

1975

Melvin L. Matlock v. Government Employees Insurance Company : Brief of Respondent

Utah Supreme Court

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Richard W. Campbell; Olmstead, Stine and Campbell; Attorneys for Plaintiff.

L.L. Summerhays; Strong and Hanni; Attorneys for Defendant.

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SUPREME COURT

BRIEF

14107R

E COURT

OF UTAH

* * *

MELVIN L. MATLOCK,

Plaintiff and
Respondent,

-vs-

Case No. 14107
00174

GOVERNMENT EMPLOYEES
INSURANCE COMPANY,

Defendant and
Appellant.

* * *

BRIEF OF RESPONDENT

* * *

Appeal from the Judgment of the
Second Judicial District Court, Weber County
Honorable John F. Wahlquist, Judge

* * *

RICHARD W. CAMPBELL of
OLMSTEAD, STINE AND CAMPBELL
2650 Washington Boulevard
Ogden, Utah 84401
Attorneys for Plaintiff and Respondent

L. L. SUMMERHAYS of
STRONG & HANNI
604 Boston Building
Salt Lake City, Utah 84111
Attorneys for Defendant and Appellant

FILED
OCT 15 1975

Clerk, Supreme Court, Utah

IN THE SUPREME COURT
OF THE STATE OF UTAH

* * * * *

MELVIN L. MATLOCK,)	
	:	
Plaintiff and)	
Respondent,	:	
)	
-vs-	:	Case No. 60174
)	
	:	
GOVERNMENT EMPLOYEES)	
INSURANCE COMPANY,	:	
)	
Defendant and	:	
Appellant.)	

* * *

BRIEF OF RESPONDENT

* * *

Appeal from the Judgment of the
Second Judicial District Court, Weber County
Honorable John F. Wahlquist, Judge

* * *

RICHARD W. CAMPBELL of
OLMSTEAD, STINE AND CAMPBELL
2650 Washington Boulevard
Ogden, Utah 84401
Attorneys for Plaintiff and Respondent

L. L. SUMMERHAYS of
STRONG & HANNI
604 Boston Building
Salt Lake City, Utah 84111
Attorneys for Defendant and Appellant

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IN THE SUPREME COURT
OF THE STATE OF UTAH

* * * * *

MELVIN L. MATLOCK,)	
	:	
Plaintiff and)	
Respondent,	:	
)	
-vs-	:	Case No. 60174
)	
	:	
GOVERNMENT EMPLOYEES)	
INSURANCE COMPANY,	:	
)	
Defendant and	:	
Appellant.)	

* * * * *

STATEMENT OF THE NATURE OF THE CASE

This is a declaratory judgment action filed by plaintiff insured, after defendant denied coverage involving an accident of April 7, 1973.

DISPOSITION IN LOWER COURT

The Trial Court, Honorable John F. Wahlquist, tried the case without a jury. Judgment was entered in favor of insured.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Trial Court judgment. Respondent seeks affirmance of the judgment, and allowance of attorneys fees.

STATEMENT OF FACTS

The facts, although involved, are largely not in dispute. Respondent ("Matlock") had for many years carried automobile insurance with Appellant ("GEICO"). In 1964, he and another man, one Garner McKnight, purchased a fruit orchard of 126 acres near Delta, Colorado (R-83). This was known as M & M Orchards, and operated as a complete separate entity from Matlock's occupation, that of anaesthesiologist in Ogden (R-87,84,82).

All motor vehicles kept at the Colorado orchard were and had always been insured with GEICO (R-84, 86). Matlock had personal cars in Utah and in Idaho (when he lived there) insured with another company (R-121). Both policies contained what is known as the automatic coverage provision for additional or replacement vehicles.

North Ogden Canning Company was closed in 1972. Matlock's father-in-law had a small interest in the business and he told Matlock of the availability for purchase of a 1951 Chevrolet truck owned by the Company (R-86). Matlock checked with the orchard manager, determined they could use such a truck, then went to the company property to look at it (R-86). He did not drive it then (or ever) but did look at it and agreed to buy it on or about January 5, 1973 (R-88). The truck had not been used or registered for two (2) years, and was in a shed on the company property (R-130, 87). Matlock paid North Ogden Canning Company \$750.00 for the truck, with a check drawn upon M & M Orchard's account (Ex 6). The shed was enclosed within a locked fence on the company property (R-91). Matlock did not have the key to the fence padlock, and did not get the truck keys

(Ex. 2). On May 6, 1974, GEICO denied coverage to Matlock for the accident of April 7, 1973 (Ex. AA). Suit was filed by Matlock to determine coverage July 30, 1973 (R-1). Suit was filed in Federal Court in Colorado by Horton against Matlock claiming damage for his injuries from the accident in September of 1974. Defense of the suit was tendered by Matlock to GEICO September 5, 1974, and refused (R-116). By memorandum decision after briefing and argument, Judge Wahlquist found the issues in favor of Matlock and against GEICO (R-43).

ARGUMENT

POINT ONE

THE TRIAL COURT CORRECTLY RULED RESPONDENT
GAVE APPELLANT NOTICE WITHIN THE THIRTY DAY
AUTOMATIC INSURANCE PERIOD OF THE POLICY.

An "automatic" insurance provision, such as we have here, is a common one. The beneficial purpose of such provisions is to eliminate the problem of gaps in insurance coverage on automobiles operating on the highways. 7 Am Jur 2d, Automobile Insurance §100; Western Casualty Company v Lund, 10th C.C.A., 1956, 234 F2d 916. The legal effect is to provide insurance coverage for a period of thirty (30) days after acquisition without regard to actual notice. If the required notice is not given within thirty (30) days by the insured, coverage terminates on the newly acquired car. Western Casualty v Lund, supra, English v Dairyland Mutual Insurance Company, 1968, 21 U2d 221, 443 P2d 661. This particular provision is for the benefit of the insured, English, supra, and GEICO included in its premium charge a sum attributable to the cost of such benefit (R-60, 43).

The policy provision at issue is

" . . . and the named insured notifies the company within thirty (30) days after the date of such acquisition" . . .
(Ex. A) .

No other policy language seems helpful. However, the policy change request form issued by GEICO to policy holders (Ex. C) is very helpful. This form specifies the policyholder is protected if GEICO is notified within thirty (30) days of DELIVERY of the newly acquired automobile. At best, the policy is uncertain as to when the thirty days begins; in the event of uncertainty the language should be construed most strongly against the company that prepared it and issued it, Auto Lease Company v Central Mutual Insurance Co., 1958, 7 U2d 336,325 P2d 264.

Here Matlock paid for the truck in January, but took no possession or control of it. He registered it and transferred title April 6, 1973 (Ex. BB) and took delivery April 7. The truck could not be operated on the highways in the interim because it was not registered and had not been for two (2) years. Matlock had no control during this period as the truck was under lock and key on the Canning Company property. Matlock had no possession, not even constructive, until April 7.

Section 41-1-72, U.C.A. 1953, provides:

"41-1-72. Necessary before transfer complete.--Until the department shall have issued such new certificate of registration and certificate of ownership, delivery of any vehicle required to be registered shall be deemed not to have been made and title thereto shall be deemed not to have passed, and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose except as provided in section 41-1-77." (Emphasis added).

41-1-77, U.C.A. 1953 is not applicable here.

Does the word 'acquisition' denote title, possession, or both? Utah has not decided this, other courts have with varying results. Glen Falls Insurance Co. v Gray, 1967, 5th C.C.A., 386 F2d 520, reasons that since the principal purpose of liability insurance is to provide coverage for an automobile which is to be driven and may become involved in an accident, the vehicle is not acquired until it is operable. The 1951 Chevrolet here was not operable (no valid license or registration) until April 6, 1973.

The normal purchaser of a car wants coverage on it from delivery - that is when he acquires the car in the practical sense. Mathews v Market Casualty Co., 1963 La., 152 S2d 577, interpreted language identical to our case to refer to delivery. This interpretation is certainly adopted by GEICO's own interpretation referred to in Exhibit C (thirty days of delivery). Matlock's interpretation of this concurred with GEICO - he wanted liability insurance (not fire or other coverage) on the vehicle when he took delivery, put it in operable condition and put it on the road.

An Annotation at 34 ALR 2d 936 has some collected cases that are of interest. Section 5 of that annotation at page 941 reviews cases turning on ownership as the requisite, Section 6 following discusses delivery as the key issue. Delivery, of course, is used in its ordinary and usual sense, the handing over of a physical possession and control to the new owner. Plasman v Fremont Insurance Co., 113 NW2d 906. Clearly, delivery was never accomplished here until April 6, 1973.

Cases relied upon by appellant are not persuasive here. Commercial

Standard Insurance Co. v Universal Underwriters, 10th C.C.A., 1960, 282 F2d 24 was a contest between carriers to see whose coverage was primary. The court held the vehicle was newly acquired, but no issue as to time was involved, and the new owner was in the car when it was being operated on a ride for mutual pleasure.

Wisbey v Nationwide Mutual Insurance, 1973, 507 P2d 17, Oregon, bases its finding on the fact that the insured wanted protection not only for liability, but also for fire and theft.

Williams v Standard Accident Insurance Company, California 1958, 332 P2d 1026, is completely distinguishable in that title was transferred and the car was delivered to the buyer in January of 1952. The accident was in May. The only question was whether the Trial Court was required to believe the insured's testimony that the car was inoperable all of that time up to two (2) days before the accident, and the Appellate Court held no.

U.S.F. & G. v MiNault, 72 A2d 161, 1950 NH, is a reverse situation, to see whether the insurance of the seller was still in force. Since no sale had occurred, merely an agreement to sell, the insurance was still in effect.

One Utah case that may be helpful is Stewart v Combined Insurance Company, 114 U 278, 198 P2d 467. In that case after the death of the owner, one of the heirs gave possession of the car, title and registration documents, and keys to the new purchaser. The heir received money at the same time, but not the full price. The new purchaser while driving had an accident, and this court held the decedent's insurance was still in effect on the vehicle, as no valid sale had taken place.

Yahnke v State Farm Fire & Casualty, Arizona 1966, 419 P2d 548, involved the interesting question of a jeep in need of repairs being delivered and taken into possession a year before the accident, but title not passing until some few days before the accident. The Arizona Court held the vehicle was 'newly acquired' under the policy, and that both title and possession must occur before the car is newly acquired.

In view of all the evidence, we submit the Trial Court was correct in ruling that Matlock did not 'acquire' the vehicle under policy terms until he took operative control, delivery, transferred title, licensed the truck, got the keys, and removed it from the fenced enclosure on April 6, 1973, the day before the accident. The notice of April 7, 1973 was within the thirty (30) day period provided, and GEICO is obligated by its contract to appear and defend for its insured in the Colorado Federal Court suit.

POINT TWO

THE TRIAL COURT CORRECTLY RULED THE 1951
CHEVROLET WAS A FARM VEHICLE UNDER POLICY
TERMS.

The policy provision here material is the definition of "Farm Automobile":

"means an automobile of the truck type with a load capacity of fifteen hundred (1500) pounds or less not used for business or commercial purposes other than farming."

Appellant cites a case, Buswell v Biles, La 1968, 205 S2d 165, to show this refers to the manufacturers rating rather than actual load capacity. Buswell in fact decided on an entirely different question - whether the insurer insured all of the policy-

holders vehicles. The quote on page 19 of Appellants Brief is out of context and should read as follows:

"We find from our study of the record that this was the clear intent of both the insurer and the insured and that the load capacity . . ." (underlining added to show the difference from the original quote).

The 'clear intent' this refers to is the question of all vehicles, not weight ratings. In talking about weight ratings, the Louisiana Court simply held the fact that a three-quarter ton pickup could hold more than 1500 pounds would not vitiate coverage, the identical result reached by Judge Wahlquist (R-45).

"To permit them to have a policy defense when they clearly take premiums or bill for trucks larger than that as ordinary farm vehicles is unconcionable."

The policy could easily state 'manufacturers rated capacity'. It does not, but uses 'load capacity'. The only evidence on load capacity before the trial court came from the policyholder, Matlock. He testified that a half-ton truck was rated capacity of 1545 pounds, and carries regularly 3500 to 4000 pounds (R-138,9). The three-quarter ton pickup would be rated higher than 1500 pounds, and could carry even more than the half-ton. In other words the 1971 Ford pickup appearing on the same policy we have (Ex. B) has a capacity far greater than 1500 pounds, yet it was always insured under the same policy and coverage with GEICO. The same was true (R-138) of the 1963 one and one-half ton truck insured at the farm in 1964 by GEICO, and of all the farm vehicles used over the years on M & M Orchards. It was also true of 1972 and a 1973 pickup trucks insured by GEICO (R-140). No denial from GEICO on any of these vehicles was ever received until this incident arose (R-141).

We should note also the importance put on this by GEICO . See the application form (Ex. C) for additional vehicle coverage. Page three (3) is a full page questionnaire as to the additional vehicle , but nowhere does it ever ask about weight ratings or carrying capacity .

Clearly , this provision being for the benefit of the insured , it should be construed in his favor . If it is to mean manufacturers rated capacity , it should so state. Since a half-ton truck is rated at 1545 pounds , it obviously doesn't refer to designation as half-ton , etc . Regardless of this , GEICO has been insuring M & M vehicles for years , with carrying capacity well in excess of 1500 pounds , and never raised any fuss about it . We submit the Trial Court correctly interpreted this as an approximate guide only , and one that had not been adhered to in the past between the parties to the insurance contracts .

POINT THREE

THE TRIAL COURT CORRECTLY FOUND RESPONDENT ENTITLED TO THE BENEFITS OF THE THIRTY DAY AUTOMATIC INSURANCE PROVISION OF THE POLICY .

M & M Orchards was purchased in 1964 by a partnership of Matlock and one Garner McKnight (R-83) . Between 1964 and 1973 , Matlock had become sole owner of the property . From its inception , it was operated as a complete separate entity . It had separate books , checking accounts , tax returns (R-84) . Matlock is a physician and anaesthesiologist in Ogden and did not operate the orchard (R-92) .

The funds to purchase the truck were drawn on the M & M Orchard account , on the Colorado Bank and Trust Company at Delta , Colorado . (Ex. 6) . The premiums paid to GEICO on the policy in question were M & M Orchard funds

drawn on the same account (Ex. CC). Premium notices were sent to M & M Orchards at Delta (Ex. H). The named insured as set out in the policy (Ex. B) is

MELVIN L. MATLOCK
M & M ORCHARDS
POST OFFICE BOX 6
DELTA, COLORADO 81416

It is at once apparent that M & M Orchards, Delta, Colorado, is a business entity separate and apart from Melvin Matlock, M.D., Ogden, Utah. All vehicles owned and used by M & M Orchards were insured with GEICO, and had been for the last ten (10) years. The one fact that Matlock, as an individual, is liable for debts of M & M Orchards, does not mean M & M Orchards is not the named insured.

Boling v State Farm Mutual, Mo. 1971, 466 SW2d 696 involved a policy issued to Paul Hurst, d/b/a Hurst Materials Company. In fact the car was owned by Hurst Materials Inc., was paid for by the corporation, and the insurance premiums were paid by the corporation. State Farm refused to pay the claim on the basis that Hurst, the individual, was the named insured, rather than the corporation he controlled. The Missouri Court held the corporation was in fact the named insured, not Hurst, and said:

"The checks for the policy premiums were issued by Hunt Materials, Inc., payable to State Farm, which fact causes it to be estopped to deny that the corporation was the insured."

Roseu v National Union Fire Insurance Company, Fla. 1971, 249 S2d 701 had a similar question - the named insured was Tokaiski and Martin, d/b/a Market Truck Stop. A car owned individually by Tokaiski was in an accident, and the court held the car was not owned by the 'named insured'.

GEICO here is arguing the reverse - that M & M Orchards is not the named insured, but Melvin Matlock is. The Trial Court correctly found from the evidence that the 1951 Chevrolet truck was entitled to the automatic coverage protection of the policy.

POINT FOUR

THE TRIAL COURT CORRECTLY FOUND APPELLANT
WAIVED, AND WAS ESTOPPED FROM ASSERTING
POLICY DEFENSES.

We agree with GEICO that waiver and estopped, although related, are separate and distinct doctrines. The former involves voluntary relinquishment of a right, the latter inducing another to act (or fail to act) to his detriment. Both elements are present here.

GEICO presents three (3) policy defenses -

- 1) acquisition outside of thirty (30) day period;
- 2) excess weight vehicle;
- 3) vehicles insured with other companies.

The acquisition defense was first suggested by the reservation of rights letter of January 22, 1974. Excess weight was first raised in the answer filed in this case July 30, 1974. Other vehicles not insured with GEICO was first suggested in the denial letter of May 6, 1974. Let us see when each of these possible defenses were known by GEICO:

1. Acquisition - Exhibit J, letter of Matlock to GEICO of April 28, 1973 in part:

"On April 7, 1973 I sent you notice of the used 1951 Chevrolet truck acquired by me on that date. The actual date of registration

and licensing of this vehicle was April 6, 1973 Vehicle Id. No. JEA 1070045. This vehicle had been purchased on January 5, 1973 but had not been moved from point of purchase until April 7, 1973. The vehicle was wrecked in a one (1) vehicle accident about 10:00 p.m. April 7, 1973. I notified you of this accident sometime thereafter."

2. Excess weight - Exhibit I, letter of Matlock to GEICO of April 7, 1973, mailed prior to the accident:

"Effective today I have purchased and put in service a used one and one-half ton truck - 1951 Chevrolet one and one-half ton truck Identification No. JEA 1070045, licensed in State of Colorado. Same driver as present vehicle - I would like this vehicle insured for liability only same coverage as the Ford truck." (Emphasis added).

3. Other vehicles insured with Security Mutual - Exhibit 3, letter response of Matlock to GEICO of January 6, 1973, stating 1972 truck was now insured with 'other company'. Exhibit O, letter of Matlock to GEICO of July 9, 1973:

"When I did not hear from you for over a month, I insured the unit (72 Chevrolet) with another company . . ."

We could set out many additional exhibits confirming this knowledge, but we think these three are conclusive on knowledge and date of knowledge. There is no allegation or suggestion that at any time Matlock furnished false information, or withheld any information from GEICO.

In light of this information, what actions did GEICO take?

They insured the 1951 Chevrolet truck, charged a premium for it and collected it. Exhibit B shows they initially added it by endorsement of June 8, effective April 8, then by endorsement of September 12, effective May 23, and finally by Corrected Policy Contract, issued October 29, 1973, effective March 30, 1973 through March 30, 1974.

GEICO investigated the accident through their agents McMillan in Colorado and Hollcraft in Ogden (R-136,177). GEICO representatives told Matlock 'this should wrap it up' (R-113). They requested policy verification from Matlock August 8, 1973 (Ex. D); Matlock responded with what was asked for (Ex. E).

On August 8, 1973 the home office wrote Matlock (Ex. R) "We apologize for the delay. Coverages are in force . . ."

In December of 1973 the authorized claim agent, McMillan, advised Matlock (Ex. F) "This loss occurred in April when these files were handled out of Washington, D.C. In July our area was then taken over by the San Francisco office, although existing files were to be reported to Washington, D.C. So we continued to report to that office. Without any response from them I then called San Francisco. You recall at one time Washington office told me they had issued the draft. Frankly I don't know what is going on, but all I can say is that I was told by phone today that she would run the file down and make payment. . ."

On September 24, 1973, (Ex. V) GEICO home office wrote Matlock (after erroneously cancelling the policy for a claimed non-payment that had never occurred):

"We are re-instating your policy effective July 11, 1973 without a lapse in coverage. Effective October 25, 1972 we are deleting the 1972 Chevrolet camper/truck. Effective May 10, 1973 we are deleting the 1951 Chevrolet pick-up from your policy. We apologize for the confusion. Corrected policy papers will follow."

The corrected policy was issued (Ex. B) showing coverage of the 1951 Chevrolet at time of the accident.

All of the above actions were taken with full knowledge of all of the policy defenses GEICO now asserts. This is not a case where the company is unaware

of the true facts until discovery during the investigation.

Matlock testified he made no investigation of the accident, and had no one do it for him, relying upon GEICO (R-114). GEICO did in fact make an investigation, but has never made available the results or contents of that to Matlock (R-114). He further testified that but for his reliance upon GEICO, he would have sought immediate professional help and seen to it that a prompt investigation was made. He also testified an investigation made after the denial of coverage would be far less effective than one done immediately after the accident (R-115).

The huge lawsuit now facing Matlock claims negligence in furnishing a defective vehicle (R-118). Obviously, an investigation made over thirteen (13) months after the accident would have little relevance as to the condition of the truck on April 7, 1973. An inspection of the vehicle immediately after the accident was essential to the defense of this suit, and because he was relying on GEICO, Matlock had none made. The Trial Court, in its memorandum decision, recognized this, stating (R-45):

"Third, for many months the defendant has led the plaintiff to believe that they were defending the suit. The plaintiff is in no position to take defense now. The insurance company should be estopped at this time to deny coverage.

The Court recognizes that part of the period was covered by a conditional appearance, but even a conditional appearance was not effective until long after an opportunity for "safety inspection" of the truck, etc., had expired. The confusion as to which truck they insured was their own and had no justification in fact."

The Utah case argued at length in its brief by GEICO, State Farm Mutual v Kay, 1971, 26 U2d 195, 487 P2d 852, is not controlling here. In that case plaintiff and defendant were son and mother, living in the same house, and both were in the car when it overturned. The passage of time did not involve loss of evidence (as here)

and because of the family relationship would have no effect on settlement possibilities. None of these facts as here exist - Matlock is faced with defense of a suit with serious injuries (over \$5,000.00 in hospital expenses as of August, 1973, Ex. D), large claim for damage, no efforts at settlement, and no relationship with the plaintiff that would induce settlement. Any chance for an effective evaluation of the evidence by an independent expert on vehicles is long since past. The delay in Kay was 5 months, in Matlock 13. The matter of prejudice is not an allegation, it is based on testimony, specifically found by the Court, and not controverted by any other evidence.

An insurer who provides coverage or begins to investigate an accident is not estopped until he has knowledge of the facts behind which the exclusion or denial may rest. See 7 Am Jur 2d, Automobile Insurance, Section 171. It is also the universal rule that an unreasonable delay in notifying the insured of denial of coverage will constitute a waiver or an estoppel against the insurer. Appleman Insurance Law, Volume 16A, Section 9361.

An annotation reported at 38 ALR 2d beginning at Page 1148 is involved with waiver and estoppel and the timeliness required. In Section 8 beginning at Page 1169 it points out the general rule requires that for a notice of denial to be effective on behalf of the insurer, the notice must be timely served. Generally, this question of whether the timeliness was reasonable or unreasonable is one of fact for the court or jury.

A short period of time is required if the denial is to be effective. In U.S. Casualty Company v Home Insurance Company, a New Jersey case found at 192 Atlantic 2d 169, a delay from June 28th when knowledge was acquired to July 7th when denial was made was held not to be unreasonable.

A case with similar time sequences to ours, although a different factual situation, is Salarno v Western Casualty, an Eighth Circuit Court of Appeals case found at 336 Federal 2d, Page 14. In that case an accident involving one of the insured's horses causing injuries occurred on March 23, 1959. It was promptly reported to the insurance company and within five days thereafter the insurance company had full knowledge or means of finding out the extent of the horse raising operation the insured carried on. On June 22, 1959, suit was filed by the injured party and the insurance company assumed the defense thereof. On April 6, 1960, based upon additional information the insurance company acquired on April 1st, 1960, it filed a declaratory judgment seeking to avoid coverage. The Federal Court analyzed this from the standpoint of the insurance company's having waived it's right to make such a denial, and found that as a factual matter complete knowledge of all the facts which would enable it to disclaim were either known to or within the ability to discover of the insurance company within five (5) days of the accident. It's inefficiency in going forward and ascertaining any additional facts it deemed necessary and in the meantime letting the insured rely on it for defense for a period of just over one year was sufficient that as a matter of law the insured was prevented from denying the coverage in question.

A case involving a delayed waiver of notice on an automatic insurance provision was Missouri Managerial Corporation v Pasquelleno, found at 323 Southwestern 2d Page 224. In that case the replacement automobile was acquired May 8, 1955, and no notice was given before the accident it was involved in on July 10th of 1955. The company had full knowledge of all the relevant facts By September of 1955, some three months following the accident. Suit was filed against the insured on

November 2nd of 1955 and the insurance company assumed the defense thereof. It did not secure a non-waiver agreement from the insured until February 13th of 1956. By this action the Court held that the insured was conclusively presumed to have been damaged and refused to allow the insurance company relief from its policy provisions.

The case of Mistele v Ogle, Missouri, 293 Southwestern 2d, Page 330, also involved a question of waiver. In this case the insurance carrier knew or had the ability to obtain the information regarding the question of coverage and yet delayed unreasonably for almost two (2) years to withdraw from the case. They claimed recent acquisition of the knowledge but the Court found that they had the means of knowledge earlier than that.

Another case is Merchants Industrial Corporation v Eggleston, 179 Atlantic 2d, Page 505. Here the car involved was in an accident May 12th of 1958. The insurance company acquired the facts concerning ownership of the car which gave rise to exclusion under the policy on May 26th of 1958. Despite this, it did not take any action or place the insured on notice it was reserving its rights until it filed a declaratory judgment action on February 25, 1959. This delay of some nine (9) months was held too long to enable the insurance carrier to deny. In doing so the Court said,

"In short, if a carrier receives information suggesting fraud or breach of contract, it must seek the facts with reasonable diligence and having acquired them, it must within a reasonable period decide whether to continue to perform. What is a reasonable time depends upon the circumstances. In the case of a liability policy an important circumstance is that the one who is to pay should have an early opportunity to investigate the outstanding claim of the third party. Here Merchants had notice of the facts in

May, 1958. By September 19th it surely knew the story, but nevertheless it continued to claim control in the preparation for and the defense of the damage suit. We have no doubt that its conduct constituted an election to affirm the policy. It thus waived in the sense here pertinent its right to disclaim."

It is clear from the record of the trial that Matlock is in a position where the facts of the accident, the condition of the vehicle, and other relevant matters are cold. He has rested in the security of his bought and paid for contract of insurance for months during which time the insurance carrier so far as we know conducted an investigation of the matter. At this late date to be left to assume the defense of the Federal Court action without coverage and without the help of the defendant company clearly shows that he is in a much worse position. All of the facts here relevant were known to the company not later than April 28th, 1973. Most of the facts they now claim excluded coverage were known well before that date. We respectfully submit that the carrier has chosen in light of those facts to proceed with the matter and should not be allowed by its belated denial some thirteen (13) months after the accident to escape from the coverage it sold Matlock.

POINT FIVE

RESPONDENT IS ENTITLED TO HIS ATTORNEYS FEES FOR PROSECUTING THIS ACTION.

The Trial Court found (R-62) that Matlock had actually incurred reasonable attorneys fees to his counsel in the sum of \$750.00, but refused to award Matlock judgment for that sum. Matlock has raised this as error by the statement of points he filed May 20, 1975 (R-72).

The amount of the fees, and reasonableness are not challenged.

It is universally recognized that if an insurer wrongfully refuses to defend a liability claim, it will be liable for all damages from such breach of contract, including any judgment entered against the insured, any settlement rendered, and the costs of defense to the insured, including attorneys fees. 49 ALR 2d 695, Section 12 - 16.

When Matlock defends the Colorado suit, he is entitled to recover his attorneys fees in such defense. Is there a valid reason to deny him this same right when he is forced to employ counsel to prosecute this declaratory judgement action?

Three cases that do not recognize such a distinction, and allow the insured his attorneys fees in declaratory actions, are Utilities Construction Corp. v Peerless Insurance Co., D.C. Vt. 1963, 223 F. Supp. 64; National Indemnity Co. v Harper, D.C. Mo. 1969, 295 F. Supp. 749; and Connecticut Fire Insurance v Reliance Insurance, 208 F. Supp. 20, D.C. Kansas 1962. These cases in some instances rely upon statutes, and so may not be precise authority for our case. However, they do illustrate that no valid reason is evident to deny fees in our instance and grant them in another, when the substance of both is the same.

Matlock should be awarded \$750.00 as his attorneys fees in the lower court, and a reasonable fee for his attorneys fees on appeal.

CONCLUSION

Matlock respectfully submits the evidence fully supports the Trial Courts findings in all respects. The judgment should be affirmed, with an award of attorneys fees.

Respectfully submitted,

RICHARD W. CAMPBELL of
OLMSTEAD, STINE & CAMPBELL
2650 Washington Boulevard
Ogden, Utah 84401
Attorneys for Plaintiff and Respondent