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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 7132

In the Supreme Court of Appeals of Virginia at Richmond

UTICA MUTUAL INSURANCE COMPANY, ET AL.

v.

NATIONAL INDEMNITY COMPANY, ET AL.

FROM THE COURT OF LAW AND CHANCERY OF THE CITY OF ROANOKE

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a.m.; Adjourns at 1:00 p.m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7132

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 6th day of December, 1968.

UTICA MUTUAL INSURANCE COMPANY AND SAFEGUARD INSURANCE COMPANY, Appellants,

against

NATIONAL INDEMNITY COMPANY AND OBADIAH R. MERRICKS, Appellees.

From the Court of Law and Chancery of the City of Roanoke
Stanford L. Fellers, Judge

Upon the petition of Utica Mutual Insurance Company and Safeguard Insurance Company an appeal is awarded them from a decree entered by the Court of Law and Chancery of the City of Roanoke on the 9th day of July, 1968, in a certain proceeding then therein depending, wherein National Indemnity Company was plaintiff and C. P. Witt, administrator of the estate of John Taylor Brown, deceased, and others were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said Law and Chancery Court in the penalty of $300, with condition as the law directs.

RECORD

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page 1 }

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PETITION FOR DECLARATORY JUDGMENT #9473

Comes now your petitioner, National Indemnity Company, a Nebraska corporation domesticated to do business in Virginia, and files this its petition for a declaratory judgment as provided by the laws of the State of Virginia in Title 8, Section 578-585 of the Code of Virginia (Michie 1950). Your petitioner respectfully alleges the following:

1. That on or about June 2, 1964, John Taylor Brown made application to James M. Firebaugh, insurance agent, 503 23rd Street, N. W., Roanoke, Virginia, for a policy of automobile liability insurance on a 1961 Ford Thunderbird page 2 } automobile, serial number 1Y73Y106705.

2. That the said James M. Firebaugh is an agent for Nationwide Mutual Insurance Company, but, as such, has the privilege of taking applications for insurance and brokering them through other agencies.

3. That Insurers of Virginia, Incorporated, was an insurance agent for the petitioner.

4. That a written application was signed by Brown in the presence of Firebaugh. One of the questions and the answer given in response thereto was the following:

"List any impairments you may have /s/ None"

5. That the answer was untrue because the applicant, Brown, was under a physician's care and treatment for epilepsy at the time.

6. That when the application was made Brown held a restricted operator's license from the Commonwealth of Virginia which required a satisfactory medical report to be filed with the Division of Motor Vehicles semi-annually because of this condition.

7. That after collecting a premium charge of $156.60 from Brown and deducting his commission of $15.56, Firebaugh sent the written application and a check for $140.04 to Insurers of Virginia, Incorporated.

8. That petitioner's policy of automobile liability insurance numbered ACF21293 covering the 1961 Ford Thunderbird

was issued to Brown based upon the answers in the application.

9. That during the first policy period Brown traded the 1961 Ford for a 1965 Ford Thunderbird serial number 5Y83Z158522. A second policy numbered ACEE379963 was issued to Brown which described the newly acquired automobile. It provided limits of $15,000 for injury to each person, $30,000 for bodily injury in each accident, and $5,000 property damage in each accident. The policy period was July 26, 1965 to July 26, 1966. A copy of said policy is at-
page 3 } tached hereto marked "Exhibit A".

10. That on September 26, 1965, Brown was involved in a collision in Henry County, Virginia, while operating a 1965 Ford Thunderbird which resulted in personal injury and property damage to the other defendants.

11. That the collision resulted from an epileptic seizure suffered by Brown which caused him to lose consciousness at the wheel of his car.

12. That on November 23, 1965, Brown entered into a nonwaiver agreement with a representative of the petitioner which permitted the company to investigate the case and at the same time all rights of the parties under the policy were to be preserved without any waiver of same.

13. That the petitioner was without knowledge of Brown's condition and had the true facts been disclosed on the application the policy would not have been issued.

14. That actions have been threatened by several of the defendants and an actual controversy now exists as to the rights, duties and obligations of the petitioner under its policy of insurance. Your petitioner, therefore, seeks a declaratory judgment construing its policy of insurance and specifically asks for a judicial determination avoiding the policy *ab initio* on the ground of misrepresentation of a material fact. The petitioner is ready to make full refund of all premium charges.

Your petitioner requests that this case be brought on for trial as speedily as possible; that if there are any factual issues they be submitted to a jury in the form of special interrogatories; that this Honorable Court thereafter apply the proper law, make an adjudication and enter its Order accordingly.

Given under its hand this 8th day of February, 1966.

page 4 } NATIONAL INDEMNITY COMPANY

By: Gentry, Locke, Rakes & Moore

By: Richard C. Rakes
Attorneys for National Indemnity Company

Filed in the Clerk's Office the 8th day of February, 1966. Teste: Walker R. Carter, Jr., Clerk.

Lena Testerman, D. C.

* * * * *

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RESPONSIVE PLEADING

For answer to that certain petition for declaratory judgment heretofore filed against him, the defendant, Obadiah R. Merricks, now comes and says:

1. This defendant, being without sufficient information or knowledge concerning the matters alleged therein, neither admits nor denies the allegations contained in paragraphs one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), eleven (11), twelve (12), thirteen (13), and fourteen (14) of said petition for declaratory judgment, and he calls for strict proof of each and every allegation.

2. The allegations contained in paragraph ten (10), of said petition for declaratory judgment, are admitted insofar as the same concern this defendant.

3. For further response to said petition for declaratory judgment, this defendant expressly avers that the petitioner is not entitled, on the basis of the allegations of its petition, to have its policy of insurance avoided *ab initio* as sought in paragraph fourteen (14) of said petition for declaratory judgment.

And now having fully answered said petition for declaratory judgment, this defendant moves the Court for
page 13 } an adjudication of such rights as he may have in

the proceeding, and asks that an Order be entered to his prejudice.

Obadiah R. Merricks

By: O. Dalton Baugess
Of Counsel

James I. Moyer
306-B East Main Street
Salem, Virginia

Received Feb. 25, 1966 and filed.

Juanita Simons, Deputy Clerk.

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RESPONSIVE PLEADING

For answer to that certain petition for declaratory judgment heretofore filed against it, the defendant, Burroughs-White Chevrolet Corporation, now comes and says:

1. This defendant, being without sufficient information or knowledge concerning the matters alleged therein, neither admits nor denies the allegations contained in paragraphs one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), eleven (11), twelve (12), thirteen (13), and fourteen (14) of said petition for declaratory judgment, and it calls for strict proof of each and every such allegation.

2. The allegations contained in paragraph ten (10), of said petition for declaratory judgment, are admitted insofar as the same concern this defendant.

3. For further response to said petition for declaratory judgment, this defendant expressly avers that the petitioner is not entitled, on the basis of the allegations of its petition, to have its policy of insurance avoided *ab initio* as sought in paragraph fourteen (14) of said petition for declaratory judgment.

And now having fully answered said petition for declaratory judgment, this defendant moves the Court for
page 15 } an adjudication of such rights as it may have in

the proceeding, and asks that an Order be entered to its prejudice.

Burroughs-White Chevrolet Corporation

By: O. Dalton Baugess
Of counsel

James I. Moyer
306-B East Main Street
Salem, Virginia

Received Feb. 25, 1966 and filed.

Juanita Simons, Deputy Clerk.

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NATIONAL INDEMNITY COMPANY, Plaintiff
versus
JOHN TAYLOR BROWN

Shamrock Drive
Shannon Hills
Ridgeway, Virginia

Responsive Pleading #9473

* * * * *

Now comes John Taylor Brown, by counsel, and for his responsive pleading to a petition for declaratory judgment heretofore filed against him and others by National Indemnity Company, says as follows:

1. The allegations of numbered paragraph 1 page 17 } of said petition are admitted.

2. The allegations of numbered paragraph 2 of said petition are admitted, and, in addition, defendant Brown avers that James M. Firebaugh acted as the agent of petitioner in obtaining the issuance of the policy of the automobile liability insurance that petitioner now seeks to have declared void.

3. Defendant is without sufficient knowledge to either admit or deny the allegations of numbered paragraph 3 of said petition and strict proof thereof is demanded.

4. The allegations of numbered paragraph 4 of said petition are admitted.

5. The allegations of numbered paragraph 5 of said petition are denied, and defendant Brown avers that the answer given by him on said application was true.

For further answer to said paragraph, defendant Brown avers that his father committed suicide in August of 1961 and that after this, defendant Brown became extremely nervous. In June of 1962 and again in November of that year, defendant Brown had spells in which he became extremely sick and suffered from momentary lack of consciousness. This condition was eventually diagnosed as a convulsive disorder and an anti-convulsant medication was prescribed for defendant Brown. After he started taking this medication, his attacks ceased.

On March 9, 1964, defendant Brown applied for the renewal of his operator's license. One of the questions on this application was, "Do you have any physical or mental disability that would cause loss of consciousness?", and in response to this question, defendant answered "Yes." Upon re-
page 18 } ceipt of this application, the Division of Motor Vehicles required defendant to be examined by his doctor, and after this was done, and after defendant's doctor had sent a report to the Division of Motor Vehicles, an operator's license was issued to defendant.

On the application to petitioner dated June 2, 1964, petitioner did not specifically ask this defendant whether he had epilepsy or any other type of convulsive disorder. Instead petitioner left it to his judgment to say whether he had anything that he considered to be an impairment. As used on the application, the term "impairment" was ambiguous and should be strictly construed against petitioner and liberally construed in favor of this defendant, and should receive any reasonable construction that can be placed upon it consistent with the validity of defendant's answer on the application. Whether his answer thereon was true or false, depends upon whether there was a reasonable basis for him to decide that on June 2, 1964 he had no present driving impairment. He had had no attacks since November of 1962, was taking a medication prescribed to prevent their re-occurrence, and in March of 1964 the Division of Motor Vehicles had issued him a license to drive after his physician had examined him and

sent a report to that agency. These facts afforded a reasonable basis for his conclusion that he was under no present driving impairment on June 2, 1964, and his answer to that effect was true.

6. The allegations of numbered paragraph 6 of said petition are admitted.

7. This defendant is without sufficient knowledge to either admit or deny the allegations of numbered paragraph 7 of said petition and strict proof thereof is demanded.

8. The allegations of numbered paragraph 8 of said petition are admitted.

page 19 } 9. The allegations of numbered paragraph 9 of said petition are admitted.

10. The allegations of numbered paragraph 10 of said petition are admitted.

11. This defendant is without sufficient knowledge to admit or deny the allegations of numbered paragraph 11 of said petition and strict proof thereof is demanded.

12. The allegations of numbered paragraph 12 of said petition are admitted.

13. The allegations of numbered paragraph 13 of said petition are denied. The particular question on the application that is an issue did not call for facts but for an opinion. Furthermore, at the time that this application was filled out, this defendant told Agent Firebaugh that he had indicated a driving disability on his application for the renewal of his operator's license in March of 1964, and that the Division of Motor Vehicles had issued him a license after requesting and receiving a report of the examination by his physician. This disclosure put petitioner on inquiry, and petitioner's Agent Firebaugh, in fact, requested an abstract on this defendant from the Division of Motor Vehicles. This abstract did not show defendant to be under any disability, but petitioner made no further inquiry of this defendant's physician or anyone else having any technical knowledge of his condition.

14. The allegations of numbered paragraph 14 of said petition are admitted insofar as they state that actions have been *threathened* by several of the defendants, and that an actual controversy exists between petitioner and this defendant.

All other allegations in said paragraph are page 20 } denied.

15. All allegations in said petition not expressly admitted herein are hereby denied.

WHEREFORE, this defendant moves the Court for an adjudication that said insurance policy was in full force and

effect and afforded him coverage on September 26, 1965, when he was involved in an automobile accident in Henry County, Virginia.

JOHN TAYLOR BROWN

By Counsel

David B. Worthy Of
Davis, Davis, Davis & Worthy
Rocky Mount, Virginia
Counsel for John Taylor Brown

Received Mar. 3, 1966 and filed.

Juanita Simons, Deputy Clerk.

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ANSWER OF RAY A. PERDUE
AND JOANN PERDUE:

TO: The Honorable Stanford L. Fellers, Judge:

Now comes two of the defendants, Ray A. Perdue and Jo Ann Perdue, an infant, and files this as their answer to a certain Petition for Declaratory Judgment now pending in this Court, and answers as follows:

I. That the undersigned are not advised whether the allegations of Paragraph 1 are true or false and demand strict proof.

II. That the undersigned are not advised whether the allegations of Paragraph 2 are true or false, and the undersigned defendants demands strict proof.

III. The allegations of Paragraph 3 are correct.

IV. The allegations of Paragraph 4 are correct insofar as to what appears on the application.

V. The allegations of Paragraph 5 are denied.

VI. The undersigned defendants do not know whether the allegations of Paragraph 6 are true or false.

VII. The undersigned defendants do not know whether the allegations of Paragraph 7 are true or false.

page 22 } VIII. The undersigned defendants do not know whether the allegations of Paragraph 8 are true or false and the undersigned defendants demands strict proof.

IX. The allegations of Paragraph 9 are correct insofar as the undersigned defendants are advised.

X. The allegations of Paragraph 10 are correct.

XI. The allegations of Paragraph 11 are denied.

XII. The undersigned defendants do not admit or deny the allegations of Paragraph 12 and demands strict proof.

XIII. The undersigned defendants deny the allegations of Paragraph 13.

XIV. The undersigned defendants do not know what action other defendants have taken in this matter but admit that they have demanded payment from the Petition which has been refused.

Your undersigned defendants further answer and state that full disclosure was made to the agent at the time the application was filled out and as far as the undersigned defendants know and believe, sufficient information was given to the agent and that the said National Indemnity Company is fully responsible to the undersigned defendants;

That as a result of the accident, Ray A. Perdue sustained property damage to his 1958 Lincoln automobile in the sum of $1,000, and his infant daughter sustained personal injuries as a result of the accident, and the said National Indemnity Company has refused to pay the undersigned defendants.

Personal Injuries sustained by the infant, JoAnn Perdue was the result of the negligent operation of the motor vehicle described in the Petition by John Taylor Brown, which accident occurred on September 26, 1965, on Route 220 in Henry County, Virginia. Therefore, the undersigned de-

page 23 } fendants pray that judgment be entered in their favor against the said John Taylor Brown in the sum of $3,500, and that the National Indemnity Company be ordered and directed by this Court to pay same;

That inasmuch as the policy in question was not a regular automobile insurance policy, the petitioner should not be allowed to raise a question as to whether the policy was void from inception. That is appears that this was an assigned risk insurance automobile policy or was a policy procured so that John Taylor Brown could meet the financial responsibility laws of the Commonwealth of Virginia.

WHEREFORE, the undersigned request that the factual issues be submitted to a jury and that a judgment be rendered against John Taylor Brown in favor of the undersigned defendants in the sum of $3,500, and that National Idemnity Company be directed and ordered to pay same.

RAY A. PERDUE AND JO ANN PERDUE

By: Willard R. Finney
Their Attorney

Received Mar. 4, 1966 and filed.

Ruth Dillard, Deputy Clerk.

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ORDER

It appearing unto the Court that one of the defendants herein, Joann (sued as Jo Ann) Perdue, is an infant under the age of 21 years, it is hereby ADJUDGED, ORDERED and DECREED that Willard Finney, a discreet and competent attorney at the bar of this court, be, and he hereby is, appointed guardian *ad litem* to defend the interests of said infant and to file such pleadings and take such other action as may be proper under the circumstances.

ENTER: 3/28/66.

SLF, Judge

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* * * * *

AMENDMENT TO PETITION FOR
DECLARATORY JUDGMENT

Comes now your petitioner, National Indemnity Company, by counsel, and, pursuant to leave of court, herewith files its Amendment to a Petition for Declaratory Judgment heretofore filed in this cause.

1. The original Petition and this Amendment are to be considered together and the allegations in paragraphs 1 through 14 and the prayer of the original Petition are expressly incorporated herein.

2. In addition thereto, your petitioner respectfully alleges that in Item 7 (c) of the Declarations to policy numbered ACEE 379963, the said John Taylor Brown represented to the petitioner that no insurer had cancelled similar insurance issued to him for a period of three years next preceding July 26, 1965, the date of issuance of the renewal policy. Said representation was not true as one or more automobile liability insurers had cancelled similar insurance issued to John Taylor Brown during the period in question. Petitioner issued its policy to John Taylor Brown based upon this representation and the answers listed in his application for insurance, and would not have done so if the true
page 31 } facts had been disclosed.

3. Your petitioner denies the allegations in the defensive pleadings filed to date as follows:

(a) It is denied that James M. Firebaugh was an agent of the petitioner as alleged in paragraph 2 of the responsive pleading of John Taylor Brown.

(b) It is denied that the subjective test as opposed to an objective test should be applied to determine the truthfulness of the answer of John Taylor Brown to the question asked in petitioner's application as alleged in paragraph 5 of the responsive pleading of John Taylor Brown.

(c) It is denied that "Agent" Firebaugh was an agent of the petitioner as alleged in paragraph 13 of the responsive pleading of John Taylor Brown.

(d) It is denied that petitioner was under a duty to make any other inquiry as to the condition of John Taylor Brown as alleged in paragraph 13 of the responsive pleading of John Taylor Brown in view of his negative response to the question concerning impairment.

(e) It is denied that full disclosure was made to James M. Firebaugh at the time the application was signed by John Taylor Brown as alleged in paragraph XIV of the Answer of Ray A. Perdue.

(f) It is admitted that the petitioner has refused to pay the claims of Ray A. Perdue and Joann Perdue as alleged in paragraph XIV of the Answer of these defendants.

(g) It is denied that this court has the power to award money judgments in favor of any of the defendants against

the petitioner as the prayer of Ray A. Perdue and Joann Perdue asks in paragraph XIV of their Answer.

(h) It is denied that this was an assigned risk policy or that it was other than a regular automobile policy issued to a member of the so-called "desirable risk" class as alleged in paragraph XIV of the Answer of Ray A. Perdue and Joann Perdue.

Wherefore, it is requested that the defendant, John Taylor Brown, be required to answer the allegations in paragraph 2 of this Amendment to the Petition for Declaratory Judgment which Answer should include the names of all automobile liability insurers which have cancelled a policy issued to him since June 2, 1961, and the approximate dates of said cancellations.

National Indemnity Company

By: Gentry, Locke, Rakes & Moore

By: Richard C. Rakes
Its Attorneys

Filed 4/4/66.

S.L.F.

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RESPONSIVE PLEADING

For answer to that certain amendment to petition for declaratory judgment heretofore filed against him, the defendant, Obadiah R. Merricks, now comes and says:

1. That he does not have sufficient information or knowledge concerning the matters alleged in said amendment, and he calls for strict proof of each and every such allegation.

And now having fully answered said petition for declaratory judgment and said amendment thereto, this defendant moves the Court for an adjudication of such rights as he may have in the proceeding, and asks that no Order be entered to his prejudice.

OBADIAH R. MERRICKS

By: James I. Moyer
Of counsel

Received April 11, 1966 and filed.

Walker R. Carter, Clerk.

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RESPONSIVE PLEADING

For answer to that certain amendment to petition for declaratory judgment heretofore filed against it, the defendant, Burroughs-White Chevrolet Corporation, now come and says:

1. That it does not have sufficient information or knowledge concerning the matters alleged in said amendment, and it calls for strict proof of each and every such allegation.

And now having fully answered said petition for declaratory judgment and said amendment thereto, this defendant moves the Court for an adjudication of such rights as it may have in the proceeding, and asks that no Order be entered to its prejudice.

Burroughs-White Chevrolet Corporation

By: James I. Moyer
Of counsel

Received April 11, 1966 and filed.

Walker R. Carter, Clerk.

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ANSWER OF RAY A. PERDUE, TO
AMENDED PETITION FOR
DECLARATORY JUDGMENT:

Now comes Ray A. Perdue, by Counsel, and files this as his Answer to a certain Amendment to a Petition for Declaratory Judgment, and answers as follows:

I. The undersigned defendant prays that the original Answer filed by him be read and considered in its entirety.

II. For answer to Paragraph 2 of said Amended Petition, the undersigned defendant answers and says that he is not advised as to what answers John Taylor Brown gave the agent regarding cancellation of insurance. However, if such answer was untrue (which is not known to the undersigned defendant) this was not a material representation and the policy issued to the said John Taylor Brown should be declared and decreed by this Court to have been in full force and effect at the time of the automobile accident in question.

III. The undersigned defendant further answers and says that the agent was well aware, or certain sufficient facts were presented to the agent, or the agent should have known from all the circumstances surrounding the application that the said John Taylor Brown was not a desirable risk.

WHEREFORE, your undersigned prays that this Honorable Court enter an order declaring that the policy
page 36 } issued by the petitioner was in full force and effect at the time of the accident which occurred on September 26, 1965.

All of which is respectfully submitted this the 15th day of April, 1966.

Ray A. Perdue

By: Willard R. Finney
His Attorney

Received April 18, 1968 and filed.

Ruth Dillard, Deputy Clerk

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RESPONSIVE PLEADING TO AMENDMENT TO PETITION FOR DECLARATORY JUDGMENT #9473

Now comes defendant, John Taylor Brown, by Counsel, and for his responsive pleading to numbered paragraph Two (2) of the Amendment to the Petition for Declaratory Judgment heretofore filed against him and others by National Indemnity Company, says as follows:

1. That the allegations of said paragraph are admitted in so far as they state that the Declarations to policy numbered ACEE 379963 contained a provision that no insurer had cancelled similar insurance issued to John Taylor Brown, for a period of three (3) years next preceding July 26, 1965, and that an automobile liability insurer had, in fact, cancelled similar insurance issued to John Taylor Brown during the period in question. All other allegations are denied.

For further answer to said paragraph, this defendant avers that at all times he acted in good faith in page 38 } his dealings with petitioner, and at no time did he make any attempt to conceal the fact of cancellation of similar insurance. He avers that he was not aware of the aforesaid policy provision relating to cancellation of similar insurance, nor was he chargeable with such knowledge when said policy was issued; at that time he was an infant, as petitioner well knew. He states further that petitioner is estopped from relying upon said policy provision in order to forfeit his rights thereunder. In the application for said insurance petitioner failed to make any inquiry on this subject of this defendant. The omission of this inquiry from the application now estops petitioner from asserting it in avoidance of its obligation under the policy.

For further answer to said paragraph, John Taylor Brown avers that he made a full disclosure of the fact of prior cancellation of similar insurance to petitioner, acting by and through its agent, James M. Firebaugh, at the time of the aforesaid application. Petitioner's issuance of the insurance in question after its acquisition of the aforesaid knowledge

constitutes a waiver of any forfeiture right that might possibly arise out of the aforesaid policy provision.

JOHN TAYLOR BROWN

By Counsel

David B. Worthy of
Davis, Davis, Davis & Worthy
Rocky Mount, Virginia

Received: April 21, 1966.

Juanita Simons, Deputy Clerk.

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page 40 }

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ORDER

This day came the plaintiff, National Indemnity Company, by counsel, and advised the Court that one of the defendants in this cause, John Taylor Brown, is now deceased, and that C. P. Witt, Sheriff of Henry County, duly qualified as Administrator of the Estate of John Taylor Brown, deceased, on March 2, 1967, in the Clerk's Office of the Circuit Court of Henry County, as it appears from a certificate of said qualification filed herewith. Whereupon, the plaintiff, by counsel, moved the Court pursuant to Rule 2:16 of the Rules of the Supreme Court of Appeals of Virginia to substitute the aforesaid personal representative as party defendant in the place of the defendant, John Taylor Brown, now deceased.

In consideration whereof, and it appearing unto the Court that the successor has consented thereto, it is accordingly ADJUDGED, ORDERED and DECREED that the said C. P. Witt, Sheriff, Administrator of the Estate of John Taylor Brown, deceased, be, and he hereby is, substituted as party defendant in this cause in place of John
page 41 } Taylor Brown.

* * * * *

ENTER: 6/2/67 S.L.F., Judge

page 65 }

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ORDER 9473

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For good cause shown, it is hereby Adjudged, Ordered and Decreed that David B. Worthy, Attorney at Law, be allowed to withdraw from this case as counsel, and that the pleadings heretofore filed on behalf of John Taylor Brown be adopted and considered as the pleadings of C. P. Witt, Sheriff, Administrator of the Estate of John Taylor Brown, deceased.

ENTER: 7/27/67

S.L.F., Judge

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ORDER

This matter came on to be heard on the motion of Defendant Obadiah R. Merricks for leave to file a Crossbill pursuant to Rule 2:14 of the Rules of Court of the Supreme Court of Appeals of Virginia, and to correct the record to show the law firm of Young, Kiser and Frith as counsel of record, and upon due notice of said motion.

The motion was duly argued by counsel and from said argument, it appears to the Court that on September 26, 1965, the date of the accident as alleged in the Petition for Declaratory Judgment, the Defendant Obadiah R. Merricks was operating an automobile owned by Defendant Burroughs-White Chevrolet Corporation, which was insured by Utica Mutual Insurance Company by a policy containing a standard Virginia uninsured motorist endorsement. It further appeared that on the same date, the Defendant Oba-
page 69 } diah R. Merricks personally owned a 1952 Chevrolet automobile, which was insured by Safeguard Insurance Company, wherein Merricks was the named insured and the policy of insurance also contained the standard Vir-

ginia uninsured motorist endorsement. It further appeared that on September 20, 1967, Obadiah R. Merricks recovered a verdict in the amount of $40,000.00 against the estate of John Taylor Brown for injuries sustained by Merricks which resulted from Brown's negligent operation of this motor vehicle on September 26, 1965, and the object of the Petition for Declaratory Judgment in this cause is to determine whether or not Plaintiff, National Indemnity Company, insured Brown at the time of the accident.

Argument was made by counsel for Defendant Obadiah R. Merricks that should the Court find in favor of the Plaintiff in this action, it would result in John Taylor Brown, decedent of Defendant C. P. Witt, Administrator, being an uninsured motorist within the meaning of Section 38.1-381 of the 1950 Code of Virginia, as amended. In turn, this could result in possible contractual liability upon Utica Mutual Insurance Company and Safeguard Insurance Company by reason of their uninsured motorist endorsement in their respective policies. The Court does not here attempt to pass upon the contractual liability of said insurance companies, but only indicates that this is a possibility and is of the opinion that inasmuch as the said insurance companies' contractual liability under their respective policies could be affected by the Court's decision, the said insurance companies should be before the Court, so that the question framed by the Petition for Declaratory Judgment and the responsive pleadings thereto can be answered and become binding upon
page 70 } the original parties and Utica Mutual Insurance Company and Safeguard Insurance Company.

WHEREFORE, the Court is of the opinion and doth ADJUDGE and DECREE that the Defendant Obadiah R. Merricks be and is hereby granted leave to file a Crossbill in this cause, making Utica Mutual Insurance Company and Safeguard Insurance Company third-party defendants in this cause.

It is further ORDERED and DECREED that the firm of Young, Kiser and Frith be and are hereby shown as counsel of record for the Defendant Obadiah R. Merricks with leave to file such amended responsive pleadings on his behalf as they deem necessary.

Counsel for the Plaintiff, National Indemnity Company, and counsel for Defendants Burroughs-White Chevrolet Corporation and Obadiah R. Merricks (prior to the entry of this Order) duly objected and excepted to the Court's action in granting the Motion of Obadiah R. Merricks.

ENTER this 19 day of October, 1967.

Stanford L. Fellers, Judge

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AMENDED ANSWER OF
OBADIAH R. MERRICKS

#9473

Comes now the Defendant Obadiah R. Merricks pursuant to leave granted by order of this court and files his Amended Answer to the Petition for Declaratory Judgment and says as follows:

1. The allegations set forth in Paragraphs 1 through 14 of the Petition for Declaratory Judgment are admitted.

WHEREFORE, this Defendant joins with the Plaintiff in the relief prayed for in the Petition for Declaratory Judgment.

This 21st day of October, 1967.

OBADIAH R. MERRICKS

By Jackson L. Kiser
Counsel

Received Oct. 23, 1967 and filed.

Juanita Gregory, Deputy Clerk.

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CROSSBILL

Obadiah R. Merricks, Defendant and Third Party Plaintiff, alleges as follows:

page 74 } 1. On the 26th day of September, 1965, Obadiah R. Merricks was the operator of a 1965 Chevrolet owned by Burroughs-White Chevrolet Corporation of Martinsville, Virginia, and insured by Utica Mutual Insurance Company, Third Party Defendant, under a garage owners liability policy, which contained an uninsured motorist endorsement in conformity with the laws of the State of Virginia and under which Obadiah R. Merricks was an insured.

2. On the 26th day of September, 1965, Obadiah R. Merricks was the owner of a 1952 Chevrolet, which was insured by Safeguard Insurance Company, Third Party Defendant, wherein Obadiah R. Merricks was the named insured, said policy containing the uninsured motorist endorsement in conformity with the laws of the State of Virginia.

3. The allegations set forth in Paragraphs 1 through 13 of the Petition for Declaratory Judgment are as follows:

"1. That on or about June 2, 1964, John Taylor Brown made application to James M. Firebaugh, insurance agent, 503 23rd Street, N. W., Roanoke, Virginia, for a policy of automobile liability insurance on a 1961 Ford Thunderbird automobile, serial number 1Y73Y106705.

2. That the said James M. Firebaugh is an agent for Nationwide Mutual Insurance Company, but, as such, has the privilege of taking applications for insurance and brokering them through other agencies.

3. That Insurers of Virginia, Incorporated, was an insurance agent for the petitioner.

4. That a written application was signed by Brown in the presence of Firebaugh. One of the questions and
page 75 } the answer given in response thereto was the following:

"List any impairments you may have /s/ None"

5. That the answer was untrue because the applicant, Brown, was under a physician's care and treatment for epilepsy at the time.

6. That when the application was made Brown held a restricted operator's license from the Commonwealth of Virginia which required a satisfactory medical report to be filed with the Division of Motor Vehicles semi-annually because of this condition.

7. That after collecting a premium charge of $156.60 from Brown and deducting his commission of $15.56, Firebaugh sent the written application and a check for $140.04 to Insurers of Virginia, Incorporated.

8. That petitioner's policy of automobile liability insurance numbered ACF21293 covering the 1961 Ford Thunderbird was issued to Brown based upon the answers in the application.

9. That during the first policy period Brown traded the 1961 Ford for a 1965 Ford Thunderbird serial number 5Y83Z158522. A second policy numbered ACEE379963 was issued to Brown which described the newly acquired automobile. It provided limits of $15,000 for injury to each person, $30,000 for bodily injury in each accident, and $5,000 property damage in each accident. The policy period was July 26, 1965 to July 26, 1966. A copy of said policy is attached hereto marked "Exhibit A".

10. That on September 26, 1965, Brown was involved in a collision in Henry County, Virginia, while operating a 1965 Ford Thunderbird which resulted in personal injury and property damage to the other defendants.

page 76 } 11. That the collision resulted from an epileptic seizure suffered by Brown which caused him to lose consciousness at the wheel of his car.

12. That on November 23, 1965, Brown entered into a non-waiver agreement with a representative of the petitioner which permitted the company to investigate the case and at the same time all rights of the parties under the policy were to be preserved without any waiver of same.

13. That the petitioner was without knowledge of Brown's condition and had the true facts been disclosed on the application the policy would not have been issued."

The aforesaid paragraphs of the Petition for Declaratory Judgment are hereby adopted as part of this Crossbill.

14. On the 20th day of September, 1967, Obadiah R. Merricks recovered against C. P. Witt, Administrator of the estate of John Taylor Brown, a verdict in the amount of $40,000.00, in the Circuit Court of Henry County, Virginia. An actual controversy now exists between Obadiah R. Merricks, Third Party Plaintiff, and Utica Mutual Insurance Company and Safeguard Insurance Company as to whether or not the said John Taylor Brown was insured under his policy with the Plaintiff, National Indemnity Company. Obadiah R. Merricks, therefore, seeks a declaratory judgment construing the policy of National Indemnity Company with John Taylor Brown and specifically asks for a judicial determination voiding the policy *ab initio* on the ground of misrepresentation of a material fact.

This 21st day of October, 1967.

OBADIAH R. MERRICKS

By Jackson L. Kiser
Counsel

Received Nov. 2, 1967 and filed.

Lena Testerman, Deputy Clerk.

* * * * *

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* * * * *

SAFEGUARD INSURANCE
COMPANY'S RESPONSE
TO CROSSBILL #9473

Safeguard Insurance Company, in answer to the Crossbill filed by Obadiah R. Merricks in this cause, states:

(1) It admits the allegations of Paragraph No. 1 of the Crossbill and further alleges that in the event this Court determines that John Taylor Brown was uninsured at the time of this accident, then the sole uninsured motorist coverage available to the plaintiff is that afforded by Utica Mutual Insurance Company under its garage owner's liability policy issued to Burroughs-White Chevrolet Corporation, owner of the vehicle plaintiff was driving at the time of the accident.

(2) It admits the allegations of Paragraph No. 2 of the Crossbill but affirmatively alleges that the uninsured motorist provisions of the policy issued to Obadiah R. Merricks covering a 1952 Chevrolet are not available for the benefit of the said Merricks in the instant case even if it is determined by this Court that John Taylor Brown was uninsured at the time of the accident.

page 79 }

(3) With respect to the allegations of Paragraph No. 3 of the Crossbill in which Obadiah R. Merricks incorporates by reference the original petition for declaratory judgment filed by National Indemnity Company, the defendant, Safeguard Insurance Company, states:

(a) It is without sufficient information or knowledge to

form a belief as to the truth of the allegations contained in subparagraphs numbered 1, 3, and 7, and therefore calls for strict proof of each of said allegations.

(b) Safeguard Insurance Company denies the allegations of subparagraphs 5, 6, 8, and 13 of Paragraph No. 3 of the Crossbill.

(c) Safeguard Insurance Company admits the allegations of subparagraph No. 2 of Paragraph No. 3 of the Crossbill and further alleges that James M. Firebaugh was at the time he took the application of John Taylor Brown for insurance acting as agent for National Indemnity Company.

(d) It admits the allegations of subparagraphs numbered 9 and 10 of Paragraph No. 3 of the Crossbill.

(e) With respect to subparagraph No. 4 of Paragraph No. 3 of the Crossbill, it admits the question alleged was asked and answered as indicated but specifically alleges that the question asked was ambiguous and that John Taylor Brown's answer thereto was correct insofar as he was concerned.

(f) Safeguard Insurance Company calls for strict proof of subparagraph No. 11 of Paragraph No. 3 of the Crossbill, particularly in view of the fact that the allegation there made is directly in conflict with the position taken
page 80 } by Obadiah R. Merricks in the trial of the tort case in the Circuit Court of Henry County wherein the said Merricks obtained judgment for $40,000 on September 20, 1967.

(4) In addition to the foregoing, Safeguard Insurance Company avers that National Indemnity Company, by its conduct and actions, has waived its right to declare the policy it issued John Taylor Brown void *ab initio* and is estopped from taking such a position notwithstanding the non-waiver agreement entered into according to subparagraph No. 12 of Paragraph No. 3 of the Crossbill.

(5) With respect to Paragraph No. 4 of the Crossbill, this defendant admits the judgment was obtained in the Circuit Court of Henry County as alleged and admits that an actual controversy exists between the third party plaintiff and third party defendants.

WHEREFORE, this defendant prays that:

(a) this court determine that the policy issued John Taylor Brown by National Indemnity Company was a valid policy and not void *ab initio*; or, in the alternative,

(b) this Court determine that the uninsured motorist provisions of the policy issued by this defendant to Obadiah R.

Merricks are not available for his benefit in the event John Taylor Brown is determined to be uninsured.
Respectfully,

SAFEGUARD INSURANCE COMPANY

By John L. Walker, Jr.
Of Counsel

Received Nov. 22, 1967 and filed.

Juanita Gregory, Deputy Clerk.

* * * * *

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* * * * *

RESPONSIVE PLEADING #9473

Utica Mutual Insurance Company, for answer to that certain Crossbill filed by Obadiah R. Merricks herein, comes and states:

1. That it calls for strict proof of the allegations of said Crossbill, except as to the allegations of paragraphs 1 and 2 of said pleading, and except as to that portion of the allegations of paragraph 4 of said pleading as may be applicable to it.

2. For further answer to said Crossbill, it avers that National Indemnity Company, by its conduct and actions, has waived any right it may have had to avoid coverage under its contract of insurance with said John Taylor Brown and is, therefore, estopped from taking such a position in this proceeding.

WHEREFORE, this defendant prays that the controversy existing between it and the said plaintiffs may be resolved in its favor.

UTICA MUTUAL INSURANCE COMPANY

By James I. Moyer
Of Counsel

Received and Filed Nov. 27, 1967.

Patsy Testerman, Deputy Clerk.

* * * * *

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* * * * *

MOTION 9473

NATIONAL INDEMNITY COMPANY, Plaintiff,

versus

JOHN TAYLOR BROWN
Shamrock Drive
Shannon Hills
Ridgeway, Virginia

ETHEL A. WALTON
2023 Ridge Street, S. E.
Roanoke, Virginia

BURROUGHS-WHITE CHEVROLET CORPORATION
c/o N. R. Burroughs, Registered agent
305 West Church Street
Martinsville, Virginia

OBADIAH R. MERRICKS
205 Broad Street
Martinsville, Virginia

RAY A. PERDUE
Route 2
Rocky Mount, Virginia

JO ANN PERDUE, infant
Route 2
Rocky Mount, Virginia, Defendants.

Comes now the Defendant Obadiah R. Merricks and moves the Court as follows:

1. For the record to reflect that the responsive pleading filed in his name by James I. Moyer, attorney at law, was not authorized by him and that the record should reflect that his counsel of record in this matter is the law firm of Young, Kiser and Frith, 60 West Church Street, Martins-
page 85 } ville, Virginia.

2. That in view of the unauthorized action of James I. Moyer in filing a responsive pleading that Young, Kiser and Frith be granted leave to amend the said responsive pleading in any manner that this Defendant's interest may dictate.

3. That this Defendant be granted leave of Court to file a Crossbill, bringing in new parties, to-wit: Utica Mutual Insurance Company, insurance carrier for Defendant Burroughs-White Chevrolet Corporation, and Safeguard Insurance Company, insurance carrier for Defendant Obadiah R. Merricks, on the grounds that the defendant, Obadiah R. Merricks, recovered a verdict of $40,000.00 against the estate of John Taylor Brown on September 20, 1967, and should the Plaintiff prevail in this action, the estate of John Taylor Brown would be uninsured and the aforesaid insurance carriers would be liable by virtue of the uninsured motorists endorsement set forth in their respective policies.

OBADIAH R. MERRICKS

By Jackson L. Kiser
Counsel

Received Sep. 29, 1967 and filed.

Carolyn Whitt, Deputy Clerk.

* * * * *

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* * * * *

ORDER 9473

It appearing to the Court that counsel of record for all parties herein stipulate and agree that the following may be made a part of the record in this case and that each is a true copy of the original instrument:

(1) Letter dated February 9, 1966, from Richard C. Rakes to John T. Brown;

(2) Letter dated August 24, 1966, from Richard C. Rakes to John T. Brown; and

(3) Non-waiver agreement executed by John T. Brown on November 23, 1965,

it is all so ADJUDGED, ORDERED and DECREED. And it is further ORDERED that copies of each of the aforesaid instruments tendered this day by counsel of record for Safeguard Insurance Company be, and they hereby are, made exhibits in and part of the record of this case.

Enter this 22 day of March, 1968.

S.L.F.

* * * * *

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February 9, 1966

Certified Mail
Return Receipt Requested

Mr. John Taylor Brown
Shamrock Drive
Shannon Hills
Ridgeway, Virginia

Re: Automobile accident Henry County, Virginia-September 26, 1965

Dear Mr. Brown:

As you know, we represent National Indemnity Company in connection with the above accident. You had an automobile liability insurance policy with that company at the time of the collision which involved personal injury and property damage to several people.

On November 23, 1965, you executed a non-waiver agreement with C. H. Wright of Gay & Taylor, Inc., a representative of the company. On January 19, 1966, you gave me a sworn statement concerning the circumstances surrounding your application for insurance.

Based upon the investigation which has been made, National Indemnity Company has decided to ask the court to determine whether or not it must afford coverage to you for the claims arising out of the accident in question. Pursuant to this, I have filed a petition for declaratory judgment in the Court of Law and Chancery of the City of Roanoke, and you will no doubt be receiving these papers within the next day or so.

Based upon the aforesaid non-waiver agreement and with a full reservation of its rights National Indemnity Company will defend any actions that are brought against you pending a final determination of the declaratory judgment suit. Should the company prevail in this matter then, of course, no judgments would be paid and the company would withdraw from any defense of these claims.

page 90 } I have been instructed, therefore, to advise you to *immediately* mail any suit papers pertaining to any actions against you by the claimants to Insurers of Virginia, Incorporated, 3123 West Marshall Street, Richmond, Virginia. This agent would then forward the papers to another attorney who would enter an appearance on your behalf.

With reference to the declaratory judgment suit, however, you will have to employ your own attorney, if you desire counsel to represent you. If there is any question concerning this matter please do not hesitate to call me collect at the telephone number listed on this letterhead.

Very truly yours,

GENTRY, LOCKE, RAKES & MOORE

Richard C. Rakes

RCR:sww

cc: Insurers of Virginia, Incorporated
cc: National Indemnity Company
Omaha, Nebraska

page 91 }

August 24, 1966

Mr. John Taylor Brown
Shamrock Drive
Shannon Hills
Ridgeway, Virginia

Obadiah R. Merricks
versus
John Taylor Brown
(In the Circuit Court of
Henry County)
D/A: 9/26/65

National Indemnity Company
versus
John Taylor Brown, et al
(Declaratory Judgment action
in the Court of Law & Chancery
for the City of Roanoke)

Dear Mr. Brown:

As you know, we represent National Indemnity Company, which company issued you an automobile liability insurance policy based upon your application on or about June 2, 1964. It is in this capacity, as attorneys for National Indemnity Company, that we are writing you this letter with regard to the above styled matters.

I am sure that you will recall executing a non-waiver agreement on November 23, 1965, and receiving a reservation of rights letter, both with regard to the accident in question, on February 9, 1966. Further, you know that National Indemnity Company has started a declaratory judgment action in the Court of Law and Chancery for the City of Roanoke in order to determine whether or not it has coverage for you for claims arising out of the automobile accident in question.

National Indemnity Company advised you in a letter of February 9, 1966, that based upon the non-waiver agreement and with a full reservation of all its rights they would defend any actions that were brought against you pending a final determination of the aforementioned declaratory judgment suit. It was pointed out, however, that if National Indemnity Company prevailed in the declaratory judgment action then no judgments or claims would be paid and said company would withdraw from the defense of any claim it was then handling. This letter is being written simply to reiterate National Indemnity Company's position in this connection and to point out certain other matters.

page 92 } We have now been advised that Obadiah R. Merricks has instituted an action against you in the Circuit Court of Henry County, Virginia, asking for damages in the sum of $75,000 for personal injuries received in the automobile accident of September 26, 1965. I believe the motion for judgment in this action was served on you on August 17, 1966. As set forth in the letter of February 9, 1966, based upon the aforementioned non-waiver agreement and with a full reservation of all its rights, National Indemnity Company is referring this action of Obadiah R. Merricks against you in the Circuit Court of Henry County, Virginia,

to Mr. A. L. Philpott of Philpott and McGhee, Attorneys at Law, Philpott Building, Box 489, Bassett, Virginia, for handling. His handling of this will be under the terms and conditions of the non-waiver agreement and the letter of February 9, 1966, and with National Indemnity Company having a full reservation of all its rights and defenses under the automobile liability insurance policy referred to hereinabove. National Indemnity Company reserves all its rights and does not waive any defenses it might have by referring this matter to Mr. Philpott for handling on its behalf and on your behalf.

We also wish to point out that the amount asked for in the motion for judgment filed by Obadiah R. Merricks against you in the Circuit Court of Henry County is in excess of the limits of liability afforded to you under National Indemnity Company's policy. Therefore, you are at liberty to employ your own independent counsel to work with Mr. Philpott and protect your own individual interest. If any judgment is returned in this action in excess of your policy limits with National Indemnity, this would, of course, be your own individual responsibility.

We are sending a copy of this letter to your own individual counsel of record, Mr. David B. Worthy, and we are also sending a copy along with the suit papers and investigation file to Mr. Philpott. We are sure Mr. Philpott will be in touch with you within the next few days, go over the matter and decide with you how to best plead in this action in the Circuit Court of Henry County, Virginia. He will thereafter file the necessary responsive pleading within the pleading period time.

We ask that you cooperate with Mr. Philpott and that you keep him advised of any and all subsequent developments with regard to this action in the Circuit Court of page 93 } Henry County, Virginia. We believe all of the above is self-explanatory but if we can be of any help in answering questions concerning same, we shall be glad to discuss the matter with you and your individual attorney and we are sure Mr. Philpott will be happy to do likewise.

Very truly yours,

NATIONAL INDEMNITY COMPANY

By: Gentry, Locke, Rakes & Moore

By: Its Attorney

RCR/jk
cc: Mr. David B. Worthy (2) (Davis, Davis, Davis & Worthy and Joyce & Stone)
Mr. A. L. Philpott
bcc: Mr. Veryl A. Rowson

page 94 } NON-WAIVER AGREEMENT

IT IS HEREBY UNDERSTOOD AND AGREED by and between the parties signing this agreement, that any action taken by the hereinafter named Insurance Company or Companies in investigating the cause of loss, or investigating and ascertaining the amount of sound value, or the amount of loss and damage which occurred on Sept. 26, 1965, shall not waive or invalidate any of the terms or conditions of any policy or policies, and shall not waive or invalidate any rights whatever of either of the parties to this agreement.

IT IS FURTHER UNDERSTOOD AND AGREED that neither the examination of the insured or of any other person, the examination of the books of account, bills, invoices, or other vouchers of the insured or any other person, the request of any other information, or the furnishing thereof, or the incurring of any trouble or expense by the insured shall waive or invalidate any of the terms and conditions of the policy or policies, or any defense thereunder.

THE INTENT of this agreement is to preserve the rights of all parties hereto, and to permit an investigation of the cause of loss, the investigation and ascertainment of the amount of sound value, or the amount of loss and damage, or any of them without regard to the liability of the hereinafter named Insurance Company or Companies.

WITNESS our hands in duplicate this 23rd day of Nov., 1965.

C. H. Wright
John T. Brown

Filed by leave of Court.

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* * * * *

OPINION

The Court in this case is called upon in this Declaratory

Judgment proceedings to determine the liability of the complainant under an automobile liability policy issued by it to one John Taylor Brown on June 3, 1964 to expire June 3, 1965, and which was renewed by the complainant on July 26, 1965 to extend coverage until July 26, 1966. On September 26, 1965 he had an accident with his car inflicting personal injuries and property damage. The coverage by the policy issued by the complainant was that of a poor risk coverage due to the age of the insured and his marital status.

The complainant refused liability on the policy due to alleged misrepresentation made on the application by Brown where the following question and answer was made: "List any impairments you may have". Answer "None".

Brown had had prior thereto an Epileptic seizure and was taking a drug to control epilepsy at the time. That is not denied but the defense claims that the disease was under control and by reason thereof it should not be considered in the ordinary use of the word as an "impairment". Brown some three months prior to the accident had been issued a drivers license by the Commissioner of Motor Vehicles page 96 } after having made known to the Commissioner his prior Epileptic seizure, but upon the condition that he furnish periodic reports from his Doctor as to his condition. Brown died from other causes in September 1966.

Certainly, the word "impairment" used in the insurance application for a liability policy on the operation of an automobile could mean nothing else than that which would or might effect the ability of the insured to operate the car safely. Surely this could not have been misunderstood by a reasonably intelligent person, and the evidence shows that Brown was clearly within that classification.

The Court concludes that there was no ambiguity in the policy in question which could have been misunderstood by Brown.

The policy in question, it may be pointed out, was not written by the complainant under either the Voluntary Assignment Plan or the Statutory Assignment Plan but was written by it under its plan for less desirable or a Poorer Risk policy than the Desirable Risk but at a higher rate of premium. Therefore, in the opinion of the Court the policy is avoided if the insured made a misrepresentation of any material fact in his application, whether made innocently or otherwise. However, it might be further added that it can hardly be conceived from the recent experience Brown had had obtaining a drivers license that his answer could have been innocent.

Of course, the burden of proof of materiality is on the complainant, and the ordinary test as to whether that burden has been carried is furnished by *Casualty Company* v. *Robertson* 206 Va. 866, *City Standard Accident Ins. Co.* v. *Walker* 127 Va. 140 wherein it is said:

page 97 } "A fair test of the materiality of a fact is found in the answer to the question, whether reasonably careful and intelligent men would have regarded the fact communicated at the time of effecting the insurance as substantially increasing the chances of the loss insured against so as to bring about a rejection of the risk or charging an increased premium."

(It will be noted however that the insurance premium charged in the instant case related only to the age of the insured and his marital status.)

The Court is of the opinion that the evidence of the materiality of the representation in this case is beyond question.

The Court is further of the opinion that the record shows no conduct of the complainant which would estop it from claiming a recision of the insurance contract in this case on account of misrepresentation of a material fact. There is a wide difference between the facts in this case from those in the case of *Virginia Mutual Ins. Co.* v. *State Farm Mutual Auto Ins. Co. et al* 204 Va. 783 relied upon by the defendants.

6/24/68

S.L.F., Judge

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* * * * *

ORDER 9473

This cause came on to be heard on the pleadings, depositions, and briefs and argument of counsel. After mature consideration, and in accordance with the decision reached in the written opinion filed on June 24, 1968, it is ADJUDGED, ORDERED and DECREED that the policy of insurance issued by National Indemnity Company to John Taylor Brown on July 26, 1965, numbered ACEE-379963 is voided *ab initio*

on the ground of misrepresentation of material facts in the application for insurance executed by Brown on June 2, 1964. It is the further ORDER of this Court that the plaintiff, National Indemnity Company, refund any premium paid for said policy to C. P. Witt, Sheriff, Administrator of the Estate of John Taylor Brown, deceased.

In view of the action of the Court in voiding the aforesaid policy of insurance it naturally follows, and this Court so holds, that the plaintiff, National Indemnity Company, has no duty to pay any part of the judgment obtained by Obadiah R. Merricks against the Estate of John Taylor Brown in the Circuit Court of Henry County on September 20, 1967, and that it likewise has no duty to defend any actions or pay any judgments that might subsequently be filed or obtained against the Estate of John Taylor Brown arising out of the automobile collision of September 26, 1965, in Henry County, Virginia.

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It is the further ORDER of this Court that the plaintiff, National Indemnity Company, do have and recover its costs of and from the defendants in this suit. The clerk is directed to certify a copy of this Order to any party or his attorney upon proper application made.

We have seen this Order:
Gentry, Locke, Rakes & Moore

By: Richard C. Rakes
Counsel for Plaintiff,
National Indemnity Company

Young, Kiser & Frith

By: Jackson F. Kiser
Counsel for Obadiah R. Merricks
Willard R. Finney, Guardian *ad litem*

N. B. Hutchenson, Jr.
Counsel for Ray A. Perdue and
Guardian *ad Litem* for Jo Ann
Perdue, Infant

We have seen this Order and object
and except to its entry on the grounds set forth
in the Memorandum of Authorities filed on behalf
of Utica Mutual Insurance Company

James I. Moyer
Of Counsel for Burroughs-White
Chevrolet Corporation and Utica
Mutual Insurance Company

Woods, Rogers, Muse, Walker & Thornton

By: John L. Walker, Jr.
Counsel for Safeguard Insurance
Company

ENTER: 7/9/68

SLF Judge

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* * * * *

NOTICE OF APPEAL

AND

ASSIGNMENT OF ERROR

TO: Mr. Walker R. Carter, Clerk, Court of Law and Chancery, City of Roanoke, and to Counsel of Record for Plaintiff

YOU ARE HEREBY NOTIFIED that the Defendant, Safeguard Insurance Company, does hereby file with the Clerk of the Court of Law and Chancery for the City of Roanoke, Virginia, its notice of appeal and assignment of error from the final order of the said Court, entered in the above-styled action of July 9, 1968.

page 101 } The Defendant assigns as error the following:

(1) The Trial Court erred in finding that John Taylor Brown made a misrepresentation of fact on his application for automobile liability insurance with National Indemnity Company.

(2) The Trial Court erred in ruling that the question on the application pertaining to "impairments" was unambiguous.

(3) The Trial Court erred in ruling that the alleged misrepresentation was material.

(4) The Trial Court erred in holding that the policy was

void even if the misrepresentation was innocently made and in finding that John Taylor Brown made such representation willfully.

(5) The Trial Court erred in finding that the plaintiff, National Indemnity Company, was not estopped or did not waive its right to declare the policy it issued to John Taylor Brown void *ab initio*.

(6) The Trial Court's decision was contrary to the law and the evidence.

Respectfully,

Safeguard Insurance Company

By John L. Walker, Jr.
Of Counsel

Received & filed August 27, 1968.

Patsy Testerman, Deputy Clerk.

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NOTICE OF APPEAL

AND

ASSIGNMENT OF ERROR

TO: Mr. Walker R. Carter, Clerk, Court of Law and Chancery, City of Roanoke and to Counsel of Record for Plaintiff

YOU ARE HEREBY NOTIFIED that the Defendant, Utica Mutual Insurance Company, does hereby file with the Clerk of the Court of Law and Chancery for the City of Roanoke, Virginia, its notice of appeal and assignment of error from the final order of the said Court, entered in the above-styled action of July 9, 1968.

The Defendant assigns as error the following:

(1) The Trial Court erred in finding that John Taylor Brown made a misrepresentation of fact on his

page 103 } application for automobile liability insurance with National Indemnity Company.

(2) The Trial Court erred in ruling that the question on the application pertaining to "impairments" was unambiguous.

(3) The Trial Court erred in ruling that the alleged misrepresentation was material.

(4) The Trial Court erred in holding that National Indemnity Company, an insurer admittedly writing "sub-standard" or "poor risk" coverage on the same terms and under the same conditions applying to "statutory risks", and "poor risks" under the Virginia Automobile Assigned Risk Plan, was entitled to treat John Taylor Brown as a "desirable risk".

(5) The Trial Court erred in holding that the policy was void even if the misrepresentation was innocently made and in finding that John Taylor Brown made such representation willfully.

(6) The Trial Court erred in finding that the plaintiff, National Indemnity Company, was not estopped or did not waive its right to declare the policy it issued to John Taylor Brown void *ab initio*.

(7) The Trial Court's decision was contrary to the law and the evidence.

Respectfully,

Utica Mutual Insurance Company

By James I. Moyer
Of Counsel

Received and filed Sept. 3, 1968.

Patsy Testerman, Deputy Clerk.

* * * * *

James M. Firebaugh

Received under seal July 26, 1967 and filed.

Juanita Gregory, Deputy Clerk.

#9473

APPEARANCES: Richard C. Rakes, Esq., Gentry, Locke, Rakes & Moore,
Roanoke, Virginia,
Attorney for Plaintiff

O. Dalton Baugess, Esq.,
Gochenour & Baugess,
Salem, Virginia,
Attorney for Burroughs-White Chevrolet Corporation and Obadiah R. Merricks

De bene esse deposition of witness taken before John H. Spangler, a notary public for the State of Virginia at Large, pursuant to Notice, hereto annexed, at the law offices of Gentry, Locke, Rakes & Moore, Roanoke, Virginia, at 11:00 A.M., on the 15th day of June, 1967, on behalf of the Plaintiff in the above-entitled cause pending in the Court of Law and Chancery of the City of Roanoke, State of Virginia.

6/15/67
page 1 } JAMES M. FIREBAUGH, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Rakes:

Q. Please state your name, age, and business address.

A. My name is James M. Firebaugh, my business address is 502 23rd Street, Northwest, Roanoke, Virginia.

Q. What is your business, Mr. Firebaugh?

A. I am an insurance agent with the company.

Q. Which company?

A. Nationwide Insurance Co.

* * * * *

James M. Firebaugh

Q. All right, sir. Do you have a contract with
6/15/67 Nationwide Insurance Co.?
page 2 } A. Yes, I do.
Q. Did you have a contract with them on June 2, 1964?
A. Yes.

* * * * *

Q. Now, do you have presently a contract with any other insurance company besides Nationwide?
A. There's no contract, in that I am not licensed with any other company.
6/15/67 Q. What do you mean, sir, by "licensed"?
page 3 } A. That would be where you make a formal application to that company, and they have specific percentage of commissions, and so forth. All other dealings that I have with any other companies are on a brokerage basis or split commissions.

* * * * *

6/15/67
page 4 }

* * * * *

Q. In other words, you did have authority under your contract with Nationwide in June of 1964, to actually bind liability insurance through Nationwide for an applicant?
A. I would have authority if the applicant were eligible for Nationwide.
Q. Now, did you have a set of rules and regulations from Nationwide which permitted you to make the independent determination yourself as to whether they came within the scope that Nationwide would issue a policy for?
A. We did.

* * * * *

James M. Firebaugh

6/15/67
page 6 }

* * * * *

Q. Now, in June of 1964 were you taking applications for automobile liability insurance from any persons for coverage with companies other than Nationwide?

A. Yes, I was.

Q. Would some of these be under the Virginia Automobile Assigned Risk Plan?

A. Well, if the application were submitted to the Virginia Automobile Assigned Risk Plan, then they would place it with one of the companies that comes under their plan.

Q. Let us assume, Mr. Firebaugh, that an applicant for automobile liability insurance would come into your office, and upon your questioning him, you were able to determine to your satisfaction that he would not meet the standards set by Nationwide for voluntary insurance on him; what other choices would you have with respect to securing liability insurance for this individual?

6/15/67 page 7 } A. Well, as I recall this particular situation—

Q. I am talking about, in general, first, if you could tell us—answer that question as to what alternatives you might have to try to help him.

A. I don't recall how many companies that offered this coverage, but from time to time we are contacted, either personally or by mail, by various companies soliciting this type of business, usually referred to as substandard market designed to cover this gap whereby an applicant cannot secure insurance at normal rates because of not meeting eligibility rules and regulations.

Q. Now, this is something different from an application submitted through the Virginia Automobile Assigned Risk Plan?

A. Are you referring to this particular—

Q. No, sir; I am talking about general; I am still in general terms now.

A. The difference being, mainly, you know exactly what company this insurance will be placed with, whereas in the Assigned Risk Plan it could be with any one of several hundred companies operating in Virginia. Also, the other difference being that most of these companies give the agent bind-

ing authority as of the postmark or by verbal agreement by telephone conversation, whereas the Assigned Risk Plan requires a waiting period before the coverage becomes effective.

Q. Now, in June of 1964, can you recall what in-
6/15/67 surers, other than Nationwide, that you would take
page 8 } applications, and submit them directly to?

A. Without searching some records and doing some investigation, I could not tell you at this time.

Q. Would you think it would be several?

A. Possibly at that time—and this is purely the first thing that comes to my mind: Would be, maybe, two or three companies.

Q. Would you work through the company's office directly, or through one of their general agents?

A. Always through a general agent. We would not be permitted to deal directly with the company.

Q. That is other than Nationwide?

A. Unless we were licensed with that company.

Q. Now, what was your relationship with the Insurers of Virginia, Incorporated, in June of 1964?

A. I had from time to time brokered business with them—and still do—even recently.

Q. Would you explain how this came about originally, and then just briefly the procedure that you go through to broker business through them?

A. There's always been a need for this so-called substandard market to offer coverage to insureds who cannot secure insurance at normal rates. And I can't recall the exact instance of the first time I had brokered business with Insurers

of Virginia, but I would say I was licensed in 1955
6/15/67 —so that Insurers of Virginia is an old company
page 9 } that has been in business for years; and I would

say that I have been brokering with them since shortly after I was licensed in '55.

Q. When you speak of licensed in '55, it was with Nationwide?

A. Right. I have never been licensed with any other company.

Q. Do you recall how this relationship got started, Mr. Firebaugh, with the Insurers of Virginia?

A. I would say it was from frequent mail solicitation on their part.

James M. Firebaugh

Q. Your recollection would be, or best guess would be that you may have received a communication by mail from them?

A. (The witness nods his head) I don't recall exactly how my relationship started with Insurers of Virginia. But that's the way most of these companies, who solicit business—that's the way they started. Then, too, one agent possibly recommends to another agent this source of securing coverage.

Q. Do you think that it could have been possible that you might have learned of Insurers of Virginia from another agent and made an inquiry to them as to whether you might take applications for them or brokerage?

A. I would say that that would be accurate. I believe that I recall Mr. Cooper was associated with me in a similar connection, as Mr. Munger is now—Mr. Ben R. Cooper. And, as I recall, he had *dome* some business with Insurers of Virginia in the past, and I learned of it from him.

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Q. And, of course, this is a source of additional income to you, the brokerage business? I am speaking of other than your commissions through Nationwide?

A. There is a commission paid on all brokerage business.

Q. Did you have any type of written contract with Insurers of Virginia in 1964?

A. No, sir.

Q. With whom were you dealing in that organization at that time?

A. My dealings have always been with Mr. John Dempster. If I recall—I am not certain—he's either the owner of this agency—or I'm not sure. I guess it is—is it incorporated, Mr. Rakes?

Q. Yes.

A. I would assume he's been vice-president—I'm not certain about that. I always talked with him, if he's available; if not, then someone in the office.

Q. Do you know whether this agency is an agent in the sense that it directly writes for companies other than Nation—National Indemnity Company?

A. I do not know, other than the fact that I understand that they are the general agents for the State of Virginia for National Indemnity Company.

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Q. You don't know whether they have any agency relationship with any other insurer, or not?

A. They do at this time, but in 1964, I could not tell you. I do not know.

Q. That's perfectly all right.

A. They do at this time.

Q. What was your procedure for brokering business with Insurers of Virginia, Incorporated, in 1964?

A. They furnished us with applications—Insurers of Virginia, that is, with their agency name imprinted. These forms are completed and remitted with a net premium, that is, the premium less agent's commission to Insurers of Virginia's Richmond office. They in turn issue the policy and return to the agent, and then the agent in turn forwards this policy to the insured.

Q. When you speak of "agent," you are speaking of Insurers of Virginia?

A. No. Insurers of Virginia returns the application to the same agent who submitted it to them—I beg your pardon—returns the policy to the same agent who submitted the application.

Q. Agent or broker? Did you mean an agent in a general sense?

A. I think in a general sense. We are not licensed with National Indemnity, but the insured certainly con-
6/15/67 siders us to be their agent. They call us for advice.
page 12 } Q. You are the contact, in other words, through whom he pays his premium and signs his application, and this sort of thing; is that correct?

A. I think the terminology should be "broker" and "agent," even though I am not licensed with the company.

Q. In any event, if a man comes in and wants insurance—a liability, that is, on his automobile, and you determine that he cannot be written through Nationwide, then you can take one of these applications—application forms given to you by Insurers of Virginia, Incorporated, take down the information, fill in the blanks, have the applicant sign and date it, collect a premium from him, and mail the premium less your commission, along with the application, to Insurers of Virginia, Incorporated, in Richmond, Virginia; is that correct?

A. That is correct.

Q. How did you determine what the premium would be? Do you have some—

A. That same agency furnishes us with rate charts.

Q. I see. And then does Insurers of Virginia in Richmond

decide on the basis of the application whether they will issue the policy, and if so, do they write the policy in their office and mail it back to you for delivery to the insured?

A. That's correct.

6/15/67 page 13 } Q. Now, does Insurers of Virginia, Incorporated, in Richmond ever decline to write any policy after receiving the premium and the application from you?

A. I have known on a very, very few instances where this occurred.

Q. And what do they do in this instance—return the premium to you?

A. Yes.

Q. And in turn you give it back to the applicant?

A. That's right.

Q. In those instances would you likely attempt to secure liability coverage from the applicant through the Virginia Automobile Assigned Risk Plan?

A. That would be an individual decision.

Q. To be made by the applicant?

A. And the agent.

Q. The applicant and you, in other words?

A. Yes.

Q. Now, did Insurers of Virginia, Incorporated, take applications from people who were required by the Division of Motor Vehicles of Virginia to have an SR 22 filed?

A. If they met all of the other eligibility requirements, they did.

Q. In other words, if an individual, for example, who had had no liability insurance, and was involved in an automobile accident, and the Division of Motor Vehicles had suspended his operating privileges, and then had later indicated to him that they would restore those privileges provided he could furnish proof of financial responsibility in the future, then would this require an SR 22 Filing?

6/15/67 page 14 }

A. That would be one reason for an SR 22 Filing.

Q. This is an illustration?

A. Yes, sir.

Q. And in such a situation as that, as you have indicated, if this individual met the requirements of Insurers of Virginia, Incorporated, for example, they'd be willing to issue the policy to him for an increased premium and make the SR 22 Filing for it; is that correct?

A. Yes, sir.

Q. Now, do you know a party, now deceased, by the name of —or did you know a party by the name of John Taylor Brown?

A. Yes, I did.

Q. How did you happen to make his acquaintance?

A. I suppose—well, it would definitely be through a relationship by marriage that I had met John.

Q. Could you describe that, please, sir?

A. Yes, I could. My brother married his mother's sister.

Q. Approximately when, would you estimate it was, when you first met John Taylor Brown?

6/15/67 page 15 } A. Possibly six or eight years ago.

Q. Was he then a teen-age boy?

A. Yes, he was.

Q. Do you recall when he first began to drive automobiles?

A. No, sir; I don't.

Q. Was he living with his parents when you first met him?

A. Yes, he was.

Q. Was that in Rocky Mount, Virginia?

A. Yes, sir.

Q. Do you recall whether that was 416 Pell Street, in Rocky Mount?

A. I recall that as being the address for the purpose of insurance application; I don't recall where they lived—I wasn't that closely associated with them.

Q. Do you recall when you first had any discussions with Mr. Brown relative to automobile insurance—just approximately?

A. It was possibly—certainly within the 30-day period previous to this application in June of '64.

Q. Do you recall the circumstances under which the initial discussion took place?

A. If I recall, his mother called me to inquire about an application for insurance.

6/15/67 page 16 } Q. For John Taylor Brown?

A. Yes.

Q. And what was the result of that conversation, if any?

A. I immediately began to qualify him for insurance with Nationwide, as I would any applicant, and determine, because of his age and being single—among other factors, such as not having the supporting business of his parents, that he would not be eligible for Nationwide.

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Q. Did you determine this through personal discussions with him?

A. Yes.

Q. Where?

A. The discussions started by a phone call to my office, as I recall—the exact date I don't remember—some days previous to this application; and then John and his mother came into my office and these discussions were continued there.

Q. He was not married at this time?

A. That's right.

Q. He was under 25 years of age?

A. Yes, sir.

Q. And would this be one of the reasons why Nationwide would not voluntarily consider him for coverage in his own name?

A. The fact of being under 25 and single.

6/15/67 page 17 } Q. Yes, sir.

A. Would make him ineligible, unless we had the supporting business of the parents.

Q. What do you mean by that?

A. I mean by that that we should have the parents' automobile insured, or other lines of insurance.

Q. I see. In other words, if you insured the parents for liability, or—as you have indicated, other lines of insurance, you might consider the single, under-25 male son for coverage?

A. Yes, if there was no other objectionable factor.

Q. But you did not have this supporting business from the parents of John Taylor Brown, so this would disqualify him for coverage?

A. And if we had the coverage of business, it would have had to have been in force for six months.

Q. Upon making this determination, what did you do, Mr. Firebaugh?

A. I immediately began to search the various connections to determine what to suggest to him, and it appeared that Insurers of Virginia was the best source to give him coverage.

Q. You made no determination in your own office, but through your own examination of your files and research, and so forth, or did you discuss it with anyone at the time, that you recall?

A. I don't recall discussing it with anyone.

6/15/67 page 18 } Q. So, did you have him come back to your office, or did you take this application all at the

initial visit, in this application—through Insurers of Virginia, I'm speaking of?

A. I can't recall exactly how that was handled.

Q. I don't know how much importance to attach to it, and it may not have any, Mr. Firebaugh, and if you can't recall—

A. I don't recall.

Q. That's perfectly all right. Well, did you on June 2, 1964, then, take an application from John Taylor Brown on a form provided you by Insurers of Virginia, Incorporated?

A. Yes, I did.

Q. Do you recall whether his mother was present at the time?

A. Yes, she was.

Q. I hand you, sir, a photostatic copy of an application or form of Insurers of Virginia, dated June 2, 1964, and purportedly signed by a John T. Brown, and ask you if you recognize it?

A. Yes, I do.

Q. Is that the application that you took from Mr. Brown in the presence of his mother on June 2, 1964, or a copy of it, rather?

A. Yes, sir.

* * * * *

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* * * * *

Q. I notice in the upper right-hand corner that there appears a stamp, "James M. Firebaugh," with an address and phone number on it; is that one of your stamps, sir?

A. Yes, sir.

Q. And did you stamp this particular application yourself?

A. Yes, sir.

Q. With that stamp of yours showing your name and address?

A. This application is furnished to me in blank, and with "Insurers of Virginia, Incorporated" imprinted.

Q. Now, I notice in the last paragraph of this application there has been a strike-through, with the words, "Not applicable." This language, that the handwritten notation "Not

applicable" appears over, appears to refer to the financial responsibility and filing under the Assigned Risk Plan and SR 22, which we have talked about previously; I take it then that Mr. Brown was not required to file an SR 22 with the Division of Motor Vehicles at the time you took this application from him?

A. He was not required to file.

Q. So that portion of the application would indeed, then, not be applicable to this particular application?

A. That is not applicable, that is correct—

6/15/67 that's the reason—

page 20 } Q. The strike-over was made?

A. Yes, sir.

Q. Who actually wrote down the answers to the questions indicated in this application form?

A. I wrote the answers down as I asked the various questions of the applicant.

Q. In other words, then, the answers on the application are in your handwriting?

A. Yes, sir.

Q. And where did you obtain the information for you to supply the answers?

A. From the applicant Mr. Brown.

Q. And did you ask him each of these questions on this application?

A. Yes, I did.

Q. Including his name and address and age and marital status and date of birth, all these things?

A. Yes, sir.

Q. You would ask him the question, and he would supply the answer, and you'd write it down?

A. That's right.

Q. What is this occupation you have listed here, sir?

A. It should have been "Cosmetologist."

Q. (Indicating) What is that, Mr. Firebaugh?

6/15/67 A. I understood he was a hairdresser, and he

page 21 } had been to some type of school to learn this trade.

Q. That is a ladies' hairdresser?

A. Ladies' hairdresser; yes, sir.

Q. And you show his employer at the time as Hollywood Beauty Salon in Rocky Mount, Virginia?

A. Yes, sir.

Q. Do you know whether his mother was residing at 416

Pell Street in Rocky Mount at the time this application was secured?

A. I don't recall. I don't have any way of knowing—however, I assume that she did.

Q. You assume that she resided here, and he resided with her at that time?

A. (The witness nods his head)

Q. Now, you have described this 1961 Ford Thunderbird by identification number; where did this information come from?

A. I don't recall exactly. Normally, we ask them to produce a bill of sale or a copy of the registration card—but it doesn't necessarily have to come from that.

Q. Whatever source you can obtain the identification on?

A. Whatever source we can get it from. Sometimes they read it off to us.

6/15/67 page 22 } Q. One of the questions read, "List all convictions and accidents, give dates and describe accidents," with the answer "None" being supplied; that was the information given to you by Mr. Brown himself?

A. Yes, sir.

Q. And another one of the questions reads, "List any impairments you may have"—with a similar answer—"None"; is that the answer supplied to you by Mr. Brown?

A. That was an answer supplied by Mr. Brown.

Q. Did you read this question to him, and he said that he had none, and that's why you wrote "None" in there?

A. That's correct.

Q. Did he ask you at the time to further elaborate on what was meant by the word "impairment"?

A. I don't recall that he asked me that. However, our discussion from—at some time during this application—I don't recall exactly when—led around to the fact of his father's untimely death and the emotional strain which he had been under which, in my opinion, was normal. And he may have possibly mentioned that he had seen a doctor about this nervous condition. That was the area of our conversation.

Q. Did he indicate to you that this nervous condition, or whatever it was he had seen a doctor about, in any way *interferred* with his driving or might interfere with it?

6/15/67 page 23 } A. I remember some area of our conversation touching on that, and I can't recall the exact details. But at some time in the conversation, it

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seems to me that I asked him, in his opinion, would this affect his driving. But these facts and figures on this particular point are vague to me. I can't recall exactly whether I asked or didn't ask him. However, as insurance agents, we are always alert to this type of thing. Primarily, we watch for impairment such as loss of limbs, that type of thing, you can definitely pinpoint.

Q. Did Mr. Brown or his mother tell you that he had been suffering from epilepsy?

A. Neither Mr. Brown nor his mother ever mentioned this condition to me.

Q. And had you any prior knowledge, at the time this application was taken, that he had been so treated for epilepsy?

A. No, sir.

Q. Had you been told by them that he was suffering from epilepsy, or if you had had any prior independent knowledge of that, would you have written the answer "None" down in response to this question?

A. I would not under any conditions.

Q. You, of course, were aware of the fact that Mr. Brown's father had committed suicide in 1961?

A. Yes, sir.

Q. And that Mr. Brown himself, I think, had discovered it?

A. Yes.

6/15/67 page 24 } Q. And when you were advised that subsequent to that time the applicant had been nervous and had been seen by a doctor, you attributed that to the expected reaction from such a traumatic experience?

A. Yes, sir.

Q. Now, just so that I can completely understand this—and I will leave this particular topic—Mr. Firebaugh, when you read off the question to Mr. Brown, "List any impairments you may have," the answer or response to that was "None," and that is what you put in the answer there?

A. That's right.

Q. Now, did you quote a premium to him that this minimum coverage of $15,000, $30,000 bodily injury limits, and $5,000 property damage would cost him on an annual basis, if this company decided to issue a policy to him?

A. (The witness does not respond)

Q. You may refer to this application.

A. I am sure I did; yes, I am sure I quoted him a premium.

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Q. Is that premium quoted—listed on this application form?

A. Yes, sir.

Q. What is the amount?

A. $155.60.

6/15/67 page 25 } Q. And there is another blank for "Payment collected," and is that figure inserted there also $155.60?

A. The same amount.

Q. And did you write these figures, yourself, in there?

A. I assume I did. This appears to be—that is the normal procedure, so I can assume that I did.

Q. Does that appear to be your handwriting?

A. It does.

Q. And there is another item called "Net check (Less 10%)", with a figure which appears—and $140.04; is this the difference between the amount collected and the net check which would represent your commission?

A. Yes, sir.

Q. And would that amount to $15 and some few cents in this instance?

A. $15.56.

Q. After receiving this application and the money, how was it paid—by check or cash, or do you recall?

A. Had I known this information would be asked, I would have been to search my records. I don't have a record of it here.

Q. That's perfectly all right, sir. Well, in any event, what did you do with the application and the premium money that was given to you on this occasion?

A. I attached the net check to the application and submitted it to—by mail to Insurers of Virginia, Incorporated.

6/15/67 page 26 } Q. Did you send a covering letter along with it?

A. No, sir. It's not—as I recall, it's not necessary—

Q. You didn't?

A. —To send a letter.

Q. You just—

A. I don't recall. I don't have a copy in my file, if I did.

Q. You do have a file which purports to contain all copies and memoranda of any dealings that you had with Mr. Brown? Do you have it with you?

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A. I have a file—how complete it is, I don't know. I didn't know exactly what information you would ask for from the file. But I do have a file and a copy of the application.

Q. As far as you know, you have no reason to know that the file isn't complete?

A. No, I have no reason to think that the file is not complete; no, sir.

Q. And the file does not contain a copy of any covering letter that would have gone along with this application?

A. No, sir.

Q. Now, do you recall what happened next after that?

A. The normal procedure of the policy—was issued by Insurers of Virginia and forwarded to the insured.

6/15/67 page 27 Q. Would the policy, if it were issued by the Insurers of Virginia, have been sent to you for mailing or delivery to the insured, or would it be mailed directly to him?

A. It would be mailed to the agent.

Q. To you?

A. Yes, sir.

Q. Do you recall receiving the policy in this particular instance and sending it to Mr. Brown?

A. I can't recall. I am sure that that is what occurred. I do have a copy of the policy—the agent's copy in my file.

Q. And do you recall whether Mr. Brown came by and picked up the original policy from your office, or whether it was mailed to him?

A. It was mailed to him—it would be the normal procedure. I cannot recall.

Q. In this instance?

A. In this instance.

Q. And you have no copy of any covering letter, if indeed it were mailed?

A. No, sir.

Q. Would the normal procedure be to mail the original policy?

A. Yes, sir.

6/15/67 page 28 Q. Now, what other action or activity, if any, did you take with respect to this particular applicant?

A. Would you be more specific in this question?

Q. What I am trying to find out, Mr. Firebaugh, is if you did anything with respect to John Taylor Brown's applica-

tion for insurance through Insurers of Virginia, Incorporated, other than simply take this application, collect his premium, and forward it to them, and send his policy when it came in?

A. We renewed the policy by—submitted a statement to Mr. Brown at the expiration of this policy, and he returned his check to me, as I recall, by mail, and it again was forwarded to Insurers of Virginia for a net premium, and they automatically renewed it for another policy term—which, again, was the normal procedure, as we had followed it in the past, and a second application was not necessary.

Q. Was the first policy period—what were the dates of the first policy period?

A. The effective date?

Q. Yes, sir?

A. June 3, '64.

Q. To June 3, '65?

A. To June 3, '65. This policy was not renewed effective June 3, '65—the exact reason I don't know. But he never paid the renewal until July, and at that time the policy was renewed from July, '65 to July, '66.

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Q. And these were the dates—that is, July 26, 1965 to July 26, 1966, were the inclusive dates of the policy period for the renewal policy which was Policy No. SWACEE 379963; is that correct?

A. That's right.

Q. Had he paid the renewal premium at the time the statement was originally submitted to him? I assume that the policy period for the renewal policy would have been the same date, that is, June 3 to June 3?

A. That would be the normal procedure; yes, sir.

Q. Now, I notice, also, that the description of the automobile in the renewal policy was a '65 Ford coupe; do you know how this came about? This is different from the description of the original automobile.

A. Yes, sir. My memo to Insurers of Virginia, Incorporated, dated April 21, '65, requested transfer to a 1965 Thunderbird.

Q. Had he traded the '61 Thunderbird for a Plymouth?

A. For a Plymouth previous to that—1964 Plymouth.

Q. And had that change been made on his original policy, too?

A. I do not have a record of an endorsement showing that.

Until just now I hadn't realized there was no endorsement in my file.

Q. In any event, Brown had only one automobile during the entire policy period at the same time?

A. To my knowledge; yes, sir.

6/15/67 page 30 } Q. And the renewal policy was issued for the 1965 Ford Thunderbird?

A. Yes.

Q. In this brokerage business, such as you had with Insurers of Virginia, would you keep up with the renewal dates and the collection of the entire premium, and then remit the net to Insurers of Virginia, after withholding your commission?

A. The procedure then, as now, was that they would send a list of all of the renewals for a particular month—usually two months in advance—to the agent—and here, again, we mean brokering agent; the agent in turn would notify the insured of the upcoming renewal.

Q. I understand. All right. Now, Mr. Firebaugh, have you subsequently learned—that is, since this renewal policy was issued—that Mr. Brown was involved in an accident in Henry County, Virginia, in September of 1965?

A. Yes, sir. His mother called me—the exact date I don't recall—to inform me of that, and at a later date an SR 300 report was sent to my office to notify me.

Q. Of the accident?

A. Yes, sir.

Q. Do you have a copy of that?

A. I believe I do. Yes, this is a copy.

Q. May I see it, please?

6/15/67 page 31 } A. I think two pages would cover the various cars. I can't verify who signed it. It was mailed to my office. In fact, that's not the original.

Q. There is a notation that says "PH signed original"?

A. The secretary. We didn't have access to a copying machine at that time, and she typed this off by hand from the original.

Q. And in the normal course of her business with you?

A. Yes, sir.

Q. Would the "PH" refer to policy holder?

A. I think that's what she means.

Q. Dated September 29, 1965? Mr. Firebaugh, is this an exact copy of the SR 300 which your office received from the insured Mr. Brown?

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A. I don't recall comparing this, Mr. Rakes, with the original. I can only assume it is. It was in the file.

Q. And it purports to be a copy made by your secretary in the regular course of her business with you?

A. Yes, sir.

Q. I assume that a copy of this could be secured from the Division of Motor Vehicles?

A. Yes, sir.

Q. All right.

Mr. Rakes: I offer this as Plaintiff's Exhibit 2, and ask the court reporter to so mark it, and file it with the deposition.

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page 32 } (Plaintiff's Exhibit No. 2—Accident report form SR 300.)

Q. Was receipt of this report the first knowledge that you ever had of Mr. Brown's being subject to epileptic seizures?

A. As far as I can determine, it was. I knew that, of course, there was a lapse of time from June, '64 until this occurred some time later, by way of the connection of the family relationship. I had heard some rumors that John Brown had had some more disturbances of this nervous conditon. But this epileptic condition was never mentioned, and a member of the family had mentioned to me that they had attempted to keep this information suppressed.

Q. Was this after the accident?

A. All this came out after.

Q. Is Mr. Brown now deceased?

A. Yes, sir.

Q. Do you recall where he died?

A. I read it in the paper, and also heard it from members of the family that he took his life in a hotel room here in Roanoke.

Q. In September of 1966?

A. I don't recall the date, without checking into it.

Q. Does that sound approximately correct to you?

6/15/67
page 33 } A. Yes, sir.

Q. Answer any questions Mr. Baugess may have.

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CROSS-EXAMINATION

By Mr. Baugess:

Q. What type of building is this, Mr. Firebaugh, that you occupy in your insurance business?

A. The building that I occupied at the time of this application in question?

Q. That's correct.

A. —Which is different from our office now. It was a residence that was converted for office use, owned by the Colonial-American Bank, to whom we paid rent.

Q. Is it in a business area or residential area?

A. It's a combination—primarily business.

Q. At the time did you have any sign or letter writing on the door regarding the fact you were in the insurance business?

A. Yes, sir; there was a sign out near the street.

Q. How did it read?

A. It read at the top, Nationwide Insurance Agents, and listed the agents under the sign; and if I recall correctly, at that time there were only two of us—Mr. Nicholas Munger and myself.

Q. Was there any reference on the sign to any other insurance company, other than Nationwide?

A. No, sir.

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* * * * *

Q. In connection with Insurers of Virginia—whom I understand represents Nationwide—I mean National Indemnity, isn't it just a matter of course that once you send an application, they rely upon your integrity as an insurance agent, and the application is approved as a matter of course?

A. The application is approved solely on the basis of the facts and figures written on the application.

* * * * *

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6/15/67 page 37 } Q. Some mention was made of whether or not you would take direct application for assigned risk—do you?

A. We do take assigned risk applications.

* * * * *

Q. My point is, who makes the determination as to whether or not this person has to have assigned risk insurance?

A. The agent and the applicant will—we usually explain various means of securing insurance, and the agent and the applicant together make the decision.

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Q. Once you have taken that—and I am referring now to Insurers of Virginia—and you sent it to them—the Insurers of Virginia, Incorporated, I take it, writes the policy?

A. They type it in their office, I understand.

Q. And they return that to you, and then you, as the agent, deliver it either by hand or mail to the insured?

A. That's correct.

Q. On the other hand, suppose the application is rejected, what happens in that instance?

A. (The witness does not respond)

Q. What part do you play, in other words?

A. That has happened in a few instances. And we immediately get on the phone or contact the insured personally to let him know that it was rejected, to make whatever—take whatever action is necessary to have him not operate the vehicle, or get a replacement policy.

* * * * *

James M. Firebaugh

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* * * * *

Q. How familiar were you with John Taylor Brown?

A. I'd seen him a time or two as a teen-ager while visiting my brother in Rocky Mount, Virginia. And it seems—as usually happens—that he grew up overnight. And I recall him as a teen-ager and high school—

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Q. Well, he was pretty close to a near-stranger to you, then?

A. No, sir; he wasn't a stranger. It's hard to pin-point this degree of how well I knew him. I wouldn't say he was a stranger.

Q. I believe you testified earlier, in response to a question by Mr. Rakes, if you knew where he lived, and I think—I don't mean to misquote you—you said, I believe, he lived at 416 Pell Street, by virtue of his answer to the question on the application, but you did not know the physical—

A. I have never been to his home.

Q. When the first approach was made to you for an application for insurance, you concluded, after talking with him, that he would not be eligible for insurance with Nationwide, solely because of possibly three reasons—his mental status, his age, and income?

A. The income should not have been—if it was entered on the record, it was error. The income has nothing to do with that. The supporting business of his parents was the other factor that I mentioned—the fact that we do not insure his parents. Had he insured his parents, then we would have been, to a degree, obligated to have written his insurance.

Q. This places eligibility on an economic basis with Nationwide?

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A. No, sir.

Q. Well, suppose that his parents had said, "All right, we'll cancel our present insurance, and give it to you"; then you would have issued the policy for him?

A. Had I kept their insurance in force for six months.

Q. Six months?

A. Yes, sir.

Q. But since that was not the fact, you then looked for other sources of insurance for him?

James M. Firebaugh

A. Yes.

Q. Did your mind go directly to Insurers of Virginia?

A. Yes, sir. As I recall, they were one of the—or the only company that, at that time, would write a single, under-25 applicant male on this so-called substandard program.

Q. Did you lead them to believe that you were the agent for National Indemnity? Were they of this understanding?

A. Well, they understood I was to collect their money and remit it to the company.

Q. Now, this application—once again, that has been entered in evidence—says, "Premium quoted"—which, I believe, is $155.60?

A. Yes, sir.

Q. $155.60? Is the general procedure for the applicant to write a check to you, and then you in turn send cash or a check to the Insurers of Virginia?

6/15/67 A. That's correct—for the net amount.

page 43 } Q. So he does not write a check to Insurers of Virginia or to National Indemnity—he deals directly with you?

A. That's right.

Q. Now, you stated you wrote the answers to the questions on this particular application?

A. Yes, sir; I wrote that application.

Q. Generally speaking, do you explain the nature of any questions in the application, where it needs explanation?

A. Yes, sir; we do. That question could cover a lot of territory. I don't want to—we ask the question—we read it off to the applicant, and type it in, and then after it's completed, we hand it to them and ask them to look the application over, and if everything looks in order, then they sign it.

Q. And if they have any questions, they will ask, and you answer?

A. Yes, sir.

Q. When you asked a question on the application, listing impairments you may now have, you recall whether or not you elaborated on the interpretation?

Mr. Rakes: Excuse me for interrupting, Mr. Baugess. I don't see the word "now" in this application that you just quoted in the record.

Mr. Baugess: Strike the word "now."

Mr. Rakes: Excuse me. Go ahead.

James M. Firebaugh

6/15/67 By Mr. Baugess: (Continuing)
page 44 } Q. Did you elaborate on the question, "List any impairments you may have," or did you just ask the question, and he answered?

A. We have no guidelines as to specifically read off the list of illnesses. But I do recall, as mentioned previously, that we discussed his nervous condition and determined that this did not affect his driving—and that's the term we used for the nervous condition due to mental disturbance of his father's death.

Q. This question listing impairments you may have, does not state, "Further which may affect your driving"; is that correct?

A. It doesn't.

Mr. Rakes: I object to the question. The application speaks for itself. And Mr. Firebaugh's interpretation of what it may mean is completely irrelevant to the case.

By Mr. Rakes:

Q. You may go ahead and answer.

Mr. Rakes: I wanted to put that objection in the record.

Mr. Baugess: Certainly, if Mr. Firebaugh does not know the interpretation of the word "impairment," how can an applicant be expected to know?

Mr. Rakes: That's argument. That's not testimony.

6/15/67 A. I think I started to answer that we could
page 45 } only assume that this would be areas of impairment that would affect a man's driving—or the applicant's driving habits.

By Mr. Baugess: (Continuing)

Q. Was this specifically explained to him?

A. I don't recall.

Q. I think Mr. Rakes asked the question regarding the phrase, listing impairments you may have, and, as you stated, he did not ask the question—or ask you to explain that, but that you all had discussed that he had an emotional strain; and I think you stated further that he may have possibly mentioned he had seen a doctor about his nervous condition prior to this time, and you concluded that this was—or would not affect his driving ability?

James M. Firebaugh

A. We concluded it together—the applicant and I.

Q. Did you have any knowledge whatsoever that he may have had epilepsy?

A. No, sir.

Q. Do you know, in fact, whether he had ever had epilepsy, aside from hearsay?

A. At the time of the application, I did not.

Q. Did you know it prior to the time he had his accident?

A. I had no knowledge of it. However, I do know that a few months before the accident he was hospitalized for supposedly some irregular type of reaction—and I
6/15/67 have no evidence. It's just based on the connection
page 46 } of the family ties—which is normal that these things were discussed—that he may have tried to take his life before that—the final time he succeeded.

Q. This difficulty with this emotional difficulty, he informed you about?

A. This emotional thing, when we took the application, had no implications of him attempting suicide. It was only a nervous condition.

Q. As I say, you, in fact, didn't know that prior to the accident that he had epilepsy?

A. No, I had no knowledge of that.

Q. Plaintiff's Exhibit No. 2 is an SR 300, which purportedly was the duplicate of one filled out by someone whom you don't know?

A. I would have to ask the secretary who typed that, if she recalled any exact details of this.

Q. I would like for you to read something, if you would, off of the SR 300 that's been introduced. Read this description of the accident.

A. I repeat that this—the copy was in my file, and I have never read this before, other than to scan it, and I cannot verify that this is the wording of the report that was mailed to my office. Would you like this read in view of that?

Q. Yes.

6/15/67 A. This says on the back section of page number
page 47 } one, in the area describing the accident: (Reading)

"Vehicle #1 was traveling North on Rt. 220 and had an epileptic seizure and hit #2 and then continued on and hit #3 and #4. Vehicles 2, 3, and 4 were heading South. No. 1, 2, 3 and 4 - NC."

James M. Firebaugh

I can assume that the "NC" stands for "No charges placed."

And, again, I will say that the purpose of this copy is for my office to keep the basic details of the accident in my office so that if we should need this information at a later date, then we can interpret what this says. I cannot verify that is an exact copy of the original.

Q. My point a minute ago, you don't know who filled it out originally?

A. I don't think it would be fair to anyone involved for me to comment on this further, until I talk to the secretary who typed it, and see if she recalls what the instance was. I faintly remember it was signed by the assured—and that, based on the telephone report of his mother, was the basis on which we reported to the company.

Q. Mr. Firebaugh, I want to show you what is purported to be a duplicate copy of the Virginia State Police report made out by the investigating trooper on the accident in question. I want to show you the narrative description that was purportedly made by the state trooper, and I want to have you compare that with the description as shown on your SR 300, and have you tell the Court if there is any difference.

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A. The wording is identical to the two copies of SR 300 presented here.

By Mr. Baugess: (Continuing)

Q. That's all I wanted to ask.

REDIRECT EXAMINATION

By Mr. Rakes:

Q. I just have a couple of questions in rebuttal, Mr. Firebaugh. When you took this application from Mr. Brown, along with his $155.60, you didn't undertake to bind the insurance

with him the, did you—you didn't represent to him that you could guarantee you would get him insurance?

A. You are right. The assumption is that this is postmarked the same day; and when it reaches the Insurers of Virginia office we assume—the following day—they would make the final decision, after reviewing the application.

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Q. In other words, relating this back now specifically to this case, this application of John Taylor Brown, 6/15/67 he realized that you couldn't get him insurance page 52 } with Nationwide and bind him on the day he gave you the premium money, didn't he?

A. He understood that.

Q. You all discussed the fact that you were going to try to get him coverage through Insurers of Virginia, Incorporated, in Richmond?

A. Yes, sir.

Q. And he gave you the premium money and signed the application in your presence, with that understanding?

A. Yes, sir.

Q. And did he have an opportunity to examine the answers to the questions which you had written, and he had verbally disclosed to you?

A. Yes, sir. The application was handed to him.

Q. Completely filled out?

A. Yes, sir.

Q. And he signed it in your presence?

A. Yes, sir.

* * * * *

Received and filed July 13, 1967 by Juanita Gregory, Deputy Clerk.

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Dep.
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page 1 }

* * * * *

Depositions *de bene esse* on oral examination of W. H. Brillheart and John E. Dempster taken in behalf of the plaintiff, before Margaret H. Dutrow, a notary public in and for the Commonwealth of Virginia at large, pursuant to annexed Notice, commencing at 10:30 o'clock a. m., June 21, 1967 in the offices of the Division of Motor Vehicles, 2220 West Broad Street, Richmond, Virginia.

APPEARANCES:

Richard C. Rakes, Esq., of the firm of Gentry, Locke, Rakes & Moore, Roanoke, Virginia,
Counsel for the Plaintiff.

W. Travis Poole, Esq., of the firm of Poole, Moncure, and Thompson, Mutual Building, Richmond, Virginia,
Counsel for the Defendant Burroughs-White Chevrolet Corp.; and Utica Mutual Insurance Co. under the Uninsured Motorist Act.

Dep.
6/21/67
page 2 } W. H. BRILLHEART, was sworn and deposed in behalf of the plaintiff, as follows:

DIRECT EXAMINATION

By Mr. Rakes:

* * * * *

Q. Mr. Brillheart, in your capacity as Director of the Bureau of Safety Responsibility for the Division of Motor Vehicles, do you have under your custody and control certain records pertaining to some licensed motorists of the State of Virginia?

Dep.
6/21/67 A. Yes.

page 3 } Q. Do you have records in particular pertaining to a party by the name of John Taylor Brown of Rocky Mount and Martinsville, Virginia?

A. Yes.

Q. What is the first record you have in your file pertaining to this individual, Mr. Brillheart?

A. The first notice we had of the individual was November 22, 1963.

Q. What particular record is that? What does it pertain to?

A. This record was pertaining to an application for renewal of operator's license and a statement by Dr. Frank H. Dudley addressed, "To whom it may concern."

Q. May I see that, please? You say this report came in connection with a renewal of an operator's license by John Taylor Brown?

A. In connection with an application for renewal of his license.

Q. What is the date of that application for renewal?

A. November 20, 1963.

Q. May I see that, please? What action was taken by the Division of Motor Vehicles with respect to this application for renewal of operator's license submitted by Mr. Brown? What I am getting at, of course, is whether or not he was issued an operator's license based upon this application?

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page 4 }

A. At that particular time he was not issued a renewal license. In fact, the application was rejected.

Q. What does the record reflect as the next activity with respect to this individual?

A. Mr. Brown was requested to get a further statement from his physician, which he did, on the Division of Motor Vehicles' form.

Q. What physician was that, sir?

A. Dr. F. H. Dudley.

Q. What is the date of that additional statement?

A. February 24, 1964.

Q. And following receipt of that additional—

A. May I retract that statement? In lieu of what I just stated, the same form was executed by Dr. F. H. Dudley on December 13, 1963.

Q. In other words, Dr. Dudley submitted additional statements from his November, 1963 letter to DMV, statements on the regular forms used by DMV; those additional statements being submitted in December, 1963 and in February, 1964?

W. H. Brillheart

A. Yes.

Dep. 6/21/67 page 5 } Q. Now what was the next activity in your file following receipt of Dr. Dudley's form report of February, 1964?

A. The next activity was a letter dated March 6, 1964 by this Division addressed to John Taylor Brown.

Q. What did this letter purport to say to Mr. Brown?

A. Reading from the letter, and I quote, "We are in receipt of an acceptable physician's statement and a check in the amount of two dollars.

"Since your operator's license 3L 312180 expired November 30, 1963, it will be necessary that you undergo and pass a complete examination. A schedule of examinations is attached.

"If another license is issued to you, you will be required to furnish this office with an acceptable physician's statement about your medical conditon every six months.

"We are returning your check in the amount of two dollars to be paid to the examiner, when you have passed an examination." And it is signed "Yours very truly, C. H. Lamb, Commissioner, by J. B. Warfield, Director of Bureau of Operators Licenses."

Q. What happened next with reference to this applicant? Did he submit a new application to the Division of Motor *Vehilces,* dated March 9, 1964?

A. Yes.

Q. Do you have that application, sir?

Dep. 6/21/67 page 6 } Mr. Rakes: By agreement and stipulation of counsel the entire records of the Division of Motor Vehicles on John Taylor Brown will be copied and an exact copy will be introduced into evidence in lieu of the original of the Division of Motor Vehicles, to be called Plaintiff's Exhibit "A."

Mr. Poole: We will agree to the stipulation. (The said copies of the records of the Division of Motor Vehicles were marked as Plaintiff's Exhibit A.)

By Mr. Rakes:

Q. Mr. Brillheart, is this an exact, true copy of that application which was forwarded to me by you at my request and your letter to me of December 23, 1965?

A. Yes, sir.

Mr. Rakes: We would like to mark this for identification as Plaintiff's Exhibit No. B.

(The said application and letter were marked as Plaintiff's Exhibit No. B.)

Q. Mr. Brillheart, on the reverse side of this application I wish you would read that Question No. 2 and the answer shown on that application, please?

A. "Do you have any physical or mental disability . . ." That is blacked out by a stamp, " . . . or any disease that causes loss of consciousness or control of body or limbs?"

Dep. 6/21/67 page 7 }

Q. What was the response given to that question on the application submitted by John Taylor Brown?

A. "Yes."

Q. And did he give any explanatory comment to that answer?

A. Yes.

Q. Would you read that, please?

A. "The disability was over a year and has cleared up. A physician's statement is on record in Richmond."

Q. Now, of course, the Division of Motor Vehicles did have several physicians' statements on record at the time that application was submitted?

A. Yes, sir.

Q. Based upon the new examination and the new application was an operator's license issued to Mr. Brown in 1964?

A. Yes, sir.

Q. Do you have that date, sir?

A. March 26, 1964.

Q. Was there any restriction placed on that operator's license?

A. The license was issued on the condition that a satisfactory medical report would be required semi-annually in order for the license to remain valid.

Dep.

W. H. Brillheart

6/21/67 page 8 } Q. All right, sir, were any subsequent medical reports received?

A. Yes, sir.

Q. When was the next one, sir?

A. September 16, 1964.

Q. May I see that, please? Were there subsequent reports received after that day?

A. Yes, March 23, 1965.

Q. May I see that? All of these ae by Dr. F. H. Dudley of Rocky Mount, Virginia?

A. Yes.

Q. Were any medical reports received after that day? Was that last report of Dr. Dudley of March, 1965 accepted by the Division of Motor Vehicles as complying with the requirements of the restricted permit?

A. No.

Q. Were subsequent reports received?

A. Yes.

Q. When was the next one, sir?

A. April 28, 1965.

Q. Were any subsequent medical reports received by the Division of Motor Vehicles between that day and September 26, 1965?

Dep. 6/21/67 A. No.

page 9 } Mr. Rakes: I have no further questions.

CROSS EXAMINATION

By Mr. Poole:

Q. Mr. Brillheart, the last medical report received on April 28, 1965 was acceptable to the Division of Motor Vehicles, was it not, sir?

A. Yes.

Q. Now the next report, medical report that you would require would be six months from April 28, 1965?

A. That is correct, or thereabouts, yes.

Q. You stated, however, that the report dated April 28, 1965 was the last report that you have received, is that correct, sir?

A. Prior to a certain date.

Q. I was just asking—

A. It was not the last report I received but it was prior to a date.

Mr. Rakes: September 26.

By Mr. Poole:

Q. When was the next report you received, Mr. Brillheart?

A. September 30th is the date we received the report.

Dep. 6/21/67 page 10

Q. What year was that, sir?

A. 1965.

Q. May I see that, sir? And that report was acceptable to you, was it not?

A. Yes.

Q. The Division of Motor Vehicles had never cancelled Mr. Brown's operator's license you granted? You granted it with the condition attached that he submit the medical reports?

A. His license was suspended by Order dated December 2, 1965.

Q. And for what cause, sir?

A. The reason, and I quote from the Order, "The records of this Division show that you are afflicted with or suffering from disabilities which act to prevent you from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways and you having waived a formal hearing in the premises and voluntarily surrendered your operator's license to the Division of Motor Vehicles, which is now being held in the files of this office."

Q. And that was December 2, 1965?

A. Yes, sir.

Dep. 6/21/67 page 11

Q. And he voluntarily submitted his license and waived the hearing?

A. Yes, sir.

Q. Did you have any medical report prior, just prior to issuing that Order, sir?

A. No, sir.

Q. On September 26, 1965, Mr. Brown did have a valid permit, did he not, sir?

A. Yes.

Q. Now, Mr. Brillheart, did his accident of September 26, 1965 have anything to do with your revoking his license, sir?

A. Yes, sir.

Q. And that action on the part of the Division of Motor Vehicles was taken without having Mr. Brown examined by a physician, sir?

A. No, it was taken on the basis of a driver deficiency report.

Q. But you did not have him examined by the physician at that time, did you, sir, or require him to be examined?

A. The Division of Motor Vehicles, as such, did not; he was examined.

Q. But on the record that you have he was considered capable of operating a motor vehicle on the highways in September, September 26, 1965?

Dep. 6/21/67 A. Yes, sir.

page 12 } Mr. Poole: We have no further questions.

* * * * *

REDIRECT EXAMINATION

By Mr. Rakes:

Q. Mr. Brillheart, this driver deficiency report which you mention in response to Mr. Poole's questions, is that not a report on a standard form of DMV, SP-163, entitled Driver Deficiency Report, which was dated at Martinsville, Virginia on October 7, 1965 and submitted by Virginia State Trooper C.P.S. Price?

A. Yes, with one exception, it is a State Police form.

Q. But it was received by the Division of Motor Vehicles in the normal course of its business here in Richmond?

A. Yes, sir.

Mr. Rakes: I have no further questions.

RECROSS EXAMINATION

By Mr. Poole:

Q. Mr. Brillheart, quite a few operators' permits are revoked by the Division of Motor Vehicles by reason of the fact that a driver has been in an accident or more than one accident, whether he has any physical deficiency or not?

Dep. 6/21/67 page 13 } A. Yes.

Mr. Poole: That is all.

John E. Dempster

REDIRECT EXAMINATION

By Mr. Rakes:

Q. This Order which you read into the record a moment ago, which revoked Mr. Brown's operator's license in view of his voluntarily surrending same in lieu of a hearing, had he indeed received a Notice of a hearing prior to his voluntary surrender of his permit and was the purpose of this proposed hearing to examine his qualifications to be able to continue having the privilege of operating a motor vehicle on the highways of this State?

A. Mr. Brown received notice through investigation conducted by the Division, at which time the waiver was given. The purpose, of course, was to determine whether or not he was competent to operate a motor vehicle safely.

Q. He had the choice either of going through the formal hearing or waiving the hearing and voluntarily surrendering his license, and he chose the latter?

A. Yes, sir, this is correct.

* * * * *

Dep.
6/21/67
page 15 } JOHN E. DEMPSTER, was sworn and deposed in behalf of the Plaintiff, as follows:

DIRECT EXAMINATION

By Mr. Rakes:

Q. Please state your name and business address?

A. John E. Dempster, 3123 West Marshall Street, Richmond, Virginia.

Q. What is your occupation?

A. General insurance.

Q. How long have you been in this business?

A. In the general insurance business?

Q. Yes, sir?

A. Since 1936.

Q. Are you connected with any particular insurance agency at the present time?

A. Yes, Insurers of Virginia, Incorporated.

Q. Located at this address you have just given?

A. Same address.
Q. What position do you hold with this corporation?
A. President.
Q. How long have you occupied that position?
Dep. A. Since 1951, I think.
6/21/67 Q. Mr. Dempster, was Insurers of Virginia, In-
page 16 } corporated, operating as that particular entity in 1964?
A. Yes.
Q. Do you recall approximately when this firm was incorporated?
A. I think it was 1951.
Q. In June, 1964 did your insurance agency act as general insurance agent for any automobile liability insurance carriers?
A. Yes.
Q. How many?
A. I think two, as well as I remember.
Q. Was National Indemnity Company one of them, of Omaha, Nebraska?
A. Yes.
Q. Now, Mr. Dempster, did your agency have authority from National Indemnity Company to write automobile liability policies at that time?
A. Yes.
Q. And did you have some of the policy forms in your office and would your own personnel type some of these policies that were issued by your agency?
A. We typed all of the policies.
Dep. Q. That were issued by your agency?
6/21/67 A. Issued by the agency for this Company.
page 17 } Q. Now did your agency accept any business brokered through other agencies throughout the State of Virginia?
A. Yes.
Q. Did you have any type of written contract with any of these other agents?
A. No.
Q. Do you know Mr. James M. Firebaugh, a Nationwide agent of Roanoke, Virginia?
A. Yes.
Q. Was your agency accepting brokerage business through him in 1964?

A. Yes.

Q. And your agency had authority to bind coverage for National Indemnity Company, did it not?

A. Yes.

Q. Did Mr. Firebaugh, who brokered some business through your agency, have authority from National Indemnity Company to bind coverage for them?

A. No.

Q. Did you furnish Mr. Firebaugh and other agents throughout the State with a supply of application forms with Insurers of Virginia's name printed on it?

Dep. 6/21/67 page 18

A. Yes.

Q. What was the purpose of these application forms?

A. Well, it was to accept business that met our underwriting approval which was declined or cancelled by other companies or they couldn't get insurance for one reason or another.

Q. Would it be fair to say that National Indemnity Company wrote some substandard coverage?

A. Yes.

Mr. Poole: Mr. Rakes, this is a deposition *de bene esse* and I think you are leading the witness extensively, sir, and I object to it.

By Mr. Rakes:

Q. If, National Indemnity Company accepted an application from a substandard risk, would the policy be written at the same or a greater premium than a normal risk?

A. At a greater premium.

Q. What is this called?

A. It is called a substandard rate.

Q. Is surcharge another name for it?

A. Yes.

Q. When Mr. Firebaugh and other agents who did business with your firm took and signed an application from an individual who desired coverage, what would they do with it?

Dep. 6/21/67 page 19

A. They would send it to us for approval and the writing of the policy, if it was approved.

Q. Were any of these other agents, and Mr. Firebaugh, in particular, on a payroll of Insurers of Virginia, Incorporated?

John E. Dempster

A. None were.

Q. When they would take an application and submit it to your firm and it was approved and the policy written, what sort of remuneration would the brokering agent receive?

A. He received part of the commission we received from the company.

Q. How was this collected?

A. Well, the agent collected the premium and forwarded to us either the net or the full amount and if he forwarded the full amount we reimbursed him for the commission that was due him.

Q. Did your firm write a policy for National Indemnity Company in June of 1964 for an insured by the name of John Taylor Brown?

A. Yes.

Q. How did your firm come to write this policy?

A. Application for the policy was submitted by James M. Firebaugh.

Dep. 6/21/67 page 20

Q. Is he a Nationwide agent in Roanoke, Virginia?

A. Yes.

Q. Do you have that original application in your file?

A. Yes, I do.

Q. May I see, please?

Mr. Rakes: I am going to ask the Court Reporter to mark this original application, dated June 2, 1964, reportedly signed by John T. Brown, as Plaintiff's Exhibit C.

(The said report was marked as Plaintiff's Exhibit C.)

Q. Was that policy period June 3, 1964 to June 3, 1965?

A. That is correct.

Q. Was that covering a 1961 Ford Thunderbird?

A. Yes, sir.

Q. Now was there a change of vehicle on that policy subsequent to the date that was issued?

A. Yes.

Q. What vehicle was substituted for it?

A. A 1965 Ford Coupe. Do you want the motor number?

Q. No, sir. What date was that change of vehicle effected?

A. April 21, 1965.

John E. Dempster

Dep. 6/21/67 page 21

Q. This is called "general change endorsement, No. 1," is that a true copy of that endorsement?
A. Yes.

Mr. Rakes: I will ask the Court Reporter to mark this as Plaintiff's Exhibit D for identification.

(The said form was marked as Plaintiff's Exhibit D.)

Q. Now, Mr. Dempster, was this original policy subsequently renewed?
A. Yes.
Q. When was that?
A. It was renewed July 26, 1965.
Q. And effective for how long?
A. It was cancelled—
Q. How long was it effective?
A. For one year to July 26, 1966.
Q. And was cancelled when?
A. November 16, 1965.
Q. Now, did you have any understanding or did you have any instructions from the home office of National Indemnity Company in Omaha as to what type of substandard risk you could write and what types you could not write in June, 1964?
A. Yes.

Dep. 6/21/67 page 22

Q. Can you generally describe those types of risks that were in the prohibited class at that time?
A. Well, risks that had any type of disability that might cause a blackout while driving or any drivers who went to sleep at the wheel and caused an accident or habitual drinkers, drinkers with evidence of drinking and driving, and various others, those who had a number of convictions for accidents; it is quite a long list.
Q. Now if a person was unable to obtain insurance as a normal risk and was unable to obtain insurance as a substandard risk through a company which would voluntarily write a policy on it, was there any other source that he might turn to in an effort to try to obtain liability coverage?
A. There is the Virginia Automobile Assigned Risk Plan which also has restrictions.
Q. Are those restrictions greater or less than National Indemnity Company?

John E. Dempster

A. Well, I think they would both be about the same as far as the type of risk we would take.

Q. Would it be possible for a person to obtain coverage through the Virginia Automobile Assigned Risk Plan and not be able to get coverage through National Indemnity Company?

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Q. And in that situation the individual applicant would not apply to a particular company but he would make his application to the Virginia Automobile Assigned Risk Plan and then he would be assigned to a particular company?

A. That is correct.

Q. Which was the next one on the list?

A. Right.

* * * * *

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Q. Mr. Dempster, was Mr. Brown applying for coverage with assigned risk?

A. No.

Q. Was he applying for voluntary coverage?

A. So far as I know.

Q. I mean application that was received from Mr. Firebaugh in this instance was to your agency, was it not?

A. That is correct.

Q. Do you submit any records to the Home Office Underwriting Department in Omaha, Nebraska of policies that you write?

A. Yes.

Q. What information do you submit to them?

A. I submit the application or a copy of the application and a copy of the policy called a daily report.

Q. Does the Home Office Underwriting Department in Omaha, Nebraska have the power to cancel any policies that you have bound coverage for and written policies on?

A. Yes.

Q. If the application that you had received from Mr. Firebaugh, signed by John T. Brown, had disclosed the fact that he had been treated for epilepsy, would you have written a policy?

A. No.

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Q. Why not?

A. It is the type of disability that is on our list not to accept.

page 25 } Q. Do you ever or have you ever received an application for insurance coverage which you were not certain as to whether it might be the Company's standard and had to submit it to the Home Office before the policy itself was issued?

A. Not often, it might occur on a commercial risk.

Q. But not often with respect to private passenger automobiles?

A. No, sir.

Mr. Rakes: Answer any questions Mr. Poole has.

CROSS EXAMINATION

By Mr. Poole:

Q. You mentioned that you had instructions from the Home Office of the National Indemnity Company as to what risks to write or what substandard risk to write and what not to write; do you have a copy of that list?

A. No, I don't, I don't have one available.

Q. Was it given to you in writing or were those oral instructions?

A. I don't remember whether I have ever had any in writing from the Company but I have made up lists of types of risks we will not take and used that with the approval of the Company.

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page 26 } Q. Did this Company approve that list that you submitted to them, sir?

A. Yes.

Q. Would you be kind enough to supply me with a copy of that written list that you compiled?

A. If I can find one, I am not sure I can find one.

Q. Now, Mr. Dempster, what investigation did you or the Company make concerning Mr. Taylor Brown before you bound him under this policy, the original policy?

Mr. Rakes: At this point counsel for the plaintiff will object on the ground that no further investigation is required by law of the company other than the analyzing of the written application submitted by the applicant for insurance. However, I have no objection to the witness going forward and answering, I simply make my objection on the ground of irrelevancy.

John E. Dempster

A. We obtain Division of Motor Vehicle reports on all risks.

By Mr. Poole:

Q. Did you obtain such a report on Mr. Brown?

A. Yes.

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Q. Did you make any other further investigation?

A. No.

Q. But on the basis of the report you received from the Division of Motor Vehicles you did issue him the policy?

A. That is correct.

Q. Did your Company make any further investigation when the policy was renewed, sir?

A. Not that I know of.

Q. Did you see Mr. Brown when the policy was renewed?

A. No, sir.

Q. You just renewed it because it had expired?

A. Because the premium was sent in and renewal requested.

Q. And at that time, in issuing the renewal policy, you made no further investigation?

A. Except the Division of Motor Vehicle's report.

Q. And that report was evidently satisfactory to you because you renewed the policy?

A. Yes, sir, it only contained one speeding charge.

Q. Now, Mr. Dempster, I believe you said that this policy was cancelled as of November 16, 1965?

A. Yes, sir, that is correct.

Q. What did you do when you cancelled the policy, Mr. Dempster?

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A. Sent the usual cancellation notice.

Q. Was that all you did, sir, just send him the cancellation notice?

A. That is all that is required.

Q. And you made no return of premium to him?

A. Oh, yes.

Q. What premium did you return to him, sir?

A. The return premium was $167.00.

Q. And when was that premium returned to him?

A. I don't have those records with me.

Q. Did you return the premium to him or did you return it to the Company or who was it returned to and by whom?

A. It was returned—I will have to look that up, I don't know; it was returned to either the insured or the agent who sent it in.

Q. You can't answer that question without referring to your records?

A. No, I cannot.

Q. What is your general practice? Do you return it to the writing agent?

A. Usually, yes.

Q. And that is your usual practice?

A. Yes.

Q. And you do not return it directly to the insured?

A. No, we return it to the agent, usually.

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Q. What was the total premium on the policy, sir?

A. $242.00.

Q. And you returned to him only $167.00?

A. That is correct.

Q. And you are not sure whether that was returned to Mr. James Firebaugh, the producing agent, or whether it was returned to Mr. Brown, the insured?

A. I would have to check my records.

Q. Mr. Dempster, prior to writing the original policy did you review any other records at the Division of Motor Vehicles other than the one you wrote?

A. That has never been done as far as we are concerned.

Q. And though Mr. Taylor Brown had a record here which would have been available to you, you made no inquiry of that fact?

A. It would be absolutely impossible to get that record on all of our insureds.

Q. But you did not do it as far as Mr. Taylor Brown?

A. We don't do it as far as anyof them are concerned.

Mr. Poole: We have no further questions.

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REDIRECT EXAMINATION

By Mr. Rakes:

Q. Mr. Dempster, sir, you have mentioned several reports

that were obtained from the Division of Motor Vehicles and I believe you stated that policy was issued after receiving those reports, is that entirely correct, sir?

A. We do it both ways, we either write the policy without the report and obtain the report or we get the report before we write it, whichever is convenient.

Q. Which was done in this instance?

A. The report was received after we wrote the policy. Those reports are not available most of the time when the insured wants coverage.

Q. Mr. Dempster, I hand you a document and ask you to identify it, please, sir?

A. Yes.

Q. What is it, sir?

A. It is a letter written by Lee H. Firebaugh, Chief of Police, Town of Rocky Mount, Virginia, to the Division of Motor Vehicles, "Attention: Bureau of Safety Responsibility."

Q. Would you read that, please?

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A. "Please verify or furnish the number of the current Operator's or Chauffeur's license and any accident and/or conviction record on the person listed on the reverse side of this form.

"Thank you very much for your assistance in this matter, and may I assure you that it is our desire to aid you at all times.

"Yours very truly, Lee H. Firebaugh, Chief of Police."

Q. All right, sir, now turn over on the reverse side; what do you find there?

A. It is a form that has been filled in partly with typewriter and partly in handwriting.

Q. Would you just read the form also and the typewritten insertions first?

A. The first is, "Name," and it is typed, "John Taylor Brown."

(Off the record.)

Q. Now, Mr. Dempster, this typewritten entry on the reverse side of this form also shows the address of 416 Pell Avenue, Rocky Mount, Virginia?

A. That is right.

Q. It shows the month, date of birth, sex and race of John Taylor Brown and also his current operator's license number, is that correct?

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A. That is correct.

Q. All right, the handwritten notations, it has "exp: 11-30-66," it has "corrective lenses," "convictions: none;" "accidents, none;" "revocations or suspension: no," and it is dated May 29, 1964?

A. That is correct.

Q. Do you know how this got in your file, Mr. Dempster?

A. It was evidently sent in by the broker, Mr. Firebaugh.

Q. Mr. James M. Firebaugh?

Mr. Rakes: I ask the Court Report to mark this as Plaintiff's Exhibit E.

(The said report was marked as Plaintiff's Exhibit E.)

Q. Now, Mr. Dempster, I hand you another form and ask you if you will identify it, please?

A. Yes, sir, I do.

Q. What is that?

A. It is a copy of Mr. Brown's Division of Motor Vehicles record obtained March 31, 1965.

Q. Is this one of your agency form letters?

A. Yes.

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Q. And was that form typed up in your office, some of the entries, and mailed to DMV on March 31, 1965?

A. Yes.

Q. And was it then received back in your office in the regular course of your business?

A. Yes.

Q. From the Division of Motor Vehicles?

A. Yes.

Q. With the date of April 5, 1965?

A. That is the date the record was obtained.

Mr. Rakes: I will ask the Court Reporter to mark this as Plaintiff's Exhibit F for identification.

(The said report was marked as Plaintiff's Exhibit F.)

Philip Liesche

Mr. Rakes: No further questions.

RECROSS EXAMINATION

By Mr. Poole:

Q. Mr. Dempster, after all the records you received and making what investigation you did, this policyholder, Mr. Brown, was charged a surcharge for this insurance, was he not?

A. That is correct.

Q. And you did that, made that surcharge on the basis that he was a substandard risk, sir?

A. No, that is not correct.

Q. Why did you?

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A. The substandard surcharge was due to a speeding charge on his DMV record.

By Mr. Rakes:

Q. How about the question of his being a male driver under twenty-five years of age?

A. That carries a certain rate, a higher rate than one who is over.

* * * * *

Vol. #3

Received under seal Jul 21 1967 and filed.

Juanita Gregory, Deputy Clerk.

DEPOSITION OF PHILIP LIESCHE

Deposition of MR. PHILIP LIESCHE, taken before me, Jack M. Fitch, Notary Public and Court Reporter within the State of Nebraska, beginning at 3:30 o'clock P. M., June 23, 1967, at 730 Farm Credit Building, Omaha, Nebraska, pursuant to the within Stipulations, to be read in evidence in behalf of the Plaintiff in the above-entitled action.

* * * * *

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APPEARANCES

MR. HARRY L. WELCH, on behalf of the Plaintiff;

MR. JOHN R. BARTON, on behalf of the Defendants.

* * * * *

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page 3 } PHILIP LIESCHE, being by me first duly examined, cautioned, and solemnly sworn, as hereinafter certified, testified as follows:

DIRECT EXAMINATION

By Mr. Welch:

Q. Would you please state your name?

A. Philip Liesche.

Q. Where do you live, Mr. Liesche?

A. 1406 Crawford Road, Omaha, Nebraska.

Q. How old a man are you?

A. Forty-nine.

Q. What connection, if any, do you have with the National Indemnity Company of Nebraska?

A. I am a vice president.

Q. Where is the National Indemnity Company located?

A. 3024 Harney, Omaha.

Q. And that is the home office of the company?

A. It is.

Q. Do you hold an office in the National Indemnity Company?

A. I am vice president.

Q. Who is the president of the company?

A. Mr. Jack Ringwalt.

Q. And are you the next highest officer of the company?

A. Yes.

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Q. Are you the first and only vice president?

A. Yes.

Philip Liesche

page 4 } Q. How long have you been a vice president of National Indemnity Company?

A. Oh, approximately sixteen or seventeen years.

Q. And what has been your capacity and experience with National Indemnity Company so far as underwriting is concerned?

A. Well, I have always headed the underwriting section of the company.

Q. When you say always, for what period of time?

A. Well, I have been with them a little more than nineteen years and I came in as an underwriter and have supervised underwriting from then on.

Q. And were you in underwriting prior to the time you came to National Indemnity Company?

A. Yes, I was.

Q. Over whom do you have supervision in the underwriting department, what department, or what group of persons of the National Indemnity Company?

A. Well, we work through territories. The country is divided into territories and the head of each territory is called a territorial underwriter, which we have six or seven. They are supervised by Roland Miller, who is our chief underwriter, and I would supervise Roland.

Dep. 6/23/67 page 5 } Q. Now, Mr. Liesche, has a matter concerning Mr. John Taylor Brown of 416 Pell Street, Rocky Mount, Franklin County, Virginia, come to your attention?

A. It has.

Q. And was John Taylor Brown a policyholder of National Indemnity Company?

A. Yes.

Q. Who is your agent in Virginia or particularly in Richmond?

A. John Dempster and the business name is Insurers of Virginia, Incorporated.

Q. 3123 West Marcel Street, Richmond, Virginia?

A. That's right.

Q. Are they authorized by the National Indemnity Company to write business in Virginia as your agent?

A. They are.

Q. And do the Insurers of Virginia, Incorporated, your agent, have the authority to issue policies in Virginia?

A. Yes.

Q. Now, in connection with their issuing of policies in Virginia, is this subject to a review by the underwriting department in Omaha?

A. Yes.

Q. And do you reserve the right in the event the risk becomes known or is disclosed to be undesirable—do you reserve the right to cancel policies written by the Insurers of Virginia?

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A. We do.

Q. Now, Mr. Liesche, the evidence in this case will disclose that John Taylor Brown of 416 Pell Street, Rocky Mount, Franklin County, Virginia, signed an application for automobile liability insurance, for an automobile liability insurance policy, on the 2nd day of June, 1964; that among the questions that were asked in this application was the following question - "List any impairments you may have," and his reply was, "None." Now, let me first ask you, have you seen that application or copies of it?

A. Yes.

Q. In your department records?

A. Yes.

Q. If Mr. John Taylor Brown had in this question of "List any impairments you may have," - if he had answered that he was suffering from epilepsy, would you have written a policy?

A. No.

Q. Or I should say, would you have issued the policy?

A. No.

Q. Is that a policy or regulation of the company?

A. It is.

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Mr. Barton: Object to that as not being the best evidence.

Q. If it subsequently became known by the National Indemnity Company that Mr. John Taylor Brown was suffering from epilepsy, what would you have directed to be done?

Mr. Barton: Same objection.

A. Requested cancellation.

Q. And how would you request cancellation, through your agent?

A. Yes.

Mr. Welch: I believe that's all.

CROSS EXAMINATION

By Mr. Barton:

Q. Mr. Liesche, does National Indemnity have an underwriting manual or manuals?

A. Yes, we have rate cards containing underwriting rules.

Q. Did you bring those with you today?

A. No, I didn't.

Q. Will you make them available to me?

A. I will be glad to do so.

Q. So that it can be made a part of the deposition. Mr. Liesche, you have been with the National Indemnity almost from its beginnings, haven't you?

A. Well, not the very beginning, but—

Dep. 6/23/67 page 8 } Q. For the greater share of its growth?

A. I think it had been in existence about seven or eight years when I joined them.

Q. Has National Indemnity been what might be termed sort of a special risk company?

A. They have.

Q. In other words, National Indemnity would write risks that other companies would not write, am I correct?

A. True.

Q. And for that, of course, you charged additional premium?

A. That's right.

Q. Do you know of a James Firebaugh? I understand he is the producing agent on the business.

Q. And do Insurers of Virginia or Mr. Firebaugh have what in the industry would be termed "binder authority"?

A. Insurers of Virginia would have. Mr. Firebaugh would not.

Q. Why would he not have binder authority?

A. Because that is not supposed to be carried beyond our general agent who is familiar with our operation and the rating.

Q. Was Mr. Firebaugh a part of your general agency or—

A. No.

Q. What was his connection with Insurers of Virginia?

Philip Liesche

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A. He took applications for business, submitted them to Insurers of Virginia for acceptance and after they were accepted they delivered the policy, collected the premium, and paid Insurers of Virginia for the policies.

Q. Now, in this particular instance, do you know whether or not Mr. Firebaugh or Insurers of Virginia collected the premium in advance?

A. I have no knowledge of that.

Q. Would the records that you have with you show whether or not he did?

A. No.

Q. They would not?

A. These would be in John Dempster's office and not a part of the company records at all.

Q. Who is John Dempster?

A. He is president of Insurers of Virginia.

Q. Do you have a copy of the application in your file that was signed by John Taylor Brown?

A. I don't have one here.

Q. Would the underwriting cards or underwriting manual that we have talked about—would Insurers of Virginia also have those underwriting cards, or would they be limited to your territorial underwriters?

A. No, they would have the underwriting instructions.

Q. And what about Mr. Firebaugh, would he have them also, do you know?

A. Probably.

* * * * *

Received and filed July 6, 1967 by Juanita Gregory, Deputy Clerk.

* * * * *

The Deposition of Dr. D. S. Camden taken before Jean Stritesky, a Notary Public for the State of Virginia at Large, on the 28th day of June, 1967, at his offices at the Collinsville Shopping Center, Collinsville, Virginia, at 9:00 A.M., and taken *De Bene Esse,* pursuant to copy of notice to take depositions which is hereto attached.

APPEARANCES:

Mr. Richard C. Rakes, Esq., of Gentry, Locke, Rakes, Moore & Rakes,
Shenandoah Building,
Roanoke, Virginia,
Counsel for Plaintiff,

Mr. Dalton Baugess, Esq.,
118 1/2 Main Street,
Salem, Virginia.

* * * * *

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page 2 } DR. D. S. CAMDEN, a witness for the Plaintiff, being first duly sworn, deposed as follows:

DIRECT EXAMINATION

By Mr. Rakes:
Q. Please state your name and professional address?
A. Dorman S. Camden, M.D., Collinsville Shopping Center, Collinsville, Virginia.
Q. I believe you are a doctor of medicine?
A. I am.

* * * * *

Q. Do you practice any specialty, sir?
A. No, sir.
Q. You are engaged in the general practice of medicine?
A. General practice of medicine is right.

* * * * *

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* * * * *

Q. Doctor Camden, did you have occasion to see professionally an individual by the name of John Taylor Brown?

Dr. D. S. Camden

A. Yes, I did, sir.

Q. When did you see him the first time?

A. I saw him the first time, 1-7-65.

Q. What was the reason Mr. Brown consulted you on that occasion, Doctor Camden?

A. With a chief complaint of urinary frequency.

Q. And did you do an examination then?

A. I did not do a thorough examination. I geared into the problem at hand and examined primarily his genital urinary system, finding that he had an acute kidney infec-
Dep. tion, as evidenced by fever and by pyuria, which is
6/28/67 pus of the urine, and treated for same with good
page 4 } response.

Q. What address did he list at that time?

A. Only one and that was his place of employment which was Style City Beauty Salon, which is across the hall from me here.

Q. You didn't take a residence address from him?

A. No, sir.

Q. In other words, the patient was employed in the vicinity of where your office is located?

A. That's right, across the hall.

Q. Did you take a history from him on this occasion?

A. No, sir, except for one thing, and he was asked if he was allergic to any type of medication, at which time he told me that he was allergic to penicillin, and that he had one previous—now, this is not per my notes here and chart, but rather from memory; that he had had a similar episode in Rocky Mount, and was treated by some physician in Rocky Mount some time in the past.

Q. Did you see him on more than one occasion
Dep. after this first visit?
6/28/67 A. Yes, sir, I saw Mr. Brown many times after
page 5 } this particular visit. One was a follow-up visit
for his kidney infection which had cleared. That was some ten days following the institution of treatment for his kidney problem. Shall I continue with—

Q. With each of the visits, yes, sir.

A. All right, again I saw him in February 1st, 19—, pardon me, no—that was a follow-up visit—no, that was a third visit to ascertain that his urine was clear, and then I saw him on February 17th, 1965, at which time he had a rash on his face, and I felt that it was probably a fungus problem, and

Dr. D. S. Camden

gave him appropriate medication for this which was fulvicin, which did not clear with the medication and—pardon me, which did clear with the medication—yes.

Now, he was again seen on March 27, 1965, with an earache, and at this time wax was removed from his ear which cleared his earache.

Q. When was the next time?

A. The next time was on April 22nd, 1965, at which time I didn't see him but he called me on the phone and said he had a cold, and I sent him appropriate medication from Wickline's Drug Store for this.

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Q. The next contact you had then?

A. The next contact was in July—let's see, July 27th, 1965, at which time he was complaining of an itch in the groin area, and this was found to be a lice problem in the groin area, which was treated with appropriate medication and cleared.

The next time was in August—on August 2nd, 1965, at which time he was complaining of abdominal discomfort, and it was felt that he probably had peptic ulcer problems, and for this hospitalization was advised, which was accordingly done on that date. And he was given a complete work-up in the hospital, at the Martinsville General Hospital, and at that time the positive findings were, on X-ray, it was felt that he had a duodenal ulcer, a small one. As a general work-up, or included in his work-up, a thyroid evaluation was done which revealed that he did have a low thyroid condition commonly called hypothyroidism, and he was, therefore, at that time, started on appropriate medication for this, plus medication for his ulcers, which were, for the ulcer problem, he was given a medication called probanthine and mylanta, which is an antiacid.

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Now, at the time when he was in the hospital, the cause of this particular laboratory examination; that is, the P.B.I. because that—because the blood had to be sent to California, I did not make a diagnosis of low thyroid problem for some two weeks following his discharge, because the results had not yet come back to me.

And then on 9-9-65, he was commenced on his thyroid medication which was cytomel, twelve and a-half micrograms, gradually increased to a total of thirty-seven and a-half micrograms.

Now, the next time I saw him was 10-28-65; at this time was

Dr. D. S. Camden

for an evaluation of this thyroid status, and a blood test at that time revealed that he was on the appropriate—no, I beg your pardon—let's go back. The next visit I saw him was on 9-24-65, which was in follow-up to ascertain how he was doing with regard to both his ulcer and his thyroid condition, and at that time he was doing well, with absence of any abdominal pain and was feeling more alert and with more energy which was felt to be secondary to his thyroid medication.

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The next time I saw him was on the morning of 9-26-65, at which time I was in the hospital and was called to the Emergency Room to see Mr. Brown because of an automobile accident that allegedly had happened, and when I saw him in the Emergency Room, he was apparently in a postictal state, drowsy, evidence of some bleeding from his mouth, which was found to be coming from a laceration which was small, on his tongue; his eyes rolling about from side to side and holding his left arm, which was obviously deformed.

He also was noted to have had urinary incontinence as evidenced by what appeared to be urine on his trousers.

He shortly thereafter became more alert, and at this time I questioned him about previous episodes of seizures and at that time, he gave me the history that he had had a similar episode two years previous to this, and that he had been taking regularly dilantin, two hundred milligrams a day. In addition, the history was obtained from one of the troopers that he had been seen to be salivating profusely at the time of the accident.

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Now this is—here too, this is from purely memory as far as history is concerned, and because I had known him so well over the previous few months of time that I had been treating him, I asked him why hadn't he told me something about his seizures that he had had in the past and the fact that he had been taking dilantin, and he remarked that it was an embarrassing thing for him and that he had intentionally withheld this information from me. Again this is not by written notes, but by memory.

Now, he was then hospitalized under Doctor Claude Sherman's care and treated for what proved to be a fracture of his left forearm.

And the next time that I saw him was after he was discharged from the hospital on 10-28-65, at which time he was

seen for follow-up of the three problems; one was ulcer, secondly was his thyroid status, and thirdly was the status of his—of what was thought to have been epilepsy, or an epileptic seizure at the time of his accident. And he was then continued on his dilantin and in view of the suggested therapy for epilepsy as evidenced by grand mal seizures, phenobarbital in the amount of a half of a grain three times a day, was instituted.

Dep. 6/28/67 page 10 } The next time I saw him was on 12-17-65 at which time he had a swollen left ankle which had been intermittently hurting and swelling since his accident 9-26-65, and at that time his ankle was X-rayed and was found to be negative, for fractures.

Q. Doctor Camden, what frequency did you prescribe medication for Mr. Brown following his automobile accident, in order to treat the epileptic condition?

A. The medication prescribed was a hundred milligrams of dilantin twice a day, and phenobarbital, grains a half—pardon me, I've forgotten what I said in terms of dosage of phenobarbital, but it was a quarter grain three times a day. Now, this was felt to be in order with what would be considered to be good dose medication for this problem in view of the fact that he had had no seizures for two years prior to his automobile accident, and it was felt that the addition of mild doses of phenobarbital would be adequate to control his seizure problem.

Dep. 6/28/67 page 11 } And also, I might add that John gave me the history following the accident, on his discharge from the hospital, that I believe his license had been revoked, and he at that time, was not driving.

Q. How did the medication which you prescribed for Mr. Brown after the accident, differ from the history that he gave you of the medication he had been taking prior to the accident, but which had not been previously disclosed to you?

A. The only difference was the addition of phenobarbital in a dose of a quarter grain three times a day.

Q. Did he tell you that he was taking the dilantin once a day?

A. Twice a day. Two hundred milligrams a day.

Q. Which is the same dosage you prescribed after the accident?

A. That's right. This was, as I brought out—was in view of the fact that he had been so nicely controlled on just the two capsules for over a two-year period of time.

Dr. D. S. Camden

Q. Where had he been getting the dilantin prior to the time that you became aware of the epileptic condition?

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A. I can't tell you, sir. I don't know.

Q. But your understanding from him was that he was taking these capsules twice daily all during the eight or nine months that you had been seeing him prior to the accident?

A. Yes, sir. He disclosed to me that he had taken them with regularity for two years, one twice a day, and the identity of these capsules was ascertained as being dilantin by virtue of the fact that he them in his pocket at the time of his accident.

Q. Did he tell you that he had been treated and under the care of Doctor F. H. Dudley in Rocky Mount for this epileptic condition?

A. By a physician in Rocky Mount two years prior to the time that I saw him.

Q. But he didn't identify the physician?

A. No, sir, nor did I ask. Or to my knowledge, I didn't ask.

Q. And your recollection is that when you inquired as to why he had not disclosed this fact to you during all this time you were treating him for other conditions, his response was that it was embarrassing and that he had deliberately withheld that information from you?

Dep. 6/28/67 page 13

A. That's correct, sir. Again, this is by memory and not by notes.

Q. Doctor Camden, did you continue to see Mr. Brown off and on up until the time of his death in September of '66?

A. Yes, sir. The—just as a run down, I saw him only for cough and colds in March and April.

Q. Of 1966?

A. Right sir. And then in June, the 3rd, 1966—now, let's go back just a little bit.

Now, after his accident—now, I do not have the specific dates, but following his discharge from the hospital and in spite of the dilantin and phenobarbital therapy, he continued to have intermittent seizures, and this again is from memory, but I suspect that I might have seen him on at least six occasions with seizures, grand mal in nature; the usual shaking all over, the foaming at the mouth, the urinary incontinence, et cetera, and these episodes I saw him at least on two or three occasions at the Drug Store, at Wickline's,

Dep. 6/28/67 page 14 } having been over there, and had one of these seizures in the Drug Store.

And also on a couple of occasions, across the hall where he worked, he would come into my office appearing fainty and white, and he would begin to convulse.

Now, it was felt that he needed a neurological evaluation, and so Doctor John Varner of Roanoke, Virginia, was called, and an appointment was made for him. Doctor Varner saw him on the 2nd of May in his office, and it was Doctor Varner's opinion, and I quote from a letter that I got from him written on May 3, 1966, that he suspected that he had "idiopathic epilepsy", and Doctor Varner further stated that he suspected that most of his seizures had followed some drinking. What, he doesn't say. And he further stated that he was going to admit him to Roanoke Memorial Hospital for a complete neurological work-up which was accomplished between 5-9-66 and 5-17-66.

At that time, per complete neurological examination and by E.E.G., and by skull X-rays, a diagnosis of idiopathic epilepsy was made, and the disposition at that time by Doctor Varner was that he should take dilantin, a hundred milligrams four times a day, ad phenobarbital, thirty milligrams four times a day.

Dep. 6/28/67 page 15 } Q. This was a higher dosage than had originally been prescribed?

A. That is right, sir.

Q. Doctor Camden, can you describe exactly what happens from a physiological standpoint in one of these seizures; specifically, does it involve loss of consciousness or can it?

A. Yes, sir, it does involve loss of consciousness.

Q. So that if a person were operating an automobile, for example, when—at the time one of these seizures occurred, he would absolutely have no control over the movement of that automobile, if he suffered one of these seizures while at the wheel?

A. If he were convulsing at the time, true, sir. In the name as I have stated prior to this, he would have some warning of these things, and that on several occasions he would walk from the beauty shop where he worked, into my office and tell me that he felt bad and appear pale, and within just a minute or two following that, he would convulse.

Dep. 6/28/67 page 16 } Q. Which would involve a loss of consciousness?

A. That's right, sir, it would involve—very definitely.

Dr. D. S. Camden

Q. And when you questioned him following the automobile accident when he had been brought in to Martinsville General Hospital, he advised you that he had had a similar seizure two years before?

A. That's right, sir.

Q. And that this was the reason that he was taking this dilantin?

A. That's right, sir.

Q. After having consulted a *physican* in Rocky Mount for this condition?

A. Here again this is by memory, and the only history actually that I have written is that two years prior to his accident, he had a similar seizure and was treated for same and advised to take dilantin. Where he got it, I believe Rocky Mount, but from whom he got it from, I don't know.

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Q. Doctor Camden, during this period of approximately eight months that you treated Mr. Brown prior to his automobile accident, did you have any reason to suspect that he suffered from grand mal epilepsy?

A. Would you repeat the question please?

Q. During this period of some eight months prior to the accident during which you treated him with some regularity, did you have any reason to suspect that he suffered from epilepsy?

A. None whatever.

Q. What was your impression as to Mr. Brown's mental faculties and how he responded to your questions and his general level of education?

A. Mr. Brown was a very intelligent fellow. His mental acumen was remarkable. I would say that he was emotionally unstable, in the manner in which he would manage an emotional situation was not, shall we say, as good as the average person, and this was displayed by periods of coming into my office crying about something that had happened at home, say, an argument between his stepfather and his mother, and in not knowing just generally what to do or where to turn.

Q. Was this before or after the accident?

A. This was after the accident.

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Q. Would you think it would be fair to say that following the accident, he tended to open up and be more candid with you—

A. Very much so.

Q. And bring his problems to you which—
A. Very much more so.
Q. —he had been reluctant to do before the accident?
A. That's right.

Mr. Rakes: I don't think I have any further questions.

CROSS EXAMINATION

By Mr. Baugess:

Q. Doctor, are there any tests which you personally can perform here to make a determination as to whether or not a person is subject to some form of epileptic seizure; now, I mean this aside from visual diagnosis?

A. Well, I can answer you in this way—when we see patients who have had a seizure, we do an examination which is termed a neurological examination, and if the seizures were perhaps secondary to say a brain tumor, or a scar on the brain or something of this nature, then at times we physicians can find abnormalities, say, in reflexes, station of gait, et cetera, that would give a clue or a hint as to the cause of seizures.

Dep. 6/28/67 page 19 } Q. Regarding Mr. Brown, did you have any reason to suspect that he may have been epileptic in some form or another?

A. No, sir, not by physical determination, nor by history, nor by actions.

Q. In general, are there degrees of this epileptic condition?

A. Epilepsy is a broad term to include many types of seizures, and this can be displayed by the so-called petit mal, which is just a momentary lapse of consciousness or memory or by that type thing, or on down the line increasing in gradation to the point where the patient suffers from a clonic tonic type of movements indicating what we term grand mal epileptic seizures, so there are degrees.

Q. Well, is it true that an ordinary person under strenuous or straining circumstances, could become subject to this petit mal form?

A. No, sir, I would not say so, unless there was some underlying central nervous system defect; in other words, a person who has epilepsy, has epilepsy, and a person who is considered to be say, normal like you and I, who are normal so to speak, we would not be subject to this

Dep.

6/28/67 type thing under circumstances or under stressful
page 20 } circumstances, shall we say.

Now, it is true that there are other problems that will cause seizures. We know very well—we see frequently, for instance, alcoholics who are trying to get off the bottle so to speak, who will have so-called withdrawal seisures, which are for all the world the same as we see in grand mal epilepsy.

Q. Is it possible that if a person had—

A. And I will also be first to tell you that I am not an expert on epilepsy.

Q. Would it be possible for a person who has had some form of epilepsy, for this condition to remain dormant so to speak, for a period of time, and he may not even know that he has it?

A. For years, yes, sir. This is certainly so. We see—we read in the literature and we see in actuality, for instance, children who have had seizures as a youngster, only at times when they are running a fever, only in later life to develop the so-called idiopathic epilepsy.

Dep. Q. And then it becomes manifest?
6/28/67 A. Apparent—manifest, yes, sir.
page 21 } There are many people who have epilepsy who take no medication, and as a matter of fact, I think that the law in the State of Virginia gives some period of time—I believe that my recollection is that this is three years, that if the patient has had no seizures during that period of time, he is allowed again to drive automobiles, even though on no medication, so they do become quiescent.

Q. Another general question—I hope you don't think this is too general, Mr. Rakes. From your observation and practice, Doctor, have you found it prevalent that where a person or a member of the family does have some form of epilepsy, that the information as to that condition is withheld from him by his family and perhaps, by his doctor?

Mr. Rakes: I don't understand the relevancy of the question to this particular case, Mr. Baugess.

Mr. Baugess: The relevancy is to the effect that Brown may not have known that he had epilepsy.

Mr. Rakes: The Doctor just testified that he—

Mr. Baugess: He testified after the accident.

Dep. Mr. Rakes: But that he had had the condition
6/28/67 two years before, similar seizure, and been taking
page 22 } medicine every day for it.

Dr. D. S. Camden

Mr. Baugess: I realize that.

Mr. Rakes: I will object to the question for those reasons, but then you may go ahead and ask it.

Mr. Baugess: Do you remember the question?

A. Yes, sir, I do. I cannot tell you the usual practice of other physicians. If a person comes into my office and he has had a grand mal seizure, he is told the importance of finding out why he had that seizure, and he is told in truth and given full information as to his condition.

Now, in terms of is it likely that a parent or members of a family would withhold information from a sibling or a child, then I can answer that this is at times done, but whether this was the case at hand with Mr. John Brown, I can't answer.

Q. And the medication that is prescribed for epilepsy is dilantin?

Dep. 6/28/67 page 23

A. D-i-l-a-n-t-i-n. Not necessarily—there are many medications that we use in treatment of epilepsy, and there again I emphasis that epilepsy is a broad term to include any seizure activity. Any seizure activity, regardless of whether it's the petit mal, as we discussed, or if it is displayed by grand mal seizures. There are cases of epilepsy where dilantin is not used. Generally speaking, for grand mal seizures, dilantin is utilized.

Q. Was John Brown able to disclose to you—I believe on the day of the accident you saw him in the hospital—as to the nature of his epilepsy as disclosed—as allegedly disclosed to him?

A. No, sir.

Mr. Rakes: I'm afraid I don't understand the question, Mr. Baugess. Maybe the Doctor does—

A. The only history that I obtained from him was that he had had a seizure. Now, obviously a patient, as brought out by the other questioner, people are unconscious when they have seizures, and so how could they know how they did or how they acted. The only thing that he knew was that he had —that what he told me was that he had a problem, and was told that he had had a seizure two years before, and as to his knowledge of what had happened at that time, I can't tell you whether he was told what happened or not.

Dep.
6/28/67 Mr. Baugess:
page 24 } Q. Did he indicate to you that during the two year span, that he was free from seizures?

A. Yes, he did.

Q. And of course, during the many times that you examined him and treated him, you found no evidence?

A. None whatever. No evidence of any seizures—

Q. Right.

A. Or epilepsy?

Q. Right.

A. No, sir, I did not. I had no knowledge of it at all.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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