thus, we are brought to the crucial issue set out in (2) above, and one which has not been decided by the Courts before, namely, if the uninsured motorist carrier is required to pay the judgement and it is subsequently determined that coverage was improperly denied by the liability insurance carrier, is the liability insurance carrier liable to the uninsured motorist carrier for the full amount of the judgement obtained and paid even when such judgement is in excess of the limits of the liability insurance carrier's coverage? The statute speaking to this circumstance is not vague, uncertain or ambiguous. It is clear. It says that subrogation shall be allowed to the extent that payment was made. In this case payment would be made in the amount of $55,000.00 and subrogation would be

allowed in that amount. Though it is unlikely, as counsel for Utica points out, that the General Assembly contemplated the factual situation in this suit when writing the statute, nevertheless, the statute speaks for itself and, in this Court's opinion, clearly covers this issue. It is the function of the courts to interpret and apply the acts of the legislature as written and not to rewrite them or make corrections in them on the basis of some assumption of error. See Carter v. Nelms, 204 Va. 338 (1963). In Winston v. The City of Richmond, 196 Va. 403 (1954), the Supreme Court said that "when the legislature has spoken plainly it is not the function of the courts to change or amend its enactments under the guise of construing them. The province of the construction lies wholly within the domain of ambiguity, and that which is plain needs no interpretation. The question here is not what the legislature intended to enact but what is the meaning of that which it did enact. We must determine the legislative intent by what the statute says and not by what we think it should have said." Since the language of the statute is clear and unambiguous there is no reason to consider the intent of the legislature or the wisdom of the law or whether or not the section dealing with subrogation is unfair or unwise. If the practical result of what the General Assembly has enacted is unfair or unjust then such correction should be made by amendment of the statute in

an act of the General Assembly. This Court can go no further than what the law allows. See generally General Accident v. Aetna, 208 Va. 467 (1868).

Therefore, the Court is of the opinion that the uninsured motorist carrier should pay the judgement of $55,000.00 and that under §38.1-381 (f) the uninsured motorist carrier would be entitled to be subrogated against the liability insurance carrier in the full amount of the payment made to the plaintiff in this case, notwithstanding that that amount is in excess of the coverage limits in the liability insurance carriers' policy.

III

MOTIONS FOR SUMMARY JUDGEMENT FILED BY TRAVELERS INDEMNITY COMPANY AND UTICA MUTUAL INSURANCE COMPANY

The facts pertinent to this portion of the opinion are the same as set out in part II above.

This portion of the opinion deals with the substantive coverage questions raised by the motions for summary judgement filed by the insurance companies herein. There are two policies to be considered and they will be discussed separately.

(a) COVERAGE UNDER THE TIVIS GILBERT POLICY

The issue here is whether the incident which occurred constituted an "accident" within the meaning of the Virginia Motor Vehicle Safety Responsibility Act. To frame the issue in different language, was it the intent of the General Assembly

to include intentional torts within the coverage of the Virginia Motor Vehicle Safety Responsibility Act.

It appears agreed that the Tivis Gilbert policy was an "owner's policy" within the meaning of the statute, which means that the statute grants coverage for the insured's operation of a designated owned vehicle, but does not cover the insured's use of "any motor vehicle not owned by him." The facts are also clear that the injuries suffered by Elizabeth Gilbert were the result of intentional and willful acts of the defendants. Moreover, it is agreed that the policy of Tivis Gilbert was certified by the Department of Motor Vehicles and was in effect at the time of the accident.

This leaves for determination whether or not an intentional tort is within the statutory coverage of the Virginia Motor Vehicle Safety Responsibility Act, popularly called the Financial Responsibility Act. The Court is of the opinion that such coverage is not available.

As has been pointed out in the briefs, the difference between a state having a Financial Responsibility Act and one having compulsory insurance law should first be noted. In a compulsory insurance jurisdiction all motorists are required to have some form of insurance specified by the statute prior to obtaining the privilege to operate a motor vehicle within that jurisdiction. Thus, all motorists are subject to the

same statute and afforded the same protection. In a financial responsibility jurisdiction, however, and under Virginia law particularly, a driver is not required to purchase automobile liability insurance prior to operating a motor vehicle on the highways of Virginia unless that driver has committed some irresponsible act in his use of a motor vehicle which by the terms of the Financial Responsibility Act would require the Commissioner of the Division of Motor Vehicles to obtain proof of the financial responsibility in the future before allowing that person to operate a motor vehicle on the highways of Virginia. Thus, the compulsory nature of the Financial Responsibility Act applies only to those few people who have shown themselves to be irresponsible in the operation of a motor vehicle in Virginia. Every other driver in Virginia is free to decide for himself whether or not to purchase automobile liability insurance for his protection. Therefore, not being a compulsory insurance state, see Reliance Insurance Companies v. Darden, 217 Va. 694 (1977), it is possible for a driver in Virginia to collide with another driver who does not have insurance coverage. To correct the injustice that may arise from such a situation (that is, an innocent victim not being able to recover for injuries caused by a negligent non-insured driver), Virginia has pioneered the concept of uninsured motorist coverage. Id., at 696.

Against this background the Court addresses itself to the issue of whether an intentional tort is covered under the statutory skeem of financial responsibility. The Virginia Supreme Court has not spoken to this issue but the Supreme Court of Oregon has addressed it in a recent opinion. In the case of Snyder v. Nelson, 278 Or. 409, 564 P 2nd 681 (1977), this precise issue was addressed. Nelson intentionally rammed Snyder's vehicle and ran it off the road. The insurance policy issued to Nelson was issued under the Oregon Financial Responsibility Law. It was contended that the Financial Responsibility Law extended coverage in the policy to apply to intentional torts. The Supreme Court of Oregon rejected this contention stating as follows:

> The thrust of the law apparently is to make certain an insured has coverage of normal scope which cannot be voided subsequent to an accident by the insured's own statements or lack of cooperation. It is, therefore, our conclusion that the Financial Responsibility Law was not intended to require coverage for intentionally inflicted personal injuries or property damages.

Under a voluntary policy issued in Virginia (that is, one not issued pursuant to the Financial Responsibility Law), it seems evident that intentional acts are not covered as against public policy. See Farm Bureau Mutual Automobile Insurance Co. v. Hammer, 177 F. 2d 793 (4th Cir. 1949). If, therefore, it was the intent of the legislature, and this Court feels that it

was, to require certain drivers to show evidence of financial responsibility so that potential innocent victims would be protected in the same manner as if they encountered a driver with voluntary coverage, then it would be inconsistent to hold that the Financial Responsibility Law requires coverage for intentional torts. To hold otherwise would create two classes of coverage, one a "super coverage" for those drivers who are, in fact, irresponsible and then a lesser coverage for those drivers who have, in fact, demonstrated no such irresponsibility. Such a result seems illogical to this Court.

It is true as counsel for Utica points out that as a general rule the compulsory insurance jurisdictions have held that intentional torts are within the statutory coverage; however, in a compulsory insurance state all drivers are subject to that determination so that there is no difference in the quality of coverage between two classes of drivers.

However, the Court feels there is a stronger reason, based on statutory policy, why the uninsured motorist carrier should bear the coverage burden in this case. There is little question that equity requires a statutory scheme by which coverage should be allowed to this plaintiff even though injuries were sustained as a result of wrongful acts. In some jurisdictions, North Carolina and Massachusetts, for example, that result is accomplished by the concept of compulsory insurance, whereas in

Virginia, this Court believes, that that result is intended to be accomplished by the concept of Financial Responsibility Laws plus the concept of uninsured motorist coverage. This combination, in theory at least, tends to accomplish the same purpose as compulsory insurance does in other jurisdictions.

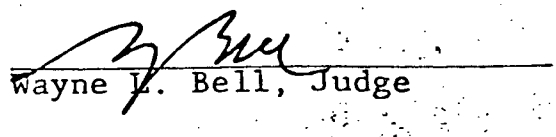
Therefore, the Court is of the opinion that intentional torts are not within the statutory coverage of the Financial Responsibility Law and that such loss as was adjudicated in the instant case was meant under the insurance concept developed by the General Assembly of Virginia to be born by the uninsured motorist carriers.

(b) COVERAGE UNDER THE NORMAN GILBERT POLICY

Norman Gilbert, one of the defendants, also had a policy certified by the Commissioner of the Department of Motor Vehicles. There is some question as to whether that policy was an owner's policy or an operator's policy. In view of the fact that the Court has determined that a wrongful act would not be covered under the policy in any event, the other issues surrounding the Norman Gilbert policy are now moot.

Counsel for Travelers is requested to prepare a draft decree for endorsement by all counsel of record.

THIS 6th DAY OF JULY, 1978.



Wayne L. Bell, Judge

[Filed November 6, 1978]

November 1, 1978

Honorable Wayne L. Bell, Judge
Washington County Circuit Court
Abingdon, Virginia 24210

Re: Utica Mutual Insurance Company v.
Travelers Indemnity Company, et al

Dear Judge Bell:

We acknowledge receipt of Bob Ingram's letter to me of October 12th, a copy of which was sent to the Court. Enclosed is a copy of my letter of this date to Bob partially explaining the situation and partially apologizing for the delay.

Resolved and unresolved questions. The prayer for relief in the Complaint in this case contains six paragraphs. Paragraph 5 contained four subparagraphs, (a), (b), (c) and (d). Subparagraph (d) in turn was subdivided into six subsidiary questions, (i) through (vi). Some of these issues have been rendered academic or moot by subsequent developments or by the Court's opinion, but there are two unresolved questions for decision.

Paragraph 1 of the Complaint, requesting the appointment of a guardian ad litem, etc., has been complied with.

Paragraph 2 of the Complaint, requesting the stay of further prosecution of the action styled Elizabeth Gilbert v. Fireman's Fund Insurance Company, et al, is not the subject of any present controversy.

Paragraphs 3 and 4, requesting the stay of further prosecution of the Shirley Gray, Elizabeth Ann Gilbert and Nelson Jennelle suits, have been rendered moot by the settlement of those suits by Fireman's Fund Insurance Company.

Paragraphs 5 (A), (B) and (C) have been resolved adversely to the uninsured motorist carriers by the Court's opinion.

Paragraph 5(D)(i) of the Complaint is now moot in that Fireman's Fund concedes that it has the primary uninsured motorist coverage, and has settled the Shirley Gray, Nelson Jennelle and Elizabeth Ann Gilbert cases on the basis of that concession.

Paragraph 5(D)(ii) has not been adjudicated, but Utica now concedes that Elizabeth Gray Gilbert was a resident of the household of Shirley Gray at the time of the collision.

Paragraphs 5(D)(iii), and (iv) have been rendered moot by the settlement of the Elizabeth Ann Gilbert and Nelson Jennelle cases by Fireman's Fund.

This leaves the issues raised by Paragraphs 5(D)(v) and (vi) still undecided and not mooted by the Court's opinion or subsequent developments. In fact, the Court's opinion as to the applicability of the Travelers policies brings those questions to the fore.

Validity of service of process. Paragraph 5(D)(v) asks the Court "to determine and adjudicate that the judgment in the action in this court styled Elizabeth Gilbert v. Gorman Gilbert, et al is void as against Doug Wright and Enos Blankenship for lack of effective service of process, and that Utica, Fireman's Fund and AIE have no liability for such judgment as to said defendants."

The Court file in Elizabeth Gilbert v. Gorman Gilbert contains an Affidavit filed by Elizabeth Gilbert to the effect that Enos Blankenship and Doug Wright could not be located; that due diligence had been used to ascertain in what county or corporation those defendants resided, but without effect; and that "she does not know and is unable to ascertain any post office address" for said defendants. A copy of that Affidavit is attached for ready reference.

Process directed at said defendants was served on the Commissioner of Motor Vehicles. Attached for ready reference are copies of the Commissioner's letter of September 30, 1976 to the Clerk of this Court, along with his Affidavit of Compliance and a copy of the Notice. The letter to the Clerk and the Affidavit of Compliance both

indicate that no notice was mailed to defendants Doug Wright and Enos Blankenship since their addresses were unknown. Also attached is a copy of Mr. Harrigan's letter of September 27, 1976 to the Chief Deputy Sheriff of the City of Richmond. There was no other service of process on Enos Blankenship or Doug Wright, and neither of them made any voluntary appearance in the case.

The Affidavit filed by Elizabeth Gilbert states that "service of process is authorized pursuant to Section 8-67.1 et seq. and 8-71 of the 1950 Code of Virginia. . . ." Section 8-67.1 of the Code provides for service of process on a "non-resident" through service on the Commissioner of Motor Vehicles, and defines "non-resident" so as to include "any person against whom an Order of Publication may be issued under the provisions of Section 8-71." Section 8-71, in turn, provided that "on affidavit . . . that diligence has been used by all on behalf of the plaintiff to ascertain in what county or corporation he [a defendant] is, without effect . . . and order of publication may be entered against such defendant."

The applicable statutes therefore seem to sanction the procedure followed by plaintiff. However, as applied to this situation, the Virginia statutory scheme makes no provision for giving actual notice of the suit to the defendant, nor for any method reasonably calculated to give him notice. It is therefore invalid in this situation since to permit the entry of a judgment against a defendant who has not been given actual notice of the proceeding, and when procedures reasonably calculated to give him notice have not been followed, would deprive such defendant of his property without due process of law in violation of the Fourteenth Amendment.

The leading case on this point is Wuchter v. Pizzutti, 276 U.S. 13 (1928), a copy of which is attached. In Wuchter v. Pizzutti, the Court stated that the question to be decided was "whether a statute, making the Secretary of State the person to receive the process, must, in order to be valid, contain a provision making it reasonably probable that notice of the service on the Secretary will be communicated to the non-resident defendant who is sued." The Court noted that the New Jersey statute under consideration contained no such requirement, and said "we think that a law with the effect of this one should make a reasonable provision for such probable communication." The Court further noted that "the enforced acceptance of the service

of process on a state official by the defendant would not be fair or due process unless such officer or the plaintiff is required to mail the notice to the defendant, or to advise him, by some written communication, so as to make a reasonably probable that he will receive actual notice."

Other cases have held that it is not necessary that the defendant actually receive notice of the suit, but that it is necessary that means be followed reasonably calculated to give the defendant notice. In the present case the method which was followed guaranteed that defendants Wright and Blankenship would not receive notice. Process was not directed to the Sheriff of Dickenson County in an attempt to serve Wright and Blankenship. No order of publication was in fact entered, either in a newspaper having general circulation in Washington County, in Dickenson County, or elsewhere.

Utica is not challenging the entire Virginia statutory scheme for service of process on non-resident motorists through the Commissioner of Motor Vehicles. It only challenges it in the limited factual situation in which the statute provides for giving no notice to the defendant, and provides no means reasonably calculated to supply notice to the defendant. That was the situation as to defendants Wright and Blankenship, and the judgment as to those defendants is void for lack of valid service of process upon them.

Apportionment of Coverages. In Paragraph 5(D)(vi) of the Complaint, Utica asks the Court, in the event of a ruling that the vehicle which alleged ran the Shirley Gray vehicle off the road was an "uninsured motor vehicle," to declare and determine that "Utica and AIE must contribute in proportion to the amounts of their respective uninsured motorist coverages to satisfy any judgments in excess of the primary uninsured motorist coverage with Fireman's Fund, and to determine the amounts of such coverages."

In the present case American InterInsurance Exchange has filed a copy of its policy pursuant to Utica's Request for Production of Documents, but I cannot find any Answer filed by it in my file. Perhaps one was filed and I either failed to receive a copy of it, or it was misfiled in my office. In any event, the Answer filed by American Inter-Insurance Exchange in the case styled Elizabeth Gilbert v. Fireman's Fund Insurance Company, et al., states that American Inter-Insurance Exchange "is not responsible

for any payments unto plaintiffs until such time as monies from all other insurance carriers have been exhausted," and that "American InterInsurance Exchange is subrogated to all other defendants herein." In other words, AIE seems to be saying that Fireman's Fund's coverage is primary; that Utica's is secondary; and that its coverage is tertiary.

I am not aware of any authority for AIE's position. In State Farm Mutual Automobile Insurance Company v. United Services Automobile Association, 211 Va. 133, 176 S.E. 2d 327 (1970), the Virginia Supreme Court ruled that carriers whose coverages are secondary to those on the vehicle in which the plaintiff is riding would, as between themselves, contribute toward the judgment in proportion to the amounts of their respective coverages. That is, they "pro-rate." Perhaps counsel for AIE can advise the Court of the basis for AIE's position.

I am sure that Mr. Harrigan will want to reply to my position concerning the service of process on defendants Wright and Blankenship, and that Mr. Sichta will want to state his position regarding the applicability of AIE's coverage. After the Court has ruled on these points, I will be glad to incorporate those rulings into the proposed Final Order prepared by Mr. Ingram, to make some other minor changes in his proposed Order, and to submit it to Court for entry.

With best regards, we are

Very truly yours,

PENN, STUART, ESKRIDGE & JONES

By: Wm. W. Eskridge

WWE/jth
Enclosures
cc: Robert Ingram, Esq.
Thomas J. Harrigan, Esq.
Thomas G. Hodges, Esq.
Robert Sichta, Esq.

[Filed as Exhibit to Letter]

VIRGINIA:

IN THE CIRCUIT COURT OF WASHINGTON COUNTY

ELIZABETH GILBERT

Plaintiff

vs.

GORMAN GILBERT, et al

Defendants

AFFIDAVIT

This day Elizabeth Gilbert, Plaintiff in the above-styled action states under oath, pursuant to Section 8-67.1 et seq. and section 8-71 of the 1950 Code of Virginia as amended, that the defendants hereinafter listed were operators of a motor vehicle either in person or by an agent or employee and were involved in an automobile accident on December 6, 1975 in Washington County, Virginia. The deponent states that she has used due diligence to ascertain in what County or corporation the below listed defendants reside without effect. In support thereof she states:

1. Plaintiff on August 30, 1976 deposed other parties to this action who are close friends of these defendants and at that time, made inquiry without success as to the whereabouts of the below listed defendants.

2. Plaintiff has questioned, without success, friends of the below listed defendants.

3. That the hereinfiled cause of action arises out of a hit and run accident on December 6, 1975, following which no accident report was filed by any of the defendants or their

agents or employees, with the State as required by law.

4. That the below listed defendants have intentionally concealed and withheld their identity and location from the plaintiff.

5. That the below listed defendants have no known address or residence and plaintiff has been unable to ascertain in what County or corporation the below listed defendants reside.

Plaintiff further states that she does not know and is unable to ascertain any post office address of the below listed individual defendants and that service of process is authorized pursuant to Section 8-67.1 et seq. and 8-71 of the 1950 Code of Virginia as amended on the Commissioner of Motor Vehicles.

1. Enos Blankenship

   Last known address unknown

   Please Serve: Commissioner of Motor Vehicles
   Richmond, Virginia

2. Doug Wright

   Last known address unknown

   Please Serve: Commissioner of Motor Vehicles
   Richmond, Virginia.

Elizabeth Gilbert

Elizabeth Gilbert

Subscribed and sworn to before me this 8th day of September, 1976.

Notary Public

My commission expires: January 17, 1978

FILED
Sept. 16, 1976
Deputy CLERK
CIRCUIT COURT
WASHINGTON COUNTY, VA.

[Filed as Exhibit to Letter]

# COMMONWEALTH of VIRGINIA

*Division of Motor Vehicles*

*2220 West Broad Street*

VERN L. HILL
COMMISSIONER

MAIL ADDRESS
P. O. BOX 27412
RICHMOND, VIRGINIA 23269

September 30, 1976

RE: ELIZABETH GILBERT VS GORMAN GILBERT A/K/A GARMAN GILBERT, RONALD E. BAILEY, A MINOR, NORMAN GILBERT, TIVIS GILBERT, DOUG WRIGHT (*), & ENOS BLANKENSHIP (*)

Hon. C. W. Smith, Clerk
Washington County Circuit Court
Abingdon, Virginia

Dear Sir:

Enclosed is affidavit of compliance showing service of process for the above case pursuant to §§ 8-67.1 and 8-67.2 of the Code of Virginia of 1950.

(*) PROCESSES NOT MAILED ADDRESSES UNKNOWN -- SEE ATTACHED AFFIDAVIT.

Sincerely,

Vern L. Hill, Commissioner

By L. M. Gracey

Financial Responsibility Department
Telephone 804/786-5979

lmy
Enclosure

cc: Thomas J. Harrigan, Esquire
The Dixie Building
2060 North 14th Street
Arlington, Virginia 22201

FILED
Oct. 1, 1976
C. W. Smith
CLERK
CIRCUIT COURT
WASHINGTON COUNTY, VA.

FR 11 Rev. 10/75

[Filed as Exhibit to Letter]

# Commonwealth of Virginia

IN THE OFFICE OF THE COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES.

## Affidavit of Compliance

I, L. M. YANCEY, being cognizant of the facts as required by statute and being designated for the purpose by VERN L. HILL, COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES OF THE COMMONWEALTH OF VIRGINIA, do certify that on the 29th day of September, 19 76, a process, consisting of Notice of Amended Motion for Judgment, in the case of

ELIZABETH GILBERT, Plaintiff

vs

GORMAN GILBERT A/K/A GARMAN GILBERT, RONALD E. BAILEY, A MINOR, NORMAN GILBERT, TIVIS GILBERT, DOUG WRIGHT (*), & ENOS BLANKENSHIP (*), Defendants

pending in the Washington County Circuit Court, Abingdon, Virginia was left in the office of the Commissioner of the Division of Motor Vehicles of the Commonwealth of Virginia, in the City of Richmond, Virginia, together with a fee of $ 9.00, in accordance with §§ 8-67.1 and 8-67.2 of the Code of Virginia, 1950.

I further certify that on the 30th day of September, 19 76, a copy of said process, and a notice of the fact that such process was left in said office in the City of Richmond, Virginia, on the 29th day of September, 19 76, were forwarded by the Commissioner of the Division of Motor Vehicles of the Commonwealth of Virginia, by registered mail to

TIVIS GILBERT, c/o Virginia Rachel Ray, 12858 S. W. 55th Street, Miami, Florida 33165

(*) NOTICES NOT MAILED TO DEFENDANTS - ADDRESSES UNKNOWN, SEE ATTACHED AFFIDAVIT.

said address(es) being furnished as the last known post office address(es) of the defendant(s), registered delivery receipt(s) for same being requested.

Given under my hand this the 30th day of September, 19 76.

L. M. Yancey

State of Virginia
City of Richmond, to-wit:

I, the undersigned, a Notary Public in and for the City of Richmond, State of Virginia, do hereby certify that L. M. YANCEY whose name is signed to the foregoing affidavit bearing date herewith, personally appeared before me in my City and State, and made oath that the matters therein contained are true.

Given under my hand this the 30th day of September, 19 76.

My commission expires: MY COMMISSION EXPIRES MAY 2, 1978

Lilly Pearl Loving
NOTARY PUBLIC

FR 11A

[Filed as Exhibit to Letter]

# Commonwealth of Virginia

IN THE OFFICE OF THE COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES.

## Notice

TO: TIVIS GILBERT, c/o Virginia Rachel Ray, 12858 S. W. 55th Street, Miami, Florida 33165

PLEASE TAKE NOTICE that on the 29th day of September, 1976, the attached process, consisting of a Notice of/Amended Motion for Judgment, in the case of

ELIZABETH GILBERT, Plaintiff

vs

GORMAN GILBERT A/K/A GARMAN GILBERT, RONALD E. BAILEY, A MINOR, NORMAN GILBERT, TIVIS GILBERT, DOUG WRIGHT (*), & ENOS BLANKENSHIP (*), Defendants

pending in the Washington County Circuit Court, Abingdon, Virginia was left in my office in the City of Richmond, Virginia, in accordance with the provisions of §§ 8-67.1 and 8-67.2 of the Code of Virginia, 1950, and the same is being forwarded to you by registered mail with registered delivery receipt requested.

Given under my hand in the City of Richmond, Virginia, this the 30th day of September, 1976.

VERN L. HILL, COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES OF THE COMMONWEALTH OF VIRGINIA,

BY L. M. Gaskey

STATE OF VIRGINIA

CITY OF RICHMOND, to-wit:

I, the undersigned, a Notary Public in and for the City of Richmond, State of Virginia, do certify that L. M. YANCEY whose name is signed to the foregoing writing, has personally appeared before me in my city aforesaid and made oath that the matters therein contained are true.

Given under my hand this the 30th day of September, 19 76.

My commission expires: MY COMMISSION EXPIRES MAY 2, 1978

Lilly Pearl Loving
NOTARY PUBLIC

FR 11B

TELEPHONE: 522-9200
AREA CODE (703)

THOMAS J. HARRIGAN
ATTORNEY AT LAW

[Letter filed January 5, 1979]

The Dixie Building, Suite 106
2060 North 14th Street, Arlington, Virginia 22201

November 8, 1978

Honorable Wayne L. Bell, Judge
Washington County Circuit Court
Abingdon, Virginia 24210

Re: Entry of Order;
Utica Mutual v. Travelers
Indemnity Co.

Dear Judge Bell:

I have received a copy of Bill Eskridge's letter of November 1, 1978 to you, which states his views regarding entry of the order in the above case.

Mr. Eskridge states two issues need to be resolved and agrees both can be decided on the record without a further hearing.

1. Validity of Service of Process against Doug Wright and Enos Blankenship in the original case of Elizabeth Gilbert v. Gorman Gilbert, et al. I also believe this issue can be decided on the record for the following reasons:

(a) The same issue was previously raised by Mr. Eskridge in argument on the motion to set aside the verdict in the original case and overruled by the Court. No appeal to that ruling was made by Utica Mutual, and it is my position the ruling is final. Further, the order in the original case recites Enos Blankenship appeared on the show cause notice and did not offer any objection to judgment being entered against him.

(b) Utica does not have standing to make a collateral attack where the defendants themselves have not raised the issue.

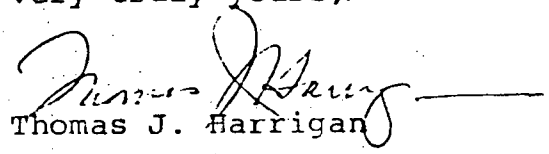
(c) The record discloses the statutory procedures were followed as to each defendant. Therefore, the

Court should overrule Utica's motion to void the judgment against Enos Blankenship and Doug Wright.

2. Apportionment of Coverage between Utica Mutual and American Inter-Exchange Insurance Co. I have spoken with Bill Eskridge, attorney for Utica Mutual and Robert Sichta, attorney for American Inter-Exchange, and both have stated they agree the balance of damages owing should be apportioned pro rata in proportion to the amounts of their respective coverages. Therefore, this issue appears to be resolved.

Therefore, I request the Court rule that Mr. Eskridge's Motion to Void the Judgment against Enos Blankenship and Doug Wright on the grounds stated be denied. Mr. Eskridge has indicated if his motion is denied he would incorporate it into the order together with the pro rata provisions and the final order could be entered.

Very truly yours,



Thomas J. Harrigan

TJH:sct

cc: William W. Eskridge, Esq.
Robert Sichta, Esq.
Thomas C. Hodges, Esq.
Gary C. Hancock, Esq.

TWENTY-EIGHTH JUDICIAL CIRCUIT OF VIRGINIA
CITY OF BRISTOL, COUNTIES OF SMYTH AND WASHINGTON

[Filed January 5, 1979]

WAYNE L. BELL, JUDGE
BRISTOL, VIRGINIA 24201

J. AUBREY MATTHEWS, JUDGE
MARION, VIRGINIA 24354

TO: ALL COUNSEL OF RECORD

FROM: Wayne L. Bell, Judge

DATE: January 3, 1979

RE: Utica Mutual Insurance Company
v.
Travelers Indemnity Company
Unresolved Issues

Gentlemen:

There are apparently two issues still unresolved in the above matter. The first concerns validity of service of process against Doug Wright and Enos Blankenship in the original case of Elizabeth Gilbert v. Gorman Gilbert, et als. The service of process is being challenged by Utica. After reviewing the file the Court finds that the service is valid on its face and finds no merit to the challenge to the service of process. Therefore, this objection lodged by Utica will be overruled.

The other issue concerned the apportionment of coverage between Utica Mutual and American Inter-exchange Insurance Company. Based on correspondence received by me it appears that the two companies have agreed to prorate the balance of damages owing in proportion to the amounts of their respective coverages. Therefore, this issue apparently is resolved.

I would ask Mr. Eskridge to incorporate the rulings herein in the final order.

Very truly yours,

Wayne L. Bell, Judge

WLB:jr

RECEIVED
JAN 1979
D.E.E.

[Entered March 20, 1979]

FINAL DECREE

THIS CAUSE came to be heard on April 21, 1978 upon the Complaint and the exhibits filed therewith; upon the respective Answers of Elizabeth Jennelle, Nelson Jennelle, Shirley Gray, Travelers Indemnity Company, Fireman's Fund Insurance Company; the Answer of Elizabeth Ann Gilbert by guardian ad litem; upon the Answers to Interrogatories and the documents produced in response to Request for Production of Documents; upon the Amended Answer of Travelers Indemnity Company; and upon the respective Motions for Summary Judgment filed by Elizabeth Gilbert Jennelle, Utica Mutual Insurance Company, Fireman's Fund Insurance Company and Travelers Indemnity Company, and the cause was argued by counsel. At said hearing counsel for the parties agreed that the case should be decided upon the pleadings and the exhibits and that no one who had appeared desired to introduce any further evidence.

After considering the oral argument, written briefs were filed by counsel for Utica Mutual Insurance Company, Travelers Indemnity Company and Elizabeth Gilbert Jennelle. The Court then took time to consider of its opinion, and on July 6, 1978 filed its Memorandum Opinion, which is incorporated by reference herein, as to the principal issues raised by the Complaint and the responsive pleadings.

Thereafter the Court considered additional arguments raised in letters of authorities from counsel for Utica Mutual Insurance Company and counsel for Elizabeth Gilbert Jennelle, including

the representation that certain issues raised by the Complaint had been rendered moot by subsequent events, and that the question of proration of coverage between Utica Mutual Insurance Company and American Inter-Insurance Exchange had been resolved by agreement. Thereafter on January 3, 1979 the Court filed its letter opinion ruling upon the remaining issues in the case.

In accordance with the views expressed in the Memorandum Opinion of July 6, 1978 and the letter opinion of January 3, 1979, and the stipulations of the parties, it is DECLARED, ADJUDGED and ORDERED as follows:

1. That intentional torts are not within the statutory coverage of the Virginia Financial Responsibility Law, that the collision described in Paragraph II of the Complaint herein was not an "accident" within the meaning of the Virginia Motor Vehicle Safety Responsibility Act, that therefore neither the Travelers policy number PQMV-1718373 issued to Tivis Gilbert nor its policy number PQMV-1712800 issued to Norman Gilbert, provides coverage for the judgment described in Paragraph VIII of the Complaint; that the 1969 Chevrolet four-door sedan described in Paragraph II of the Complaint was therefore an "uninsured motor vehicle" within the meaning of section 38.1-381(c) of the Code of Virginia; and that the Motion for Summary Judgment filed by Utica Mutual Insurance Company is denied and the Motion for Summary Judgment filed by Travelers Indemnity Company is granted;

2. That the judgment described in Paragraph VIII of the Complaint is not invalid as to Doug Wright and Enos Blankenship for lack of service of process, and that the request by Utica Mutual Insurance Company to have such judgment declared void as to said defendants for lack of service of process is denied;

3. That Fireman's Fund Insurance Company, Utica Mutual Insurance Company and American Inter-Insurance Exchange are obligated to pay and satisfy the judgment described in Paragraph VIII of the Complaint, to the extent of their respective uninsured motorist coverages or the extent of the judgment, whichever is less, and prior to any final determination on appeal of the applicability of the Travelers policies; and that, in the event it is determined on appeal that one or both of the Travelers' policies are applicable to the collision in controversy, Fireman's Fund Insurance Company, Utica Mutual Insurance Company and American Inter-Insurance Exchange are subrogated against Travelers Indemnity Company for the full amount of such payment, notwithstanding that such amount may be in excess of the coverage provided by either or both of the Travelers policies, to which exception is made by counsel for Travelers Indemnity Company.

4. That Fireman's Fund Insurance Company has the primary uninsured motorist coverage applicable to such judgment, and that after the exhaustion of the Fireman's Fund uninsured motorist coverage, Utica Mutual Insurance Company and American Inter-Insurance Exchange are obligated to contribute toward the satisfaction of the balance of such judgment in proportion to the amounts of their uninsured motorist respective coverages; and

5. That Paragraphs 2, 3, 4, and 5 (d)(iii) and 5(D)(iv) of the Complaint are dismissed as moot.

Counsel for Utica Mutual Insurance Company, Fireman's Fund Insurance Company and American Inter-Insurance Exchange duly objected and excepted to the rulings of the Court that the Virginia Motor Vehicle Safety Responsibility Act provides no coverage for intentional acts, that the collision in controversy was not an "accident" within the meaning of the Virginia Motor Vehicle Safety Responsibility Act, and that the Travelers

policies are not applicable to the collision in controversy; that the 1969 Chevrolet described in Paragraph II of the Complaint was an "uninsured motor vehicle within the meaning of Section 38.1-381 of the Code; that said companies are obligated to satisfy the judgment described in Paragraph VIII of the Complaint prior to a final determination as to the applicability of the Travelers policies; and that the judgment described in said paragraph is valid as to Doug Wright and Enos Blankenship. Counsel for Travelers Indemnity Company duly objected and excepted to the ruling of the Court that said companies are subrogated against Travelers for the full amount of their payment in the event it is determined on appeal that one or both of the Travelers policies is applicable to said judgment, notwithstanding that such amount may be in excess of the amount of Travelers' coverage.

Counsel for Utica Mutual Insurance Company having indicated his intention to appeal this Final Decree to the Virginia Supreme Court, it is ORDERED that execution of this Decree be suspended as to Utica Mutual Insurance Company provided that it, or someone for it, shall file an appeal bond in the Clerk's Office of this Court within thirty days from the entry of this Decree, in the penalty of $1,000.00, reciting this judgment, and conditioned as provided in Section 8.01-676 of the Code of Virginia.

Nothing further remaining to be done herein, this action is stricken from the docket of the Court.

The Clerk shall send attested copies of this Final Decree to counsel of record.

Seen and objected to:

GILMER, SADLER, INGRAM, SUTHERLAND & HUTTON

By _____
Counsel for Travelers Indemnity Company

Seen and objected to:

PENN, STUART, ESKRIDGE & JONES

By _____
Counsel for Utica Mutual Insurance Company

Seen and objected to:

CAMPBELL, YOUNG & HODGES

By _____
Counsel for Fireman's Fund Insurance Company

Seen and objected to:

ROBERT SICHTA

By _____
Counsel for American Inter-Insurance Exchange

ENTER THIS 20th DAY OF MARCH, 1979.

_____
Wayne H. Bell, Judge

Seen:

_____
Thomas J. Harrigan
Attorney for Elizabeth Jennelle, Nelson Jennelle, Shirley Gray and Attorney and Guardian ad Litem for Elizabeth Ann Gilbert

[Filed March 26, 1979]

NOTICE OF APPEAL

Notice is hereby given that Utica Mutual Insurance Company, complainant in this cause, appeals to the Virginia Supreme Court from the Final Decree entered in this cause on March 26th, 1979.

No transcript, statement of facts, testimony or other incidents of the case are to be hereafter filed.

UTICA MUTUAL INSURANCE COMPANY

By Counsel

[Filed with Petition for Appeal, June 12, 1979]

## ASSIGNMENTS OF ERROR

1. The trial court erred in sustaining Travelers' Motion for Summary Judgment and in overruling Utica's Motion for Summary Judgment by holding that the collision in question was not an "accident" within the meaning of the Virginia Motor Vehicle Safety Responsibility Act, that policies issued pursuant to that Act do not provide coverage for an insured's intentional torts involving the use of an automobile, and that the vehicle owned by Tivis Gilbert was, therefore, an "uninsured motor vehicle."

2. The Court erred in holding that service of process on Doug Wright and Enos Blankenship in the previous tort litigation did not violate their rights under the 14th Amendment to the United States Constitution.

[Filed with Brief in Opposition, June 25, 1979]

ASSIGNMENT OF CROSS-ERROR

1. The trial court erred in holding that if the uninsured motorist carrier is required to pay the judgment and it is subsequently determined that coverage was improperly denied by the liability insurance carrier (Travelers), then the liability insurance carrier is liable to the uninsured motorist carrier for the full amount paid even when such amount is in excess of the limits of the liability insurance carrier's coverage.