CLERK
SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

223 Va 287

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 791278

ERIE INSURANCE EXCHANGE,
Appellant

v.

DORIS PAULINE MEEKS,
Appellee

JOINT APPENDIX

Russell H. Roberts, Esq.
ROBERTS, CROSLEY, HALEY
& ASHBY
303 Amelia Street
Fredericksburg, Virginia 22401

Counsel for Appellant

Buford M. Parsons, Jr., Esq.
Suite 800
700 Building
700 East Main Street
Richmond, Virginia 23219

Counsel for Appellee

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

TABLE OF CONTENTS

	Appendix Page
Motion for Judgement filed 7-18-78	1
Grounds for Defense filed 8-3-78	3
Final Order entered 6-14-79	4
Assignments of Error	6
Defendant's Exhibits	
From Exhibits 1 and 2:	
Declaration page of insurance policy	7
The Insuring Agreements	8
From the Conditions of Policy - pages 4 & 5	9
Exh. 3 - Letter dated 5-5-77 from Shook to Foley	11
Exh. 4 - Report of Automobile Accident or Loss	12
Exh. 5 - Letter dated 4-22-77 from Stokes to Shook	14
Excerpts of Transcript of Testimony Heard 5-23-79	
Proceedings in Chambers	15
Opening Arguments, etc.	28
Testimony of Ira T. Dunn	47
Testimony of Doris Pauline Meeks	79
Testimony of William Edward Shook	90
Motion to Strike Closing Arguments, etc.	116

MOTION FOR JUDGMENT

The plaintiff files this Motion for Judgment on account of the following:

1. On February 17, 1976, Doris Pauline Meeks was riding as a passenger in a motor vehicle operated by Walter L. Meeks, Jr., when it was involved in a certain accident with a motor vehicle operated by Robert A. Foley, which accident was as the result of the negligence of Robert A. Foley and which accident caused injury to your plaintiff, Doris Pauline Meeks.

2. Doris Pauline Meeks filed suit against Robert A. Foley in the Circuit Court of Louisa County for injuries arising from the aforesaid accident.

3. At the time of the accident in question, Robert A. Foley maintained automobile liability insurance with the defendant, Erie Insurance Exchange, which policy provided coverage for Robert A. Foley, and which policy was in full force and effect at the time of the accident in question.

4. That the Erie Insurance Exchange has wrongfully denied coverage to Robert A. Foley under the aforesaid policy of insurance and has failed to defend its insured, Robert A. Foley, or to satisfy the judgment that has now been rendered against him.

5. On May 16, 1977, Doris Pauline Meeks obtained judgment against Robert A. Foley in the sum of $30,000.00 with legal interest thereon from May 16, 1977, which judgment remains outstanding and is the obligation of the defendant to satisfy under the terms of the aforesaid policy of automobile liability insurance.

WHEREFORE, your plaintiff, demands judgment against the defendant, Erie Insurance Exchange, in the sum of THIRTY THOUSAND DOLLARS ($30,000.00), with legal interest thereon from May 16, 1977, and its costs expended.

DORIS PAULINE MEEKS

By _____
W. W. Whitlock
Whitlock Building
Mineral, Virginia 23117

By _____
Buford M. Parsons, Jr.
MAY, MILLER AND PARSONS
Suite 800, 700 Building
700 East Main Street
Richmond, Virginia 23219

Filed in the Clerk's Office the 18th day of July, 1978
Writ Tax $ 5.00
Fee
Deposit 25.00
Total Paid $ 30.00
Teste: _____, Clerk
Anne C. Longo D. Q.

GROUNDS OF DEFENSE

Comes now defendant, by counsel, which for its grounds of defense to the motion for judgment says as follows:

1. The allegations contained in paragraphs 1, 2 and 3 of the motion for judgment are admitted.

2. The allegations contained in paragraphs 4 and 5 of the motion for judgment are denied.

WHEREFORE, defendant moves the Court to enter judgment on its behalf, together with its reasonable costs in this behalf expended.

Respectfully submitted,

ERIE INSURANCE COMPANY

By Counsel

CERTIFICATE

I hereby certify that a true copy of the foregoing grounds of defense were mailed to W. W. Whitlock, Esquire, Whitlock Building, Mineral, Virginia 23117, and Buford M. Parsons, Jr. Esquire, May, Miller and Parsons, Suite 800, 700 Building, 700 East Main Street, Richmond, Virginia 23219, counsel for plaintiff; on this 1st day of August, 1978.

David Craig Landin

David Craig Landin
Of Counsel

COUNSEL:

McGUIRE, WOODS & BATTLE
P. O. Box 1191
Charlottesville, Virginia 22902

003

Filed 8-3-78
Anne C. Long
Deputy Clerk

FINAL ORDER

On May 23, 1979, came the plaintiff, in person and by her counsel, and came also the defendant, Erie Insurance Exchange by its Claim Manager and its counsel;

And, thereupon came a jury, to-wit: Elsie Roberta Goffney, William Russell Kent, Mildred Badget Goodwin, Roby Wagner, Jr., W. B. Paulett, David Thomas Greene and Lewis Earl Bowles, who were sworn well and truly to try the issue joined in this case.

Thereupon, opening statements were made, evidence presented, motions made and ruled upon, and exceptions made to such rulings as will be fully reflected by the transcript of these proceedings.

WHEREUPON, the Court doth ADJUDGE, ORDER and DECREE that the plaintiff, Doris Pauline Meeks, recover and have judgment against the defendant, Erie Insurance Exchange, in the amount of Thirty Thousand Dollars ($30,000.00), with interest thereon, from the 16th day of May, 1977, and her cost expended herein, and also, her costs expended in the case of Doris Pauline Meeks v. Robert A. Foley, to which action of the Court, the defendant, by counsel, objected and noted exception.

WHEREUPON, defendant, by counsel, having noted its intention to appeal from the judgment of the Court, and having moved for a suspension of execution of this judgment, pending action thereon by the Supreme Court of Virginia, it is ORDERED that execution of this judgment be, and hereby is, suspended

for a period of thirty days from the date of entry of this Order, and thereafter, until the Virginia Supreme Court acts on defendant's petition for appeal, provided that within said period of thirty days, defendant files proper notice of appeal, and proceeds with its appeal as provided by law, the plaintiff not having asked for an appeal bond, no bond is required.

It is further ORDERED that a transcript of testimony and proceedings before this Court in this case is to be made a part of the record of this case, provided said transcript is duly filed in the office of the Clerk of this Court within sixty days from the date of entry of this Order.

387

ENTER: Lanaff L. Purcell
JUDGE

DATE: 6-14-79

I ASK FOR THIS:

p. q.

SEEN AND EXCEPTED TO:

Russell D. Roberts
p. d.

ASSIGNMENTS OF ERROR

1. The Court erred in ruling that Meeks did not have the burden of proving the terms of the insurance contract.

2. The Court erred in overruling Erie's motion to strike made when Meeks rested her case without presenting evidence.

3. The Court erred in overruling Erie's motion to strike which was renewed upon Erie's resting its case.

4. The Court erred in entering summary judgment for Meeks.

ERIE INSURANCE COMPANY (ONLY IF BLOCK IS MARKED X)

BRANCH

AGENT'S NAME
DD2058 IRA T DUNN JR

ITEM 2 POLICY PERIOD
7-21-75 TO 7-21-76

POLICY NUMBER C.C.
V07-21-02323 N

ITEM 1 NAME AND ADDRESS OF NAMED INSURED

ROBERT ALLEN FOLEY
RT 2 BOX 181-A
GORDONSVILLE VA 22942

Policy period begins and ends at 12:01 A. M., standard time at the address of the Named Insured as stated herein. Until terminated by either the Named Insured or the Erie in accordance with the terms of the policy, this policy will be continued in force for successive policy periods by payment of the required continuation premium.

BM

POL. VF CO LOUIS

LIENHOLDER: CAR

ITEM 3 LIENHOLDER: CAR
VA NATL BK
MAIN ST
ORANGE VA 22960 CAR 2

ITEM 4 DESCRIPTION OF INSURED AUTOMOBILE(S)

#	YEAR, MAKE AND BODY STYLE	PURCHASED NEW DATE	PURCHASED NEW COST	SERIAL NO. (LAST 5 DIGITS)	STATISTICAL INFORMATION CL.	TERR.	SYM.	EXP.	PRIVATE PASSENGER CARS CLASSIFICATION (SEE ENCLOSED CARD FOR EXPLANATION)	DISCOUNTS (1. DRIVER TRAINING 2. COMPACT CAR 3. MARRIED MALE AGE 21, 22, OR 23 4. MULTI-CAR 5. BUMPER 6. AGE 55 OR OVER)	DEFENSIVE DRIVER PLAN
1	~~71 FORD~~ 66 Ford			~~80604~~ 81103	X10E	21	45	12	A2	4	010
2	~~73 CHEVE~~			22904	X11D	21	33	12	A1A	2-4-5	
3											

ITEM 5 THE INSURANCE AFFORDED IS ONLY WITH RESPECT TO EACH AUTOMOBILE AND EACH COVERAGE FOR WHICH A SPECIFIC DEPOSIT PREMIUM IS CHARGED. THE LIMIT OF ERIE'S LIABILITY FOR EACH SUCH COVERAGE SHALL BE AS STATED HEREIN, SUBJECT TO ALL THE TERMS OF THIS POLICY HAVING REFERENCE THERETO:

DEPOSIT PREMIUM -1-	DEPOSIT PREMIUM -2-	COVERAGE	LIMITS OF LIABILITY
$ 41.	30.	A Bodily Injury Liability	$ 50 ,000 EACH PERSON $100 ,000 EACH OCCURRENCE
$ 23.	17.	B Property Damage Liability	$ 25 ,000 EACH OCCURRENCE (FAMILY POLICY) OR EACH ACCIDENT (COMBINATION POLICY)
$ 7.	6.	C Medical Payments	$ 1000 EACH PERSON
$ ~~17.~~	16.	D Comprehensive (Includes Fire & Theft)	ACTUAL CASH VALUE
$ ~~39.~~	29.	E Collision	ACTUAL CASH VALUE LESS $ 100 DEDUCTIBLE
$		F Fire	ACTUAL CASH VALUE
$		G Theft	ACTUAL CASH VALUE
$		J Towing	
$ 4.	4.	K Uninsured Motorists	Bodily Injury $ 25 ,000 EACH PERSON $ 50 ,000 EACH ACCIDENT; Property Damage $ 5 ,000 EACH ACCIDENT
$		Endorsements	
$ 233.		TOTAL	
$ 75.		LESS	
$ 158.		X PAYMENT ☐ REFUND	

PAY THE AMOUNT SHOWN

ITEM 6 OCCUPATION

ITEM 6A ENDORSEMENTS, EXCEPTIONS, IF ANY, TO DECLARATION ITEMS 7, 8, 9, 10 AND 11 WHICH APPEAR ON REVERSE SIDE.
AV-M-AA1

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ITEM 6B THE VEHICLE(S) WILL BE USED FOR "PLEASURE AND BUSINESS" EXCEPT AS FOLLOWS:

Authorized Agent

ERIE INSURANCE EXCHANGE

ERIE, PENNSYLVANIA

Family Automobile Insurance Policy

THE SUBSCRIBERS at ERIE INSURANCE EXCHANGE, severally, but not jointly, each ratably with other Subscribers, but not one for the other, and represented by ERIE INDEMNITY COMPANY, Attorney-in-Fact, AGREE with Subscriber, named in the Declarations made a part hereof, in consideration of the payment of the premium deposit, and the execution of a power of attorney to ERIE INDEMNITY COMPANY, authorizing it to execute reciprocal or inter-insurance contracts between said Subscriber and other Subscribers at ERIE INSURANCE EXCHANGE, and in reliance upon the statements in the Declarations, and subject to all the terms of this policy:

PART I—LIABILITY

COVERAGE A—BODILY INJURY LIABILITY
COVERAGE B—PROPERTY DAMAGE LIABILITY

To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of:

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

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

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

Supplementary Payments

To pay, in addition to the applicable Limits of Liability:

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

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

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

(d) all reasonable expenses, other than loss of earnings, incurred by the Insured at the ERIE'S request.

Persons Insured

The following are Insureds under Part I:

(a) With respect to the owned automobile,
  (1) the named Insured and any resident of the same household,
  (2) any other person using such automobile with the permission of the named Insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, and
  (3) any other person or organization but only with respect to his or its liability because of acts or omissions of an Insured under (a) (1) or (2) above;

(b) with respect to a non-owned automobile,
  (1) the named Insured,
  (2) any relative, but only with respect to a private passenger automobile or trailer,
  provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission, and
  (3) any other person or organization not owning or hiring the automobile, but only with respect to his or its liability because of acts or omissions of an Insured under (b) (1) or (2) above.

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

Definitions

Under Part I:

"Subscriber" means only the person who signed the application resulting in the issuance of this policy;

"named Insured" means the Subscriber named in Item I of the Declarations and also includes his spouse, if a resident of the same household;

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

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

"owned automobile" means

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

(b) a trailer owned by the named Insured,

(c) a private passenger, farm or utility automobile ownership of which is acquired by the named Insured during the policy period, provided
  (1) it replaces an owned automobile as defined in (a) above, or
  (2) the ERIE insures all private passenger, farm and utility automobiles owned by the named Insured on the date of such acquisition and the named Insured notifies the ERIE during the policy period or within 30 days after the date of such acquisition of his election to make this and no other policy issued by the ERIE applicable to such automobile, or

(d) a temporary substitute automobile;

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

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

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

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

008

(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.

Definitions

"Insured." The unqualified word "Insured" means:

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

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

(c) any person, with respect to damages he is entitled to recover for care or loss of services because of bodily injury to which this Part IV 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 ERIE'S liability.

"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.

"uninsured automobile." The term "uninsured automobile" means (a) 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 (1) cash or securities on file with the Virginia Commissioner of Motor Vehicles nor (2) 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

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

but the term "uninsured automobile" shall not include:

(1) 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;

(2) 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;

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

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

"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: (1) there cannot be ascertained the identity of either the operator or the owner of such "hit-and-run automobile;" (2) 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.

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

Exclusions

This policy does not apply under Part IV:

(a) to bodily injury to an Insured while occupying an automobile (other than an insured automobile) owned by the named Insured or 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 ERIE, 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.

Limits of Liability

(a) The limit of bodily injury liability stated in the Declarations as applicable to "each person" is the limit of the ERIE'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 Declarations as applicable to "each accident" is the total limit of the ERIE'S liability for all damages, including damages for care or loss of services, because of bodily injury sustained by two or more persons as the result of any one accident.

(b) The limit of property damage liability stated in the Declarations as applicable to "each accident" is the total limit of the ERIE'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; and

(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 Part IV 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 Part IV 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.

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 ERIE shall not be liable for a greater proportion of any loss to which this Part IV 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.

CONDITIONS

(The following Conditions apply to all parts of the policy except where otherwise noted)

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

2. DECLARATIONS By acceptance of this policy, the Insured named in Item I of the Declarations agrees that the statements in the Declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the ERIE or any of its agents relating to this insurance.

3. PREMIUM **Parts I, II and III** If the named Insured disposes of, acquires ownership of, or replaces a private passenger, farm or utility automobile or, with respect to Part III, a trailer, any premium adjustment necessary shall be made as of the date of such change in accordance with the manuals in use by the ERIE. The named Insured shall, upon request, furnish reasonable proof of the number of such automobiles or trailers and a description thereof.

Part IV 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 ERIE during the policy period of any change and the premium shall be adjusted in accordance with the manuals in use by the ERIE. If the earned premium thus computed exceeds the advance premium paid, the named Insured shall pay the excess to the ERIE; if less, the ERIE shall return to the named Insured the unearned portion paid by such Insured.

009

4. NOTICE In the event of an accident, occurrence or loss, written notice containing particulars sufficient to identify the Insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the Insured to the ERIE or any of its authorized agents as soon as prac-

ticable. In the event of theft the Insured shall also promptly notify the police. If claim is made or suit is brought against the Insured, he shall immediately forward to the ERIE every demand, notice, summons or other process received by him or his representative.

If, before the ERIE makes payment of loss under Part IV, 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 ERIE by the Insured or his legal representative.

5. TWO OR MORE AUTOMOBILES **Parts I, II and III** When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each, but an automobile and a trailer attached thereto shall be held to be one automobile as respects Limits of Liability under Part I of this policy, and separate automobiles under Part III of this policy, including any deductible provisions applicable thereto.

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

Parts I and IV The failure or refusal of the Insured to cooperate with or assist the ERIE which prejudices the ERIE'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 ERIE.

7. ACTION AGAINST THE ERIE **Part I** No action shall lie against the ERIE unless, as a condition precedent thereto, the Insured shall have fully complied with all the terms of this policy, nor until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the ERIE.

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 ERIE as a party to any action against the Insured to determine the Insured's liability, nor shall the ERIE 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 ERIE of any of its obligations hereunder.

Parts II and III No action shall lie against the ERIE unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy nor, under Part III, until 30 days after proof of loss is filed and the amount of loss is determined as provided in this policy.

8. MEDICAL REPORTS; PROOF AND PAYMENT OF CLAIM **Part II** As soon as practicable the injured person or someone on his behalf shall give to the ERIE written proof of claim, under oath if required, and shall, after each request from the ERIE, execute authorization to enable the ERIE to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the ERIE when and as often as the ERIE may reasonably require.

The ERIE 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 ERIE.

Part IV As soon as practicable, the Insured or other person making claim shall give to the ERIE 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 ERIE unless the ERIE 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 ERIE when and as the ERIE 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 ERIE execute authorization to enable the ERIE 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 ERIE within sixty days after the occurrence of loss, unless such time is extended in writing by the ERIE, 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 ERIE'S request, the Insured shall exhibit the damaged property to the ERIE.

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 ERIE, by filing with the ERIE 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.

9. INSURED'S DUTIES IN EVENT OF LOSS **Part III** In the event of loss the Insured shall:

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

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

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

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

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

Part IV Any amount due hereunder is payable to the Insured or his legal representative.

12. NO BENEFIT TO BAILEE **Part III** The insurance afforded by this policy shall not inure directly or indirectly to the benefit of any carrier or other bailee for hire liable for loss to the automobile.

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

14. CHANGES Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the ERIE from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed by notice to or knowledge possessed by any agent or other person, but only by policy endorsement signed by an agent of the ERIE specifically authorized to affix such signature.

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

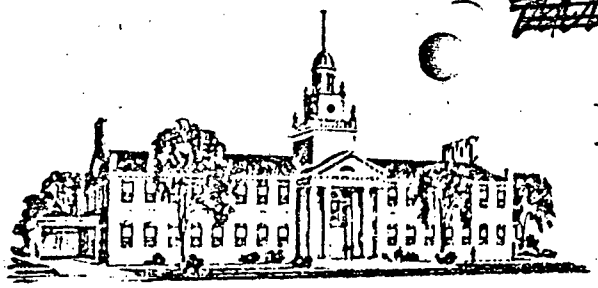
JUN 0 2 1976

010

16. CANCELLATION This policy may be cancelled by the Insured named in Item 1 of the Declarations by mailing to the ERIE written notice stating when thereafter the cancellation shall be effective.

This policy may be cancelled by the ERIE by mailing to the Insured named in Item 1 of the Declarations at the address shown in this

B. CRAWFORD BANKS, Jr.
District Sales Manager



ERIE INSURANCE GROUP

ERIE INSURANCE EXCHANGE
ERIE FAMILY LIFE INSURANCE COMPANY
ERIE INSURANCE COMPANY

Superior Auto · Home · Business · Life Insurance

Home Office · Erie, Penna. - H. O. HIRT, President

DISTRICT OFFICE · 520 WEST BROAD STREET · P. O. BOX 567 · WAYNESBORO, VIRGINIA 22980 · PHONE 703/942-6181

W. E. SHOOK, District Claims Manager

Mr. Robert A. Foley
Route 2, Box 181-A
Gordonsville, Virginia 22942

MAY 11 1977

May 5, 1977

DEFENDANT'S EXHIBIT #3 MAY 23-79

Re: Doris Pauline Meeks v.
Robert A. Foley

Dear Mr. Foley:

This letter is to advise you that the Erie Insurance Company, which issued a policy of liability insurance with effective dates of 7/21/75 to 7/21/76, was notified on or about April 22, 1977, of an accident which occurred on February 17, 1976, and of the ensuing action in the Circuit Court of Louisa County under the above style, which was filed on February 9, 1977 and which was served upon you.

We have been informed by Mr. David Landin, who appeared at a hearing on May 2, 1977, with regard to a motion for a continuance which was made by Thomas Stokes, counsel for Government Employees Insurance Company, that Government Employees Insurance Company withdrew their grounds of defense and have been dismissed from the case. A motion was made by Mr. W. W. Whitlock, counsel for Doris Pauline Meeks to enter a default judgment against you at that time. The order of default judgment was entered by the Court and the Court scheduled a hearing on damages only for Monday, May 16, 1977 at 9:30 A.M. in the Circuit Court of Louisa County. Because the default judgment was entered, no trial will take place on May 5.

Due to breach of the terms and conditions of the insurance contract by you, Erie Insurance Company is hereby denying coverage under the policy with regard to matters arising out of the accident of February 17, 1976 and will take no action with regard to the action now pending in the Circuit Court of Louisa County.

A copy of this letter has been sent to the attorney for Mrs. Meeks and the attorney for Government Employees Insurance Company.

Sincerely,

011

W. E. Shook
District Claims Manager

cc: W. W. Whitlock, Esquire

Thomas D. Stokes, Esquire

CC: Dave Landin

DEFENDANT'S EXHIBIT #4 MAY 23-79

V0221

CLAIM NO.

ERIE INSURANCE GROUP
BOX 1699 ERIE, PA. 16530

REPORT OF AUTOMOBILE ACCIDENT OR LOSS

INSURED

NAME: ROBERT ALLEN FOLEY | HOME PHONE: 672-5797 | BUSINESS:
ADDRESS: RT 2 BOX 181-A | CITY: GOODELSVILLE | STATE: VA

COVERAGE

POLICY NO.: V07-21-02323 N | EFFECTIVE DATES: FROM 7-21-71 THRU 7

DRIVER

NAME: Same | AGE: 30 | HOME PHONE: | BUSINESS:
ADDRESS: | CITY: | STATE:
RELATIONSHIP TO POLICYHOLDER: | OPERATOR'S LICENSE NO.: | CAR USED WITH OWNER'S PERI ☐ YES ☐ NO

VEHICLE INFORMATION

YEAR: 66 | MAKE: FORD | MODEL: 2DR MUST | SERIAL NO.: 81163 | LICENSE PLA
TYPE OF LOSS: A | LOCATION OF CAR: | AMOUNT OF D $
DAMAGED AREAS: N/A TODAY WAS THE FIRST I'VE HEARD OF TH

DATE – TIME

DATE OF ACCIDENT (MONTH – DAY – YEAR): 2-17-76 | DAY OF WEEK: | HOUR: A.M. P.M. | HIT AND RUN ☐ YES

LOCATION

STREET NAMES OR HIGHWAY NO.: @ INTERSECTION #33 & #15 | CITY: LEWISA CO. | STATE: VA

DAMAGE TO PROPERTY OF OTHERS

DRIVER: Doris P Meeks | HOME PHONE: 894-5738 | BUSINESS PH
ADDRESS: RFD 1 Box 227-1E | CITY: Mineral | STATE: VA | ZIP: 23117
OWNER: Walter M. Meeks, Jr. | HOME PHONE: | BUSINESS PHO
ADDRESS: | CITY: | STATE: | ZIP:
YEAR: | MAKE: | MODEL: | LICENSE PLATE NO.: | AMOUNT OF DAM $
DAMAGED AREA: WINDSHIELD | LOCATION OF CAR:
INSURANCE CARRIER (NAME & ADDRESS):

DAMAGE TO PROPERTY OF OTHERS

DRIVER: | HOME PHONE: | BUSINESS PHONE:
ADDRESS: | CITY: | STATE: | ZIP:
OWNER: | HOME PHONE: | BUSINESS PHONE:
ADDRESS: | CITY: | STATE: | ZIP:
YEAR: | MAKE: | MODEL: | LICENSE PLATE NO.: | AMOUNT OF DAMAG $
DAMAGED AREA: | LOCATION OF CAR:
INSURANCE CARRIER (NAME & ADDRESS):

APR 26 1977

PERSONS INJURED OR KILLED

INDICATE
(A) INSURED CAR
(C) OTHER CAR
(P) PEDESTRIAN

NAME: ( ) DORIS MEEKS | AGE: | OCCUPATION: | PHONE:
ADDRESS: | CITY: | STATE: | ZIP:
INJURY: headaches & nervous condition | SEAT BELTS ON ☐ YES ☐ NO
DOCTOR (NAME & ADDRESS):
HOSPITAL (NAME & ADDRESS): | CONFINED ☐ YES ☐ NO

012

PERSONS INJURED OR KILLED

INDICATE
(A) INSURED CAR
(C) OTHER CAR
(P) PEDESTRIAN

NAME ( )	GE	OCCUPATION	PHONE
ADDRESS	CITY	STATE	ZIP
INJURY			SEAT BELTS ON ☐ YES ☐ NO
DOCTOR (NAME & ADDRESS)			
HOSPITAL (NAME & ADDRESS)			CONFINED ☐ YES ☐ NO

NAME ( )	AGE	OCCUPATION	PHONE
ADDRESS	CITY	STATE	ZIP
INJURY			SEAT BELTS ON ☐ YES ☐ NO
DOCTOR (NAME & ADDRESS)			
HOSPITAL (NAME & ADDRESS)			CONFINED ☐ YES ☐ NO

WITNESSES

INDICATE
(A) INSURED CAR
(C) OTHER CAR
(P) ALL OTHER

NAME	ADDRESS	ZIP	PHONE
( )			
( )			
( )			

POLICE INVESTIGATION ☑ YES ☐ NO IF SO, WHAT DEPARTMENT (LOCAL, COUNTY, STATE)

THEFT

DATE OF THEFT	TIME A.M. P.M.	WHAT WAS STOLEN	VALUE $

SPEED	INSURED CAR	OTHER CAR	DIRECTION OF TRAVEL	INSURED CAR	OTHER CAR	NUMBER OF OCCUPANTS	INSURED CAR	OTHER CAR

DETAILS OF ACCIDENT OR LOSS

BRIEFLY DESCRIBE HOW THE ACCIDENT HAPPENED

"A" WAS PULLING OUT AFTER MAKING STOP + THREW GRAVEL STRIKING "C"S WINDSHIELD - MRS MEEKS CLAIMS TO HAVE DODGED WHEN SHE SAW GRAVEL COMING STRIKING HER HEAD ON DASH BOARD - SHE CLAIMS HEADACHES & NERVOUS CONDITION AS A RESULT -
TODAY IS THE FIRST I'VE HEARD OF THIS INCIDENT AT ALL -

DRAW DIAGRAM OF THE ACCIDENT

INDICATE NORTH BY ARROW

USE A TO INDICATE ASSURED
USE C TO INDICATE CLAIMANT

013

WEATHER
☐ CLEAR ☐ RAIN ☐ SNOW
☐ FOGGY ☐ OTHER _____

ROADWAY
☐ DRY ☐ WET ☐ ICY
☐ SNOWY ☐ OTHER _____

ROAD SURFACE
☐ CONCRETE ☐ ASPHALT
☐ DIRT ☐ OTHER _____

LIGHTING
☐ LIGHT ☐ DUSK ☐ DARK

4-22-77 — DATE RECEIVED
[illegible] — REPORTED BY
RECEIVED BY

CF-1B

LAW OFFICES
BROWDER, RUSSELL, LITTLE, MORRIS AND BUTCHER
1200 ROSS BUILDING
RICHMOND, VIRGINIA 23219

AREA CODE 804
TELEPHONE 644-9842

JOHN B. BROWDER
GEORGE B LITTLE
JACK B RUSSELL
JAMES W. MORRIS, III
PHILIP B. MORRIS
ROBERT G. BUTCHER, JR.
RUFUS G COLDWELL, JR.
ROBERT M WHITE
J TERRY PARSLEY
DAVID D. ADDISON
R CARTER SCOTT, III
MALCOLM E. RITSCH, JR.
JOHN H. OBRION, JR.
R HUNTER MANSON
JAMES K. CLUVERIUS
THOMAS B. DAVIDSON, JR
THOMAS D. STOKES, III

WILLIAM D. JONES
JAMES H PRICE, III
WILLIAM D BAYLISS
PAUL S. BLILEY, JR
JOHN S GRAHAM, III
RICHARD K BENNETT

DEFENDANT'S EXHIBIT #5 MAY 23-79

April 22, 1977

Mr. Bill Shook
Erie Insurance Exchange
520 W. Broad Street
Waynesboro, Virginia

Re: Doris Pauline Meeks
v.
Robert A. Foley

Dear Mr. Shook:

I enclose pleadings and medical information regarding the above action which is pending in the Circuit Court of Louisa County.

My secretary has spoken with Mr. Ira T. Dunn in Gordonsville, Virginia, the producing agent for Mr. Foley, informing him of the basic facts of this case. My firm is involved as attorneys for Geico, the UM carrier for Mrs. Meeks.

From what I can gather from Mr. Dunn and Mr. Foley, Mr. Foley was insured at the time of the accident, but he did not notify Mr. Dunn. He simply enclosed the Motion for Judgment in with his payment check to you approximately two weeks after he was served.

Please call me at your earliest convenience concerning this matter, since it is scheduled for trial on May 5, 1977 and our coverage questions should be resolved before that time.

Very truly yours,

Thomas D. Stokes, III

TDS:dn

cc: Mr. Ira T. Dunn

791278 6/14/79

Frances K. Haley & Associates
Court Reporters
1311 Princess Anne St.
Fredericksburg, VA 22401
Office: 371-5258 Home: 786-4780

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
AUG 30 1979
RICHMOND, VIRGINIA

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF LOUISA

DORIS PAULINE MEEKS, Plaintiff

vs.

ERIE INSURANCE EXCHANGE, Defendant

Complete TRANSCRIPT of all the evidence and other incidents in the above styled case when heard on May 23, 1979, at 10:00 a.m., before Honorable Harold H. Purcell, Judge, with a jury.

APPEARANCES:

Mr. Buford M. Parsons, Jr., May, Miller & Parsons, Suite 800, 700 Building, 700 East Main Street, Richmond, Virginia 23279, Counsel for the Plaintiff;

Mr. W.W. Whitlock, Attorney at Law, Whitlock Building, Mineral, Virginia 23117, Counsel for the Plaintiff;

Mr. Russell H. Roberts, Roberts, Crosley, Haley & Ashby, 303 Amelia Street, Fredericksburg, Virginia 22401, Counsel for the Defendant.

Reported by Donna G. Eck

FRANCES K. HALEY & ASSOCIATES
Court Reporters
Courthouse Building
Fredericksburg, Virginia 22401
Office: 371-5258 Home: 786-4780

1 INDEX

	DIRECT	CROSS	REDIRECT	RECROSS
Ira T. Dunn	49	66	86	87
Doris Pauline Meeks	93	102	--	--
William Edward Shook	104	109	125	--

EXHIBITS

	PAGE
Defendant's Exhibit One (insurance policy)	59
Defendant's Exhibit Two (insurance policy)	59
Defendant's Exhibit Three (letter)	108
Defendant's Exhibit Four (document)	128
Defendant's Exhibit Five (letter)	129

MAY 23, 1979

NOTE: Court convenes at 10:00 a.m. After the swearing of the Court Reporter, the hearing is begun as follows:

IN CHAMBERS

THE COURT: All right. Who has the pretrial motion?

MR. PARSONS: I do. So, Judge, in a motion for judgment, I assume you have got the papers there, in which there was an automobile accident; and as a result of it, Mr. Whitlock represented a Mrs. Meeks and filed suit against Mr. Foley in your Court. Mr. Foley did not answer the motion for judgment. The Government Employees Insurance Company, who was the uninsured motor carrier, filed its answer. Ultimately, the Government Employees settled

IN CHAMBERS

with Mr. Whitlock under their contractual coverage. The grounds of defense of the Government Employees Insurance Company was withdrawn. Mr. Foley still had no attorney, and after a hearing on the matter, you entered in a judgment for the plaintiff against Mr. Foley in the sum of thirty thousand dollars on May 15, 1977.

Mr. Whitlock and I then joined in the representation of Mrs. Meeks and filed a suit against the Erie Insurance Company who was the liablilty insurance carrier. In that, in the first three paragraphs, we alleged the accident that Mr. Meeks was in, Mr. Foley was insured by the Erie Insurance Company, and that the policy was in force at the time of the accident.

In their grounds of

IN CHAMBERS

defense, they admitted the first three paragraphs but deny the remainder.

THE COURT: Now, what do they admit, and what do they not admit?

MR. ROBERTS: Well, on behalf of Erie, we admit that there was an accident, that there was a judgment entered against Mr. Foley, and that there was an insurance contract in force; but we deny that we owe anything under the insurance contract under the facts of this case.

MR. PARSONS: Now, as I understand it, the basis of the deposition of their denial and of the proposed jury charge that they submitted to you is two-fold. They say that they deny coverage, because Mr. Foley did not report to them the happening of the accident, number one; and number two, that he failed to

IN CHAMBERS

turn over the suit papers to them.

Is anything else in there, Mr. Roberts?

MR. ROBERTS: That's basically our defense.

MR. PARSONS: And our motion is for the record and may be technically denied, though Mr. Roberts just told you that the judgment was rendered against him and we had the suit papers here, and the Clerk can put that in if we can't get it stipulated with the policy being admitted and that it was in force, that the burden then switches to the defendant to show that there is no coverage.

THE COURT: I think that's true, isn't it, Mr. Roberts?

MR. PARSONS: And I brought this case right here, North River Insurance Company v. Gourdine.

IN CHAMBERS

THE COURT: That's an affirmative defense.

MR. ROBERTS: It's an affirmative defense that we have the burden of going forward with the evidence.

THE COURT: I think you have gotten rid of the plaintiff in the case.

MR. ROBERTS: We go forward with evidence showing lack of notice.

MR. PARSONS: If everybody agrees that that's correct, how do we proceed from here? Do I get to make the opening statement, or does the defendant get to make the opening statement first? I think that he must really go first. He has the burden. He has admitted this in his pleadings, and I believe the Court should so advise the jury that normally the plaintiff has the burden of going forward first and

IN CHAMBERS

proving its case, but that in this case the defense has the burden and that it will go forward.

THE COURT: I would think that the defendant would go forward. I haven't had this before. There may be some cases in point on it, and I may be incorrect; but if he has the burden of proof, he goes forward.

MR. ROBERTS: I think the plaintiff has the burden of proving the contract. We admit insurance coverage, but we don't admit the details of the contract, because the details of the contract were not alleged.

MR. PARSONS: At the time of the automobile accident, he maintained automobile insurance with the defendant Erie Insurance Company which coverage provided and which policy was in full force and effect at the time of the accident in question, and they admit that.

1 IN CHAMBERS

2

3

4 MR. ROBERTS: But with the terms of

5 the policy, they didn't state what the terms

6 of the policy was; and they have the burden --

7 MR. PARSONS: (interjecting) We do

8 not have the burden. Thirty-eight point one

9 of the Code of Virginia requires that they must--

10 MR. ROBERTS: (interjecting) But it

11 has nothing to do with limits, and --

12 THE COURT: But you haven't alleged

13 that there was a lack of limits.

14 MR. PARSONS: Mr. Landin admitted in

15 his deposition --

16 MR. ROBERTS: (interjecting) Well,

17 do you want to put Mr. Landin's deposition

18 on?

19 MR. PARSONS: I would think that the

20 defendant insurance company would have to go

21 forward with the burden of proving the lesser

limits. They're going to have to prove it.

IN CHAMBERS

THE COURT: They're going to have to prove it. I think that's correct. It would appear to me, however, that you might be better off, Mr. Parsons, for you to proceed with opening statement, and then say, "It's now our contention that we have become defendants, and Mr. Roberts is the plaintiff. The burden of proof is upon him. We don't have to present any evidence, and the burden of proof is upon him to prove it," and I am going to sustain you at that point and say, "Mr. Roberts, proceed."

MR. WHITLOCK: We would introduce to the Court here, and which we are doing now, the admissions and say that we have made it our case.

MR. PARSONS: The pleadings themselves, I don't think that we have to introduce them. They're already in.

IN CHAMBERS

MR. WHITLOCK: Then, it doesn't have to be done before the jury. If there wasn't any further evidence, the Court would instruct the jury.

THE COURT: Right.

MR. WHITLOCK: But I think Mr. Roberts wants us to make the opening statement and stay in the usual position of plaintiff.

THE COURT: Looks like to me you'd have a clearer case to the jury in that regard.

MR. WHITLOCK: But the burden would shift to you after these admissions have been called to the Court's attention.

MR. ROBERTS: And then on closing, we would go first. They would rebut our closing argument, and then we would have the final closing.

THE COURT: I would think so. The burden of proof is upon you.

IN CHAMBERS

MR. PARSONS: We'll ride with you, Mr. Roberts. Which way do you wish to go, sir?

MR. WHITLOCK: We don't want to make a problem with it. It doesn't seem to make a whole lot of difference.

MR. PARSONS: I would like to say for the record: I don't know how the Court feels, but I am willing to give Mr. Roberts his choice. You just tell us what you want to do, and I'll concur with it as far as this thing is.

THE COURT: You have a peculiar situation if you want to keep with your opening statement, and then you're going to yield to him. I don't think it makes any difference to closing.

MR. ROBERTS: Well, Your Honor, it

IN CHAMBERS

would seem to me that the appropriate way would be for them to open first, and for us to close first.

MR. PARSONS: Is that all right with you, Mr. Whitlock? That's agreeable to me.

MR. WHITLOCK: Fine, but we still take the position that the burden shifts to you. How you proceed in procedural matters doesn't seem to make any difference.

MR. ROBERTS: Your Honor, I presume the Court has ruled then that the plaintiff does not have to prove the contract. It's --

THE COURT: That's correct.

MR. ROBERTS: But, please respectfully note our exception on the Court's point.

THE COURT: It's not denied as I see it. You have admitted it.

their answers were. The whole purpose of excluding witnesses is to make your testimony your own and not based upon what someone else has said.

Do you all understand?

Take them, please, to the witness room, Sheriff.

NOTE: At this time all witnesses are excluded from the Courtroom in the company of the Sheriff.

THE COURT: There is no other person in the Courtroom, so there is no one else that we can exclude.

Gentlemen, proceed with opening statements.

MR. PARSONS: Judge Purcell, members of the jury, my name is Buford Parsons, and I'm supposed to be a lawyer, but I'm right nervous right now simply because I'm trying to think how, in my own words, how I'm going to explain what this case is all about.

1 Normally, if you have
2 ever come down here on days in which civil cases
3 are being tried, the word "insurance" is a bad
4 word; and if anybody says it, you're going to
5 have the urge to quit and come back another day.
6 Well, today we are going
7 to talk about automobile liability insurance;
8 and what we have really got to decide is whether
9 or not Mr. Robert Foley, who is a witness,
10 though I think he's got more interest in this
11 thing than anybody does perhaps, but whether
12 or not Mr. Foley, who had a policy of insurance
13 with Erie Insurance Company, is entitled to
14 coverage under that policy.
15 Now, I am going to start
16 just briefly, and I am going to come back in
17 the hopes that I can make this a little bit
18 clearer. In February, on February 17, 1976,
19 Mr. Foley was operating his automobile when it
20 was involved in an incident which was a no-
21 contact accident with the vehicle in which

1 Mrs. Meeks was a passenger.

2 What this all involves

3 is the fact that Mr. Foley's vehicle threw

4 a rock, threw some rocks upon her car, the car

5 that she was in, and into the windows of the

6 vehicle. As a result of this accident, Mrs.

7 Meeks was injured.

8 Now, this was in

9 February, February of 1976. She retained

10 Mr. Whitlock to represent her in her claim for

11 injury as a result of the accident.

12 Now Mrs. Meeks, the

13 vehicle that she was in, she had insurance just

14 like Mr. Foley did; and she had insurance with

15 the Government Employees Insurance Company.

16 Now, you ask me, somebody is going to say,

17 "What does the Government Employees Insurance

18 Company have to do with it?", and I hope, if

19 there are any questions, that we can get to

20 that in a few minutes. But Mr. Stokes, who is

21 a lawyer for them, will be here to tell you

1 what he did in this incident; that Mrs. Meeks
2 was insured; and likewise, Mr. Foley had insurance
3 with the Erie Insurance Company.
4 When we filed this suit,
5 we alleged, basically, what I told you: that the
6 accident occurred; Mrs. Meeks filed suit against
7 Mr. Foley to recover for her injuries; and
8 at the time of the accident, Robert A. Foley
9 maintained, and I'll read it to you. It's the
10 only time I am going to read anything. He
11 maintained automobile liability insurance
12 with the defendant, the Erie Insurance Exchange,
13 which policy provided coverage for Robert A.
14 Foley, and which policy was in full force and
15 effect at the time of the accident in question.
16 And the Erie Insurance
17 Company admitted that. They admitted that they
18 had the policy of insurance for Mr. Foley; but
19 they say that they don't owe him coverage, as I
20 understand from this, for two reasons. The
21 first reason is that he did not report the

1 accident to them after it occurred; and the
2 second reason is that he did not turn over the
3 suit papers when Mrs. Meeks filed her suit
4 against Mr. Foley, that he, Mr. Foley, did not
5 turn over the suit papers to the insurance
6 company; and that they were prejudiced by Mr.
7 Foley due to his failure to keep them informed.
8 What you're going to
9 have to decide here today is: Did he fail to
10 report the accident? Did he fail to turn
11 over the suit papers?
12 Well, I am going to
13 tell you what they are going to say about it,
14 but did he fail to do those things? Even if
15 you believe that he failed to do it, was the
16 insurance company prejudiced by it?
17 Now, I think the evidence
18 is going to be that after this accident occurred
19 on February 17, 1976, after the incident occurred,
20 Mr. Foley did not realize that there were rocks
21 being thrown from his car. He did not realize

that he had been in an accident, and he went on back to work. Mrs. Meeks came and told him of what had occurred; and she eventually, Mrs. Meeks, got out against Mr. Foley a ticket, a warrant for reckless driving. Mr. Foley will tell you that when he got the ticket or the warrant for reckless driving, he had Mr. Higginbotham to represent him, and he went and told Mr. Dunn about this incident occurring and that the lady had some windshield or glass damage to her vehicle. He'll tell you that he gave Mr. Dunn the lady's name and telephone number, and I would assume that Mr. Dunn is going to say that that's not correct. But Mr. Foley says it was a no-contact accident, and he gave the information to him, to Mr. Dunn.

You're going to have to decide that issue. Did he give the information to Mr. Dunn, or did he not give the information to Mr. Dunn? In other words, did the insurance company know of the accident, or did they not know of it?

1 After this, Mrs. Meeks
2 had some problems. She spent a considerable
3 period of time seeing physicians, went to the
4 doctors and all; and on February 9, 1977, she
5 filed her suit against Mr. Foley to recover
6 for her injuries in the automobile accident.
7 She filed it in this Court.
8 Now, after she filed a
9 suit, the evidence will be, and the way these
10 matters work, is that the papers were served on
11 Mr. Foley.
12 Now, Mr. Foley will tell
13 you that when the papers were served on him, he
14 went down and told Mr. Dunn that he had gotten
15 the suit papers, that he had gotten the papers
16 from the Court that said that he owed a lot
17 of money. He went down and told Mr. Dunn about
18 it, and at that time or within a few days after
19 that, he got from the Erie Insurace Company a
20 claims form as to how the accident occurred.
21 Mr. Foley sat down with his wife, who does most

of the writing for the family, and filled out the insurance claims form of how the accident occurred, what it was about. They put the suit papers in with the form and mailed it back to the Erie Insurance Company.

From that point on, and I might have to add this, for you all have got automobile insurance. I guess all of you have got it. Not only does the insurance company go ahead and agree to pay on your behalf, but the insurance company agrees to defend you. In other words, they agree to provide an attorney to defend you.

The Erie Insurance Company did not get an attorney, and they did not file an answer for grounds of defense on behalf of Robert A. Foley. But, if you can follow this, at about this time Mr. Stokes comes in, because everybody has uninsured motorist coverage, and he filed an answer for an uninsured motorist carrier, which is

1 this Government Employees Insurance Company,
2 and Mr. Stokes will be here sometime around
3 noon to tell you what he did.
4 But in any event, he
5 filed an answer, not to Mr. Foley, but for his
6 uninsured motorist carrier, and he wrote to
7 Mr. Foley and asked him if he had any insurance.
8 He called him on the telephone and found out
9 that he was insured with the Erie Insurance
10 Company. He got Mr. Foley in before a Court
11 Reporter, before a young lady like this one,
12 and took his deposition on April 18 and asked him
13 if he was insured, and he said that he had
14 insurance with the Erie Insurance Company and
15 that Mr. Dunn was his insurance agent.
16 They wrote on April 22
17 to Mr. Shook, who is sitting right there in the
18 blue suit, and they told him about the accident.
19 He is the claims manager for the Erie Insurance
20 Company, and they told him about the accident
21 and what had occurred. They told him about the

1 suit papers; about the case being set for trial.
2 Then on May 2, May 2nd, 1977, they came into
3 Court before Judge Purcell.
4 Well now, if you can
5 visualize, this thing was starting to catch their
6 attention. They still weren't answering. They
7 didn't answer the suit papers. They hadn't
8 corresponded with Mr. Foley and tell him what
9 to do, but they sent a lawyer, a Mr. David
10 Landin who is with a firm in Charlottesville,
11 and they sent Mr. Landin over here; and the
12 evidence will show that Mr. Whitlock or Mrs.
13 Meeks, it probably would be more proper to say
14 this Court, told Mr. Landin, who was the lawyer
15 for the Erie Insurance Company, "Your time has
16 run. You can't file an answer after twenty-
17 one days." But they told him, "If you want
18 to file an answer, a grounds of defense, I'll
19 endorse an order permitting you to file it."
20 And I think the evidence
21 will show that they, the plaintiff Mrs. Meeks,

1 would have agreed that the Erie Insurance
2 Company could come in and answer for their
3 insured Mr. Foley. The case was set for trial
4 on the next Monday. I think May 2nd was on a
5 Friday, and the case was set for trial on a
6 Monday. And they told the Erie Insurance
7 Company that they would even agree to a
8 continuance of the case to give them some
9 time to prepare it for trial.
10 And the evidence will
11 be that Erie Insurance Company did nothing.
12 They refused or did not act on the offers that
13 were made to them. They turned their back and
14 went home to their office. And on the 5th of
15 May, when it was all too late, they wrote a
16 letter and told Mr. Foley, "You don't have any
17 coverage. Due to a breach in the conditions of
18 your policy, you don't have any coverage."
19 They even told him that
20 this Court was going to have a hearing on the
21 6th of May to assess damages against him, and

1 Mr. Foley did not have a lawyer; and the Court
2 did that. The Court heard evidence as to the
3 damages that Mrs. Meeks had sustained, and this
4 Court entered a judgment in her favor against
5 Robert A. Foley for thirty thousand dollars with
6 interest from May 16, 1977. And nobody showed
7 up to defend him; and everybody knew about it,
8 I think the evidence is going to show.
9 So, what it is, the
10 purpose of an opening statement, is to tell you
11 what I think the evidence is going to be;
12 what the case is about. I think it's the
13 issues of notice of accident, of the suit
14 papers, and whether or not if you think Mr.
15 Foley feels he was doing what he was supposed
16 to do. But if he didn't do what he was supposed
17 to do, was the insurance company prejudiced by
18 it, or could they have come in when the offer
19 was made and picked up and started?
20 The only other thing I
21 can add is that Mr. Stokes, who represented the

1 Government Employees Insurance Company, and
2 we'll introduce this now: They investigated
3 this case. They summoned records. They
4 summoned all kinds of doctors' records.
5 They hired a doctor in Richmond to do an
6 independant medical examination pursuant to an
7 order of this Court. They summoned all the
8 witnesses for the trial, and this case was pre-
9 pared for trial. And the Erie Insurance
10 Company would not have their lawyers come in
11 and defend the case.
12 I think the evidence
13 will even show that after the continuance, if
14 Erie Insurance Company would have simply asked
15 Mr. Stokes, he would have given it to them, just
16 hand it over; andhe would have given them the
17 investigation, the whole preparation, the
18 whole thing. And they refused.
19 So, that's basically
20 what we are going to be talking about. I
21 know it's hard to follow. I don't know how

many of you can figure what we are talking about, but it's insurance coverage. Is he entitled to coverage under the policy that he bought and paid for? And that's what we are going to prove today.

Judge Purcell, based on the pleading motion showing policy defenses that admit the policy, has rendered a judgment that is admitted as a part of this record of this Court. And they have the burden and want to follow with it, and they should do that; and the Court has sustained the motion that they go forward with the evidence.

THE COURT: Proceed, Mr. Roberts.

MR. ROBERTS: May it please the Court, ladies and gentlemen of the jury, I think that we have been introduced a number of times, but I am Russ Roberts representing Erie Insurance Company here before you today. My office is in Fredericksburg just adjoining Louisa County, near Spotsylvania actually.

1 regard to the bank, the bank advanced the money
2 for the house to be purchased. And then the
3 bargain going the other way is that it has to
4 be repaired --
5 MR. PARSONS: (interjecting) Judge
6 Purcell, he is not telling them what the facts
7 are. He is arguing the theories of the case.
8 The purpose of an opening statement is to
9 tell them what the evidence is going to be.
10 THE COURT: That's the purpose,
11 but we grant you some leeway. Proceed, Mr.
12 Roberts.
13 MR. ROBERTS: Thank you, Your Honor.
14 Now, this is a contract
15 case as I stated. There was a contract entered
16 into between Mr. Foley and the Erie Insurance
17 Company. Mr. Foley was to pay premiums, which
18 he did. We have admitted that the policy was
19 in force at the time of this accident.
20 But, there are other
21 provisions of that insurance policy, and I think

other provisions that are not unknown to members of this jury.

One of those provisions is, and I'll just read it as follows: "In the event of an accident, occurrence, or loss, written notice," not oral notice; not dropping by the agent's office and saying, "I have had an accident," but "written notice containing particulars sufficient to identify the insured," that would be Mr. Foley, "and also reasonable obtainable information with respect to the time, place, and circumstances of the accident shall be given by the insured or on his behalf to Erie, the insurance company, or any of its agents as soon as practicable after the accident."

Now, we feel that the evidence is going to clearly show that Mr. Foley did not do that. This accident occurred on February 17, 1976. Immediately after the accident, Mrs. Meeks followed, Mr. Meeks was driving with Mrs. Meeks as a passenger, followed

1 out in the evidence if Mr. Foley testifies to
2 that, that on April 18, 1977, which is a year,
3 a little over a year after the accident, not
4 some three years as it is now, but on April 18,
5 1977, in formal depositions, Mr. Foley was asked
6 by Mr. Whitlock, who sits right here to my left,
7 after describing the accident and everything,
8 he asked Mr. Foley, "Did you turn it in to
9 your insurance company?" And do you know what
10 Mr. Foley's answer was? His answer was no.
11 Now, if he says today
12 that he went and told Mr. Dunn a lot of stuff
13 about the accident, keep in mind what he said
14 immediately or about a year after the accident.
15 Now, there is another
16 provision of the insurance policy that says
17 that if suit is brought, if a claim or suit is
18 brought, then the insured, in this case Mr.
19 Foley, shall immediately, not as soon as
20 practicable, but he shall immediately get those
21 suit papers to the insurance company.

1 MR. ROBERTS: The point is well
2 taken, and I apologize to the Court.
3 The evidence is what
4 is important in this case, not what the attorneys
5 say. The evidence is going to be the contract.
6 The evidence is going to be whether or not
7 Mr. Foley complied with his contract.
8 I sumbit to you that
9 the evidence will be perfectly clear after you
10 have heard it all, that Mr. Foley did not
11 comply with his contract. Therefore, he is not
12 entitled to the protection that the insurance
13 would ordinarily afford him if he had complied
14 with the contract.
15 So, at the conclusion
16 of the evidence, we will ask you for a verdict
17 for the Erie Insurance Company.
18 Thank you.
19 THE COURT: All right, gentlemen.
20 Gentlemen, you have a policy of defenses here.
21 That's an affirmative defense. So the duty will

be on the defendant. The burden of proof will be on the defendant to show the policy of defense. The defendant will receive first.

Mr. Roberts.

MR. ROBERTS: Your Honor, please note our exception to the Court's ruling in that regard. I think for the record that I'd best make a motion at this point.

THE COURT: Motion is overruled.

Proceed, Mr. Roberts.

MR. ROBERTS: All right, Your Honor. Note our exception to the Court's overruling of our motion.

We would call as our witness Mr. Ira Dunn, who has been excluded.

IRA T. DUNN, a

witness, being called for examination by counsel for the defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROBERTS:

Q State your name, please, sir.

A Ira T. Dunn.

Q Mr. Dunn, where do you reside?

A I reside in Fluvanna County.

Q Where is your place of business, sir?

A Gordonsville, Main Street in Gordonsville.

Q Mr. Dunn, what is your business?

A I own the Dunn Insurance Agency.

Q Mr. Dunn, did you in February of 1976, have an insured by the name of Robert A. Foley?

A Yes, I did.

Q Let me, if you will, show you some

photocopies of some documents and ask you if you can identify those photocopies.

A Yes. This is a copy of the declaration page of the original policy that was issued to Mr. Foley.

Q Is that the declarations page for the policy that was in force on February 17, 1976?

A That's correct.

Q All right. So, the second document, is that the policy itself?

A Yes, it is.

Q That's a true copy of the policy?

A Yes.

NOTE: Mr. Roberts at this time hands several paperwritings to counsel for the plaintiff.

MR. PARSONS: May we approach the bench, Your Honor?

THE COURT: Yes, sir. If you're going to raise an objection, I would ask that the jury be excluded.

THE COURT: All right, gentlemen, this is Defendant's Exhibit One and Defendant's Exhibit Two. You may hand them to the jury if you desire; or if you wish to question the witness about the exhibits, you may do so.

NOTE: At this point the witness, Mr. Dunn, returns to the Courtroom and resumes his place on the witness stand.

DIRECT EXAMINATION (continuing)

BY MR. ROBERTS:

Q Mr. Dunn, how long have you been an agent for Erie Insurance Company?

A Six years ago March 1st.

Q And have you had your agency anywhere other than in Gordonsville?

A No. It's been in the same place since March 1st, six years ago.

Q Prior to that, what did you do?

A I worked with State Farm Mutual

1 Insurance Company in Frederick, Maryland. I had been with
2 them for twenty years. I worked as an agency liason man
3 between the agency and the regional office in Frederick,
4 Maryland.
5 Q During your time with State Farm
6 and your recent time as an agent with Erie, can you tell
7 us whether or not you have familiarized yourself with the
8 provisions of a standard automobile policy?
9 A Yes, sir.
10 Q Now, sir, I refer you to condition
11 number four of this policy of insurance that you had issued
12 to Mr. Foley.
13
14 MR. WHITLOCK: Your Honor, I believe
15 that the policy speaks for itself and to pick
16 out one point in it without reading that
17 entire thing would be misleading, and I
18 object to it.
19 THE COURT: Objection is overruled.
20 I presume he is asking the witness to point out
21 a part of the policy. Objection overruled.
Proceed, Mr. Roberts.

direct - Dunn

1 BY MR. ROBERTS: (continuing)

2 Q In regard to that condition four,
3 would you please read condition four verbatim to the jury.
4 It's a short one.

5 A "Condition four: Notice. In the
6 event of an accident, occurrence or loss, written notice
7 containing particulars sufficient to identify the Insured
8 and also reasonable obtainable information with respect
9 to the time, place and circumstances thereof, and the names
10 and addresses of the injured and of available witnesses,
11 shall be given by or for the Insured to the Erie or any of
12 its authorized agents as soon as practicable. In the event
13 of theft the Insured shall also promptly notify the
14 police. If claim is made or suit is brought against the
15 Insured, he shall immediately forward to the Erie every
16 demand, notice, summons or other process received by him
17 or his representative."

18 MR. ROBERTS: All right, sir. Thank
19 you, Mr. Dunn.

20 THE COURT: You may hand the exhibit
21 to the jury, if you so desire.

MR. ROBERTS: All right.

NOTE: Mr. Roberts at this time hands Defendant's Exhibit One and Defendant's Exhibit Two to the jury.

THE COURT: Proceed, Mr. Roberts.

MR. ROBERTS: All right, sir.

BY MR. ROBERTS: (continuing)

Q Mr. Dunn, now I take you back to February of 1976, and let's talk about the period of time between February 17, 1976, and April 22, 1977. Tell me, if you will, what if anything Mr. Foley gave you in the way of written notice of an automobile accident that occurred on February 17, 1976.

A He didn't give me anything. I never heard of the incident at all.

Q Between February 17, 1976, and April 22, 1977, tell us, if you will, what if anything Mr. Foley gave you with regard to suit papers that had been served on him.

direct - Dunn

A Well, again he didn't give me anything.

Q Did he advise you of any claim being made against him?

A No, he did not.

Q Now, he gave you nothing in writing. Did he come and tell you orally about anything?

A No, he did not.

Q Did you ever hear of an accident that occurred on February 17, 1976?

A Not until April 22, 1977.

Q How did you hear about it?

A I received a phone call from a law firm in Richmond, a long title. I don't recall all the names. I believe a Mr. Browder was one of them, and a Little and a Russell; and the secretary was calling me, and she called and asked if indeed Mr. Robert A. Foley had coverage on February 17, 1976. It was a liability insurance policy, and I informed her that he did. At that point she informed me that there was some suit papers that were being mailed to me on that day, April 22nd, and I asked her what

1 was the suit about. I knew nothing of any suit or any
2 accident, and she informed me that Mr. Foley had had an
3 incident on February 17, 1976, with a Mr. Meeks, and that
4 she would send the suit papers to me that day.
5 Q And did you receive them?
6 A I received them the next day.
7 Q And what did you do upon receiving
8 that phone call regarding Mr. Foley's accident?
9 A What I did immediately was to pick
10 up a telephone and call my claims superintendent, Mr. Bill
11 Shook, and inform him what happened, and he told me to
12 submit a claim report that very day with just as much
13 information as I had and any subsequent papers I received,
14 to send them immediately, and I did directly.
15 Q Did you, after April 22, 1977,
16 talk with Mr. Foley?
17 A Yes, I did.
18 Q Did you discuss with Mr. Foley this
19 question of notice?
20 A I asked Mr. Foley why it was that
21 he didn't report the accident to me, and he said, "Mr. Dunn,
I didn't consider it an automobile accident."

Q Well, did he say anything else on the subject?

A That was about it. That's all he said.

Q Did you discuss with him the question of suit papers being forwarded to you?

A No. I sure didn't, because I didn't know anything about it at that time. The suit papers I knew about was the ones in Richmond. I didn't discuss that with him at all.

MR. ROBERTS: We have no further questions for Mr. Dunn. Thank you, Your Honor.

CROSS EXAMINATION

BY MR. WHITLOCK:

Q Mr. Dunn, you said you got notice of the accident on April 22, 1977.

A That's correct, sir.

Q And on that same day you filled out an accident report and sent it in.

A I sent it to the Waynesboro office.

Q That's normally the way that insurance agents operate when a claim is made. You don't receive a written notice, but you get the verbal notice, and you fill in the form, and that's the written notice that's made to the company.

A We put it in writing just as soon as possible.

Q The agent usually receives a verbal or an oral notice of the accident from their policyholder. You put it in writing and send it to the company.

A That's correct.

Q And that's the written notice you normally give to the insurance company. Now, on this day, you said that the man from the Richmond law firm told you that --

A (interjecting) No. The secretary told me. I never talked with him; the secretary.

Q They told you that they had suit papers, and they were going to send them to you.

A They were going to send them to me that day.

Q Why when you talked to Mr. Foley you said that you didn't know anything about the suit papers?

A What I said was I didn't discuss it with him, because he didn't know anything about them.

Q Mr. Foley didn't say anything?

A He didn't relate to me whether he knew anything about it.

Q Did you ask him whether he knew anything about it?

A No, sir, I didn't. I didn't discuss the suit at all.

Q But, you knew that he had been sued.

A The suit --

Q And knowing that he had been sued and that that suit was pending against him, you didn't tell him anything about it.

A No, because the agents don't do this. Once there is an accident, the agent reports it to the Claims Department, and the Claims Department handles it then.

Q Did you tell him that somebody would be getting in touch with him later about it?

A I am sure that they did, yes.

Q You told him that a lawyer would be getting in touch with him?

A No, sir. I did not tell him. I told him he would be hearing about it.

Q I see. Well, did you know that at this time, I assume you did know, that a trial was pending for May 5th, 1977?

A No, sir, I didn't know.

Q Are you saying that the people in Richmond didn't tell you that?

A No, sir. They sent me the suit papers. I sent the suit papers on to Waynesboro.

Q Didn't they also tell you that they had fully investigated this accident, and that they would turn this investigative file over to you so that you could turn it over to your insurance company?

A (witness shaking head)

MR. ROBERTS: What was your answer, Mr. Dunn?

THE WITNESS: No, sir.

BY MR. WHITLOCK: (continuing)

Q Mr. Dunn, Mr. Foley had paid the premium for this coverage in full, had he not?

A He had paid it. He made a partial payment to cover it. His policy went out of force several weeks after the accident.

Q He paid the premium.

A There was coverage in force at the time of the accident.

Q Now, when had your company notified Mr. Foley, then, that they were not going to cover him for that accident?

A There again, I had nothing to do with it. That came from the Claims Department.

Q You didn't know? The company never notified you?

A No. They don't confer with me on claims once I turn them over to them.

Q But, you do know that you never sent any of the premiums back to Mr. Foley that you charged him, don't you?

A We collected the premium. He had coverage until, I believe, it was about the 28th of January, at which time the policy runs out of force, and they reinstated it until the following month.

Q But the premium he paid at the time this accident happened was never refunded to him at all. Was it refunded by the company?

MR. ROBERTS: Objection, Your Honor. I don't believe this has any materiality in this matter.

THE COURT: I'll have to hear you on that.

Members of the jury, retire to your juryroom. Mr. Dunn, I'll have to ask you to step down again.

NOTE: At this point the jury and the witness depart from the Courtroom in the company of the Sheriff, after which the matter continues as follows:

JURY IN

THE COURT: Objection sustained. Gentlemen, proceed.

Mr. Dunn, retake the stand.

NOTE: The witness returns to the witness stand.

CROSS EXAMINATION (continuing)

BY MR. WHITLOCK:

Q Mr. Dunn, you read from the insurance contract certain portions, and I believe you omitted some portion. Would you read a part from this contract referring to parts one and four here as to what it says about the --

A (interjecting) This part right here?

Q Yes.

A "Parts One and Four." This is under the item six, "Assistance and Cooperation of the Insured."

1 "The failure or refusal of the Insured to cooperate with or
2 assist the Erie which prejudices the Erie's defense of an
3 action for damages arising out of the operation or use of
4 an automobile shall constitute non-compliance with the
5 requirements of the policy that the Insured shall cooperate
6 with and assist the Erie."
7 Q That says that failure has to prej-
8 udice the company, does it not?
9 MR. ROBERTS: Your Honor, I object
10 to Mr. Dunn being examined as to the content
11 and the import of the contract. And we also
12 raise no defense as to failure to cooperate.
13 Our defense is failure to notify and failure
14 to forward suit.
15 THE COURT: Objection overruled.
16 MR. ROBERTS: Please note our
17 exception.
18
19 BY MR. WHITLOCK: (continuing)
20 Q This says that the failure of the
21 insured, of Mr. Foley, to cooperate, to assist Erie, has to

prejudice the company before you can deny coverage, does it not?

A Well, I think what it says is he shouldn't prejudice the company's rights for recovery by not cooperating with them is my understanding.

Q Are you contending that he prejudiced the company?

A I think that he did in that he didn't report it to them.

Q All right, sir. Now, Mr. Foley had coverage that would protect him up to fifty thousand dollars for this accident, did he not?

A No.

Q What is the limits of coverage that he had?

A He had fifty thousand to one hundred thousand dollars.

Q For one person injured or dead, and that's shown on this declaration sheet that's been admitted as Defendant's Exhibit Two, is that right?

A Yes.

Q Mr. Dunn, were you aware that before

1 this case was tried that an offer was made to Erie to have
2 his lawyer come in and defend this case and investigate
3 the case, and that a continuance would be granted if
4 necessary?
5 A I didn't understand your question.
6 Q I said: Before, were you aware, that
7 before judgment was entered in this case, that an agreement
8 was made, an offer was made to them, to Erie's attorneys,
9 that they could come in and defend this case to have a
10 continuance for the purpose of investigating it and deter-
11 mining the facts if they wanted to?
12 A No.
13 Q You weren't aware of that?
14 A No, sir.
15 Q All right, sir. Now, you said
16 that you weren't notified by the attorneys in Richmond of
17 the trial date on May 5th. I hand you a letter addressed
18 to you, or at least it's addressed to Erie, dated April 22,
19 1977, and I ask you if you didn't receive that, and doesn't
20 that in fact tell you that the case was set for trial on
21 May 5th?

A That's right.

Q So, you were informed of it.

A But the letter was addressed to Mr. Bill Shook.

Q Doesn't that show a copy of it?

A I got a copy for my file.

Q So, you were aware of the case being set for trial and scheduled for trial on May 5th when you talked to Mr. Foley, but you didn't relate that to him.

A I don't think.-- We didn't discuss that, no.

Q But you were aware of it.

A Yes. I received that letter which I sent on to Mr. Shook. It was for him.

Q But you said it was important to your policyholder to inform him that he was scheduled to be in Court and that this case would be tried on May 5th.

A It wasn't within the jurisdiction of the agent to do that.

Q Did you think it was important?

1 A No, I didn't.

2 Q You didn't think you had any respon-

3 sibility to your policyholder to tell him that?

4 A I didn't think it was my responsibility

5 to. That's the responsibility of the Claims Department.

6 Q Now, did an occasion come during

7 this time, around this time, that Mr. Foley came to see

8 you and told you that he had gotten a letter from me, and

9 that you told him not to come to see me and not to come to

10 see any lawyer other than somebody from Erie?

11 A (witness shaking head) I got a

12 letter subject to this suit that Mr. Foley brought in and

13 asked me about it, what should he do, and that you had

14 asked him to come to your office, and you said that Mr.

15 Parsons would be there, and he said what should he do. I

16 picked up the phone and asked Mr. Shook and that was the

17 adivce that he gave him.

18 Q What was the advice?

19 A Do not go see you.

20 Q So, Mr. Shook told you to tell him

21 not to come see me.

A (witness nodding head)

Q But they were denying coverage and wouldn't defend him.

A That, I don't know. That's up to the Claims Department.

Q Now, Mr. Dunn, does your company send out claim forms for the policyholders to use in filling out an accident report?

A Claim forms?

Q Yes.

A If they have an accident, yes.

Q Do they mail those out?

A Yes.

Q And do they mail an envelope out with them telling them to mail it back?

A Yes.

Q It's a self-addressed envelope, and that's the company in Waynesboro, or rather the company in your office, is it not?

A (witness nodding head)

Q Did you send out one in this case?

A No, sir.

Q You said that you talked with Mr. Foley, and he said that he didn't consider it an automibile accident. When did you talk with Mr. Foley or have this discussion with him?

A It was sometime after I got the notification of the accident.

Q Well, did you ask him for any of the details of the accident then?

A Yes, I did.

Q And you were aware then that he -- let me ask you this: How come you weren't in touch with Mr. Foley?

A No. I ran into Mr. Foley on the street. He didn't come to see me at all.

Q Do you know when that was?

A It was just a couple of days after I got the papers from Richmond, the suit papers.

Q Did you tell him then anything about his being scheduled to go to trial, or that he ought to get a lawyer, or that you all weren't going to defend him?

1 A I talked to him purely about the
2 accident, his account of the accident.
3 Q Well, did you ask him for any of
4 the details of the accident?
5 A Yes, I did.
6 Q Did you fill out that in writing
7 and send it to the insurance company?
8 A Yes, I had already sent that in.
9 Q You did put that in writing and
10 had sent it to the insurance company.
11 A (witness nodding head)
12 Q Was any claim made against your
13 company for the damage to the Meeks' car by Mr. Meeks for
14 the windshield?
15 A No, sir.
16 Q Did you talk to Mr. Riner, who
17 was Mr. Thomas Riner, who was the man Mr. Foley worked for
18 at the time this accident happened?
19 A Yes, I did.
20 Q When did you talk to him?
21 A I talked to him the same day that I
got the phone call from Richmond.

Q You went to see Mr. Riner?

A Um-hum.

Q Why did you go to see Mr. Riner rather than talk to Mr. Foley?

A Because I had talked with Mr. Riner, and was assured by a freind of Mr. Foley that this is where it happened, and that he was working for Mr. Riner, and that Mr. Riner should know about it; and Mr. Riner was served some suit papers that were not for him and which indeed should have been for Mr. Foley.

Q Mr. Riner told you that Mr. Foly had an attorney, Mr. Higginbotham in Orange. Did you get in touch with Mr. Higginbotham to get any details of this accident?

A I certainly did.

Q Did he tell you anything?

A He wasn't in. I talked with his secretary.

Q But, did you get any information about this accident?

A This is in my notes there. The secretary pulled the file and told me that they had had

a hearing relative to the accident. It's in Orange, and Mr. Higginbotham had represented Mr. Foley there, and that Mr. Foley had been charged with a summons. She wasn't sure what it was. They had appealed the case. It was to be heard at a later date, and the file ended there. I don't know what happened.

Q Did you report that to Erie?

A I certainly did. I sent them a memo.

Q You sent that in writing?

A I sent that to Waynesboro.

THE COURT: Can you tell me when that was done, Mr. Dunn?

THE WITNESS: That was done just a couple of days after the 22nd.

THE COURT: After April 22nd, somewhere along about April 24th?

THE WITNESS: Something like that, sir, yes.

BY MR. WHITLOCK: (continuing)

Q When did Mr. Foley's coverage terminate with you?

A See, he was covered for the accident, so it terminated about the last part of that month, I believe, about the 28th.

Q And did he renew his coverage?

A Sure. He reinstated it with time out of force in March of that year, and they have an active policy now.

Q So, you have coverage for them now.

A Yes, sir.

Q With Erie?

A Yes, sir.

MR. WHITLOCK: All right, sir, that's all.

THE COURT: Do you want to question him, Mr. Roberts?

MR. ROBERTS: Yes, sir.

REDIRECT EXAMINATION

BY MR. ROBERTS:

Q Mr. Dunn, all of these letters and so forth that Mr. Whitlock has asked you about on cross examination, did all of this take place after April 22, 1977?

A That's correct.

Q The letter that Mr. Whitlock wrote to Mr. Foley that was shown to you, was that after this suit was brought?

A Yes, it was. That's correct.

Q By this suit, I mean the suit of Mrs. Meeks versus the Erie.

A That's correct.

MR. ROBERTS: Your Honor, that's all I have for Mr. Dunn now.

THE COURT: Do you want to excuse this witness, Mr. Whitlock?

MR. WHITLOCK: Just a moment, sir.

RECROSS EXAMINATION

BY MR. WHITLOCK:

Q Mr. Dunn, do you have a copy of the letter that you say was received after this suit was executed, that Mr. Foley brought you?

A Um-hum. I have it in my files.

Q Where is it?

A It's in my files.

Q You don't have it with you today?

A No, sir.

Q Well, how do you know it was after this suit was instituted?

A Because I have it. I file them in chronological order. Everything that has happened in this suit was at the top page. The only thing on top of it is the summons to appear today.

Q Did you send a copy of that letter on to Erie?

A No, sir. I called Mr. Shook.

Q You kept the letter?

A I kept it.

Q So, the only person that would have that letter would be you.

A I kept it for Mrs. Foley.

Q You kept it for Mrs. Foley?

A Um-hum.

Q Why did you keep it for Mrs. Foley?

A She asked me to.

Q Did she give it to you to send to Erie?

A No, sir. She came in and asked me what should she do. I said, "We'll find out." I picked up the phone and called Mr. Shook.

Q And you advised her what to do.

A Yes, sir, by Mr. Shook's advice.

Q At that time you were all looking out for Mrs. Foley. You were against her, were you not?

A I think we were looking out for her.

Q You think you were looking out for her by not telling her? How were you looking out for her?

A One of the ways: I'd be taking

1 partial payments from her that we don't take from other
2 people.
3 Q I mean this letter. How were you
4 looking out for her?
5 A Because she came to me for advice.
6 Q Did you ever think of telling her,
7 "I have a conflict of interest. Our insurance company is
8 denying you coverage, and it wouldn't be proper for me to
9 advise you"?
10 A No, because I felt I would be doing
11 her a service by getting her the proper advice.
12 Q Proper advice from whom?
13 A From the company.
14 Q But the advice you got from the
15 company was what they wanted to be done, not what would be
16 good for Mrs. Foley.
17 A I represent the company. I have to
18 look out for the insured.
19 Q Even though you were looking out
20 for the company, you didn't advise Mrs. Foley of that and
21 to look elsewhere for answers, did you?

1 A It was our plan that was the best
2 for her.
3 Q In whose opinion?
4 A Our Claims Department.
5 Q I see. Well, do you know why it
6 was for the best interest of your Claims Department that
7 Mrs. Foley turn the letter over to you, and you put it in
8 your file and nobody knew anything about it or responded
9 to it?
10 A That wasn't on the letter she
11 received from me.
12 Q What was that?
13 A That wasn't on the letter she
14 received from me.
15 Q I see. What about any other letters
16 then?
17 A Well, I don't know about those.
18 Q You just said it was a lot of
19 letters.
20 A Well, she kept those.
21 Q How do you know anything about them?

A Because she mentioned them to me. She said she kept getting them, and she didn't know what to do. She was very confused.

Q Did you suggest to her that she write a letter to Mr. Higginbotham?

A Mr. Higginbotham wasn't involved in this case. He was involved in the traffic charge. He had nothing to do with the suit.

Q Were you and your company involved in this matter?

A In what matter: the suit or the --

Q The claim against the Foleys.

A Well, certainly the suit.

Q How were you involved in the claim against the Foleys?

A Because we were involved. Because I received a summons to be here today.

MR. WHITLOCK: All right, sir. Nothing further.

THE COURT: All right, gentlemen. Do you want to excuse this witness or what?

DORIS PAULINE MEEKS, the plaintiff, being called for examination by counsel for the defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROBERTS:

Q Now, Mrs. Meeks, I gather that you are the Doris Meeks that is the plaintiff in the suit against Mr. Foley, is that correct?

A That's right.

Q And Mr. Whitlock represented you in that suit, didn't he?

A That's correct.

Q Mr. Whitlock is still representing you, is that correct?

A Yes, sir.

Q Now, Mrs. Meeks, is it correct that on February the 17th, 1976, you were riding as a passenger in your husband's automobile?

A Yes, sir.

Q And then the car was involved in an accident with a vehicle operated by Mr. Foley, wasn't it?

A Yes, sir.

Q Did you all follow Mr. Foley after the accident?

A Yes. After he kicked up the rocks and things, well, he didn't make no effort to stop, so sure, we followed him.

Q And you followed him to a job site, didn't you?

A Yes, sir.

Q Which was what, about a half a mile to a mile away from where the accident took place?

A About a half a mile or so.

Q You would say about a --

A (interjecting) About a half a mile.

Q Did you talk with Mr. Foley at the job site?

A I sure did.

Q And you told him, I gather in no

uncertain terms, that his car had thrown rocks on the car in which you were riding, didn't you?

A Yes.

Q You told him that the car was damaged, did you not?

A I just told him that the windshield was damaged, but I had tried to dodge the rocks that came in, and I was also holding a baby on my lap, and I took the child and throwed it in between my husband and I.

Q Did you tell Mr. Foley all of this?

A Yes, I did.

Q Did you tell him that you hurt yourself?

A Yes.

Q And all of this occurred right on the day of the accident, didn't it?

A Yes.

Q And then, you went and had a reckless driving warrant sworn out against him, didn't you?

A Yes, because he gave me a false name.

Q What name did he give you?

A Thomas Riner.

Q So, your first reckless driving warrant was sworn out against Thomas Riner, wasn't it?

A Yes, sir.

Q And then you determined that that was in error, didn't you?

A Yes, sir, when I went to Court.

Q And you swore out a second warrant against Mr. Foley, didn't you?

A That's correct.

Q And that went to Court also?

A Yes.

Q Did it go to Court in May or June of that year? Can you remember approximately?

A (no response)

Q Can you remember approximately?

A I can't remember.

Q Well, approximately how long after the accident was it?

A It wasn't too long.

Q It wasn't too long after the accident that the reckless driving warrant came to trial.

A That's correct.

THE COURT: Was that in 1976, gentlemen?

Q Was that in 1976?

A I am pretty sure, sir. Yes, 1976.

Q So, it was just a short while after the accident.

A Yes, sir.

Q Now, was Mr. Foley present that day at the trial?

A Yes.

Q Did you testify at the trial on the reckless driving warrant?

A Yes, sir.

Q Was Mr. Foley in the Courtroom when you testified?

A No, I don't think so.

Q You think Mr. Foley was out of the Courtroom.

direct - Meeks

A Yes, because they made the witnesses leave the room, because I went outside too.

Q Well, of course, he was the defendant.

A I don't know whether or not they sent him out. I think Mr. Riner was the one outside with me at the door.

Q So, Mr. Riner was outside with you, and Mr. Foley was in the Courtroom.

A As I recall, he was.

Q And you testified again about what Mr. Foley did.

A Yes.

Q Did you also tell the Court that you were injured?

A Yes.

Q Were there some cross words between you and Mr. Foley over this at the job site?

A No. I just told him that -- well, he told me that he was going to pull me out of the car.

Q Mr. Foley did?

A Yes.

Q I'm sorry. Go right ahead.

A I told him that I didn't feel much like arguing over it, because I had already been upset that morning and had found my grandmother dead over in Orange.

Q On that very same day, had you?

A Yes, and he told me that he didn't care.

Q That's what Mr. Foley told you.

A Yes.

Q Now, didn't Mr. Foley also tell you on that day that he didn't want you to report this?

A Yes, he did. He said because he was having marriage problems.

Q And that he felt if you reported this accident, it would make his marriage problems worse.

A Well, I don't know what was the reason. He just told me that he was having marriage problems.

Q So, he specifically told you not to report the accident.

A He told me that for me to give him

my name and address and telephone number, and he would call his insurance company and have them call me.

Q And you never heard from the insurance company, did you?

A To this day --

Q To this day you haven't heard from Erie Insurance Company, have you?

A No.

Q Did he tell you what company he had insurance with?

A No, sir.

Q Now Mrs. Meeks, I presume that during this time you kept in touch with Mr. Whitlock, didn't you?

A Mr. Whitlock has been keeping in touch with me.

Q So, you were aware of the fact, were you not, that Mr. Whitlock had filed suit against Mr. Foley in February of 1977, were you not?

A Yes.

Q As a matter of fact, on April the 18th, 1977, you and Mr. Foley in that suit went to Mr.

1 Whitlock's office for your depositions to be taken, didn't
2 you?
3 A That is correct.
4 Q And were you present in the room
5 when Mr. Foley testified?
6 A Yes.
7 Q And also there was Mr. Whitlock and
8 Mr. Stokes, who represented the Government Insurance
9 Employees Company, in the room, weren't they?
10 A That's right.
11 Q You also knew when you were there
12 at Mr. Whitlock's office on April 18, 1977, that your
13 case was scheduled to come to trial on May 5th, 1977, didn't
14 you?
15 A I cannot recall. I think we were
16 summoned for that day. I can't recall if I was told that
17 day or not.
18 Q Well, wasn't it originally scheduled
19 for May 5th and postponed until the 16th of May?
20 A Yes.
21 Q Is that correct?

A Well, one of them was postponed, so I know it was one of them, so it might have been that one.

Q Well, it actually was on the 16th of May that you appeared before Judge Purcell, wasn't it?

A Yes.

Q And that was in the year 1977.

A That's correct.

Q And Mr. Foley was not here that day, was he?

A I don't recall.

MR. ROBERTS: Your Honor, that's all I have of this witness. Thank you.

THE COURT: Cross examine.

CROSS EXAMINATION

BY MR. WHITLOCK:

Q Mrs. Meeks, you said that you never received any kind of notice from the Erie Insurance Company, anything about that coverage or anything in reference to that coverage.

A No, sir.

MR. WHITOOCK: All right, then. That's all.

THE COURT: Thank you, Mrs. Meeks. You may step down.

WITNESS STOOD ASIDE

THE COURT: Next witness, Mr. Roberts.

MR. ROBERTS: I call Mr. Shook, please, Your Honor.

THE COURT: Ladies and gentlemen of the jury, I am going to take a five minute recess here, and I ask you to step back to your jury room and ask you to take a five minute recess.

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NOTE: A brief recess is now taken. After which, the matter continues as follows, with the jury seated in the jurybox, and all parties present as before.

WILLIAM EDWARD SHOOK, a witness, being called for examination by counsel for the defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROBERTS:

Q State your name please, sir.

A William Edward Shook.

Q And what is your occupation?

A I am the claims manager for the Erie Insurance Exchange in Waynesboro, Virginia.

Q Were you so employed in February of 1976?

A Yes, sir.

Q What about April and May of 1977?

A Yes, sir.

Q Under whose supervision are any claims files kept?

A Mine.

Q Would those claims files contain any notices received of insured accidents?

A Yes.

Q Would those same files contain any suit papers?

A Yes, sir.

Q Mr. Shook, have you, at my request, reviewed your claims file on this Foley and Meeks matter?

A Yes, sir.

Q Now, referring you to the period of February the 17th, 1976, through April 22nd, 1977, tell us, if you will, what if any notice Erie has received of the accident on February 17th, 1976.

A None whatsoever. On the afternoon, as I recall it was the afternoon, Mr. Dunn called our office --

Q Afternoon of what date, sir?

A April 22nd.

Q Of what year?

A '77. That was the very first notice we had of this accident.

Q After reviewing the matter, did someone make a decision as to whether coverage would be afforded Mr. Foley under all of the circumstances that you had available, under all the facts that you had available to you?

A Yes, sir.

Q And who made that decision?

A I did.

Q And what decision did you make?

A That coverage would not be granted due to the breach of the contract.

Q And what breaches are you referring to?

A Simply that we did not have proper notice. We did not have the notice as required by the policy as soon as is practicable after the occurrence.

Q All right, sir. Let me show you a copy of a letter and ask you if you can identify that letter.

A Yes, sir. This is a letter that I wrote to Mr. Foley; a copy to Mr. Whitlock; and a copy to the Government Employees Insurance counsel, Mr. Stokes; and also a copy to Mr. David Landin, denying coverage due to the breach of contract.

Q Was that letter mailed?

A Oh, yes; registered and return receipt requested.

Q And did you get your return receipt back?

A Oh, yes, sir.

MR. ROBERTS: Your Honor, we tender this as a defense exhibit.

THE COURT: All right, sir. This is Defendant's Exhibit Three, I believe.

MR. ROBERTS: Yes, Your Honor.

NOTE: The above referred to letter is now being marked and filed by the Court as Defendant's Exhibit Three.

BY MR. ROBERTS: (continuing)

Q Mr. Shook, when you made your decision with regard to the policy and whether Erie would offer a defense and coverage, were you aware of when the trial date would be in this matter?

A Yes, sir.

Q And what date did you understand that to be?

A May the 5th.

Q Of what year?

A 1977.

MR. ROBERTS: That's all I have for Mr. Shook, Your Honor.

THE COURT: Mr. Parsons; Mr. Whitlock.

CROSS EXAMINATION

BY MR. PARSONS:

Q Mr. Shook, you have told us that you reviewed your records and found no report of this accident.

A That's true.

Q Now, your company has a claims form that an accident is reported upon, is that correct, sir?

A Yes, sir.

Q And what you expect is that the people tell the agent, and the agent provides the form and fills out the form, and it reaches your office.

A In most cases that's true.

Q Now, in this particular incident, sir, you did receive a report of this accident, didn't you?

A Yes, sir; after April 22nd.

Q May I have a copy of that, please?

A I don't have it with me.

Q You mean you came here today, and you did not bring the report of the accident?

A No, sir.

Q But your agent turned in to you a report of the accident.

A Yes, sir.

Q And when did you recieve that report?

A April 25th, 1977.

Q Now, when you received the report of the accident on April 25th, 1977, what other information if any did you have to consider besides that report?

A I don't know if we had the suit papers at that time. I don't believe we did.

Q Well, do you recall, sir, and I hand to you a letter dated April 22nd, 1977, that Mr. Stokes wrote to you?

A Okay, if I might see that.

NOTE: A paperwriting is now handed to the witness by Mr. Parsons.

Q Did you receive a letter dated April 22, 1977, from Mr. Thomas Stokes? He is an attorney in Richmond.

A Yes, sir.

Q All right. When did you receive that letter?

A I'd be guessing, but I'd say probably at about the same time, April 25, 1977.

Q Would you read to the jury the contents of that letter.

A "Dear Mr. Shook, I enclose pleadings and medical information regarding the above action which is pending in the Circuit Court of Louisa County."

"My secretary has spoken to Mr. Ira T. Dunn of Gordonsville, Virginia, the producing agent for Mr. Foley, informing him of the basic facts of this case. My firm is involved as attorneys for GEICO, for the U.M. carrier, Mrs. Meeks."

"From what I can gather from Mr. Dunn and Mr. Foley, Mr. Foley was insured at the time of the accident, but he did not notify Mr. Dunn. He simply enclosed the motion for judgment in with his payment check to you approximately two weeks after he was served."

"Please call me at your

earliest convenience concerning this matter since it is scheduled for trial on May 5, 1977, and our coverage questions should be resolved before that time. Very truly yours, Thomas D. Stokes, III."

Q Now, on April 25, you did know that this case was set for trial before then.

A That's true, sir.

Q You had a copy of the motion for judgment, is that correct, sir?

A Yes, sir.

Q And you had medical information as to the injury that Mrs. Meeks had sustained, is that correct, sir?

A Yes, sir.

Q Would you tell me, sir, how much information did you have; how much medical information?

A I would assume the doctors' reports; the medical bills from whatever hospitals or doctors she did go to; the X-rays; the usual plaintiff bills.

Q All right. Did you have a report from Doctor Mauck who made an independant medical examination?

A I would assume that we did if he sent all of them. I would assume that we did.

Q So, you had the medical information and had a claims report which showed that an accident had occurred.

A (witness nodding head)

Q Now, that report showed, sir, that there was no contact between the vehicle operated by Mr. Foley and the vehicle operated by Mrs. Meeks, isn't that correct, sir?

A True.

Q It showed a rock throwing incident, isn't that correct, sir?

A True.

Q And at that time, did you obtain, or attempt to obtain, any investigative police officers' reports?

A No, sir.

Q Did you attempt to obtain any reports from the Division of Motor Vehicles as to how the accident occurred?

1 A No, sir.

2 Q So, you took exactly what your

3 agent had given you and what Mr. Stokes had given you, and

4 you sat down, and you reviewed that, and you decided. Did

5 you go to Mr. Foley and authorize or direct someone to take

6 a statement from him?

7 A No, sir.

8 Q Did you go to Mr. Dunn at that time

9 and ask for any further information?

10 A I am sure that we called him, but

11 I don't believe he had any more. I can't be sure of that.

12 Q Now, before April 25, besides this

13 letter that you received from Mr. Stokes dated April 22,

14 you talked with him on the telephone, didn't you?

15 A Before that time, no, sir.

16 Q When did you talk to Mr. Stokes,

17 or did you talk to him?

18 A I don't know that I ever did. I'm

19 sorry.

20 Q You don't recall talking to Mr.

21 Stokes.

A No.

Q And based on this information, what you have told us, you decided there was no coverage.

A That's true, sir.

Q And knowing that there was a trial date, and you had an alternative as a claims manager at that time, didn't you, sir, in that you could have defended Mr. Foley under a reservation of your rights?

A No, sir; not in my judgment.

Q I just asked you if you have, that is, an alternative. I know you didn't select it, but that is an alternative. You're familiar with that, aren't you?

A I am familiar with it.

Q But your suggestion, your desire was, or your decision was that there was no coverage.

A True.

Q And that decision was made on April 25, 1977.

A On or about that time, yes, sir.

Q All right. Now, you said that there

1 was no coverage. You said, "There is no coverage to you,
2 Mr. Foley. You're denied coverage." When did you -- you
3 did hire an attorney by the name of David Landin, didn't
4 you, sir?
5 A Yes, sir.
6 Q When did you hire Mr. Landin?
7 A I don't know the exact date, but
8 it was within that week of April 25.
9 Q Did you hire Mr. Landin to rep-
10 resent whom?
11 A Erie Insurance.
12 Q Erie Insurance.
13 A Yes, sir.
14 Q Were you advised by Mr. Landin that
15 there was going to be a hearing or a motion before this
16 Court on May 22, 1977, I think, May 2nd, 1977?
17 A Quite possible, yes.
18 Q Mr. Shook, did he write you a letter
19 and tell you what went on in that hearing?
20 A Yes, sir.
21 Q Mr. Landin wrote you a letter and

1 told you what had occurred in this Courtroom on May 2nd,
2 1977, didn't he, sir?
3 A I say yes, but the letter is not
4 fresh in my mind. I'm sorry.
5 Q Well, do you have the letter?
6 A Not with me.
7 Q You've left that behind --
8 A (interjecting) My entire file
9 is back in my office.
10 Q Well, what did he tell you in the
11 letter?
12 A Simply that he appeared, that, I
13 believe, an offer of a continuance was made which was
14 refused. In other words, he did not act in any -- he acted
15 in our behalf in theory. He was there at our employ, but
16 he did not speak up in behalf of anyone. I don't believe he
17 made anything as far as motions or recommendations or
18 et cetera.
19 Q All right, sir, what you are saying
20 is you hired Mr. Landin. You asked him to go to this
21 hearing on May 2; and then you were advised that as a result

of the hearing, your company could file a grounds for defense, couldn't they, Mr. Shook?

A Yes, sir.

Q And you were advised that your company could obtain a continuance of the May 5 trial date.

A That's true.

Q And your company, your decision as a claims manager for the Erie Insurance Company was that you would make, there was no coverage, and you would not file a grounds for defense, and you would not be at the trial on May 5.

A Right.

Q And that's a decision that you made.

A Yes, sir.

Q So we'll all understand, you understood that you could have made the reverse decision if you wished.

A Yes, sir.

Q And you could have filed a grounds for defense so that you would have been able to defend him, and you could have gotten a continuance of the May 5 trial

1 date to a later time so that you could have prepared a
2 defense, isn't that correct?
3 A Yes, sir.
4 Q There's no question about that.
5 A No, sir.
6 Q Now, Mr. Shook, after you made that
7 decision sometime around April 25, 26, in that area, you
8 didn't sit down then and immediately write to your insured
9 and tell him that you were denying coverage to him, did
10 you, sir?
11 A No, sir.
12 Q You waited until the 5th day of May,
13 the day that the matter was scheduled for trial to write
14 him a letter; and that at that time you told him, number
15 one: the trial date of May 5, didn't you, sir ?
16 A It's in my letter, yes, sir.
17 Q And you knew that he wouldn't have
18 gotten it before May 5 or on May 5. You were telling him
19 of something that had already occurred, correct?
20 A Yes, sir.
21 Q And you waited from either the

1 25th or the 26th of April until May 5 to tell Mr. Foley
2 that he had no coverage.
3 A Yes, sir.
4 Q Did you ever ask Mr. Stokes if he
5 would make available to you his investigative file?
6 A No, sir.
7 Q Do you know Mr. Stokes?
8 A I have met him for the first time
9 today.
10 Q You never requested -- you're
11 familiar with his law firm.
12 A Yes, sir.
13 Q And you never requested that they
14 give you their investigative file?
15 A No, sir.
16 Q You never requested that they give
17 you any further medical information?
18 A No, sir.
19 Q In fact, you made no request at all.
20 A None.
21 Q You're talking about your records

of checking -- where did you check your records, sir?

A What records are these, sir?

Q You said you checked about suit papers. You checked about notification of accidents. What did you check, what records?

A I don't understand the question. In other words, do you mean when Mr. Dunn called and said that he had received a call from an attorney in Richmond or something at that point?

Q I thought you told me or told the members of this jury that you were asked the question: From February 17, 1976, until April 22, 1977, did your records show any report of an accident --

A (interjecting) Right.

Q -- and you said no.

A That's true.

Q And I'm asking you what records did you check?

A Oh, excuse me. We maintained a claim card on each and every individual that submits a claim under a certain policy; and for each claim in our office,

there would be a card under that insured's name, and that's what we checked. We would also check under her name as far as a claimant. This is what the insurance company calls somebody who is presenting a claim: a claimant. And there was no record at all of either party.

Q Now, but you just said, what you said was that you checked in your office of the Claims Department as to whether or not there was a card.

A That's true.

Q In Waynesboro.

A That's right.

Q Did you check anywhere else in the Erie Insurance Company as to whether or not there was a report?

A I don't recall. I doubt that we did. I doubt it.

Q And what is the address of the Erie Insurance Exchange?

A Do you want a post office box, or --

Q Well, let me ask you this: Is it 44 East Sixth Street, Erie, Pennsylvania 16530?

A That's our home office.

Q And is that the address that you place on your policies?

A I guess it is.

Q And you did not check there.

A No, sir; or if I did, it came up negative. I doubt seriously if we did though.

Q You say that you have no recollection that you checked there.

A No. I cannot say for sure.

Q In fact, the only place you checked was to pull the cards in the claim office to see if there was a card.

A That's true.

Q To what address are the premiums paid?

A That address. It's actually a box number, Box 1699.

Q Erie, Pennsylvania?

A Yes, sir.

Q And that's where one would pay his premium to.

A True. May I back off of that for just one second. Some people pay their premiums directly to their agents, and they in turn send it to the home office. Now, how this gentleman did it, I have no idea.

Q The envelopes that you send out, I think you all call it direct billing.

A Yes, sir, that's true.

Q The insurance company's home office, wherever it is, your account department is making a billing. You send them a return envelope in which to send their premium in, is that correct?

A That's correct.

Q And that one carries the post office box of Erie, in Erie, Pennsylvania. That does not come to Waynesboro.

A No, sir. That's true,

Q All right. The offer of continuance and the offer to file grounds for defense that was made was refused by you.

A Yes, sir.

Q And you made that decision yourself.

A Yes, sir.

THE COURT: He already so testified.

MR. PARSONS: That's all, Your Honor.

MR. ROBERTS: I have just a couple of items on redirect, Your Honor.

REDIRECT EXAMINATION

BY MR. ROBERTS:

Q Mr. Shook, if notice had gone to the home office, to whom would it have been transmitted?

A Automatically, that very same day, we would have gotten a phone call concerning this, and they would have sent it down by mail. They know themselves that they have got to find out which office this goes to.

MR. PARSONS: Objection. That's a conclusion. He can't tell what anybody is going to do with one of these companies. They make mistakes, I assume.

redirect - Shook

1 THE COURT: All he can do is to
2 testify as to the general practice. I presume
3 it's general procedure is what he is testifying
4 to.
5 MR. ROBERTS: That was the question
6 that was asked, Your Honor.
7 THE COURT: Yes. Go ahead and
8 answer.
9
10 A (continuing) That's it. I mean
11 they would have sent it down to us. Then -- maybe I'd better
12 not add. I was going to elaborate.
13 Q Let me ask you this with regard to
14 what is the general practice: If you get notice from the
15 home office that some insured has notified the home office,
16 what is the general practice with regard to the setting up
17 of these cards to which you referred?
18 A Depending upon the severity of the
19 accident, if it's a simple fender-bender in the parking lot
20 or if somebody has backed into a parked car in a parking lot,
21 they would mail it down to us. We would get it the next

1 day or possibly two days after. And at that point, a claim
2 would be set up and matched up with a policy file. We
3 would pull these control cards I'm talking about if they
4 were available. If the person has never had an accident
5 before, we would set up a new control card all by itself.
6 Coverage would be
7 determined in view of the policy file, and these cards
8 would be typed up and inserted into our files, and the
9 people contacted.
10 Q Thank you, Mr. Shook. Now, sir, on
11 cross examination, Mr. Parsons asked you about a claim
12 form that you received either from Mr. Dunn or Mr. Foley.
13 Let me show you a document and ask you if you can identify
14 that.
15 A Yes, sir. Yes, sir, this is a
16 copy of the original that Mr. Dunn, he took that and sent
17 it to our office, and we -- 4/22 is his date.
18 Q Of what year?
19 A '77. Excuse me.
20
21

NOTE: The above referred to document is now handed to counsel for the plaintiff by Mr. Roberts.

MR. ROBERTS: Your Honor, we tender this as an exhibit.

THE COURT: All right, sir.

MR. ROBERTS: It's two pages. Unfortunately, they're not stapled together.

THE COURT: We'll staple them together or put a paper clip on them and mark it as the next exhibit which is Defendant's Exhibit Four, I believe.

NOTE: The above referred to document is now being marked and filed by the Court as Defendant's Exhibit Four.

BY MR. ROBERTS: (continuing)

Q Now, Mr. Shook, on cross examination, Mr. Parsons made reference to a letter that you received from Mr. Stokes, and I show you this document.

A Yes, sir.

Q Is that the letter?

A Yes, sir. It's the same one I read to the jury.

Q It's a true copy of the letter.

A Yes, sir.

MR. ROBERTS: And we tender the letter as well, Your Honor.

THE COURT: All right. It will be Defendant's Exhibit Five.

NOTE: The above referred to letter is now being marked and filed by the Court as Defendant's Exhibit Five.

MR. ROBERTS: That's all the questions I have on redirect.

THE COURT: Does that conclude the examination of this witness?

MR. PARSONS: Yes, sir.

JURY OUT

MR. ROBERTS: Yes, Your Honor. At the conclusion of the plaintiff's evidence, at which there was none, I made a motion which was a motion to strike.

THE COURT: Of course, a motion to strike which the Court properly overruled.

MR. ROBERTS: At this time, Your Honor, I renew my motion to --

THE COURT: Again overruled. Proceed.

MR. ROBERTS: Please note my exception.

THE COURT: All right, sir.

Mr. Parsons.

MR. PARSONS: The plaintiff moves to the Court to strike the evidence of the defendant and to enter a summary judgment for the plaintiff in the amount of judgment previously rendered herein for thirty thousand dollars

JURY OUT

with legal interest on them from May 16, 1977.

I think all this has been admitted. I won't repeat that part unless the Court--

THE COURT: All right, Mr. Parsons. This case involves around what is reasonable notice.

MR. PARSONS: And whether or not they are prejudiced. The Code now provides in 38.1 - 381, which was in effect in 1976, provides that the insured, that there must be prejudice. The other cases didn't have that in there, I believe, but this does, and I have a case on this.

THE COURT: All right, sir. What is the case?

MR. PARSONS: The case is Insurance Company v. Gourdine. 205 Va. 57. Do you want me to give it to you?

JURY OUT

THE COURT: Yes, I'd like to see it.

MR. PARSONS: Now, this case involves the failure to turn over suit papers and involves an instance in which an insured did give the company notice of the suit, but he failed to turn over to them the suit papers .

As a result of this, a judgment was rendered against him. The plaintiff then evidently saw what was happening and had the judgment vacated and started over.

The insurance company or the insured then turned over the second set of suit papers, and they failed to defend him on the basis that he had refused, had not turned over to them the first set of suit papers. He was denied coverage. And the case held up, that there was substantial compliance.

And I say that in our case,

JURY OUT

as a matter of law, that as to the failure to turn over the suit papers --

THE COURT: What's the style: 205 Va., what?

MR. PARSONS: Fifty-seven.

THE COURT: Continue, Mr. Parsons. I'm listening to you.

MR. PARSONS: And I say, sir, that the failure to turn over the suit papers, the company must give the evidence before you which is not in conflict, is that the company was given an opportunity to file its grounds of defense and for a continuance of the matter so that they would be able to properly investigate it, and they refused.

I don't think that they can rely upon the technical failure to turn over the original set of suit papers when they readily

JURY OUT

admit that all of that was cured by the offer made to them, and I don't see how reasonable men could differ on that point.

The second point I assume they're taking is a failure to report the accident, to give notice of the accident. The insurance company must show or come up with some evidence that they were prejudiced. They have come up with an ultimate report in April of 1977. When they received the report, there's no evidence that they would have elected to have made any additional investigation. There is no evidence of what they would have done, that they were deprived of the opportunity of doing, if they had received the report in February of 1976.

They got a report of the accident, and they simply said, "No coverage."

JURY OUT

But there is no evidence that they were prejudiced thereby.

In any event, if you think that it was at that time, Mr. Shook has said that he got from Mr. Stokes at a time when they could have still defended him, that he got the suit papers. He got the medical investigation, and there is no evidence that they would have done, and which he described as the usual plaintiff's material to him, I believe, but he got the medical investigation. And there's no evidence that if he had had more time that he would have done anything else, or that he would have changed any decision as to how they would handle the claim.

And the Code is specific about showing prejudice, and I do not think the mere failure to report --

JURY OUT

THE COURT: When was that section of the Code passed?

MR. PARSONS: Judge, the Code as it stands now, the volume that we have with the 38.1 - 381 is a 1976 replacement volume, and it is in that volume. I cannot go behind that. We do not have the book to go behind that. They usually put a note when anything is added. They do not have that note in there.

THE COURT: But it was in effect in 1976, or not in effect in 1976?

MR. PARSON: It was in effect. That's a 1976 replacement document.

THE COURT: All right, sir. Proceed. Go ahead.

MR. PARSONS: So, basically, what we say, Judge, is that they could have come up with the evidence. As it now stands, without

JURY OUT

hearing from anybody else, they have come up with the technical failure to comply, but they have not come up with any evidence that they were prejudiced thereby.

THE COURT: All right, sir. But how is it though that the Supreme Court said that if you don't give the insurance company notice, that that in and of itself is prejudice, Mr. Parsons?

MR. PARSONS: I'm not aware of that, sir. What the Supreme Court said, I think, this other case has said in volume two is before the changing of the Code, failure to comply with these provisions without more was sufficient.

Now, maybe Mr. Roberts has that case. He's reading very attentively over there. If he does, I assume he'll let us have it.

JURY OUT

In this case you're reading, it says, "While the insurer does not have to show," on page 62, "that it was prejudiced by failure to cooperate, the absence of prejudice, if it appears, is a circumstance to be considered on the question of the materiality of the information which it is claimed the insured failed to give."

THE COURT: Then on page 64, it says, "The plaintiff has made no contention that it was prejudiced in any way by the failure of its insured to forward a copy of the first motion for judgment in the civil justice court."

"It has interposed a highly technical defense to justify its denial of its obligations under the contract. It has, however, failed to carry the burden of showing that the failure of the insured was of such

JURY OUT

a substantial and material nature as to justify the voiding of the insurance contract. The question of substantiality and materiality in this case was a question of fact, and that question has been resolved by the trial Court."

So, that indicates that that is a question of fact which the jury should determine, does it not, Mr. Parsons?

MR. PARSONS: In that case, the Judge in that case, as I gather, submitted, whether he would have tried the facts by a jury, I'm not sure, but it was submitted to the trial of fact.

But the thing is, Judge, if there is no evidence, if they had presented no evidence, that they were prejudiced; and what is it that reasonable men can differ about?

THE COURT: In other words, you're

JURY OUT

saying that there is no evidence of prejudice before the Court at all.

MR. PARSONS: Yes, sir. There is no evidence of prejudice, and what can reasonable men differ about? That's why I am asking you to take over, because reasonable men cannot differ. That's when, as I understand this, when the Court comes in. That's when the Judge strikes or rules --

THE COURT: Well, isn't it -- now, let me ask you this: Isn't prejudice a matter of law, for somebody else could have already obtained a judgment in the amount of thirty thousand dollars?

MR. PARSONS: I don't think that the company can complain, because at the time the judgment was obtained, they had denied coverage. And once they deny, the wedding is over. You

JURY OUT

go your separate ways. They selected -- of course, they did have the right to argue the facts, to come in; but they elected not to come in.

Now, I don't see how they can say thay were prejudiced when they, number one, had the right to come in; and number two, I think even more importantly, that they at that time made the decision there would be a flat-out denial of coverage and not a reservation of rights.

THE COURT: All right, sir.

MR. PARSONS: And they even had their lawyer.

THE COURT: Mr. Whitlock, do you wish to add anything to that?

MR. WHITLOCK: No, sir, Your Honor, I think that Mr. Parsons covered it.

JURY OUT

THE COURT: All right, Mr. Roberts.

MR. ROBERTS: Your Honor, the first thing, I would like to see the statutory language to which Mr. Parsons is referring. He referred to 38.1 - 381.

MR. WHITLOCK: 381.5, something like that. I can find it, all right?

THE COURT: All right, sir. The Court would like to see it too, so suppose we look at that.

MR. PARSONS: Who wants to look first?

THE COURT: Show it to Mr. Roberts first.

MR. WHITLOCK: Judge, here is a copy of 38.1 - 381.

MR. ROBERTS: Your Honor, he, Mr. Parsons, is referring to 38.1 - 381, subsection

JURY OUT

(a1), on page 170, which reads -- well, there is no reason for me to read it. The Court has it in front of you. Have you found it, Your Honor?

THE COURT: No, I don't have it.

MR. ROBERTS: You don't have a Code book. I thought you were looking at a Code book.

THE COURT: No. You have it. I asked counsel to show it to you. I don't have it yet.

MR. ROBERTS: Here it is, Your Honor, on page 170, (a1).

THE COURT: All right, sir. I see what it says.

MR. ROBERTS: All right. Your Honor, on that point, and I don't know whether Your Honor has the policy in front of him or not, but

JURY OUT

in essence, I believe the evidence is clear.

There are three things that a person really has to do when he is involved in an accident. Number one: He has to notify the insurance company of the accident in writing. Number two: When he is sued, he has to forward the suit papers to the insurance company; and number three: During the period that the insurance company is investigating the accident and defending the suit, he has to cooperate with the insured fully in the investigation.

Now, that Code section there says that the insurance company cannot use the defense of failure to cooperate unless the insurance company shows prejudice to the company.

We are not even interposing the defense of failure to cooperate. The

JURY OUT

policy that we have tendered into evidence says exactly what that statute says: that if he fails to cooperate, it's to the prejudice of the company is the way the policy reads.

Now, our point is that the failure to notify in writing of the accident or the failure to send; or, not and; or the failure to send the suit papers implies prejudice.

I cite here, Your Honor, the case of State Farm Mutual v. Douglas, 207 Va. page 265. That case involved a situation where an insured --

THE COURT: Do you have the case?

MR. ROBERTS: I have it right here, Your Honor.

THE COURT: As soon as you cite it to me what you want out of it, I would like to see it.

JURY OUT

MR. ROBERTS: All right, sir. Would you like the facts, or yould you like to see it?

THE COURT: Go ahead and tell me the facts.

MR. ROBERTS: In this case, the insured was involved in an accident. The insured was knocked unconscious in the accident for a period of time. I gather, a reasonably short period of time, but unconscious enough that he had no recollection of the accident.

He went to his insurance agent. He says, "I've been in an accident, but I don't know what happened." The insurance agent said, "Here's the form. Get it filled out." And then he took sixty some odd days to get the form filled out.

The Court there held that sixty days under those circumstances was a

JURY OUT

reasonable time to file the written notice.

However, and then frankly the case sounds like under the circumstances that the Court should have held that way, but it was a split Court. Justice Gordon filed a very vigorous dissent, and in his dissent he said that, "We are agreed," and he's referring to the whole Court there, not just to the dissenting justices. "We are agreed that the prejudice is implicit in the insurance company's ignorance of the accident and that proof of prejudice is unnecessary."

THE COURT: But that was the dissent.

MR. ROBERTS: That was the dissent, but in the dissent there, he did refer to the fact that proof of prejudice is not necessary; and that has been held in other cases.

THE COURT: All right, and I want to hear those.

JURY OUT

MR. ROBERTS: All right, sir. The other cases are Hunter v. Hollingsworth, 165 Va. 583. I do not have a reprint of that case. In that one the insured delayed a little less than two months giving the insured notice of an accident causing injury to another. Moreover, the insured promptly forwarded the motion for judgment served on him in the year following the accident. The Court looked first to the contract language requiring that the insured provide the insurer with a written notice of an accident. Then found that the insured had not given notice with the reasonable promptness necessary to satisfy his contractual obligations.

THE COURT: Is that a Virginia case?

MR. ROBERTS: Yes, sir. 165 Va. 583.

The two other cases that

JURY OUT

are cited in all of these cases that both Mr. Parsons and I have referred to hold the same way, that proof of prejudice, again, is not necessary. The insurance company doesn't have to prove prejudice.

THE COURT: What are those other cases?

MR. ROBERTS: Temple v. Virginia Automobile Mutual Insurance Company, 181 Va. 561. And these cases are cited in Virginia, and Harman v. Farm Bureau Automobile Insurance Company. They say that it was a condition precedent and if not complied with, would bar recovery under the policy. It is not a matter -- It's a matter of reasonableness as far as the time within which notice should be given. However, the notice provision and the forwarding of the motion for judgment is a condition precedent, not one

JURY OUT

in which prejudice has to be shown, but one where they just have to comply within a reasonable period of time.

In the Gourdine case, which Mr. Parsons just cited, the Court held that even with regard to a cooperation clause. This was before the statute, and they said, "We held that where an insured had willfully breached the cooperation clause in this contract, and in material particular, it is not necessary for the insurance company to show that it was prejudiced by such breach before it can avoid liability."

I assume that the statute was accruing the defect in that particular case, which was, I believe, Arghyris v. Travelers', and if I can find it, excuse me, State Farm v. Arghyris, 189 Va. 913. It is our position, and I submit that the law is, and I have these two

JURY OUT

cases, which I'd be happy to give to you.

THE COURT: All right.

MR. ROBERTS: It is our position that with regard to notice and with regard to failure to forward the pleadings, that we have gone forth with our burden, and we have put forth sufficient evidence to show a prima facie case by simply showing the lack of notice and the lack of forwarding suit papers, and that no prejudice is necessary.

If we were defending under the cooperation clause, not only by statute, but by the terms of the contract, we would have to show prejudice.

THE COURT: All right, sir.

You have the right to answer, Mr. Parsons.

MR. PARSONS: Well, I'm not sure

JURY OUT

whether I understood Mr. Roberts correctly or not. I thought that he conceded that the evidence showed no prejudice. I'm not sure whether he wishes to answer that or the Court.

MR. ROBERTS: I am certainly not conceding at all. I am saying the cases show that prejudice is implied from the lack of notice and from the failure to forward the motion for judgment.

MR. PARSONS: Judge, I just do not agree with that. I think that Gourdine holds differently. I think if there is evidence from the failure to report, that there is evidence from which a jury can find prejudice, then you submit it to the jury. But if there is no evidence, just the defense, just the defense alone, then I think at this point the Court should take it in his own hands and strike the

JURY OUT

evidence in a judgment as we requested. What could reasonable men disagree about? Could reasonable men say there was prejudice based on the evidence that the insurer has put on, and in Gourdine, which is a burden to establish under this case

We can repeat these things. We can argue them forever today, but I don't think you appreciate our getting into that type of thing. We basically stated our view. I do not think the evidence supports any conclusion or any finding, or could support any finding of prejudice, and that the evidence of the defendant should be stricken.

THE COURT: Well, in this Gourdine case, it says that "An examination of the Virginia cases discloses the facts were different from those here, and that there was in each case a

JURY OUT

willful failure of the insured to comply with the terms of the insurance contract, which amounted to a substantial material and prejudicial violation thereof."

Now, that's referring to all of the other cases such as the Arghyris, A-R-G-H-Y-R-I-S, case in 189 Va. It's referring to all of those cases.

MR. WHITLOCK: Your Honor, I believe that the Gourdine case was decided before the statute was amended, and the case law cited under that section says that this section is remedial legislation and should be liberally interpreted in favor of the claimant or the insured person. That's on page 174 on the cases cited in there.

MR. PARSONS: Judge, reviewing this, would you mind looking at page 175 of the Code?

JURY OUT

THE COURT: I'm looking at it.

MR. PARSONS: At the bottom it says simply, "The 1966 amendment to subsection (a1) apparently requires prejudice to be shown from the lack of cooperation," following which Lumbermens v. Harleysville, 287 F.Supp. Western District of Virginia, 1968.

THE COURT: And the next supplement?

MR. PARSONS: The next one is, "The insurer must show prejudice when relying on a breach of the cooperation clause as a defense." Safeway Moving & Storage Corporation v. Aetna Insurance Company, 317 F.Supp. 238 Eastern District of Virginia 1970, affirmed 452 F.2d 79, Fourth Circuit 1971.

Judge, somewhere in one of these cases, one of these justices came up with the idea that these decisions were like candles.

JURY OUT

THE COURT: I beg your pardon?

MR. PARSONS: That these decisions were like candles. You could put out the fire, as long as you left the candle where you could relight it. Somewhere one of these justices commented on that. If you left it where you could relight it, you haven't hurt anything, and prejudice is one way of looking at it. I don't think it's a point of view unless you put your mind in the right shape to look at it.

But they had all the time in the world.

THE CO RT: You don't recall which justice said that?

MR. PARSONS: I sure wouldn't say it on this record if I did. I have read that somewhere relating to this idea. It's the same thing. If it's there and it can go ahead, then there's no prejudice.

JURY OUT

MR. ROBERTS: Your Honor, again the issue of prejudice applies only to the failure to cooperate clause, and not to the notice and the failure to forward suit papers. The only question is if reasonable notice was given within a reasonable time.

THE COURT: Well, that's what's got me baffled, gentlemen. It appears that to me from the outside that this is a question of law, and I don't know how in the world this jury is going to help us any with it.

What issue is there to be decided by this jury; what issue of fact? Maybe, I gather that the defendant is going to contend, or rather, the plaintiff is going to contend that notice was given to the agent, but even if notice was not given to the agent and the company had a chance to defend and did not

JURY OUT

defend, is that sufficient to say that there was no prejudice? And it bothers the Court considerably.

MR. WHITLOCK: Evidently, there is no prejudice shown, Your Honor. If they come in here and show some evidence of prejudice --

THE COURT: Yes. Well now, there is some language here in some of these cases.

Well, here is your case, Mr. Parsons. Mutual Insurance Company v. White, cited in the Gourdine case. "A dismissal without prejudice has been aptly described as being like a person blowing out a candle, which at his own pleasure may be lit again. Then that Court, following the rule laid down by it in Southern Surety v. Puryear, found that delay in notifying an insurance company of the service of summons in a first action afforded

JURY OUT

no defense in the second action, where the first action was dismissed without prejudice. Said the Court: 'The purpose of the stipulation in the policy was to afford the insurance company an opportunity to control the litigation and interpose a defense against the claim on the merits of the case. Since the first action was dismissed without prejudice there was no judgment, no payment, and no liability against appellant was sought; hence, it is clear that there was no breach of the conditions of the policy by failure of appellee to give notice of the first suit.'"

And I see some difference between that and this case. That's what's bothering me.

MR. PARSONS: Judge, if we can say anything at this point, I don't see any difference between taking the nonsuit and starting over,

JURY OUT

or inviting the defendant to come in. It's the same thing. I admit there's a technical difference in the way these were handled, but it all comes out the same in the end.

MR. ROBERTS: Except in the Gourdine case, the defendant came in at his own expense and got the former judgment vacated, and also the defendant in that case had given notice of the accident when it originally occurred.

THE COURT: All right, gentlemen. Let's get ourselves a little bit of lunch, so I can think a little bit more clearly. I'll let you know after lunch; and we'll either proceed with the rest of the case, or I'll sustain the motion.

Let's get ourselves a little lunch and be back here in about thirty minutes, gentlemen.

JURY OUT

NOTE: Court recesses until 2:15 p.m. After which, Court is in session, with all parties present as before.

THE COURT: Gentlemen, I have one question to ask both sides. What was Mr. Dunn's testimony with reference to his conversation with Foley as to why no notice of this accident was given?

MR. WHITLOCK: I think, Your Honor, that Mr. Foley, he said Mr. Foley told him he didn't consider it an automobile accident.

THE COURT: That's my recollection of it.

MR. ROBERTS: That's my recollection of it also, Your Honor.

THE COURT: Well then, gentlemen, this case boils down to whether or not you can

JURY OUT

wait a year to give notice to a company, and whether or not that is automatic prejudice to the company. And under the facts of this case, gentlemen, I don't believe it is for the simple reason that this wasn't a collision accident. This was a case in which a car threw up rocks, and I can see that to that insured there was a difference.

And I can see further that when the company was given the right to defend and didn't defend, I don't believe they can come in now and say no notice of the accident and no notice of the suit.

I'm going to sustain the motion, gentlemen, and enter a summary judgment for the plaintiff. Of course, I know Mr. Roberts excepts to that.

MR. WHITLOCK: Your Honor, in

JURY OUT

summary judgment as to liablilty, I would like you to take judicial notice and introduce the judgment ordered previously to establish damages.

THE COURT: All right. I understand there's no question about that. I quite frankly think, gentlemen, I know this case will go up, and I'll be anxious to see the results of it. This is a case that should go up. It's a very close point.

MR. ROBERTS: On that point, Your Honor, under the provisions of Rule Five, Code Nine, Rules of the Court, we would ask that the transcript of this hearing be made a part of the record.

THE COURT: It is so ordered, and I don't see where there is any bond required in this case. I don't think there is. I think you have an automatic right, and the Court will

JURY OUT

not require you to post bond.

MR. WHITLOCK: Is it stipulated that the order and the damages are in evidence, or do you want to put them in?

MR. ROBERTS: Well, the Court's already ruled on the motion to strike, and --

MR. WHITLOCK: I mean the motion as to liability. We just want to make certain when the record goes up that damages are on the record.

THE COURT: There's no question that the Court has granted judgment for thirty thousand dollars. The Court recalls doing it.

MR. WHITLOCK: So, the Court has taken judicial knowledge of it.

THE COURT: Yes. The Court recalls doing it.

MR. WHITLOCK: We ask that a certified

JURY OUT

copy of the order be made a part of the record from the previous case.

THE COURT: All right. The Court will order that too.

All right. Bring in the jury, Sheriff.

NOTE: At this point the jury returns to the Courtroom, is seated in the jurybox, after which time the matter continues as follows:

JURY IN

THE COURT: Now, we do have to have all exhibits in this case. I have to get them all in.

THE COURT: Members of the jury, in practically all cases tried these days, whether they are criminal cases or civil cases, at the conclusion of the evidence a motion is made to strike the evidence. At that time if it's a criminal case, the Court must review the evidence and see if there's sufficient evidence that it believes would justify a conviction. And if there isn't, the duty is upon the Court to strike the evidence of the Commonwealth and find the defendant not guilty.

In a civil case it's the duty of the Court to examine the evidence and see if the party upon whom the burden of proof, bearing the burden of proof, has sustained that burden.

And that motion has been made in this case. The burden of proof is upon the defendant to show that there is a breach of policy conditions, and that he has been prejudiced thereby, and that the defendant's

1 evidence in this case does not show it. And
2 then it becomes incumbent upon me to examine
3 that evidence to find out whether or not there
4 has been prejudice or whether or not there has
5 been a breach of policy conditions.
6 Now, there isn't any
7 question about it from the evidence introduced
8 by the defendant that the insurance company
9 didn't receive notice of the accident, if you
10 want to call it an accident.
11 But the Court must
12 consider what took place in this case, and
13 that was that there was no collision between
14 the cars. This man took off at such a rate of
15 speed that he threw rocks which hit the
16 plaintiff's vehicle. So, he didn't consider
17 any of that an accident and didn't report the
18 accident.
19 Then along comes the
20 suit papers, and he doesn't send those to the
21 company either. But we do have evidence that

1 the company received notice of the suit papers
2 and was given an opportunity to defend it.
3 And that makes the company responsible on the
4 policy as a matter of law of this Court as holding
5 it.
6 It doesn't mean that
7 the Court and both counsel agree, because they
8 don't agree. So, what I have done is: I have
9 sustained the motion of counsel for the plaintiff
10 to strike the defendant's evidence and enter a
11 summary judgment as a matter of law for the
12 plaintiff.
13 Now, you say, "Judge,
14 why in the world did you summons me here today
15 to have me sit here all day and then decide the
16 case yourself?" And that's a good question.
17 First of all, I didn't summons you here today.
18 It wasn't at my request that you were summoned
19 here today. You were summoned here at the re-
20 quest of counsel. I should say to you that
21 counsel should have known that your services were