

1956

# Verne J. Oberhansly v. Travelers Insurance Co. : Brief of Appellant

Utah Supreme Court

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Young, Thatcher & Glasmann; Attorneys for Defendant and Appellant;

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Case No. 8450

**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

VERNE J. OBERHANSLY,  
*Plaintiff and Respondent,*

— vs. —

TRAVELERS INSURANCE  
COMPANY, a corporation,  
*Defendant and Appellant.*

**BRIEF OF APPELLANT**

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# IN THE SUPREME COURT

## of the

# STATE OF UTAH

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VERNE J. OBERHANSKY,  
*Plaintiff and Respondent,*

— vs. —

TRAVELERS INSURANCE  
COMPANY, a corporation,  
*Defendant and Appellant.*

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### BRIEF OF APPELLANT

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### STATEMENT OF ISSUES

On September 28, 1953, defendant Travelers Insurance Company issued to LaMar Pearce Auto Mart its standard comprehensive liability policy with attached amendments (see Exhibit "A"), which policy was in force at the time of the accident hereinafter referred to.

On November 27, 1953, plaintiff sustained an injury while riding in a car registered in the name of Pearce's wife, but being driven by LaMar Pearce, President of Pearce Auto Mart, upon which he ultimately recovered a judgment for the sum of \$9,112.23. Pearce and his company were insolvent and unable to pay the judgment, whereupon plaintiff filed this action against



Travelers Insurance Company seeking to recover the amount of his judgment. Defendant defended the action upon three counts:

(1) That at the time of the accident plaintiff was either an employee of Pearce Auto Mart or it was an obligation for which the insured may be held liable under the Workmen's Compensation Law of this State and therefore expressly excluded under the terms of the policy.

(2) That the insured failed to cooperate with the insurer in the defense of the action and notwithstanding the company's request willfully and in violation of the terms of the policy Pearce failed and refused to attend the trial; failed to give evidence thereat as required by the terms and provisions of the policy.

(3) That Pearce and his business associate, Keith Oberhansly, brother of the plaintiff, conspired to render aid to plaintiff thereby assisting him in procuring the judgment by

- (a) permitting Keith Oberhansly, brother of plaintiff, to testify contrary to a written statement made by him on or about January 1, 1954, and
- (b) by defendant Pearce's refusal to attend the trial, to assist in the defense of the action and failing to offer himself as a witness in his own behalf and in behalf of the company.

A jury was impaneled but upon conclusion of all of the evidence plaintiff moved for an instructed verdict and defendant moved for judgment of dismissal. Both



parties having moved to take the case from the jury for the reason that there was no issuable facts to be presented to a jury, the Court thereupon dismissed the jury and thereafter made and entered findings of fact, conclusions of law and judgment in favor of plaintiff. Neither party is complaining as to the action of the Court in dismissing the jury.

## STATEMENT OF FACTS

As we view the record, there is no dispute as to the facts in this case. We shall briefly summarize these facts:

### **Status of Plaintiff First Defense**

While Keith Oberhansly was not formally admitted to the corporation as an officer or stockholder, yet it was the understanding of the parties that he would be made an officer of the company and share equally in the profits. He was working full time at the company's place of business under an agreement that he was to receive one-half of the profits derived from the operation of said business. His relationship to the company was characterized by Pearce as a partnership arrangement. Pearce Auto Mart was a dealer in used cars. As a part of its regular business it accepted for sale used cars from various owners delivered to it on consignment for sale upon a commission basis. Under this arrangement it had accepted a number of used cars from Spencer Auto Company of Evanston, Wyoming.

For convenience we shall hereafter designate Pearce as LaMar; his business associate as Keith, and the plaintiff as Verne.

LaMar and Keith were having financial difficulties and they decided to return two remaining unsold cars to Spencer Auto Company at Evanston, Wyoming. They called Verne and asked him if he would drive one of these cars. He indicated a willingness to do so and immediately thereafter came to the company's place of business, whereupon it was agreed between LaMar, Keith and Verne that Verne and Keith would drive the two consigned cars and LaMar would follow them in the insured car and bring them back to Ogden. The return of these cars constituted a part of the regular and customary business. In fact Verne had on at least one or two previous occasions performed a similar service. Verne stated that he would drive the car provided he was furnished sufficient money to defray the expenses incident to said trip. He was given \$10.00 and sufficient gas and oil was purchased by him at cost of between \$4.00 and \$5.00. Keith and Verne left Ogden about 3:00 o'clock P.M. and LaMar left some time later and overtook them at Echo Junction and then followed them to Evanston. The cars were delivered. The three then had dinner and then started on the return trip to Ogden. LaMar was the driver. The accident occurred at a point known as Devil's Gate in Weber Canyon during the course of the return journey. Verne sustained injuries which resulted in the judgment.

## Failure to Cooperate

### Second Defense

No report of the accident was submitted to defendant until after LaMar was served with a ten day summons on or about December 16, 1953. On January 7, 1954, as a part of an investigation concerning the accident, written statements were prepared and signed by both LaMar and Keith. These statements were written by one Wilde, an investigator employed by defendant, during the course of conversations related by them giving in detail the facts concerning the accident. The statements were in many respects quite similar. They first related the facts concerning the driving of the cars. Then in relating how the accident happened they stated that LaMar while rounding the S curve may have been driving faster than he should but that his driving at no time was erratic and that at all times he kept his car on his right hand side of the highway; that as he rounded the curve they observed for the first time a large truck about 70 feet distant travelling eastward and rounding the curve; that it was approaching on its left hand side of the highway immediately in front of LaMar; that in order to avoid a collision LaMar pulled quickly to his right off the travelled portion of the highway and struck the rocky precipitous wall which arose almost perpendicularly at the outer edge of the highway; that thereupon LaMar lost control of his car and struck the protective guard rail on the opposite side of the highway and that the striking of the guard rail was what caused Verne to sustain the injuries of which he complained.

Based upon these two written statements given freely by the two eye witnesses concerning the accident and who were incidentally the only known eye witnesses (as Verne was lying down in the back seat and did not see the accident), the insurance company believed that LaMar's negligence, if any, in driving faster than he should was not the proximate cause of the accident but that the intervening act of the driver of the eastbound truck in crowding them off the highway was the proximate cause of the accident and that consequently both LaMar and his company had a meritorious case. Defendant likewise concluded that there was a serious question as to whether or not the exclusion provision of its policy would apply in view of the facts outlined above as to the relationship of the parties. Defendant thereupon requested and received from LaMar a "Reservation of its Rights Agreement" and upon procuring the same it accepted the defense of the action. Shortly thereafter the business failed and LaMar left the State of Utah, presumably heavily indebted, knowing that the suit against him and the company was then pending in the court. His wife remained in Ogden for some time.

LaMar had employed an attorney, E. Morgan Wixom of Ogden, Utah, to represent him and the company concerning various legal problems in connection with the operation and winding up of the business and he also consulted with Wixom with respect to the signing of the Reservation of Rights Agreement. After leaving the State LaMar never communicated with the defendant or

let it know where he was residing and although his address was known to his wife, his father and Wixom, neither of these parties would reveal to defendant his whereabouts. The case was duly and regularly set for trial for November 18, 1954. Defendant had made several efforts to obtain LaMar's address without success. It had addressed letters both to the wife and to Wixom. The letter to the wife was returned unclaimed, she having in the meantime left Ogden. The letter to Wixom was never answered. Finally Attorney LeRoy B. Young, who was representing the defendant, learned that Wixom knew his address. Upon contacting Wixom he furnished Young the address upon condition that he Young would not reveal to anyone outside of his office this information, whereupon on September 28, 1954, Young wrote Pearce the following letter which was registered, to-wit:

“Mr. LaMar Pearce  
302 H. Street  
Antioch, California

“Re: Verne J. Oberhansly  
vs. LaMar Pearce

“Dear Mr. Pearce:

“Permit me to advise you that this case has been set for trial for November 18, 1954, at 10:00 o'clock A.M. I am writing you at this time so that you will have ample notice of the date and place of this trial. It is imperative that you be here by not later than November 17th and that you immediately report to our office upon your arrival so that we will have the benefit of a conference together in advance of trial.

“You realize, of course, that under the terms of your policy you are required to give full co-operation to the insurance company in the defense of this action.

“May I hear from you immediately so that I will know that you have received this letter and advise me if we can count on you being here on November 17, 1954.

“Yours very truly,

“YOUNG, THATCHER &  
GLASMANN

“LeRoy B. Young.”

LaMar received this letter on October 1, 1954. He never answered the same nor did he make any effort to contact the defendant. However, some time later LaMar's father called Young by phone and advised him that he had just talked to LaMar by phone and that LaMar had requested him to advise Young that he, LaMar, would not or could not come to the trial because of his job. Young then requested and obtained from the father a promise that he would call LaMar and explain to him the need of his being present and a request that he reconsider the matter and attend the trial. The father promised Young he would do so, and he did thereafter call LaMar and conveyed this message to him. However, LaMar did not write either Young or the insurance company and made no further explanation as to his intentions. As the time for the trial was approaching and Young not having received any direct reply to his letter or to the request relayed through the father, then con-



tacted Wixom and asked him to intercede and try to persuade LaMar to come. In compliance with this request Wixom on October 27, 1954, wrote LaMar the following letter:

“Dear LaMar:

“Mr. LeRoy B. Young has informed me that you advised him that you would not be present for the trial of the action brought against you and LaMar Pearce Auto Mart by Mr. Oberhansly for injuries he sustained in an automobile collision. I think LaMar that you should use every effort to make it to the trial. You are your own best witness and if you do not cooperate with your insurance company and appear at the trial, your chances to be reimbursed by the insurance are very slim.

“If it is money that bothers you and you cannot afford to get here, if you will write to Mr. Young and tell him, maybe the insurance company will pay your express although they are not obligated to do so.

“I hope that you are all getting along alright by now. Give my regards to your wife and best regards to you.

“Yours very truly,

“E. Morgan Wixom.”

LaMar admitted in his deposition, which was taken in California just before the trial of this action, that he received this letter. He further admitted that his reason for not coming was not due to the fact that he had not been tendered costs or expenses. LaMar did not reply to this letter written by his own attorney strongly ad-



vising him to appear at the trial, nor did he communicate with either defendant or Young. At no time did LaMar request or indicate that if a continuance were obtained he might arrange to be present. In fact in his deposition in reply to a direct question propounded by plaintiff's attorney, Mr. Alsup, he said:

"Q. Now why was it impossible for you to come to Ogden at the time you received this letter and were told when the trial was to be held?

A. Mainly from the standpoint of competition in any job or in any field of endeavor that you get into today you just—to go into your employer and tell him you are requested to appear at a trial 800 miles away and being more or less an unknown as far as he was concerned, it is not going to be anything but a reflection against your character and your ability. Keep on the job you are striving to do.

Q. Now state whether or not your leaving at that time would have jeopardized your chance at getting your promotion.

A. It would have jeopardized my chance definitely.

Q. Now would it have not been possible and easier for you to come to Ogden to this trial at a later date?

A. It could possibly have been arranged, yes. Still you must realize gentlemen, in this automobile business today, I mean not only in the automobile business, but in any business with competition such as it is, to leave a location for—it would have taken a week to have—

would have impaired my chances or could have disrupted my whole chance of remaining there as a steady employee.”

Later on LaMar made the following statement:

“Might I state this gentlemen, that frankly I thought my written statement, my signed written statement orally read would have taken care of my position being at the trial. I felt that that was sufficient. The facts were stated. That was what it amounts to.”

LaMar admitted that he never at any time wrote either Young or the insurance company requesting them to obtain a continuance of the trial nor advising them when he could appear if a continuation was obtained, nor did he inquire as to whether or not his written statement could be used in lieu of his appearance. It is fair to assume, we think, from his attitude and from his answers contained in the deposition that it was not a question of coming at some later date but that he had no intention of ever coming back to Utah to testify at the trial. He does not contend that he ever even so much as asked his employer if he might obtain a leave for a short time in order to enable him to appear as a witness in the trial. Instead of taking a week he could, of course, have come by air, attended a trial which only consumed two day's time and could have returned to his employment with an absence of not more than two days. Instead of doing this he took it upon himself to conclude that he would neither write the company nor its attorney nor would he appear at the trial.

It is important to bear this in mind by reason of some of the contentions being made by the plaintiff in this case.

On the date set for the trial LaMar did not appear. Defendant, however, did not do what many insurance companies have done when confronted with this situation. Defendant did not walk out and allow a default judgment to be entered for possibly \$50,000, but defendant conducted the best defense it could without any aid, assistance or testimony by LaMar and the jury returned a verdict for \$9,112.23.

At the time of the trial Verne called his brother Keith as a witness. His testimony was in certain respects totally at variance with his written statement. In the written statement both he and LaMar had stated that Verne was given \$10.00 and his dinner for driving the car. Nothing was said about his using this money for gas and oil and buying dinners for the three of them although the whole subject was discussed in detail with Wilde. He also stated that LaMar in rounding the curve swung wide over and into his left hand side of the highway and that the truck was approaching on its own side of the highway. He admitted that this testimony was in direct conflict with his written statements but had the effrontery to say he made untrue statements to the adjuster in an attempt to help LaMar. It is quite apparent therefore that without the help and assistance of LaMar and without the benefit of his testimony defendant could do nothing except to try to keep the damages as low as possible.

## STATEMENT OF POINTS

POINT 1. The Court erred in entering its Finding No. 5 for the reason that it is not supported by the evidence but is contrary to all of the evidence in the case.

POINT 2. The Court erred in entering the following portion of Finding No. 6:

“But he did not fail to cooperate with the defendant insurance company, nor did he fail to comply with the terms of said insurance contract,”

for the reason that said finding is not supported by the evidence in the case but is contrary to the uncontradicted evidence.

POINT 3. The Court erred in making and entering its Conclusion of Law No. 1 for the reason it is not supported by the evidence. It is contrary to all of the evidence in the case and is against law.

POINT 4. The Court erred in entering its judgment in favor of plaintiff for the sum of \$9,780.48 and in entering a judgment for any amount for the reason said judgment is not supported by the evidence but is contrary thereto and is against law.

POINT 5. The Court erred in not making and entering Findings of Fact, Conclusions of Law and Judgment in favor of defendant and against plaintiff for the reason that such a judgment would be supported by all of the evidence and would be in accordance with law.

## ARGUMENT

POINT 1. THE COURT ERRED IN ENTERING ITS FINDING NO. 5 FOR THE REASON THAT IT IS NOT SUPPORTED BY THE EVIDENCE BUT IS CONTRARY TO ALL OF THE EVIDENCE IN THE CASE.

The Court found in Finding Number 5 “at the time plaintiff herein suffered said accidental injuries he was riding as a passenger in an automobile driven by said LaMar Pearce and he was not an employee of said insured within the meaning of that word as used in the policy and as quoted in paragraph 4 hereof, nor were the insureds liable for any injuries under any Workman’s Compensation Law.”

The provision of the policy relied upon by appellant is quoted in Finding Number 4, whereby there is excluded from the provisions of the policy (a) any employee of the insured while engaged in the employment of the insured, and (b) one whose injury benefits are payable or required to be provided under any Workman’s Compensation Law.

It is the position of the appellant that under the uncontradicted evidence plaintiff was an employee of Pearce Auto Mart both (a) under the common law, and (b) under the Workman’s Compensation Act of the State of Utah.

We think respondent will admit that if plaintiff was an employee of the Auto Mart while driving the automobile from Ogden to Evanston, that this relationship continued as a part of the same employment on the re-

turn trip so that we shall discuss this phase of the question from the relationship which was created in the first instance.

Under the admitted facts as outlined let us assume that plaintiff while driving this car from Ogden to Evanston had injured a third party through his negligent operation of the automobile. Can anyone doubt that that injured party could have recovered judgment against the Auto Mart? If so, it would be on the theory of respondeat superior. Let us further assume that the plaintiff had filed an application with the Industrial Commission of the State of Utah for an award for the injuries sustained by him. Can there be any doubt that he would have obtained an award from the Industrial Commission based upon the theory that he had sustained an injury arising out of or in the course of his employment?

We think not and yet recovery under either of the assumed stated facts would have to be upon the basis of a relationship of employer-employee or master and servant.

It is to be noted that the exclusion provision applies to any employee of the insured while engaged in the employment of the insured and also to anyone whose injury benefits are payable or required to be provided under any Workman's Compensation Law, so that the exclusion applies if under the laws of this State plaintiff was an employee of the insured or if he was includable



as an employee under the Workman's Compensation Act irrespective of whether his employer carried workman's compensation or not.

What facts are to be considered in defining the relationship of employer and employee under the common law as declared by this Court? We have a number of cases discussing this question. We shall cite a few of them.

Wahlen v. U.P.R.R., 50 Utah 450, 168 Pac. 99.

In this case the defendant contended that when deceased quit work in the mine the relationship of master and servant ceased to exist between him and the company and that when he boarded the man trip and at the time he was killed the relation between him and the company was that of a carrier and passenger rather than master and servant and therefore the assumption of risk rule had no application. This court in answering this proposition stated:

“We do not so agree. The relation of master and servant continued to exist until the employees boarding the man trap were taken to the surface of the mine, deposited from the cars *and were no longer under the control of the company or amenable to its rules and regulations.*”

Citing three other Utah cases:

Jachetta v. San Pedro, 36 Utah 470, 105 Pac. 100;

Grow v. O.S.L., 44 Utah 160, 138 Pac. 398;

Gleason v. Salt Lake City, 93 Utah 577, 74 Pac. 2nd 1225.



The Gleason case is noteworthy because while this court held in that case that under the factual situation relation of master and servant did not in fact exist, yet the court with the greatest of care discusses the necessary elements in creating this relationship and lists the following five elements:

1. Right to exercise control over the details of the work.
2. Payment of compensation.
3. Power of appointment.
4. Power of dismissal.
5. For whose benefit the given work was done.

The Court then says that the first element, that is, the right to exercise control over the details of the work in the last analysis must always determine what was the essential nature of the relationship between the person who performed the given work and the person for whose benefit it was performed. The other elements are merely corroborative of the first if the first is shown to be present; and if the first element cannot be shown directly, the other elements are indicative of conditions which imply that control over the worker was in fact exercised by the person declared to be the master.

We think the foregoing statement is universally accepted by the courts, that is, in determining whether or not the relation of master and servant exists, this element of the right to exercise control is, in the final analysis, the concluding test and the other four elements

may be looked to merely as an aid in assisting the court to determine the ultimate question as to whether or not the right to control was present.

Phelps v. Boone, 67 Fed. 2nd 574,  
wherein the court says:

“The usual test in such circumstances, that is to say, the determination of liability for negligent act on the part of a servant *is the right or power on the part of the person charged to command and control the servant in the performance of the causal act at the moment of performance.*”

Badertscher v. Independent Ice Company,  
55 Utah 100, 184 Pac. 181.

This is another very interesting Utah case in which the question for determination was whether certain drivers were employees of the ice company or the coal company and this court held that at the time in question he was an agent of the coal company although he was an actual employee of the ice company and was paid his wages by said company.

Murray v. Wasatch Grading Company, 73  
Utah 430, 274 Pac. 940.

In this case the question arose as to whether the plaintiff was an employee of the defendant or of the D. & R. G. Railroad Company. The defendant carried workman's compensation on its own employees and did not list plaintiff as one of its employees. He was paid his salary by the railroad company. This court posed the question as to whether plaintiff was an employee of the defendant grading company or of the railroad company. The

court again lists the five elements to be considered and then states:

“However, the ultimate question is, was the person in question engaged in the discharge of the duties of a servant of another and was that service accepted by that other. Was such service rendered and accepted? If so, the law implies the contract of master and servant between the latter and former of employer and employee and the existence of that relationship between them.”

And this court held as a matter of law that the relation of master and servant existed between plaintiff and the grading company.

It is to be noted that in all of these cases as well as cases emanating from many other jurisdictions that the ultimate question is not whether the alleged employer did in fact exercise control but the question is did he retain the right of control?

We submit that under the facts of this case where the plaintiff was asked to drive this car that the person soliciting him to do so clearly retained the right to control him in the manner and performance of his duties even though he did not in fact exercise that right and had no occasion to do so, and the fact that Pearce followed plaintiff from Echo to Evanston is significant as evidence that he did in fact retain that control.

We say therefore that under the common law as it has been announced by repeated decisions of this court that it must be determined as a matter of law that when plaintiff was requested to drive this car to Evanston

that he was then engaged in the discharge of the duties of a servant of the Auto Mart; that his service was accepted by said Auto Mart; that he was performing a duty in the regular and customary discharge of the company's business and that from this relationship there can be no question but what the right of control did in fact exist. Even though the employment was for a short duration of time and related only to the delivery of this car, that fact in and of itself is not determinative of the issue. The question presented is whether or not at the time of the accident did such relationship exist.

### **Workmen's Compensation Law**

As heretofore noted, the insurance policy does not apply if the plaintiff was an employee under the provisions of the Workmen's Compensation Law of the State of Utah or if the insured would be held liable under the provisions of said law. This requires an analysis of the Workmen's Compensation Act of the State of Utah.

Preliminary may we suggest to this court that under its repeated pronouncements the purpose of enacting the Workmen's Compensation Law was to protect persons against the hazards incident to employment and if a person is injured while performing the duties assigned to him, it is considered right and proper that industry should absorb the loss just the same as it does with respect to depletion and depreciation in machinery and equipment *and that the length of time of employment is immaterial*. The ultimate question always is whether or not the alleged employee was injured while in the discharge of the duties he was directed to perform. If he

was so injured, then he or his dependents are entitled to the benefits provided by the Act. In order to determine whether or not an alleged accident is compensable, the first proposition to determine is whether or not the alleged employer comes within the perview of the Act. If he does not, then the Commission has no jurisdiction over the matter. Section 35-1-42, U.C.A. 1953, defines employers as follows:

“Every person, firm and private corporation having in service one or more workmen or operatives regularly employed in the same business or in and about the same esestablishment under any contract of hire, express or implied, oral or written.”

It is admitted in this case that the Auto Mart had one or more workmen regularly employed. Therefore, the alleged employer came within the provisions of the Act. Then Legislature defines “regularly” as follows:

“The term regularly as herein used shall include all employments in the usual course of the trade, business, profession or occupation of the employer, *whether continuous throughout the year or for only a portion of the year*. One can be regularly employed even though but for a short period of time if he is engaged in the performance of the duties incident to the business of the employer.”

Section 35-1-43, U.C.A. 1953, defines “casual employment” as follows:

“Subdivision 2. Every person, except agricultural laborers and domestic servants, in the service of any employer as defined in subdivision 2 of Section 35-1-42 who employes one or more



workmen or operatives regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens and minors whether legally or illegally working for hire, but not including any person whose employment is but casual and not in the usual course of trade, business or occupation of his employment."

It will be noted therefore that an employee includes every situation where the employer employs one or more workmen or operatives in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, whether legal or illegal, and then the statute by its express terms excludes only any person whose employment is but casual and *not in the usual course of trade, business or occupation of his employer.*

The underscored language above is very significant. It is to be noted that the statute above quoted does not use the term employee or servant but relates to workmen or operatives and is all inclusive provided the employer regularly employs one or more in his trade or business. It is also to be noted that under the terms of this statute the only persons who are excluded are persons whose employment is but casual and not in the usual course of trade, business or occupation of the employer. If, therefore, a workman's work is but casual, he is excluded as an employee only if the work which he is called upon to perform is not in the usual course of trade, business or occupation of his employer.

The evidence in this case without any dispute shows that the work which this plaintiff was requested to perform was work done in the usual course of the trade, business or occupation of the Auto Mart. If the casual work done was in the usual course of the trade or business, then even though casual and even though for a short duration of time he comes within the provisions of the Act.

Palle v. Industrial Commission, 79 Utah 47,  
7 Pac. 2nd 284.

In this case the court construed the provision above referred to and in doing so refers to the conjunction "and," and says that it cannot substitute the conjunction "or," so that under the express wording of this statute the only persons excludable are those casually employed in work which is not in the usual course of the trade. Note the following:

"By Section 3111, now 35-1-43, the employees who are excluded are those whose employment is but casual and is not in the usual course of trade, business or occupation of his employer. That is, to exclude an employee the employment must not only be casual but must also not be in the usual course of the trade or business of the employer.

"This, it seems, but emphasizes the fact that a casual or occasional employment in the usual course of the trade or business of the employer does not exclude the employee.

"Had the Legislature in Section 3111 used *or* instead of *and*, the meaning might well be different, but we are not justified in substituting the one for the other."



There are several other Utah cases which we desire to cite which deal with this question of when and under what circumstances the relationship of employer-employee exists under the provisions of our Workmen's Compensation Act. See

Weber County and Ogden City v. Industrial Commission, 93 Utah 85, 71 Pac. 2nd 177;

Auerbach v. Industrial Commission, 113 Utah 347, 195 Pac. 2nd 245.

In this case the court again refers to the test as being primarily whether or not the right of control is retained by the employer.

Summerville v. Industrial Commission, 113 Utah 504, 196 Pac. 2nd 718.

In this case the court in discussing this problem of casual employment states that the test is whether the services rendered are necessary to or in furtherance of employer's usual trade, business or occupation.

Certainly under the undisputed evidence in this case the service which the plaintiff was rendering for this company was necessary to its business and was in the furtherance of its trade, business or occupation.

We contend therefore that finding of fact number 5 is contrary to the undisputed evidence and that as a matter of law the plaintiff was included in the exclusion provision of the policy and that the court should have found such to be the fact.

POINT 2. THE COURT ERRED IN ENTERING THE FOLLOWING PORTION OF FINDING NO. 6:

“BUT HE DID NOT FAIL TO COOPERATE WITH THE DEFENDANT INSURANCE COMPANY, NOR DID HE FAIL TO COMPLY WITH THE TERMS OF SAID INSURANCE CONTRACT.”

Before discussing this matter we desire to emphasize that counsel will no doubt argue that the defendant insurance company failed to exercise due diligence in obtaining the cooperation of Pearce and he will no doubt cite some cases discussing this question. While we contend that the evidence in this case shows conclusively that defendant by its agents and attorneys did exercise due diligence and acted in the utmost good faith in an attempt to obtain the cooperation of Pearce and to procure his presence at the trial, yet we call attention to this important fact: *The trial court made no finding as to whether or not defendant acted with due diligence and such question is not within any issue within this case.* The court found only that Pearce “did not fail to cooperate with defendant nor did he fail to comply with the terms of said contract.” The judgment in this case is bottomed solely upon this finding and must stand or fall on this one proposition, to-wit: Did Pearce cooperate in the defense of this action? All other questions are outside the issues and the findings. The question whether the insured used due diligence is in the nature of an estoppel which must be pleaded and proved and upon which findings would have to be made if plaintiff relies upon such estoppel.

Proceeding now with a discussion of the question it seems to us that the finding of the court that Pearce did not fail to cooperate and that he did not fail to comply with the terms of the contract is not supported by any evidence, but that on the contrary the evidence is conclusive that he did fail to cooperate and that he did fail to comply with the terms of the contract. The condition of the liability insurance policy in question is set forth in Sections 6 and 13 and is copied into Finding Number 4. Unlike the provisions of some of the policies which are set forth in the cases hereinafter to be cited, paragraph 6 requires the insured to attend hearings and trials as well as to cooperate with the company in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of the suit, and Section 13 provides that no action shall lie against the company unless as a condition precedent thereto the insured shall have fully complied with all the terms of the policy.

We first desire to call to the court's attention the fact that this action is what is denominated by the courts as a derivative action for the benefit of the insured rather than a case where the policy itself creates a primary liability. A primary liability arises in cases where a statute or city ordinance requires as a condition precedent to obtaining a license to operate that the applicant must furnish a public liability bond in the form required by the statute or ordinance for the benefit of the public. This is called a primary liability as distinguished from the case wherein assured voluntarily obtains insurance

for his own protection but is not required to do so. We have no compulsory insurance law in this state. In the case of

Goldstein v. Burnstein, 52 N.E. 2nd 559,  
the court in discussing this question says:

“Their rights (third parties) in the indemnity, however, were derivative and if, by breach of the provisions of the policy of the insured, the company was discharged from its obligation to indemnify her, it was likewise relieved of any obligation to pay the plaintiffs. It has been said that the rights of the third persons injured to have recourse to the indemnity promised by the company do not rise any higher than those of the insured.” Citing cases.

See also

Salonen v. Paanenen, 71 N.E. 2d 227;  
Royal Indemnity Company v. Olmstead, 193  
Fed. 2d 451, 31 A.L.R. 2nd 635, and annotations.

In cases of derivative actions the courts agree that such a condition is a material one and that its breach constitutes a good defense against the insured and also as against an injured third party who claims thereunder. See

137 A.L.R. 1008,

wherein the general rule of law is stated to be as follows:

“The authorities are in practical unimity on this subject. A clause in an insurance policy requiring the insured’s cooperation, aid and assistance in a defense of an action against him is a material condition of a policy, the violation of which

by the insured forfeits his rights to claim indemnity under the policy. It is a condition precedent, failure of which to perform *in the absence of waiver of estoppel constitutes a defense to liability on the policy.*"

Stacey v. F and C of New York, 151 N.E. 718;

Royal Indemnity Company v. Morris, 37 Fed. 2d 90;

29 Am. Jur., Insurance, Page 1090.

Applying the rule as announced by all of the foregoing authorities it is proper to then first address ourselves to the rights of the insured Pearce under this contract of insurance in the light of the undisputed evidence. Let us assume that Pearce or his company was not insolvent and that he or the company had paid the judgment and then sought by this action to recoup their loss under his insurance policy. It seems to us that under such a state of facts no court would permit a recovery under the facts revealed by this record and if Pearce or his company could not recover, then this plaintiff's rights can rise no higher, and therefore he ought not to recover.

As heretofore pointed out, this policy required Pearce in addition to cooperating to also *upon the company's request attend hearings and trials*. It is admitted that Pearce did not attend the trial and that he rendered no assistance whatsoever to the insurance company in its defense of this action.

We believe that this is a case of first impression in this court. However, it is a matter that has been before

many courts, both State and Federal. The factual situation, of course, is different, but the rule of law governing the facts is pretty clear and defined. Keeping in mind that we are discussing merely the proposition as to whether or not the insured complied with the terms of the policy, what are the facts. Unlike some of the cases where the insured left the state and his presence could not be found, Pearce admits that on the 1st day of October, 1953, he received official notice by registered mail of the letter which informed him of the date and place of trial and which requested his presence, so this court is not confronted with a situation where the insured received no notice of the hearing. He admits that he did not attend the trial, so to that extent it must be admitted that unless he was prevented from attending the trial by circumstances beyond his control he breached the contract. There is no contention that he was prevented from attending the trial by reason of sickness, inclement weather, inability to travel or anything of that nature. He merely says that the reason that he did not come was due to his employment; that his own chances for advancement might have been jeopardized had he requested of his employer a few days to appear as a witness. In other words it was a case of measuring his own convenience with the demands of the policy. He does not contend that he even asked his employer for permission to attend the trial. He admits that he never at any time communicated directly with either the insurance company or its attorney. He never at any time suggested that if a continuance was asked for, that he might come at some later date. In fact he decided without consultation or advice



that because he had given a written statement to the insurance company that his presence at the trial was unnecessary. It seems to us that the mere statement of the situation discloses an utter disregard of the duties and obligations of the insured which constituted a willful refusal to cooperate in any degree whatsoever in the defense of the action.

Was his presence necessary? In the written statements furnished the company both by Pearce and Keith Oberhansly they had stated that this accident was caused by reason of the oncoming truck rounding the curve on the outside or left hand side of the highway thereby forcing Pearce to pull to his right to avoid a collision. If this fact was true, then the intervening negligence of the driver of that truck was the proximate cause of the accident and Pearce's testimony was absolutely necessary to prove this fact, and that was especially true when Keith Oberhansly took the stand as a witness for his brother and changed his testimony from that given in his written statement.

Counsel will suggest no doubt that defendant should have taken Pearce's deposition. However, under the terms of the policy the insured was required to attend in person and not by deposition. The facts in this case disclose how ineffective a deposition in advance of trial would have been. Defendant at that time would not have known or anticipated that Keith Oberhansly would change his statement and the subject matter would not



and could not have been covered or met in his deposition. This matter of taking depositions is discussed in the case of

Horton v. Employer's Liability Assurance Corporation, 164 S.W. 2nd 1011,

wherein the court says:

“The company was entitled to the presence of the defendant at the trial to meet any surprise testimony in contravention of the statements given by the witness, and for this purpose the company contracted for the defendant's presence at the trial.”

We shall not attempt to review the many cases dealing with this question. The factual situation is in many respects different from the facts in this case, but the cases are important in that the law is pretty definitely established.

Fischer v. Western and Southern Indemnity Company, 106 S.W. 2d 490;

Shalita v. American Motorists Insurance Company, 41 NYS 2nd 507;

Cameron v. Berger, 1 Atl. 2nd 529;

Indemnity Company of North America v. Smith, 78 Atl. 2nd 461;

Coleman v. New Amsterdam Casualty Company, 160 N.E. 367;

Glens Falls Indemnity Company v. Keliher, 187 Atl. 473;

McDaniels v. General Insurance Company of America, 36 Pac. 2nd 829;

Eakle v. Hayes, 55 Pac. 2d 1072;

Hynding v. Home Accident Insurance Company, 7 Pac. 2nd 999;

Associated Indemnity Corporation v. Davis, 45 F. Sup. 118;

Schoenfeld v. New Jersey Fidelity and Plate Glass Insurance Company, 197 NYS 606.

The Coleman v. New Amsterdam Casualty Company case is particularly interesting and persuasive because the opinion was written by Mr. Justice Cordozo and his observation is quoted in subsequent cases. Note the following in speaking of lack of cooperation:

“In diver’s ways there might be defense to a charge of negligence, or at all events, palliation, though mistakes were conceded. The default of the insured was more than sluggishness or indifference, phases of thought or conduct that might be the subject of various inferences when considered by a jury. *It was so avowed and purposed that but one inference is possible. If this was cooperation, one is at a loss to imagine when cooperation would be lacking.*”

Justice Cordozo again uses the following language:

“The argument misconceives the effect of a refusal. Cooperation with the insurer is one of the conditions of the policy. When the condition was broken the policy was at an end if the insurer so elected. The case is not one of the breach of a mere covenant where the consequence may vary with fluctuation of the damage. There has been a failure to fulfill a condition upon which obligation is dependent.”

Annotations are found in

Defendant pleaded as a further affirmative defense that Pearce, his business associate or partner, Keith Oberhansly, and the plaintiff, Oberhansly's brother, conspired to assist plaintiff in procuring this judgment. It may be as the trial court observed that the evidence was insufficient to prove a conspiracy. The evidence, however, did establish a reason for Pearce's refusal to cooperate and to attend the trial. He and his company were insolvent. There were already many creditors. One more judgment creditor would be of little or no consequence. Keith Oberhansly, his associate, apparently had nothing, but in any event this insurance policy was ample protection. Pearce and Keith Oberhansly were business associates. The brother, Verne Oberhansly, was a close friend of Pearce. Pearce and Keith Oberhansly gave written statements shortly after the accident, which, in a measure at least, exonerated Pearce, but a simple expediency of Keith Oberhansly changing his testimony and Pearce not appearing in his own defense enabled the plaintiff to obtain a judgment. In the language of Mr. Justice Cordozo, "If this conduct was cooperation, one is at a loss to imagine when cooperation would be lacking."

We contend therefore that the finding of the court that, "Pearce did not fail to cooperate with the defendant insurance company nor did he fail to comply with the terms of said insurance contract," finds no support whatsoever in the evidence, and that the evidence con-

clusively establishes as a matter of law that Pearce breached the contract by refusing to attend the trial and by failing to cooperate in the defense of the action and that as a matter of law the defendant is entitled to prevail.

As heretofore suggested, counsel will no doubt argue that the defendant did not exercise due diligence, but as we have already indicated, such an issue is wholly outside any issues in this case and wholly outside any findings as made by the court. However, if this court should disagree with this, then it becomes necessary to comment briefly upon this question. Counsel suggests:

1. That defendant should have asked for a continuance.

In order to have obtained a continuance it certainly would have been necessary for counsel to have made a bona fide showing that it was impossible to obtain the presence of the defendant at the trial. We do not believe that counsel for defendant could have in good faith made such a showing. Mere inconvenience is hardly sufficient to justify the granting of a continuance. The fact that there is competition in the automobile business hardly justifies a continuance. But, furthermore, Pearce at no time ever suggested that defendant ask for or obtain a continuance. He never at any time suggested that if a continuance was obtained, he would appear at a subsequent date. Here again counsel for defendant could hardly in good faith ask for a continuance without being prepared to show that if a continuance were granted,

that the defendant would appear at a later date. Pearce in his deposition makes it rather clear that he had no intention of appearing at any time. Competition would always be present, he says, and furthermore he had given a written statement. What more was required, he says.

The writer has a pretty distinct feeling that had he come in and asked for a continuance of this case, that counsel for plaintiff who now suggests that a continuance should have been requested, would have been vociferous in his objections to the granting of a continuance. Furthermore, the writer of this brief never was told directly that Pearce would not attend and I can state frankly that I thought that he would put in an appearance at the time of trial.

Did counsel exercise due diligence in trying to persuade Pearce to attend the trial? He was given notice by registered mail approximately six weeks before trial of the date and place of trial and a request for his attendance. When a roundabout rumor reached the writer that he would not or could not attend, the writer requested his own father to call him back and explain to him the necessity of appearing and the consequences of his failure to do so, but, furthermore, the writer then took the matter up with his own attorney who also interceded by letter to Pearce. It is true that the writer might have sent a representative of the company to visit him. Certainly the policy makes no such demands, but if the insured refused to attend after being requested so to do by the insurance company's attorney, by his own father and by his own attorney, we fail to see how some representative

of the company entirely unacquainted with Pearce could have accomplished what evidently his own father and his own attorney could not do.

This is a case where the insured left the State of Utah, and attempted to conceal his whereabouts, but his whereabouts was ascertained through the diligence of the defendant and he was promptly notified, but notwithstanding this fact he refused to attend. We say, therefore, that if the issue as to the diligence and good faith of the defendant is an issue in this case, that the evidence discloses without question that the defendant did everything required by it under the terms of its policy and under the law to obtain the presence of the insured at the trial.

POINTS 3, 4 and 5. The points raised by Points 3, 4 and 5 have all been fully discussed under Points 1 and 2 and nothing further need be added. If appellant's position on Points 1 and 2 is correct, then it must follow as a necessary consequence that the findings and judgment as entered by the trial court cannot be sustained and that judgment should be entered in favor of defendant dismissing the action.

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