

1956

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

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Richards, Alsup & Richards; Attorneys for Plaintiff and Respondent;

---

### Recommended Citation

Brief of Respondent, *Oberhansly v. Travelers Insurance Co.*, No. 8450 (Utah Supreme Court, 1956).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/2497](https://digitalcommons.law.byu.edu/uofu_sc1/2497)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

RECEIVED

FEB 21 1956

In the

LAW LIBRARY  
U. of U.

# Supreme Court of the State of Utah

VERNE J. OBERHANSLEY,  
*Plaintiff and Respondent,*

vs.

Case No.  
8450

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

## RESPONDENT'S BRIEF

RICHARDS, ALSUP & RICHARDS  
*Attorneys for Plaintiff and  
Respondent*

# INDEX

	Page
STATEMENT OF ISSUES .....	1
STATEMENT OF FACTS .....	2
STATEMENT OF POINTS .....	5
ARGUMENT .....	5
POINT I. THE COURT DID NOT ERR IN ENTERING ITS FINDING NO. 5 .....	5
POINT II. THE COURT DID NOT ERR IN ENTERING ITS FINDING NO. 6 .....	25

## INDEX OF AUTHORITIES

B & H Passmore Metal & Roofing Co., Inc. vs. New Amsterdam Casualty Company, 147 Fed. 2d 536 .....	21
Bean, et al, vs. Gibbens, et al, 265 P. 2d 1023 .....	22
Bingham City Corporation vs. Industrial Commis- sion 66 Utah 390, 243 P. 113 .....	7, 11
Braley Motor Company, Inc. vs. Northwestern Casualty Company, 49 P. 2d 911 .....	16
Daub, et al, vs. Maryland Casualty Co., 148 SW 2d 58 .....	19
Dowsett vs. Dowsett, 116 Utah 12, 207 P. 2d 809 .....	8
Durbin vs. Lord, 68 NE 2d 537 .....	29
Finkle vs. Western Automobile Insurance Company, 26 SW 2d 843 .....	27
Gleason vs. Salt Lake City, et al, 94 Utah 1, 74 P. 2d 1225 .....	10

	Page
Jensen vs. Eureka Casualty Company, 10 Cal. App. 2d 706, 52 P. 2d 540 .....	26
Jewtraw vs. Hartford Accident & Indemnity Com- pany, 131 NYS 745 .....	12
Johnson vs. Johnson (Indemnity Insurance Com- pany), 37 NW 2d 1 .....	39
Levy vs. Indemnity Insurance Company of North America, 8 Southern 2d 774 .....	39
MacClure vs. Accident & Casualty Insurance Com- pany, 49 SE 2d 742 .....	39
Murphy vs. Hopkins, et al, 4 NW 2d 801 .....	30
Pigg vs. International Indemnity Company, 261 P. 486 .....	27
Rickenbacker vs. Layton, et al, 59 Fed. Sup. 156 .....	17
Rinnard vs. Northwestern Mutual Fire Association, 187 Wash. 47, 59 P. 2d 1072 .....	27
Sills, et ux vs. Sorenson (Firemans Fund Indemnity Co., Garnishee), 73 P. 2d 798 .....	20
Stricker vs. Industrial Commission, 55 Utah 603, 188 P. 849 .....	24
Strode vs. Commercial Casualty Insurance Co., 102 Fed. Sup. 240, 202 Fed. 2d 599 .....	30
Traders & General Ins. Co. vs. Rudco Oil & Gas Co., 129 Fed. 2d 621 .....	26

## STATUTES

Sec. 35-1-43, Utah Code Annotated, 1953 .....	6
---	---

## TEXTS

Blacks Law Dictionary .....	7
-----------------------------	---

In the  
**Supreme Court of the State of Utah**

---

VERNE J. OBERHANSLEY,  
*Plaintiff and Respondent,*

vs.

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

Case No.  
8450

---

**RESPONDENT'S BRIEF**

---

STATEMENT OF ISSUES

Plaintiff accepts the defendant's statement of issues with this one explanation: The jury was dismissed at the request of both parties; therefore, the judgment should not be disturbed if either plaintiff was entitled to judgment as a matter of law or a jury question was presented on both or either issues. Only if defendant was entitled to judgment as a matter of law should the judgment entered by the district court be reversed.

## STATEMENT OF FACTS

In this statement of facts, the parenthetical references are to pages in the transcript. The parties will be referred to as plaintiff and defendant, and LaMar Pearce will be called "LaMar".

Plaintiff is unwilling to accept defendant's statement of facts. We believe that the following facts are important to a determination of this case:

### *Facts on Employment Issue*

At the time of the accident, LaMar Pearce Auto Mart, a corporation, hereinafter called corporation, was insolvent. Two cars which the company held on consignment from an Evanston, Wyoming company were to be returned as a part of winding up the business (47). In order to avoid the expense of hiring someone to drive one of the cars to Evanston, LaMar asked plaintiff to do so because he knew plaintiff would not charge him (35). On two prior occasions, plaintiff had driven cars to points in Idaho for the corporation and had not asked for nor received either wages or reimbursement for expenses (35, 192, 193). Plaintiff had never worked for the corporation or LaMar and he had his own business (191). On this occasion, when requested by phone to take time away from work to assist him, plaintiff told LaMar he would do so on one condition—that it not cost him any money; that he wasn't going to dig into his own resources to defray the costs of the trip (194). LaMar then told plaintiff he would give him \$10.00 to defray expenses—pay for gasoline and meals (195). LaMar, on behalf of the corporation, accepted plaintiff's services as a favor from one friend to another, a neighborly, friendly act (37, 43), and he did not

consider he had the right to boss plaintiff in driving the car (42). His only interest was getting the cars to Evanston (38). Plaintiff had no purpose in going to Evanston other than rendering the favor to LaMar and his brother (38). The corporation maintained Workmen's Compensation and other state and federal reports on its employees. The plaintiff was not listed as an employee at any time on any such report (45). The arrangement for driving the car was a casual and gratuitous arrangement (46). Plaintiff put gas and oil in the three cars (one to be used by LaMar to return the three men to Ogden) at a cost of \$5.40 (195), bought lunches for all three men at Echo Junction, bought dinner for all three at Evanston (198, 199), and spent in excess of the \$10.00 (205).

### *Facts on Lack of Cooperation Issue*

*LaMar's Conduct.* Following the accident, the business of the corporation ended and LaMar left Ogden for California to seek employment (57). He was in debt in Ogden and he left his address with several people, including an attorney, Morgan Wixom, but asked them not to make it public except if necessary (58, 66). Before leaving Ogden, he had advised defendant of the suit, delivered the summons to it, appeared on request at the office of its attorney (98) and given on request a written statment to its agent (57, 72, 115, 117). He went to work at Antioch, California, as a used car salesman for the Ford dealer. Two months before trial, he received a registered letter from his attorney, hired for him by defendant in accordance with the policy requirement, advising him of the trial date and of the necessity that he be present. In response to that letter he called his father in Ogden and asked him to call the attorney and advise him that, because



of his employment situation, it was impossible for him to come to Ogden at the time set for the trial (49). He later received a call from his father, telling him it was important that he come, and he then received a letter from another attorney, Wixom, advising him he should come. He failed to appear at the trial.

At the time in question, LaMar was a used car manager and he was in line to become general manager or new car manager (49). He made that promotion not long after the trial was held (49). As defendant's witness in the trial of this garnishment suit, he testified that leaving his work to attend the trial would have jeopardized his chance for this promotion (51). The trial could not have come at a worse time for him, he said (60). LaMar, a layman, thought the statement he had given the defendant company was sufficient and he assumed that after advising the attorney that he could not make the November trial date, he would perhaps receive a letter from him suggesting a future date (65), or that an agent from the Oakland, California office of the defendant company would contact him if it was important that he be there (67, 80).

*Conduct of the Defendant.* Upon being notified of the suit, the defendant took over the defense in accordance with its policy. Upon being advised by Attorney Wixom of LaMar's address, defendant wrote LaMar a registered letter, advising him of the trial date and of the necessity of his presence. Defendant then received a call from Pearce, Sr., father of LaMar, advising it in effect that LaMar had received the letter but his employment situation made it ab-



solutely impossible for him to come to Ogden at the time set for the trial (81, 83). After being thus advised of the difficulty of LaMar's position, it (1) asked the father to tell LaMar that it was important that he be here in Ogden, and (2) asked Attorney Wixom, who was not representing LaMar in any way in connection with this matter, to write him and ask him to appear on the date set.

Defendant company had a local claims office in Oakland, California (184), about forty miles from Antioch. The Oakland agent regularly covered Antioch and could have contacted LaMar without going out of his way (185), but the defendant did not deem it advisable to do so (185).

## STATEMENT OF POINTS

### POINT I.

The Court did not err in Entering its Finding No. 5

### POINT II.

The Court did not err in Entering its Finding No. 6

Defendant in its brief has listed five points of argument; however, if its Points I and II are not well taken, then it follows that its Points III, IV, and V are not well taken. Therefore, we will limit our argument to Points I and II as stated in defendant's brief.

## ARGUMENT

### Point I.

The Court did not err in Entering its Finding No. 5  
For convenience of treatment, argument on this point will be divided into the following three issues:

1. Plaintiff's injuries were not covered by the Utah Workmen's Compensation Act.
2. Plaintiff was not an employee under the common law.
3. In any event, plaintiff was not an employee within the meaning of that word as used in defendant's policy of insurance issued to LaMar Pearce Auto Mart.

We think the second issue above is not determinative of this case; however, since it has been treated by defendant in its brief, we shall answer it herein.

1. *Plaintiff's injuries were not covered by the Utah Workmen's Compensation Act.* Defendant's argument on this issue may be summarized as follows: "The Workmen's Compensation Act excludes only employees whose work is both casual and not in the regular course of the employer's business. Conceding plaintiff's employment was casual, still it was in the regular course of the business of LaMar Pearce Auto Mart; therefore plaintiff was an employee within the Act at the time of his injuries." We submit that this argument assumes the relationship in issue. We submit that the important question is whether or not plaintiff was an employee within the meaning of that word as used in the Act, and that definition is contained in Section 35-1-43, Utah Code Annotated, 1953, as follows:

" 'Employees', 'workmen' and 'operatives' defined—Casual employment—Mining lessees and sublessees—Partnership members;—The words 'employee', 'workmen' and 'operative', as used in this title, shall be construed to mean:

. . . . .

"(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 employs 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 employer."

We have italicized the words "under any contract of hire" in the above definition because we believe they are determinative of this issue. Black's Law Dictionary, 2nd Edition, defines the word "hire" as follows:

"To engage in service for a stipulated reward, as to hire a servant for a year or laborers by the day or month; to engage a man to temporary service for wages."

The Utah Court has in several cases ruled that the definition given in the Workmen's Compensation Act requires that the person performing the service receive consideration therefor—that is, be paid a wage or salary. Thus in *Bingham City Corporation vs. Industrial Commission*, 66 Utah 390, 243 P. 113, the court, after pointing out that it is necessary that some consideration be in fact paid or payable to the employee, said:

"The purpose of the act is to provide compensation for earning power, lost in industry, and the only basis for computing compensation is the earning ability of the employee in the particular employment out of which the loss arises. In short, the term 'employee' indicates a person hired to work for wages as the employer may direct."

Now, plaintiff was not a person hired to work for wages as LaMar Pearce Auto Mart might direct. He did receive \$10.00, it is true, but he received that \$10.00 to defray the costs of the expense of the trip—it was expense money, and it was so considered by the two parties involved. There is no suggestion in the transcript that Pearce gave the \$10.00 or that plaintiff accepted it as wages or compensation for the service to be rendered. Since plaintiff received no compensation for this service, it is clear he was not an employee within the Workmen's Compensation Act, and the question of whether or not the service rendered was casual or whether or not it was a part of the regular business of LaMar Pearce Auto Mart becomes immaterial.

*2. Plaintiff was not an employee of LaMar Pearce Auto Mart under the common law.* As previously stated, we think this issue is not determinative, but we shall treat of it, nonetheless. On page 15 of its brief, defendant asks us to assume that plaintiff, while driving the car from Ogden to Evanston, had negligently injured a third person, and asks:

“Can anyone doubt that the injured party could have recovered judgment against the auto mart?”

We think probably the third person could not have recovered against the auto mart under the assumed facts for the reason that the Utah court in similar circumstances has so ruled. The case of *Dowsett vs. Dowsett*, 116 *Utah* 12, 207 *P. 2d* 809, is the Utah case most nearly in point that we have been able to find. In this case, Darwin Dowsett was in the Army, stationed in Texas. He wanted his wife to join him and bring the automobile from Salt Lake City. She did not drive, so he requested his mother and father to drive the car down,

with the wife riding as a passenger. The mother and father were to take turns driving the car, and on the way, with the father driving, there was an accident. The mother sued the son, claiming the father was his agent in driving the automobile, and that the son was liable under respondeat superior. The Third District Court granted a motion dismissing the case on the grounds that the mother and father, in driving the automobile to Texas, were employees of the son and the mother could not recover for negligence of the fellow servant. The Supreme Court on appeal held that the District Court erred in its holding that the mother and father were employees of the son. It held that an independent contractorship relation was involved, and not an employer-employee relationship. Chief Justice Wolfe, in an excellent concurring opinion, points out the distinction between the two relationships and states that clearly the relationship was not one of employer-employee. He states that while it does not seem to fit exactly into the independent contractorship, still, where public policy does not dictate that the doctrine of respondeat superior apply, it should be placed in the independent contractorship even though it does not have exactly all the aspects of that relationship.

In considering this issue, let us bear in mind that the employer-employee relationship is a contractual relationship. It is created out of a binding contract between two persons. There is no more fundamental principle in the law than this: A binding contract must be supported by consideration. Defendant in its brief states that the existence of control by one party over the person performing the services is an essential and almost determining factor in the employment relationship. All of the cases cited by defendant in its brief deal with the question of control, and we have no quarrel with any of them.

Note, however, that in each of them there was a binding contract and the question of control was considered in each of them as an aid in determining whether or not that binding contract created a master-servant relationship or some other relationship.

When the courts speak of the question of control, they speak of the *legal right* to control, and this legal right can only come out of a binding contract. For every legal right, there is a correlative legal duty, a breach of which gives rise to a legal cause of action. When there is a legal right to control, there is a correlative legal duty to obey. If, then, Pearce had the legal right, for example, to order Oberhansley to stop at Morgan for sandwiches and if Oberhansley instead stopped at Echo, Pearce could sue him for violating his legal duty. Now, obviously, under our evidence in this case, Pearce would not be able to sue Oberhansley, for the simple reason that Oberhansley had not bound himself to any legal duty toward Pearce. He had not entered into any binding contract. An essential element is missing—consideration.

The Utah Supreme Court uses similar reasoning in the case of *Gleason vs. Salt Lake City, et al* 94 Utah 1, 74 P. 2d 1225, which case is cited by defendant in its brief. The question involved was whether or not a fireman was an employee of the store company where he worked to extinguish a fire. The Court considers whether or not the fire department was employed by the store, and it says:

“ . . . There was no binding contract in advance. The Fire Department was under no obligation to do the work and could have withdrawn at any time without liability for breach of contract . . . . Because there



was no contract, the company could have requested the defendant to desist at any time without liability to it for breach of contract.”

And:

“There being no contract between the company and the city or the men of the Fire Department, either could have withdrawn without liability to the other. The company could have said to the firemen when they came to pump the shaft, ‘We do not want you to do the job, you may go’, or the fire chief could have withdrawn the men at any time. It is argued that because the company could have directed the men to desist from doing the work at any time during its performance, this gave it such power of control that it is liable for their negligence. That, however, is not the sort of control referred to in the cases which impose liability on the principal or master for the negligence of the servant. The kind of control necessary to impose liability is the right of control over the details of the work, or the means or method of its performance. The fact that the fire chief could have called his men back to the station or could have refused to do the work at the request of the company but emphasizes the independence of the Fire Department, and tends to exclude any relationship of master and servant between the company and the firemen.”

And in *Bingham City, et al, vs. Industrial Commission*, cited and quoted above, the court, after pointing out why the volunteer fireman was not an employee within the meaning of the Workmen’s Compensation Act, goes on and says this:

“ . . . The deceased was not in the service of the city under any appointment or contract of hire or at all. There were no contractual relations between them



whatever . . . . There was no legal duty or obligation on the part of one to the other. There was therefore no relationship of master and servant or employer and employee . . . ”

It is true that wages are not always essential to create an employment relationship. It is also true that the important element to consider is the question of *right* to control. However, if there be no wages or other benefit flowing to the doer there can be no right to control, and there can be no employment because there is no binding contract.

3. *Plaintiff was not an employee within the meaning of the defendant's insurance policy.* We think this is the determinative issue on this employment question. This issue has not been touched upon by the defendant in its brief.

We commence consideration of this issue with the universally accepted principle that words used in an insurance policy are to receive their ordinary meaning, but when a word is ambiguous or susceptible of more than one meaning, it must receive that meaning which is most adverse to the insurance company and most favorable to the insured. That principle is used in the cases cited and quoted hereinafter.

The question was not directly involved in the case *Jewtraw vs. Hartford Accident & Indemnity Company*, 131 NYS 745. However, because of the language used in that case, we believe that it is a good introduction to the issue and we quote it at length. In this case, the insured was a costume man and he had to make a trip to Ottawa, Canada, from New York to get costumes for a winter carnival. He asked the plaintiff to go along with him to help, and he agreed to pay

the plaintiff's expenses. It was understood that the plaintiff was to be paid wages for the trip, but he had not actually been paid at the time of the trial. In considering whether or not the plaintiff was an employee of the insured, the court said:

“What employment might be regarded as sufficient to hold a man a nongratuitous passenger in an automobile traveling in Ontario under the Ontario statute might be something less, or at least different, from what might be construed to be ‘employment’ in an exclusion clause relieving an insurance company of responsibility to its insured. When these legal areas are looked at, it is to be seen that they are not congruent in the geometric sense and therefore the answer given to one is not inevitably the answer to be given to the other.

“The policy covered Davis (the insured) generally for all liability which a court might impose on him for injuries arising out of the operation of his truck, unless the exclusion became operative. Under familiar principles, the exclusion must be construed strictly against the carrier . . . . .

. . . . .

“Since we have no New York statute avoiding liability for negligence to a gratuitous guest, the question of when a rider in a vehicle may be something more than a guest but something less than an employee of the owner of the vehicle seems not to have been passed on; but cases have arisen in which consideration has been given the question of what is ‘employment’ and how it influences other effective legal relations. An examination of these cases suggests that the problem in the action now before us ought to be treated as an issue of fact.

“One such case is *Ferro vs. Leopold Sinsheimer Estate, Inc.*, 256 NY 398, 176 NE 817, 818, upon which, as we have noted before, both sides of this controversy have relied at one time or another. A boy about thirteen years old had been occasionally asked by the superintendent of a building to do some errands and small odd jobs for which the superintendent from his own funds gave him ‘a little money, a mere gratuity’. The boy was injured while helping the superintendent clean an elevator cable.

“The action was dismissed at Trial Term because the court there was of opinion the relationship was one of employment, to which the Workmen’s Compensation Law applied; but the court of appeals held it was not employment within the statute and that an employment relationship had not been ‘contemplated or established’ . . .

“In *Mandatto vs. Hudson Shoring Company*, 229 NY 624 129 NE 933, cited *supra*, the distinction between a contractual relation of employment and a ‘casual’ and ‘voluntary’ rendering of a ‘slight’ service or favor for which a gratuity is given was recognized. The expressions used are from the dissenting opinion in this court, 190 App. Div. 71, 179 NYS 458, adopted by the court of appeals on reversal. Quite similar language is found in *Lazar vs. Steinberg*, 269 App. Div. 760, 54 NYS 2d 859. These cases suggest that the actual relation between Jewtrew and Davis in making their trip together to Ottawa could be found, as a question of fact, not to have come within New York’s legal conception of what is ‘employment’.

“When we turn to decisions in other States in cases quite closely approaching the one before us under guest statutes we seem to find some further support for the view we take of what disposition ought to be

made of the case. In *Sills vs. Sorensen*, 192 Wash. 318, 73 P. 2d 798,, the assured invited plaintiff to make a trip in his automobile to act as a witness for assured on the payment of a bill, for which service the plaintiff was given \$2 by the assured. Injured in an accident the plaintiff recovered against the assured under a complaint which avoided the effect of the Washington guest statute by pleading he was employed by the assured.

“But the Washington court held that plaintiff was not precluded by the judgment in the main action from showing that this was not ‘employment’ as used in the policy of insurance excluding liability to employees of its assured injured in the course of their employment in the business of the assured. The court was of opinion there was an absence of such control over a man hired to become a witness as to avoid the conventional effect of employment and treated him as an independent contractor . . . .

“Where a man agreed to drive a truck from one city to another for a corporation of which his employer in another business was an officer, without compensation and without consideration other than two meals, it was held by the same court that he was not an ‘employee’ of the owner of the truck within an exclusion provision of the policy, *Braley Motor Co. vs Northwestern Casualty Co.*, 184 Wash. 47, 49 P. 2d 911. It was further held that under the form of submission of the negligence action in which recovery had there been allowed against the insured the injured party was not deemed conclusively to have been found to be an employee of the owner of the truck.

“In *Standard Accident Ins. Co. vs. Swift*, 92 NH 364, 31 A. 2d 66, a student in a school summer camp made

a part payment of tuition by assuming additional responsibilities in the work program which all students at the camp shared. In the course of voluntarily assuming such additional responsibilities he was injured. The New Hampshire court held that this did not fall within the 'employee' exclusion clause of a liability policy.

"The same court construed similarly an injury sustained by a relative of the assured's riding to the assured's home in the North with the understanding she should work for the assured a month later, the assured bearing the expenses of the trip from the South on which the injury was incurred. It was held that this was not 'employment' within the scope of the policy. Merchants Mutual Casualty Company vs. Manzer, 93 NH 34, 35 A. 2d 392. See also Home Indemnity Co. vs. Village of Plymouth, 146 Ohio St. 96, 64 NE 2d 248." (parenthesis added)

In *Braley Motor Company, Inc. vs. Northwestern Casualty Company*, a Washington case reported in 49 P. 2d 911, the injured person had worked for Braley Motor Company, Inc., the insured, for a period of several years selling automobiles on a commission basis. A short time before the accident, the injured person left this employment and went to work for a Mr. Braley, the president of the insured corporation, selling oysters. It was necessary that Braley Motor Company, Inc. pick up a truck in Seattle, Washington, and arrangements were made between Braley and the injured person for the two of them to drive together from Aberdeen, the home town, to Seattle and pick up the truck, and then one would drive the car back and the other one the truck. No consideration or compensation was given for the trip; however, Braley bought the injured person his breakfast and

luncheon on the trip. The court held that there was no employment relationship in the following words:

“ . . . . It is evident that the word ‘employed’ was used in the insurance policy, in its ordinary and natural sense, as implying the relationship of master and servant. The service rendered by Kantonem (the injured person) was casual and gratuitous. He was driving the car wholly as an accommodation to the appellant, even though he may have had some incidental benefit in the way of pleasure or the hope of future business. In construing the language of the policy, if construction is needed, we are to keep in mind the familiar rule, that the construction will be adopted which is the most favorable to the insured.

“ ‘There is another principle applying to contracts of insurance to the effect that if they are so drawn as to require interpretation and fairly susceptible of two different conclusions, the one will be adopted most favorable to the insured and will be liberally construed in favor of the object to be accomplished, and conditions and provisions therein will be strictly construed against the insurer as they are issued upon printed forms prepared by experts at the instance of the insurer, in the preparation of which the insured has no voice (citing cases).’ ” (parenthesis added)

In *Rickenbaker vs. Layton, et al*, a South Carolina case, 59 *Fed. Sup.* 156, the injured person was a rural mail carrier. The insured asked him to accompany him (insured) on a trip around the rural mail route to show him where several of the insured’s customers lived. The trip was taken and after the injured person had pointed out the residences of the various customers, the parties left the route and drove to a small nearby town, and then the accident occurred on the way



home. It was claimed that the injured person was an employee of the insured. The insured testified that although no definite arrangements were made as to payment of compensation, he expected and anticipated that he would have to pay the injured person for the services rendered by him and he expected to take it out of his expense account. The court held that there was no contract of employment. It stated:

“A contract of employment, like any other contract, can only arise out of a meeting of the minds of the contracting parties; and such a contract usually involves the agreement of one party to render services or labor for the benefit of another, who in turn becomes obligated, expressly or by implication, to pay a consideration therefor. The testimony in this case hardly warrants the inference that such a relationship has been established between the insured and the plaintiff as of the time of the accident. The fact that no compensation was agreed upon, or ever asked by, or paid or offered to the plaintiff, for whatever he may have done on the afternoon in question, although five years have now elapsed, lends some support to plaintiff’s contention that he was not at any time an employee of the insured . . . ”

. . . . .

The court also says:

“ . . . . in the construction of insurance contracts, that meaning should be attributed to the language used which ordinarily is given to such language, unless it is susceptible of more than one reasonable construction, in which case it will be given that construction which is most favorable to the insured . . . To say that a casual employee of the insured, who was not at the time of his injury engaged in any business of the



insured, and had not been for two hours, is excluded from coverage would be to give the language of the policy a strained construction or else to resolve a possible ambiguity in favor of the insurer and against the insured.”

In *Daub, et al, vs. Maryland Casualty Co.*, 148 SW 2d 58, the plaintiff, age sixteen, performed work for insureds about their house. On one occasion he raked leaves for a morning and was paid twenty-five cents and his dinner. A few weeks later he grubbed out a stump in the back yard and was paid \$1.50 and his lunch. Shortly thereafter, insured contacted the boy at his home and asked him to rake leaves, and he was injured while so working. The policy insured against liability to “any person or persons not employed by insureds”.

The court held the boy was not an employee within the meaning of the policy, using the following language:

“The word ‘employed’ is capable of a great variety of interpretations, and is therefore subject to restrictions and limitations arising from its use in connection with other words, or from the context of the contract or statement in which it appears. The word as used in the policy in suit here obviously imports the relation of master and servant or employer and employee, but it does not necessarily import every sort of such relationship . . . . The restrictive words ‘not employed’ are susceptible of many meanings, and therefore necessarily introduce ambiguity and leave the clause open to construction. And that construction most favorable to the insured must be adopted.

“The word ‘employee’, which is the correlative of employer, is commonly used as signifying continuous service, or as designating a person who gives his whole

time and services to another for a financial consideration, or as designating a person who performs services for another for a financial consideration, exclusive of casual employment, or a person in constant and continuous service, or a person having some permanent employment or position, or a person who renders regular and continued services, not limited to a particular transaction, or to a person having a fixed tenure or position. The words, employed and employee, as used in insurance policies, generally denote regular employment, as distinguished from occasional, incidental, or casual employment . . . . (citing cases)

“It is clear that Winton Meyer, at the time of his injury, was not regularly employed by plaintiffs, or a regular employee of plaintiffs, and he is therefore not excluded from the coverage of the policy.” (parenthesis added)

In *Sills, et ux, vs. Sorenson (Fireman's Fund Indemnity Co., Garnishee)*, a Washington case reported in 73 P. 2d 798, insured's wages had been attached, and he desired to travel to a neighboring city to pay the creditor. He asked the plaintiff to accompany him and act as witness to the payment and agreed to pay him and did pay him \$2.00 as wages for the services. On the return trip the accident occurred, causing injury to plaintiff. The exclusion provision was the same as that in our present case. The court held there was no employment, and it said:

“We proceed from the well-established and oft-repeated principle in the law of insurance that, if the policy be so drawn as to require interpretation and its language is fairly susceptible of different conclusions, that construction which is the most favorable to the assured in affording him protection under the policy will be adopted. (citing cases)

“Both parties concede, and likewise proceed upon the theory, that Sills (plaintiff) was actually paid the sum of \$2 for the service to be rendered by him on the trip . . . . .

“What, then, was Sills’ relationship to Sorenson (assured)? Respondent contends that he was an employee in the legal sense of a servant. Appellant contends that his employment was that of an independent contractor. It appears certain that he must fall within one or the other of these two classifications.

“The word ‘employee’, though more euphonious, has the same legal significance as the word ‘servant’. It imports some sort of continuous service rendered for wages or salary and subject to the direction of the employer or master as to how the work shall be done.”  
(parenthesis added)

The court then considers the distinction between employee and independent contractor, as applied to the facts, and concludes that plaintiff was an independent contractor and not an employee.

Not strictly in point, but of considerable interest, is the case of *B & H Passmore Metal & Roofing Co., Inc. vs. New Amsterdam Casualty Company*, 147 Fed. 2d 536. Chief Justice Phillips of the Tenth Circuit Court of Appeals gives an excellent discussion of the difference in interpreting the word “employee” as used in compensation acts and the word as used in insurance policies. In this case, the deceased regularly worked as a roofer for the insured. He and other employees were provided transportation to and from their places of work by their employer, but they were not paid for the time consumed in so traveling. Death resulted from an accident occurring while returning in the employer’s truck from

a job at the end of the work day. The court held that whereas the language of a workmen's compensation act should be liberally construed in favor of the injured workman and all reasonable doubt as to its meaning resolved in his favor, the exclusion clause of an insurance policy must be strictly construed against the insurer. The court then held that the death did not occur while deceased was engaged in the business of the insured, and that the exclusion provision was inapplicable.

In *Bean et al vs. Gibbens, et al*, a Kansas case, 265 P. 2d 1023, the defendant insurance company defended under an exclusion provision which provided that the policy did not apply to bodily injury, sickness, disease or death of any employee of the insured while engaged in the employment. The facts were that the insured was driving a truck and the truck broke down and he was in the process of towing it into a garage when he asked the deceased to assist him by driving the truck that was being towed for him. The deceased agreed to do so, and the insured instructed him fully as to how the truck was to be driven and directed and controlled him therein. The court held that the deceased was not an employee of the insured. It uses the following language:

“The real question was the fundamental relationship between Gibbens and Wilber under all the surrounding facts and circumstances. The word ‘employee’ as defined in the New Century Dictionary is:

“ ‘A person who is in the employ or regular working service of another, as a clerk, workman, etc.’

“Black’s Law Dictionary, 3d Ed., at page 657, defines the word ‘employee’ as follows:

“ ‘This word “is from the French, but has become somewhat naturalized in our language. Strictly and etymologically, it means ‘a person employed’, but in practice in the French language, it ordinarily is used to signify a person in some official employment, and as generally used with us, though perhaps not confined to any official employment, it is understood to mean some permanent employment or position.” ’

“On the same page Mr. Black defines the word ‘employ’ as follows:

‘To engage in one’s service; to use as an agent or substitute in transacting business; to commission and intrust with the management of one’s affairs; and, when used in respect to a servant or hired laborer, the term is equivalent to hiring, which implies a request and a contract for a compensation, and has but this one meaning when used in the ordinary affairs and business of life.’

“Also 56 CJS, Master and Servant, Paragraph 1, page 27, defines ‘employee’ as follows:

‘ “Employee has also been defined as a person in constant and continuous service, one who performs services for another for a financial consideration exclusive of casual employment.”

The court in concluding approved the following conclusion made by the trial court:

“ . . . . the task performed by said Wilbur Leroy Bean for defendant was occasional, incidental, casual and a neighborly act.”

and held that the exclusion provision did not apply.

You will note that in most of the cases above quoted, the

facts brought the parties closer to an employment situation than existed in our present case. Yet in each of them the court, relying in part upon the familiar rule of interpretation of insurance contracts, finds that no employment within the meaning of the word as contemplated by the parties to the insurance contract existed.

Assume for the sake of argument there is some efficacy to defendant's argument on this question and that there are instances where the facts in this case can be stretched to embrace an employment relationship. Nonetheless, the word "employee" is normally defined as a person who does service for another under a contract of hire. Thus, in *Stricker vs. Industrial Commission*, 55 Utah 603, 188 P. 849, the Utah court, after quoting the Workmen's Compensation Act definition of "employee" says:

"The statutory definition adds nothing to the generally accepted definition of 'employee'. An 'employee' is one who works for and under the control of another for hire."

Assume that definition were the unusual one rather than the one generally accepted. Still, under the rule of interpretation of insurance contracts quoted above, it is the one that should be adopted by the court, and in this case Oberhansley just doesn't fit into that definition. The service rendered by him was a casual, gratuitous, neighborly act and neither authority nor logic can make him an employee. We submit, therefore, that the court did not err in entering its Finding No. 5.

## POINT II.

The Court did not err in Entering its Finding No. 6

This point involves a question of whether or not the court should have found as a matter of law that the insured failed to cooperate with the insurance company, and hence that the insurance company is relieved of liability under its policy.

Counsel for defendant in its brief would have the court ignore the conduct of the insurance company in considering this point. They say that the court made no finding on the matter and therefore it is not before the Supreme Court. The court made a finding on the ultimate fact, and the ultimate fact was whether or not there was a failure of ~~consideration~~<sup>COOPERATION</sup>. It was not required to make a finding on any evidentiary fact, and the reason or reasons why it concluded that there was no lack of cooperation would be evidentiary.

The question of cooperation is a two-faceted question. It is impossible to consider that question without examining both the conduct of the insured and of the insurance company. Obviously, an insurance company cannot sit back and make no requests for cooperation and then complain because the insured failed to cooperate. Obviously, if it makes no request that the insured appear at the trial, it can't complain because the insured fails to appear. The insurance company must make some effort, and whenever in the law some effort is required, the law requires that that effort be a reasonable one. And by definition, reasonable effort means due diligence. The question, then, is a two-faceted one: (1) What, if anything, did the insurance company do to obtain the cooperation, and (2) In what manner, if at all, did the insured fail



to cooperate? We certainly do not agree that the conduct of the insurance company is in the nature of an estoppel which must be pleaded and proved by plaintiff. The defendant raised this defense: "We sought our insured's cooperation and he refused it." That defense placed in issue the question of how defendant sought its insured's cooperation.

This logic finds support in authority. The following language from *Traders & General Ins. Co. vs. Rudco Oil & Gas Co.*, 129 Fed. 2d 621, is typical of the language we find in the cases:

" . . . . the rights of the insurer (to control the defense of a suit on behalf of the insured) are not absolute, they are subject to moderation by the rule of right and justice. Exclusive authority to act does not necessarily mean the right to act arbitrarily (citing cases). The right to control the litigation in all of its aspects carries with it the correlative duty to exercise diligence, intelligence, good faith, honest and conscientious fidelity to the common interest of the parties (citing cases). When the insurer undertakes the defense of the claim or suit, it acts as the agent of its assured in virtue of the contract of insurance between the parties, and when a conflict of interest arises between the insurer, as agent, and assured, as principal, the insurer's conduct will be subject to closer scrutiny than that of the ordinary agent because of his adverse interest (citing cases)" (parenthesis added)

In *Jensen vs. Eureka Casualty Company*, 10 Cal. App. 2d 706, 52 P. 2d 540, the insured made a report of his accident to the insurance company. When he was served with the complaint and summons, he delivered them to the insurance company, and promptly responded to the notice sent

to his given address to appear and verify the answer. Then several months later, when the attorney desired to take his deposition, he could not be found and he was not located and did not appear at the trial. The court held that the insured had not failed to cooperate with the insurance company, and it used the following language:

“ . . . . . the violation of the cooperation clause of such an insurance policy by the insured, where the insurer is substantially prejudiced thereby, is a valid defense is well settled (citing cases). This rule, however, must be interpreted to assume that the insurer, diligently and in good faith, has complied with the terms and conditions of the policy.” (parenthesis added)

To the same effect, see *Pigg vs. International Indemnity Company*, a California case reported at 261 P. 486.

In *Rinnard vs. Northwestern Mutual Fire Association*, 187 Wash. 47, 59 P. 2d 1072, it was held not to constitute a breach of the cooperation clause of the policy where the insurer had informed the assured that his wife was a party to the action, and in response to a request by the assured, refused to accept the obligation of paying the assured other than his expenses in attending the trial, without compensation for the assured's lost time from work or for his wife's expenses, and where no steps were taken by the insurer to secure the deposition of the assured.

In *Finkle vs. Western Automobile Insurance Company*, a Missouri case reported at 26 SW 2d 843, the suit against the insurance company brought by the injured party who had recovered judgment against the insured was defended on

the grounds of want of cooperation. The insured turned the summons over to the insurance company, and shortly thereafter, the insurance company attorney took his deposition. At that time, the attorney told the insured they would have to be present at the trial to testify. Thereafter, at another meeting with the insureds, the attorney again impressed upon them the importance of their being present at the trial. The insureds left the state without informing the insurance company and never communicated with the attorney or with the company. Two weeks before trial date, the attorney wrote the insureds, advising them of the trial date and asking them to communicate with him at once. This letter was returned to the attorney undelivered, and the company began an immediate investigation to learn the whereabouts of the insureds but could not locate them for trial. The court held there was not a lack of cooperation, and it said:

“What constitutes ‘cooperation’ within a policy requiring the assured to cooperate with the insurer in the defense of an action brought against him is usually a question of fact (citing cases).

. . . . .

“Now in the case at bar, so long as they were in the city, defendants seem to have cooperated very fully with the garnishee, and to have acceded to every request for assistance which its counsel made. They came willingly to Teasdale’s (the attorney) office when he expressed a desire to go over the case as a whole with them; they presented themselves in response to the notice to take depositions, and, if they were not cross-examined by Teasdale, it was through no fault of their own . . . . .

. . . . .

“Under such a situation, it appears that there are two ultimate questions to be determined: First, whether the assured was guilty of bad faith in leaving; and, second, whether the company exercised reasonable diligence in ascertaining his whereabouts, and in procuring his attendance at the trial, or his deposition for use in lieu of personal appearance.

. . . . .

“ . . . . we think it is an open question as to whether the garnishee used due diligence toward securing their attendance at court . . . . .

“Of all the reported cases that we have been able to find, the one perhaps most favorable to the garnishee is Schoenfeld vs. New Jersey Fidelity and Plate Glass Insurance Company, *supra*. There the assured had left this country for Russia, leaving no address where he might be communicated with, and, when the company was unable to locate him, it withdrew from the case, and allowed judgment to go against him by default. It is significant, however, that the company withdrew from the defense two months before the default was taken, and that its attempts to locate the assured had occurred over a long period of time prior thereto. Even upon such a state of facts, the court held that the question of the company’s good faith was for the jury to determine; and, if there was a jury question present in the Schoenfeld case, how much more pointed is the issue in the case at bar . . . . .”  
(parenthesis added)

In *Durbin vs. Lord*, an Illinois case reported in 68 *NE 2d* 537, there was held to be no lack of cooperation when the insurer did almost everything that could reasonably be done to secure the attendance at trial of insured, who had left the jurisdiction and could not be located.

In *Murphy vs. Hopkins, et al*, a South Dakota case in 4 NW 2d 801, in response to a request from the insurer that she appear at the trial, the insured wrote two letters. In the first she said that she had offered to have her deposition taken before leaving the town of trial and it was refused, and since the case had been continued once, she didn't see why it couldn't be continued again. In the second letter she said she couldn't come because of financial considerations. The insurer made no offer to pay her expenses, and the court held there was no lack of cooperation when she failed to appear at the trial.

In *Strode vs. Commercial Casualty Insurance Co.*, (Kentucky), 102 F. Supp. 240, the trial against insured was set for January 10, 1950. It was then continued, and the insured was so advised. On March 27th, an attorney for insured wrote the attorneys for the insurance company, advising them the insured's employment position would be jeopardized if she left town to appear for the trial, but she would be willing to give her deposition. The insurance attorneys acknowledged the letter and advised the attorney it would be vital for insured to attend the trial in person, as she was the only witness for the defendant. An offer was made to pay her expenses to the trial. The insured's attorney then wrote the insurance company attorneys that she could not attend in person because it would mean her job. The insurance company attorneys then wrote as follows: "If Mrs. Campbell (insured) refuses to attend the trial as indicated in your letter, we will withdraw from the defense of her case and not be responsible for any judgment rendered."

The case was set for trial on May 2nd. On April 27th,

the insurance attorneys wrote to the insured's attorney, with whom they had been corresponding, advising him of the trial date. They also wrote to another attorney in the same town, requesting of him that he try to locate the insured. This attorney wrote and advised that the insured had left town and left no forwarding address. When the insured failed to appear, the attorneys withdrew and defended the garnishment action of the grounds of failure to cooperate. The court said:

“The intentions of the parties at the time of inception of the contract was that there should be mutual assistance in defending any effort to obtain money from Mrs. Campbell growing out of her operation of the car described in the policy. The legal part of any claim for damages was to be left to the insurance company. It was to hold her harmless to the extent of the terms of the policy and to furnish all legal counsel required and to notify her when she was needed to assist. That was certainly the spirit and reasonable interpretation of the terms of the policy.

. . . . .

“It appears from the record that the defendant was only looking for an excuse to abandon its insured's case. Mrs. Campbell had given a perfectly rational explanation of why she could not attend the trial.

. . . . .

“Liability insurance between the company and its insured presupposes that the company will become the champion of its insured when misfortune, in the way of accident, overtakes her and she is sued. . . . It is something of a trust relationship where the interests of the insured and not the interest or convenience of the insurance company are paramount.



“An offer in compromise is shown to have been made by the plaintiff to the insurance company in the former case of *Strode vs. Campbell*, supra, before judgment in the Court of Appeals. Mrs. Campbell was not even advised that such offer had been made. This is not the kind of cooperation from the company which the insured had a right to expect.

“I am convinced, upon a careful consideration of the whole record, that Mrs. Campbell showed no sufficient lack of cooperation within the meaning of the policy to justify the company in abandoning her case. “It is apparent that the casualty company was much more concerned in finding an excuse to set up a legal barrier between it and its client than it was to fulfill its just obligations to save her harmless . . . .

. . . . .

“I must conclude that the defendant did not discharge its obligations under the terms of the policy to its insured, Mrs. Campbell, by making a genuine effort to protect her rights . . . .”

The Circuit Court of Appeals, in affirming this decision, (202 Fed. 2d 599), ordered stricken the criticism of the insurance attorneys, and we approve. No one who knows them would question the integrity of the insurance attorneys in our present case. It seems to us the evil lies in the insurance arrangement that places attorneys in the position where they are attorneys for one person and are hired by and work for another person whose interests they must watch out for and whose interests are adverse to those of the client. Also, perhaps some blame should be placed with the insurance companies who place attorneys in such an impossible position and then seek to take advantage of it. There is certainly good



sense in the rule that requires the conduct of an insurer to be closely scrutinized when its interests become adverse to the insured and that requires that they perhaps lean over backwards to be fair in such circumstances. Certainly, insurance companies are entitled to protection against fraud. But they should not be protected when they, by mistake or design or lack of proper diligence, create or foster the fraudulent situation.

We have reviewed all of the case cited on this point by defendant in its brief. We believe that none of those cases is helpful in determining this case. Those cases are helpful in determining the effect of a failure to cooperate, but they are not helpful in determining what constitutes a failure to cooperate. For example, counsel states that the Coleman case, quoted on page 32 of defendants brief, is persuasive, and reliance is placed upon it by defendant. Compare the facts in that case to the facts in ours. There the insured was a corporate pharmacy and it was sued for making an erroneous prescription. The insurer took over the defense in accordance with the policy. Its attorney wrote to the secretary of the insured corporation, the man who had apparently made the improper prescription, and requested that he appear and sign the answer to the complaint. The secretary refused to sign the answer and refused to talk to the attorney about the case. The attorney then wrote letters to the insured requesting that some other officer come in and sign the answer. These letters were ignored. The attorney then wrote requesting that a conference on the matter be held at any time and place of insured's choosing. These letters were ignored. The insured positively refused to cooperate in any manner unless the insurance company would agree to assume complete

liability regardless of the amount of recovery. Certainly this was, as Justice Cardozo stated, a default involving more than just sluggishness or indifference.

Admittedly, too, some of the cases cited herein are not strictly in point on the facts, although the Strode case seems awfully close. In the Strode case, the conduct of the insured seems more uncooperative than the conduct of Pearce, and certainly the insurance company in that case made more effort than the insurance company did in our present case. In any event, the cases cited herein seem to us to present the principles upon which this case should be decided. Since each case must be decided upon its facts, and since the facts seem so important in deciding this point, let us again briefly list categorically what each party to this insurance contract did.

*Pearce:*

1. Notified the insurer of the accident.
2. Submitted the suit papers to insurer when served.
3. Appeared on request before the insurer and gave a written statement.
4. Appeared before insurer's attorney on request.
5. Left town without notifying insurer.
6. Upon receipt of a letter from insurer, notified it that his employment situation prevented his being at the trial at that time.
7. Took no further action, although he received Attorney Wixom's letter soon thereafter, and although advised by his father that it was important he be there.

### *The Insurance Company:*

1. Wrote a *registered* letter to Pearce, telling him he had to appear at the trial.
2. Received word from Pearce that he couldn't appear for the November trial because of his job situation.
3. Although advised of Pearce's difficulty, told Pearce's father it was important that he come.
4. Although advised of Pearce's difficulty, asked Mr. Wixom to request Pearce to come.
5. Had a claims office forty miles from where Pearce lived and had agents that covered Pearce's town.
6. Did nothing more.

Now let us review briefly the explanations given by the two parties to this contract.

### *Pearce:*

He was in line to be manager of the Ford agency and did become manager soon thereafter. He said leaving his job at the time in question would in fact have jeopardized his chances of promotion. "It was the worst possible time", he said. The situation was the same when he received word from Mr. Wixom and his father. He knew the insurance company had an office nearby and thought it would get in touch with him if everything wasn't all right. No explanation was ever made to him as to why it was important to attend the trial, how long it would take, the consequences of his not appearing, why the case could not be held at a time when his

promotion or job would not be jeopardized, or any other explanation. Laymen don't appreciate the importance of these things. Pearce wasn't a lawyer—that's why laymen hire lawyers. That's one reason why Pearce had a lawyer in this case and had paid for that lawyer when he paid his insurance premiums.

### *The Insurance Company:*

It says it didn't ask for a continuance because plaintiff's attorney would have objected and the court wouldn't have granted it. Possibly the writer, representing the plaintiff, would have objected to a continuance, although I doubt it. Possibly the court would have refused the continuance, although it is extremely doubtful. In any event, an effort might have been made. Defendant says Pearce never requested that they obtain a continuance. However, the defendant company and not Pearce had control of the suit. Pearce had contracted away his right to handle the defense, and the insurance company had assumed its policy right to do so. The defendant says in its brief that a roundabout rumor reached it that Pearce would not attend. We submit that the telephone call from Pearce the father was neither a rumor nor was it roundabout. It was direct communication in response to the registered letter sent by the defendant company. Defendant says its policy did not require it to send a representative of the company to visit Pearce, and besides, it wouldn't have done any good anyway. Whether or not the insurance policy which required the insurer to exercise due diligence and good faith in representing the insured imposed upon it the obligation of contacting the insured is a question that must be decided by the court. Would any attorney, having the normal fiduciary

responsibility to his client that is inherent in the attorney-client relationship, and having received a communication from his client containing a reasonable excuse why he could not appear at the trial at a given date some six weeks or so prior to the trial date, have sat back and said, "Well, it won't do me any good to try to get a continuance. It won't do me any good to try to contact him again, and so I'll let it go." It is inconceivable! It appears from defendant's off-the-record statements in its brief that it assumed that Pearce would attend the trial, even after receiving the communication from him that his employment situation made it impossible for him to do so. It appears that the defendant made a mistake, and it now seeks to impose the burden of that mistake upon the plaintiff.

Defendant asserts that Pearce had no right to place his convenience above his contractual obligation. However, the record shows it was not a matter of convenience. After all, he did make his promotion soon after the trial was held, and it was a substantial promotion.

Defendant suggests that Pearce should have advised defendant that if a continuance were asked for, he would come at a later date. We submit that when Pearce advised defendant it was impossible for him to attend the trial *at the time set*, he was in effect asking defendant to try to arrange for a different time. If there was any misunderstanding between insurer and insured, it was not the fault of insured. Pearce advised defendant of his inability to come and of the reason therefor, and thereafter defendant did absolutely nothing even reasonably calculated to clear up the situation. As a matter of fact, how simple it would have been for defendant to have avoided this whole issue if it had made a

three minute telephone call to Pearce, or asked one of its Oakland adjusters to see Pearce some time when he was in Antioch, or written another letter advising and explaining the situation and inquiring further into the job situation and when Pearce would be able to come to the trial—doing anything any attorney would do for a client in whose welfare he was truly interested. Nor is it an excuse to say that the contract of insurance did not require it to do so. That contract established a fiduciary relationship and the defendant's obligations are measured by that relationship. Counsel's statement in his brief that Pearce received "official" notice of the trial date is the key to the whole affair. We think we need not suggest to the court why that one and only letter from defendant to Pearce was registered. And as plaintiff's counsel in the original tort action, may we say that Pearce's presence at the trial would not have bothered us one bit.

Defendant suggests that Pearce failed to cooperate as part of a large conspiracy between him and the plaintiff. In support of this contention, it says that plaintiff's brother changed his testimony at the trial and plaintiff and his brother and Pearce were all good friends. Defendant qualified as a legal expert an insurance adjuster who admitted he had never been to law school, and this expert testified in his opinion the statements given by plaintiff's brother and Pearce constituted a complete defense to the original action. I ask Your Honors to read these statements to determine whether or not that is an accurate expert opinion.

If in fact there are some discrepancies between Keith Oberhansley's statement given to the insurance adjuster and his testimony at the trial, it is not the first time that an in-



surance adjuster in his quest for facts exonerating his insurance company failed to obtain a complete picture of an accident.

In *Johnson vs. Johnson (Idemnity Insurance Company)*, a Minnesota case in 37 NW 2d 1, a case in which the insured and the injured party were related by marriage, the court said:

“ . . . . Friendliness between the parties is no evidence of lack of cooperation. Neither is hostility necessary to cooperation.”

The fact that the insured and the injured person were brothers and that the insured employed an attorney to bring suit against himself on behalf of his injured brother was not held to show lack of cooperation in *Levy vs. Idemnity Insurance Company of North America*, a Louisiana case in 8 Southern 2d 774.

It seems to plaintiff's counsel that this case carries rather dangerous implications. If the defendant's position on this matter of lack of cooperation is sustained by the court, it seems that it will open the door to all sorts of questionable practices on the part of insurers. It seems, also, that it will do something more serious than that—it seems that it will undermine the attorney-client relationship. If an insurance company representing a client in a law suit is required to do no more than the defendant company did in this case, then certainly no attorney representing any client in any law suit is required to do more, and the bars will be down on the rather sacred fiduciary duties of an attorney toward his client.

The language of the court in *MacClure vs. Accident &*

*Casualty Insurance Company*, a North Carolina case in 49 SE 2d 742, seems pertinent.

“The (cooperation) clause cannot be interpreted in a way that would make it a mere device to entrap the insured, or a technicality so arbitrarily weighted that without detriment to the insurer in the performance of its obligation to defend, it wipes out that obligation, which is the essence of the contract, and a duty wholly surrendered to the insurer by its terms. We are unable to adopt a theory so opposed to substantial justice.” (parenthesis added)

Respectfully submitted,

RICHARDS, ALSUP & RICHARDS

*Attorneys for Plaintiff and Respondent*