

1967

Marie E. Peterson v. Western Casualty and Surety Company : Appellant's Brief

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IN THE SUPREME COURT
of the
STATE OF UTAH

MARIE E. PETERSON,
Plaintiff and Respondent,

vs.

WESTERN CASUALTY AND
SURETY COMPANY,
Defendant and Appellant.

} Case No.
10,524

APPELLANT'S BRIEF

NATURE OF CASE

Plaintiff's Complaint (R. 1-2) sets out two causes of action against the defendant. The first cause of action was in the nature of a garnishment action whereby the plaintiff sought to recover from the defendant the policy amount (\$10,000.00) on the Judgment awarded to the plaintiff in a previous action against the defendant's policyholder, Chuck Shim Lew. The second cause of action was in the nature of a tort action whereby the plaintiff sought to recover from the defendant an additional \$2,500.00 over the policy limits, claiming that the defendant was guilty of bad faith in only offering the sum of \$6,000.00 to settle the plaintiff's claim.

DISPOSITION IN LOWER COURT

On Cross Motions For Summary Judgment made at the time of the pre-trial of this action, the trial court granted plaintiff's Motion as to the first cause of action and dismissed the plaintiff's second cause of action.

RELIEF SOUGHT ON APPEAL

Defendant and appellant seeks a reversal of the summary judgment granted to the plaintiff on her first cause of action and seeks entry of a summary judgment in favor of the defendant and appellant. In the event this court sees fit to affirm the holding of the trial court, defendant and appellant seeks a modification of the judgment entered in favor of the plaintiff and respondent to eliminate or correct the interest awarded to the plaintiff by said judgment.

STATEMENT OF FACTS

The record in this case consists of the pleadings, Motions, Order and Judgment filed in this action, the pleadings, Motions, Orders and Judgments in the action brought by Marie E. Peterson against Chuck Shim Lew, Civil No. 143,286 in the District Court of Salt Lake County and a number of Exhibits, including two depositions (Exhibits D-10 and D-11). The facts, as established by the pleadings and Exhibits contained in the record before this court, are the following:

On February 24, 1963 at approximately 2:23

o'clock A.M. the plaintiff was riding as a guest in a car driven by Dennis H. McMillan, which car collided with a vehicle driven by the defendant's insured, Chuck Shim Lew. The collision occurred in the intersection of 900 East and 2700 South in Salt Lake City, which intersection is protected by a traffic semaphore showing green, yellow and red. The right front portion of McMillan's car collided with the left front door area of Chuck Shim Lew's vehicle (D-11, page 13). McMillan said the light was green in his favor as he approached, but that it turned to amber as he was in the intersection (D-11, page 15). Mr. Lew testified at a subsequent hearing in regard to a citation issued to McMillan that he (Lew) had the green light and that McMillan had gone through a red light (D-11, page 22). No eye witnesses were known (D-10, page 19) except the two drivers and the plaintiff, Marie E. Peterson.

Suit was filed on May 23, 1963 by plaintiff against Chuck Shim Lew. In the Answer to the Complaint filed on his behalf by the insurer, Western Casualty And Surety Company (hereinafter referred to as Western), Chuck Shim Lew denied any negligence or misconduct and alleged as an affirmative defense that plaintiff could not recover against defendant because the negligence of McMillan was the sole proximate cause of the accident and the resulting injuries, if any, which she sustained.

On July 25, 1963 counsel for Western mailed a letter (Ex. D-3) to Lew at his Salt Lake City address of 838 Jefferson Street, notifying him of its entrance into the case and advising him to notify Western or counsel of any change of address he might make since it may be necessary to contact him on short notice. The letter was returned, undelivered.

On August 19, 1963 counsel mailed a request to Western and an independent adjuster for assistance in locating Mr. Lew. Counsel was advised orally that Lew was residing at 301 Boyle Avenue, Los Angeles, California (Ex. D-2, pp 2-3). Pursuant to this information counsel wrote a letter (Ex. D-4) on September 6, 1963 informing Lew that a complaint had been filed against him asking \$32,154.95 in damages. In the letter he was requested to keep counsel advised of his whereabouts, and to inform them of any change of address since it may be necessary to contact him on short notice (Ex. D-5).

Mr. Lew replied by letter on September 19, 1963 in which he said:

“Dear Mr. Hanson,

“I had receive your carbon copy yesterday, and I wish to thank you for notifying me.

“At the present, I am working in Riverside, California. I wish to know if I have to

appear in court with you and the date to appear in court.

"My present address is % Chungking Rest., 3817 Market St., Riverside, California. The telephone number is Ov-6-7292. You could notify me at this address.

"Again, I wish to express my thanks to you.

"Truly Yours,
"Chuck Shim Lew"

In reply to this letter counsel on September 23, 1963 wrote to Mr. Lew:

"We are in receipt of your letter of September 19, 1963. We will advise you when it is necessary for you to appear in court or of any other action which you might be required to take in connection with this case. Kindly keep us advised of your whereabouts so that we might either write you or telephone you on short notice." (Ex. D-6)

This letter was never returned and is thus presumed to have been delivered.

On February 4, 1964 the case was set for trial on March 12, 1964. In a letter dated February 7, 1964 counsel wrote to Lew at the California address given by Lew, advising him of the trial setting and asking that he be in Salt Lake City not later than March 12, 1964. A copy of that letter was sent to Lew's Salt Lake address. The letter sent to California was returned with a notation indicating that Lew no longer lived at that address.

Upon return of that letter counsel once again contacted Western for assistance. Western referred counsel to Mr. Herbert C. Papenfuss, an agent for Monarch Underwriters who had sold Mr. Lew his policy and also loaned him money. Counsel was informed that Mr. Papenfuss had made an investigation by going to California in October of 1963 to try to locate this defendant. He interviewed various people in several restaurants, by whom he was informed that Lew had left California and had probably gone to Vancouver, Canada. He learned nothing more until January, 1964 when he received a remittance from Lew who gave his address as Club 13 Cafe, Bienfait, Saskatchewan, Canada. He telephoned the Club 13, but was told that Lew had left and might be in Florida, either in Miami or Miami Beach.

Upon the basis of the information received from Papenfuss counsel moved the court on March 4, 1964 for a continuance of the trial of the action brought by Marie E. Peterson against Chuck Shim Lew in order that additional efforts could be made to locate Lew in Florida. The motion was resisted by the plaintiff, Marie E. Peterson, and was heard and denied on March 6, 1964. On that same day counsel filed an Offer Of Judgment for \$6,000.00, the amount he had previously offered plaintiff's counsel verbally, pursuant to Rule 68 of the Utah Rules of Civil Procedure. He also mailed a letter (Ex. D-8) to Lew notifying him of counsel's with-

drawal and the denial of coverage due to his non-cooperation. Copies of that letter were sent to Lew's former address in Salt Lake City; Riverside, California; and Bienfait, Saskatchewan. All were returned, undelivered. On March 10, 1964 counsel filed Notice of Withdrawal and Notice To Appoint Other Counsel (Ex. D-9) and copies of these were mailed to the above mentioned addresses. Again they were returned, undelivered.

The case proceeded to trial with the plaintiff recovering a default Judgment against Chuck Shim Lew for \$12,500.00.

On March 4, 1965 the present action was instituted against Western. Plaintiff alleged two causes of action. In the first cause of action she sought to recover the \$10,000.00 policy limits. In the second she prayed for \$2,500.00 on the ground that Western acted in bad faith in not settling the action within the policy limits (R. 1-4).

The cause came up for pre-trial and the hearing of Motions by both parties for summary judgment before the Honorable Stewart M. Hanson on October 7, 1965 (R. 40). The defendant, Western, in support of its Motion For Summary Judgment offered in evidence the insurance contract (Ex. D-1), the transcript of the proceedings for a continuance of the trial in the prior case (Ex. D-2), the letters sent to Lew and the letter received from Lew (Exs. D 3-8), the depositions of Marie E.

Peterson and Dennis McMillan (Exs. D 10-11) and the file of the prior action against Chuck Shim Lew.

In support of her Motion For Summary Judgment, the plaintiff offered no evidence or affidavits, but stood upon the pleadings.

On December 9, 1965 the court granted the plaintiff's Motion For Summary Judgment as to the first cause of action and dismissed the second cause of action. In its Memorandum Decision the court stated (R. 52) :

“In so finding the Court is of the opinion that this is even a more flagrant case of using a reasonable effort by the insurance company than that found in 5 Utah 2d. at Page 15. It appears that the defendant has agents in various parts of the country who were able at least to determine the addresses of the insured, and they apparently left the matter of attempting to find the insured entirely to the Utah attorneys, which does not appear, to this Court, to be a reasonable effort.”

The court did not enumerate the reasons for its decision dismissing the second cause of action, the action praying for \$2,500.00 because of the alleged bad faith of the defendant, Western. We assume it was in response to the Motion of counsel for defendant made at the time of the pre-trial in the following words:

“. . . I include in this motion all the grounds stated in the motion for summary judgment, and now as a basis for the grounds

stated in the motion for summary judgment the stipulations, the exhibits and the depositions and the record of the prior case. In addition thereto I move specifically for a dismissal of the second cause of action, asking for a judgment in excess of policy limits of \$2,500.00, on the grounds that the Utah Supreme Court has specifically held in one case that a motion to recover an excess over the insurance policy cannot be joined with a garnishment action against the insurance company to recover the amount of a judgment recovered against the insured." (R. 49)

The case which counsel had in mind was *Paul v. Kirkendall*, 6 Utah (2d) 256, 311 Pac. (2d) 376, in which it was held that a judgment debtor's tort claim against the garnishee cannot be adjudicated in garnishment proceedings brought by the judgment holder.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN NOT FINDING AS A MATTER OF LAW THAT THE DEFENSE OF NON-COOPERATION HAD BEEN ESTABLISHED AND THAT THE DEFENDANT WAS ENTITLED THEREFORE TO A SUMMARY JUDGMENT.

The paramount issue in this case is whether the record supports the actions of the trial court in denying defendant's Motion For Summary Judgment and in granting plaintiff's Motion. It is the appellant's contention here that the facts within the record clearly shows: The insured acted wilfully and unreasonably in secreting himself by not

providing forwarding addresses and other essential information which the insurer had requested from him in order that he could be contacted for assistance in the preparation and trial of the action; that the insurer, Western, was diligent in its search for Lew; and that the absence of the insured, he being the sole witness capable of establishing the defendant's affirmative defense, was prima facie prejudicial to the insurer in its defense of the action against the insured.

This court has on two prior occasions dealt with non-cooperation cases. However, the situations in those two cases are readily distinguished from the present case.

In *Oberhansley v. Traveler's Insurance Company*, 5 Utah (2d) 15, 295 Pac. (2d) 1093 (1956) the court affirmed a trial court's verdict for the plaintiff. The basis for the court's decision was the fact that the insured had not hidden himself from the insurer, but had notified the insurer well in advance of the trial that he would not attend due to the danger of losing his newly acquired employment and a prospective promotion. The issue there was resolved in favor of the plaintiff on the ground that the insurer knew where the insured was, knew he was not coming to the trial and failed to preserve his testimony by taking his deposition. The court there was not concerned with the reasonableness of the insurer's efforts to find the insured, since the whereabouts of the insured was known.

Instead, the court held that the insured had a justifiable excuse for not attending the trial, and that the insurance company could not claim to have been prejudiced by his absence since the company failed to take reasonable efforts to preserve his testimony after learning that he would not be at the trial. The issue in the present case is whether the defendant made diligent efforts to locate the insured — an issue not before the court in *Oberhansley v. Traveler's*, *supra*.

In the recent case of *Montgomery v. Preferred Risk Mutual Insurance Company*, Docket No. 10,278, the court was once again faced with the question of whether the insurer could establish prejudice by the insured's non-attendance at the trial. The court held that the insurer could have used the deposition taken previously by the plaintiff and that insurer was, therefore, not prejudiced in the defense. The court also said that had the insured's presence been necessary the insurer did not act diligently in locating him, as indicated by the fact that the first letter tracing the deposition (which had never been returned by the insured) was mailed five years after the accident. The court also noted that the insured had a criminal charge pending against him, was unemployed and had recently been divorced, all of which should have put insurer on notice that the insured might not be present at the trial. However, the apparent concern of the court was over the failure to get the deposition of the insured while

he was still available — and not whether the search for him after he became unavailable was sufficient. The facts of that case present a situation where the insurer failed on all three requirements of the defense, i.e. to show that it was prejudiced by the non-attendance, that it had acted diligently to overcome the prejudice and that it had made a diligent effort to locate the insured.

The case at bar presents only one of these three issues — whether diligent efforts to find the insured were made by the insurer. This was pointed out by the trial court in its Memorandum Decision in which it concludes that the insurer was not reasonably diligent in its efforts to locate the insured. The trial court apparently did not take issue with the fact that the non-attendance of the insured worked a prejudice to the insurer's case and that the failure of the insurer to take the insured's deposition was reasonable up until the time it was informed by the return of the February 7, 1964 letter that Lew had moved without leaving a forwarding address and without notifying Western as he had agreed to do.

There can be no serious dispute as to the prejudicial effect of Lew's absence at the trial. He was the only one who could testify in support of the affirmative defense. The deposition of Dennis McMillan indicates that Lew's testimony in the citation hearing was that McMillan had run the red light and that Lew had the green light. It is obvious

that the issue of liability in that case hinged upon the sole question of who had the right of way in the intersection at the time of the accident, to which issue Lew's testimony was essential. His disappearance left Western without a defendant and without a defense.

There also is no serious dispute as to whether Western acted reasonably up to the time that notice was received of Lew's disappearance. The letter which Western received from Lew on September 19, 1963 is self evidence of the assurance given by Lew that he would be available for trial. Had he stated that he could not attend the trial here in Utah or had he in some other manner cast doubt upon his attendance the situation here would be different, thus similar to the *Oberhansley* situation. But, instead, he indicated interest in the case and the tenor of his letter pledges cooperation in the disposition of the action.

It should not be forgotten that the primary duty in such situation is on the insured, for he is under a contractual duty to make himself available for the trial. In the *Oberhansley* case the court recognized that an unreasonable failure by the witness-insured, if material, to attend the trial is a breach of the cooperation clause of the liability policy. Thus, in any consideration of whether the non-cooperation defense has been established the essential factor is whether there is any evidence indicating that the insured's failure to attend was excused or justifiable.

There was such evidence in the *Oberhansley* case, but none in the present case.

In many states the absence from trial is all that is required to sustain the non-cooperation defense. See *60 A.L.R. (2d) 1050*. It is apparent, however, that in Utah to enforce that duty the insurer must also act reasonably in obtaining the insured's cooperation — but that is not to say that the insurer need go to the expense of getting depositions from its insureds who are informed of their duty and who express willingness to perform it. It would be grossly unfair and contrary to the parties own contract to impress upon the insurer the duty to act as a nursemaid to its insureds who from all appearances are willing to cooperate in the defense and appear at the trial. It was the recognition of this rule by the trial court in the original case which made it necessary for Western to withdraw from the defense of that action. Western moved for a continuance when it learned that Lew had left Bienfait, Canada without leaving a forwarding address, so that it might continue its efforts to locate Lew in Florida. The court denied the Motion, and in doing so made the following observation:

“Well, I will show that by saying that when a witness is playing hard to get and trying to hide from you, I am more inclined to help you find him; but where a party himself gives the runaround to counsel that this defendant has seemed to give, I don't feel quite so sympathetic towards him. I think he

owes a duty to the court to be ready when the court is ready for trial, and I believe he's had *ample notice* and ample opportunity to be found if he wanted to be found, so the motion will be denied." (Ex. D-2, p. 5)

It is clearly indisputable that the defendant did all that could be reasonably expected up to the time of notice that Lew had left his California address. It is further the contention of the defendant that as a matter of law Western acted with reasonable diligence in trying to locate the insured from February 4th until the time of withdrawal on March 7th. This is not a situation as in the *Montgomery* case, where there was a three year period of disappearance and only feeble if not non-existent attempts to locate the insured by a letter seeking to get the deposition back. In the present case Western had notice on February 7, 1964 that the insured had left California without giving forwarding information to the insurer. During the next month registered letters were sent to all known addresses and information was sought from other sources such as the agent who sold the insurance policy. He reported a personal investigation in California which showed that Lew had left California for Canada or Washington. He had also received correspondence from Lew at the Bienfait, Saskatchewan address, but when he telephoned the address he was told that Lew was probably somewhere in Florida. Upon receipt of this information Western moved for a continuance in order to make an investigation in

Florida, but the motion was denied. Western had less than a month to locate Lew, who was "probably in Florida somewhere". Within that short period Western did all that could be reasonably expected under the circumstances.

It is unrealistic, if not impossible, to set up a pervasive rule as to what efforts should be taken by an insurance company in all situations of lost insureds. There are several things an insurance company could possibly do to locate the insured, given time, but the law only requires reasonable diligence under the particular circumstances. If this were not so the cooperation clause of the policy would be nullified and the insurer would often find itself defending cases without the essential testimony of the insured, as in the present case. The insurance contract involved here makes compliance with the cooperation clause a condition precedent to coverage, not merely a covenant to cooperate.

"Conditions

"4. ASSISTANCE AND COOPERATION OF THE INSURED — COVERAGES A, B, D, E, F, G, H, I, J AND K: The insured shall cooperate with The Western and, upon The Western's request, attend hearings and trials and assist in making settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of any legal proceedings in connection with the subject matter of this insurance. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or in-

cur any expense other than for such first aid to others as shall be imperative at the time of accident.

“8. ACTION AGAINST THE WESTERN—COVERAGES A, B, C AND K: No action shall lie against The Western unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy . . .”

Thus, once the insurer establishes that the insured did not attend the trial, that his absence was prejudicial to insurer's defense and that a reasonable effort had been made to locate him such defense demands as a matter of law that the insurer be relieved of liability under the policy.

There are numerous cases which hold that efforts similar to those made in the present situation are as a matter of law reasonably diligent efforts.

In *Pawlik v. State Farm Mutual Automobile Insurance Co.*, 302 Fed. (2d) 255 (CA 7th 1962) the trial court found as a matter of law that the defendant insurer had shown a breach of the cooperation clause. There the accident occurred in November, 1956. The insured went to Virginia to live, but he informed the insurer that he would return if needed. In September of 1957 suit was filed on the accident. On August 20, 1958 the insured received a letter giving notice to him that the trial was set for October 20, 1958. A second letter was received by him on October 2, 1958 advising him to attend. He did not appear and the insurer with-

drew. The court sustained the trial court's finding as a matter of law that the affirmative defense had been established and that the plaintiff had not fulfilled its burden of refuting the defense.

A case very similar to the present situation is *Rohlf v. Great American Mutual Indemnity Co.*, 161 N.E. 232, 27 Ohio App. 208 (1927). The accident occurred on August 6, 1922. Suit was brought 19 months later. The insurer attempted to find the insured in four different cities, and finally found him in Toledo on February 4, 1925. The insured at that time made a written statement in which he denied any negligence, and put the blame on the driver of plaintiff's car for driving on the wrong side of the road. On February 16, 1925 a letter was sent to the insured at the Toledo address, advising him to appear at the trial. He made no response to the letter and did not attend the trial. The court affirmed the trial court's finding that the defense of non-cooperation had been established. In doing so the court put great weight on the fact that the insured had told the insurer that he would keep it advised of any change of address, "but that he had not given the company any notice of his change of address and receipt for the registered letters had been returned to the company, signed by his representatives at the Toledo address".

In *Cooper v. Employers Mutual Liability Insurance Company of Wisconsin*, 103 S.E. (2d) 210, 199 Va. 908 (1958) the accident was reported in

July, 1955. The insured gave an address where he could be located. A week later he gave a written statement to the insurer, with the same address indicated. The Complaint was served on the insured at his address on August 12, 1955. Shortly thereafter the insurer tried to locate the insured at the address but learned that he had quit his job and had moved. His employer gave his last known address as being Alberta, Virginia. On October 31, 1955 the insurer wrote to the insured, reminding him of his duty to cooperate, which letter was sent "return receipt requested" to his last three known addresses. No response was received. On November 14, 1955 the insurer denied coverage but remained in the suit under a Reservation Of Rights, notice of which was mailed to the above addresses. On November 30, 1955 a letter was mailed to the insured again advising him of his duties and of the coming trial date. The letter was returned, unanswered. Upon the trial a judgment was recovered by the plaintiff. In the subsequent garnishment suit the trial court struck all of the plaintiff's evidence at the conclusion of his case. The court affirmed it, holding that as a matter of law the efforts of the insurer in sending letters to all known addresses of the insured and contacting his former employer were all a reasonably prudent person could be expected to do. The court said:

“. . . When he moved from 3730 Delmont Street, the address given in his accident re-

port, to 2811 Hanes Avenue he did not notify the company of his change of address and left no forwarding address. Likewise when he moved from Hanes Avenue to Alberta he failed to notify the company and left no forwarding address. The latter address was secured from his former employer. One of the two letters delivered to that address, signed for by Wynn, was not returned, but the other was returned unopened. Whether Trayham actually received the letter not returned is not shown by the record. He failed to contact the company at any time after he made his report of the accident on July 12, 1955. He did not assist in any manner in the preparation for trial nor did he appear at the trial. These facts and circumstances constituted a wilful lack of cooperation with the company and such lack of cooperation was substantial and material and was prejudicial to defendant . . . especially in view of the fact that his report of the accident filed with the company indicated a defense to the action." (Page 215)

And in *Eakle v. Hayes*, 55 Pac. (2d) 1072 (Wash. 1936) the accident occurred on February 5, 1932. The suit was filed in December, 1932 and in November of 1933 the trial date was set for March 27, 1934. The insurer tried to locate the insured at his residence in Seattle but its efforts failed. Relatives didn't know where he was either. The insurer sent letters to all known addresses, which letters were all returned. The insurer then learned that the insured had left Seattle and had gone east. Through another source of information

it was learned that the insured had been seen in Charleston, Mass. on February 7, 1934, but efforts to trace him from there were unsuccessful. In reference to the efforts to find the insured by mailing letters to all known addresses, the court said on page 1074

“ . . . there was nothing more that respondent could have done under the circumstances . . . ”

In *Grady v. State Farm Mutual Auto Insurance Company*, 264 Fed. (2d) 519 (CA 4th 1959) the accident occurred on July 19, 1955 and the insured subsequently forwarded the suit papers to the insurer. At that time the insurer notified the insured to advise its attorneys of any change of address. On October 20, 1955 a letter was mailed to the insured at his previous address, but the letter was returned undelivered. The insurer then made inquiry at the address and at the insured's previous place of employment, learning only that the insured had left with no forwarding address given. On October 28, 1955 the insurer, having learned that the insured might have moved to El Centro, California, wrote a letter to that address, requesting the insured to make immediate contact with the insurer. No answer was received. Again on November 8, 1955 the insurer wrote a letter, with copies going to the El Centro address, the Virginia address and to the insured's previous employer in Virginia. No response was ever received. The insurer then

withdrew from the case. The court affirmed the trial court's dismissal of the complaint against the insurer on the ground that there was no genuine issue as to whether the non-cooperation defense had been established.

In *Polito v. Galluzzo*, 149 N.E. (2d) 375, Mass. (1958) the accident occurred on May 1, 1953. A statement was taken from the insured on July 6, 1953 and the suit was filed September 30, 1953. On October 5, 1955 a registered letter was mailed to the insured advising him of the coming trial. The letter was returned, undelivered. An investigator who went to the address could not find him either. A constable with a subpoena also could not find him. In the garnishment action the trial court dismissed the complaint. In affirming the trial court, the court made this observation which sheds light on the present case:

“The claim here is that the disappearance of the insured without notifying the insurer of his new address or furnishing some method by which he could be reached, constitutes a lack of cooperation and justifies the insurer in disclaiming liability after it has failed by reasonable methods to secure the attendance of the insured as a witness at the trial. So far as appears *the insurer had no other available witness on the question of liability*. The last communication the company had from Galluzzo was in July, 1959. *So far as the insurance company was concerned he virtually disappeared*. Here the company had made reasonable efforts to locate him. We

think that the disappearance of the insured and his failure to notify the insurer of the change of address were a material breach of the cooperation clause in the policy and warranted a disclaimer." (Page 377)

And in *Potomac Insurance Company v. Stanley*, 281 Fed. (2d) 775 (CA 7th 1960) the insurer brought a declaratory judgment action for a determination of its non-cooperation defense. The district court granted summary judgment to the insurer. The accident occurred in March of 1957. The affidavits of the insurer indicated that a series of nine letters, beginning in September, 1957, were mailed to the insured and copies to members of his family. He moved several times and each time failed to notify the insurer of his address. The insurer enlisted the services of a credit agency, which failed to locate him. The court affirmed the summary judgment, holding that it was not debatable that the insurer had shown due diligence.

And in *Indemnity Insurance Company of North America v. Smith*, 78 A. (2d) 461, Md. (1951) the insureds knew of the necessity of their presence at the trial. One week before trial the insurer attempted to contact them and learned they had moved without leaving a new address. A continuance was granted and registered letters were sent to all known addresses, but to no avail. Subpoenaes were also issued, but returned unserved. Inquiry was made of the insureds' relatives and neighbors. In the trial court the verdict was in favor of the plaintiff, but

the appellate court reversed and granted a directed verdict to the insurer on the ground that as a matter of law the insureds had breached the policy and the insurer had made reasonable efforts to locate them.

The point of the above cases is that the efforts to be made by the insurer depend upon the time available and the information available to the insurer about the insured's whereabouts. The appellant is unable to see how the efforts taken by it and its counsel after learning of Lew's disappearance are anything but a reasonable effort. Just as in some of the above cited cases, the defendant Western did not even know for sure what state or city the insured was in. Therefore, in absence of such information the insurer's only method short of a full scale national search was to send out letters to known addresses of Lew's residences and employment in hopes of obtaining information as to his new address. It would appear to be a misconception of the relationship between the insurer and the insured to hold that the insured, with full knowledge of his duty to cooperate, could wilfully secrete himself by moving around from state to state and from country to country and yet still demand coverage because the insurance company did not employ every conceivable means of locating him regardless of the expense and time involved. The insured not only made such moves but also did it with full knowledge that he had promised to keep the insur-

ance company advised of his whereabouts and he obviously knew that the insurance company was relying upon that promise.

This obviously is not a case where the insurer was encouraging the insured to "stay lost" so that the former could withdraw. The insurer, with Lew's cooperation, had a defense to the original action. The record shows that the usual pre-trial procedures were followed by Western in preparing the defense, and that depositions of the plaintiff and Dennis McMillan were taken. And in addition, Western made a good faith offer of settlement even after it knew of Lew's disappearance. The judge of the trial court in the first action was of the opinion that the insured was giving the insurer the "runaround" and, therefore, he (the insured) would get no sympathy from the court. Consequently the insurer was caught in the middle of the proverbial "squeeze play" — the continuance was not granted since the court was of the opinion that the insured had breached its contract, but in the subsequent action the insurer is held liable because it did not make sufficient efforts to find the insured, seemingly without any regard by that court to the lack of opportunity caused by the denial of the continuance.

Appellant believes it is clear that the trial court erred in not granting defendant's Motion For Summary Judgment; that the evidence submitted, all by the defendant, establishes without any genu-

ine issue of material fact the defense of non-cooperation; and since no evidence of excuse or justification was offered by the plaintiff a summary judgment for the defendant was necessary.

POINT II.

THE DISTRICT COURT COMMITTED ERROR IN TAKING JUDICIAL NOTICE OF EVIDENCE NOT IN THE RECORD, WHICH EVIDENCE IS NOT AMENABLE TO JUDICIAL NOTICE.

The Memorandum Decision makes it clear that the trial court below, in granting the summary judgment for the plaintiff, took judicial notice of the fact that Western "has agents in various parts of the country who were able at least to determine the addresses of the insured". The court gives no other reason for holding that the defendant's efforts were not reasonable. What the court in effect did was make an assumption of fact not warranted by the record. There is no evidence in this record where Western may or may not have agents, and particularly not in the State of Florida. Such evidence, if it existed, should have been presented by the plaintiff to show that the efforts were not reasonable. But there was no such evidence presented at any stage of either proceeding.

It is a cardinal principle accepted without dispute that a court may take judicial notice only of facts which are matters of common knowledge, which are well and authoritatively settled and not

doubtful or uncertain and which must be known to be within the limits of the jurisdiction of the court, 20 *Am. Jur., Evidence, Section 17*. It is obvious that the particular whereabouts of defendant's agents, assumed in this case by the court, are not of such a class of facts as is amenable to judicial notice. If this method of fact finding were permissible the courts would be granting summary judgments based upon their own assumptions of the facts, thus depriving the parties of the effect of evidence they have submitted and depriving them of a fair determination of the issues based only on the record presented. See an analagous situation in *Malmberg v. Baugh*, 62 Utah 331, 218 Pac. 975.

It is obvious that the court erred in assuming such critical facts, and that such error calls for a reversal of the summary judgment granted to the plaintiff.

POINT III.

THE COURT ERRED IN ITS ASSESSMENT OF INTEREST AGAINST THE DEFENDANT AND APPELLANT.

There is yet another matter in which the court erred in this action, and that is in its assessment of interest on the Judgment which the court gave to the plaintiff on her first cause of action. Of course, if this court agrees with the defendant and appellant that the trial court erred in granting plaintiff's Motion For Summary Judgment or in failing to grant the defendant's Motion For Sum-

mary Judgment this point becomes moot. It is only applicable should this court decide that the trial court did not err in granting plaintiff's Motion For Summary Judgment.

By the plaintiff's Amended Complaint, plaintiff in her first cause of action prays judgment "on the first cause of action against defendant for the sum of \$10,000.00, interest from the date of said judgment at the rate of 8% per annum, costs of that action and costs of this action" (R. 4). There were no amendments to this prayer, yet the court in its Judgment entered herein (R. 53) purported to give the plaintiff interest on the Judgment in the Marie E. Peterson v. Chuck Shim Lew case, or interest on \$12,500.00, rather than on \$10,000.00, the amount of interest awarded being \$1,880.00. This would appear to be error in a number of respects.

First of all, even if we consider the amount to be \$12,500.00, the interest has been incorrectly computed.

Secondly, the award of interest would appear to be beyond the prayer of the Amended Complaint since the plaintiff simply prays for judgment on the first cause of action against the defendant for \$10,000.00 and for interest on her \$10,000.00 Judgment at the rate of eight percent per annum. We submit this is a fair construction of the plaintiff's prayer and if submitted and if the Judgment of

the trial court is otherwise affirmed would mean that the plaintiff would be entitled to a Judgment of \$10,000.00 plus interest on said sum at the rate of eight percent per annum from the date of entry thereof, which in this instance is December 13, 1965. Were we to assume that the prayer of plaintiff's Amended Complaint as set out above referred to the Judgment in the Peterson v. Lew case (which it does not) rather than to the Judgment in this case and that the defendant and appellant Western had a duty upon the rendition of the Judgment in the Peterson v. Lew case to pay its policy limits on said Judgment for the reason that its insured, Chuck Shim Lew, was not guilty of violation of the cooperative clause of his policy, assessment of interest on the \$12,500.00 figure would appear to be error. Under such a view the most that can be said is that Western would be liable for interest on that portion of the Judgment which it should have paid, or for interest on \$10,000.00.

It should be kept in mind that this is not a case where the insurer has appealed or otherwise prevented execution or collection of a judgment for its own purposes while it sought a reversal of the Judgment entered against its insured. In an action brought by its own insured against the insurer, upon a determination of the issues against the insurer, the insured would at the most only have been entitled to collect damages to the extent that he was damaged by the insurer's breach of contract,

which would include the amount the insurer should have paid plus interest on said amount. The policy of the defendant and appellant contains what is termed the "Standard Interest Clause" (see Ex. D-1) which reads as follows:

"II. SUPPLEMENTARY PAYMENTS:
... The Western agrees to pay, in addition to the applicable limits of liability:

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

It would be an inequitable result to put the burden upon the insurer to pay interest accruing on the debt of the insured. The courts have recognized the inconsistency of holding the insurer liable for interest on money which the insured is obligated to pay but has not paid, and thus subject to his beneficial use. In the landmark case of *Sampson v. Century Indemnity Co.*, 8 Cal. (2d) 476, 66 P. (2d) 434 (1937) the verdict was greatly in excess, and an appeal was taken from that verdict and was affirmed. The policy contained the standard interest clause. The question there explored is the same as is presented here, what is meant by the words "all interest accruing after entry of judg-

ment"? The court said the meaning of the words is shown by two considerations:

1. Reading the words in context with the rest of the policy clearly indicates that the interest is limited, as is the liability. The court said

"It hardly seems probable, therefore, that the parties to the policy of insurance, after expressly limiting the liability of the company to the principal sum of \$10,000, intended to make it liable for interest on any greater amount. . . ." (Page 436)

2. Since the insured could lose nothing by the appeal period, there clearly was no intent to compensate him for loss not suffered. The court argued that the insured had the use of the money during the appeal period. Therefore, since interest is merely the value set for the use of money, the insured lost nothing. The court referred to a previous case of *Maryland Casualty Co. v. Omaha Electric L. & P. Co.*, 157 F. 514, 519 (CCA 8th 1907), where the court said it was a specious argument to say that the appeal by the insurer injured the insured. The court said:

"The assured stood after paying the interest exactly as it would have stood if it had paid the judgment of \$5,000 on Jan. 3, 1902, when originally rendered. Nothing was lost by the appeal as the interest ultimately paid was neutralized by the use and enjoyment of the money before that time."

In the *Sampson* case the court thus held that the words "all interest" meant all the interest accruing on the judgment only up to the policy limits.

And in a more recent case a third reason for not holding the insurer liable was espoused. In *Standard Accident Insurance Co. v. Winget*, 197 F. (2d) 97 (CCA 9th, Cal. 1952) the standard interest clause was again involved. The court said

"If we hold an insurer liable for interest, not on the portion of the judgment for which it is liable, which it does not pay, but on the whole amount recovered against the insured, we are imposing vicarious liability . . . And a contract should not be interpreted in such a manner as to impose upon a person responsibility for the obligation of others, even if it be in the form of interest only." (Page 107)

The court then quoted from *Malmgren v. Southwestern Auto Ins. Co.*, 126 Cal. App. 135, 14 P. (2d) 351, 352 (1932)

"The only logical construction to place upon the word *interest* as used in the above mentioned policy, is that it referred only to interest accruing on the principal sum of a judgment for which respondent (insurer) was liable under the terms of the policy . . ." (Page 107)

The court compared the *Malmgren* rule and the theory of the insured.

"This interpretation commends itself to reason. The interpretation which the trial court

rejected would penalize the insurance company for exercising the right, or encouraging the insured, to appeal." (Page 107)

There have been numerous cases since the *Sampson* case which have held that the Standard Interest Clause limits liability on interest just as the total liability is limited. In *Morgan v. Graham*, 228 F. (2d) 625 (CA 10 Okla. 1956) the court followed the *Sampson* and *Standard Accident* cases in holding "all interest" as meaning only the interest on the policy limit. The *Morgan* case was followed by two later cases: *Hawkeye-Security Ins. Co. v. Indemnity Insurance Co.*, 260 F. (2d) 361 (CA 10 Colo. 1958); and *Herzog v. Fidelity And Casualty Co.*, 257 F. (2d) 840 (CA 10 Okla. 1958).

The New York rule is clearly that of limited liability for interest. It was first espoused in *Devlin v. New York Mutual Casualty Taxicab Insurance Asso.*, 213 App. Div. 152, 210 N.Y.S. 57 (1925). And in *Home Indemnity Co. v. Corie*, 206 Misc. 720, 134 N.Y.S. (2d) 443, 446 (1954) the court said:

"When the nature of interest, compensation for the use or detention of money is born in mind, the result reached is far more reasonable than that sought by the defendants (the insured). Since the limit of the plaintiff's liability on the judgments themselves is \$10,000, this is the sum of money for whose use it should pay . . . The insured's surrender of control of the action, incidental to the insurance, does not justify the imposition of liability for interest on the part of the judgment which it is in no event bound to pay . . ."

The *Home Indemnity* case was then followed in *United States Fidelity And Guaranty Co. v. Holkins*, 8 Misc. (2d) 296, 170 N.Y.S. (2d) 441 (1957). And two other recent cases have followed the rule: *Crook v. State Farm Mutual Auto Ins. Co.*, 235 S.C. 452, 112 S.E. (2d) 241 (1960); and *Carlile v. Vari*, 113 Ohio 233, 177 N.E. (2d) 694 (1961). In the *Carlile* case the court said it was following the majority position.

The defendant, therefore, contends that the better rule, and the one followed by most courts, is that the insurer is not liable for any interest other than that which accrues on the judgment for which it is liable. The various cases cited have interpreted the Standard Interest Clause as being clear and unambiguous, and have found no detriment to the insured.

CONCLUSION

A reasonable and fair consideration of the facts as presented to the trial court at the pre-trial in support of defendant's Motion For Summary Judgment leads to the conclusion that the defendant and appellant established its defense of non-cooperation by a greater preponderance of the evidence. The facts clearly show that the defendant was greatly prejudiced in its defense by Chuck Shim Lew's absence and that the defendant and appellant had made reasonably diligent efforts within the time allowed by the trial court in the *Marie E. Peterson v. Chuck Shim Lew* case, once it was

known that the insured had left California without notifying Western as he had been advised he should do, to locate the insured. The defendant's efforts did not stop even here. It sought additional time from the trial court in the action brought by Marie E. Peterson against Chuck Shim Lew to gain additional time in which to locate Chuck Shim Lew, but the trial court denied it this additional time — in effect finding that Chuck Shim Lew had failed to perform his obligation to keep counsel for Western and the court informed as to his whereabouts and had failed to cooperate either with counsel or court in making himself available for trial.

Even so, the defendant and appellant did not seek to take any advantage of Chuck Shim Lew's absence but offered to allow judgment to be taken for its evaluation of the case in the amount of \$6,000.00 even after the court had refused it a continuance — again evidencing its efforts to act in good faith both with reference to its own insured and to those who might have claims against its insured.

In view of the foregoing the trial court in this case would appear to have had no alternative but to grant the defendant's Motion For Summary Judgment in the absence of any evidence by the plaintiff that Chuck Shim Lew's non attendance was excusable and without prejudice or that Western's efforts to locate him were not reasonable. The plaintiff presented no such evidence whatsoever.

The trial court erred in yet another respect, in assuming the existence of facts not shown, to-wit, that Western had agents located throughout the country who could in fact have located the insured, Chuck Shim Lew, within the time available to the defendant and appellant. It is true that under its contract of insurance the insurer, Western, had a duty to its insured, Chuck Shim Lew, but by the same instrument he agreed

“The insured shall cooperate with The Western and, upon The Western’s request, attend hearings and trials and assist in making settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of any legal proceedings in connection with the subject matter of this insurance. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such first aid to others as shall be imperative at the time of accident.”

We should not lose sight of the fact that an insurance policy is in essence a contract between the insurer and its insured and that judgment creditors, such as the plaintiff in this case, claim through the insured and should have no greater rights under the policy than the insured, himself.

There appears to be no escape from the conclusion in this case that the insured, Chuck Shim Lew, failed to comply with his obligation under the policy and that the defendant and appellant did everything which it might be reasonably ex-

pected to do to secure his compliance and cooperation.

We, therefore, respectfully submit that the trial court erred in failing to grant the defendant and appellant's Motion For Summary Judgment and in granting such a Motion to the plaintiff; and respectfully petition this court to reverse the trial court, vacate the summary judgment and enter a summary judgment in the defendant's favor.

Respectfully submitted,

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