

1967

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

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)

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

---

### Recommended Citation

Brief of Respondent, *Peterson v. Western Casualty*, No. 10524 (1967).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/3764](https://digitalcommons.law.byu.edu/uofu_sc2/3764)

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

---

---

IN THE SUPREME COURT

of the

STATE OF ILLINOIS

MARIE E. PETERSON, Plaintiff,

vs.

WESTERN CANTON  
SURETY COMPANY, Defendant.

FILED

APPROVED

CLERK  
OF  
COURT  
SIXTH  
JANUARY

---

---

# INDEX

Page

## Cases Cited

Carlile v. Vari, 113 Ohio 233, 177 NE 2d 694.....	20
Cooper v. Employer's Mutual Liability Insurance Company of Wisconsin, 103 S.E. 2d 210, 199 Va. 908.....	13
Coventry v. Steve Koren, Inc., 1 Ohio App. 2d 385, 205 NE 2d 18 .....	20
Grady v. State Farm Mutual Auto Insurance Company, 264 Fed. 2d 519 (CA 4th 1959).....	13
Gully v. Lumberman's Mutual Casualty Company (Miss. 1936), 168 So. 609 .....	17
Indemnity Insurance Company of North America v. Smith, 78 A. 2d 461, Md.....	13
Jensen v. Eureka Casualty Company, et al., 1935, 52 P.2d 541.....	7, 15
Johnson v. Doughty (Ore. 1963, 385 P.2d 760.....	11
Keenan v. Price, 195 P.2d 662 (Idaho, 1948).....	17
Montgomery v. Preferred Risk Mutual Insurance Co., Utah 2d ....., 411 P.2d 488.....	7, 16
Oberhansley v. Travelers Insurance Co., 5 Utah 2d 15, 295 P.2d 1093 .....	7, 16
Pawlik v. State Farm Mutual Automobile Insurance Co., 302 Fed. 2d 255 (CA 7th 1962).....	13
Penhams v. Associated Indemnity Corp. (Cal. 1935), 47 P.2d 791 .....	10
Pennsylvania Thresherman and Farmers Mutual Casualty Insurance Company v. Owens, 238 Fed. 2d 549, Fourth Circuit, 1956) .....	11
Potomac Insurance Company v. Stanley, 281 Fed. 2d 775 (CA 7 1960) .....	13
Rivervalley Cartage Company v. Hawkeye-Security Insurance Co. (1959), 17 Ill. 2d 242, 161 NE 2d 161, 76 ALR 2d 978 .....	19, 21
Rohlf v. Great American Mutual Indemnity, 161 NE 232, 27 Ohio App. 208 (1927) .....	13
State Farm Mutual Insurance Company v. Farmers Insurance Exchange, Oregon 1963, 387 P.2d 825.....	8
State Farm Mutual Insurance Company v. Farmers Insurance Exchange Rehearing in 1964, 393 P.2d 768.....	9
Watseka v. Bituminous Casualty Corporation (1952), 347 Ill. App. 149, 106 NE 2d 204 .....	19

## TEXTS CITED

Annotated Case Service of ALR.....	21
76 ALR 2d 987 .....	20
31 CJS, Evidence, Sec. 36.....	16

# 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.

10524

---

### RESPONDENT'S BRIEF

---

#### STATEMENT OF THE NATURE OF THE CASE

Respondent, plaintiff in the lower court, brought an action against the defendant, appellant herein, as the insurer of one Chuck Shim Lew, to recover the benefits of Lew's automobile insurance policy and have the policy proceeds paid over to respondent towards satisfying a monetary judgment obtained against the insured in another civil action.

## DISPOSITION OF THE LOWER COURT

Respondent and appellant each filed motions for summary judgment, which motions were heard at the pretrial. Respondent was granted a summary judgment against appellant for the sum of \$10,000.00 on her first cause of action, and respondent's second cause of action was dismissed.

## RELIEF SOUGHT ON APPEAL

Respondent seeks to have the court affirm the judgment of the pretrial court against appellant.

## STATEMENT OF FACTS

The instant appeal from the lower court arises out of a judgment rendered on behalf of respondent against one Chuck Shim Lew, Civil No. 143286, as filed in the District Court of Salt Lake County (Supplemental transcript). That case was based upon an automobile accident occurring while respondent was a guest passenger in a northbound vehicle on Ninth East when her vehicle collided with the insured's vehicle traveling west on 27th South in Salt Lake City, Utah in the morning hours of February 24, 1963. A dispute existed between respondent's driver and Lew as to which vehicle was favored with the "right of way" because of the traffic semaphore.

Respondent's host driver, Dennis McMillan, submitted to a deposition at the request of appellant's counsel on August 9, 1963, the deposition being re-

ceived in evidence by the lower court in this case as Exhibit D-11. In that deposition, McMillan testified the light was green when the vehicle he was driving entered the intersection, and while in the intersection he observed the green light change to amber from the reflection of the light on the hood of his vehicle (D-11, page 16). A contrary statement of purported fact found at page 3 of appellant's brief is not borne out by the record in this case. It concerns the nature of the proceedings in which Lew supposedly testified he had the green light and respondent's driver had the red light at the time of each vehicle entering the intersection, as on page 22 of Exhibit D-11, the deposition indicates appellant's insured "in another trial proceeding" testified McMillan went through a red light without reference to the civil or criminal aspects involved. It is conceded that no other eye witnesses are known except respondent who also testified in her deposition that the light was green at the time the vehicle in which she was a passenger entered the intersection (Exhibit D-10, page 16).

A civil action was commanded on May 23, 1963, in which respondent was the plaintiff and appellant's insured was the defendant. Personal service was had over Lew on May 24, 1963, and the usual insurance company answer was filed June 11, 1963, together with a notice of taking of respondent's deposition received as Exhibit D-10, after which the host driver's deposition was taken (Exhibit D-11).

In the interim appellant's counsel wrote its insured (Exhibit D-3) advising him of their appearance into the case, which letter was returned. This letter was written to the insured at 525 Jefferson Street, Salt Lake City, Utah, and not to the address of the insured on the policy (Exhibit D-1) which was 321 First Avenue, Salt Lake City, Utah. According to appellant's counsel on receiving back Exhibit D-3, he sought the service of an independent insurance adjuster, who obtained an address of Lew in California. On September 6, 1963, Exhibit D-4 a letter was written, addressed to 833 Jefferson Street, Salt Lake City, Utah, with a carbon copy to 301 Boyle Avenue, Los Angeles, California. This letter was essentially the same as the Exhibit D-3, with the exception of an additional statement which reads, "We are sending the original of this letter to 838 Jefferson Street, Salt Lake City, Utah, and a carbon copy of the letter to 301 Boyle Avenue, in Los Angeles, *in the hope* that either the original or the copy will reach you." (Emphasis ours)

Apparently in response to the carbon copy of the letter, a hand printed reply was received by appellant's counsel bearing the signature of a Chuck Shim Lew and advising appellant's counsel of a new address, to wit, Chung King Restaurant, 3817 Market Street, Riverside, California, and a telephone number of OV-6-7292; which letter specifically stated: "I wish to know if I have to appear in court with you and the date to appear in court." In response to this, appellant's counsel wrote Exhibit D-6 to the Market Street address merely in-

forming Lew that he would be advised when it would be necessary for him to appear in court.

A notice of readiness for trial was filed September 24, 1963.

In mid October 1963, Mr. Herbert C. Papenfuss, Lew's agent at Western, went to California and while there attempted to contact Lew, only to find that he had left California and had probably gone to Vancouver.

Notwithstanding actual knowledge to appellant of Lew's unknown whereabouts, the record is void of any attempt to contact Lew or verify his whereabouts until after the pretrial which was held February 4, 1964, which resulted in the writing of Exhibit D-7 directed to Lew in care of Chung King Restaurant, 3817 Market Street, Riverside, California, (which letter was returned), with a carbon copy to Lew, at 838 Jefferson Street, Salt Lake City, Utah, (which letter was not returned.)

Prior to this Mr. Papenfuss had received a remittance from Lew giving a return address of a certain restaurant in Bienfait, Saskatchewan, Canada, (Exhibit D-2, page 4).

The record next indicates a telephone attempt to locate Lew at the Club 13, in Saskatchewan, and it was discovered that he was no longer there, but was probably in Miami or in Miami Beach, Florida, (Exhibit D-2, page 4). Even with this knowledge, Exhibit D-8, on March 6, 1964, was written to Lew at the Chung King Restaurant address in California; a carbon copy to Lew at the



Club 13, address in Saskatchewan, Canada, and a carbon copy to Lew at 838 Jefferson Street, Salt Lake City, Utah, advising Lew of the March 12th trial date, all of which were returned. Subsequently on March 10, 1964, a formal notice of withdrawal of counsel and notice to appoint counsel was mailed to Lew at the same addresses, but once again the Salt Lake letter was not returned. (T-44)

The matter came on for default trial on March 12, and the trial was continued to March 25, 1964, out of which a judgment was rendered on behalf of respondent against Lew for the sum of \$12,500.00, from which judgment the action against appellant arises.

At the time of pretrial in the instant appeal, judgment was rendered on behalf of respondent on her first cause of action for the sum of \$10,000.00, being the policy limits. Judgment was rendered for appellant on the second cause of action being a claim against Western Casualty and Surety Company for bargaining in bad faith, which claim was for the sum of \$2500.00, the excess amount of the judgment. This portion of Judge Hanson's ruling is not on appeal. A judgment for interest on the entire \$12,500.00 was also granted to respondent.

#### POINT I

THE LOWER COURT DID NOT ERR IN GRANTING  
THE SUMMARY JUDGMENT TO RESPONDENT  
AFTER VIEWING THE FACTS MOST FAVORABLE  
TO APPELLANT.

The principal question in this appeal is very closely related to a question which has come before this court twice previously:

*Oberhansley v. Travelers Insurance Co.*, 5 Utah 2d 15, 295 P2d 1093, and *Montgomery v. Preferred Risk Mutual Insurance Co.*, ..... Utah 2d ....., 411 P2d 488. In the latter case, this court set forth the following test, when it stated:

"In order for an insurance company to invoke non-cooperation clause in its contract, and avoid meeting its obligation on that ground, it must show that it used reasonable diligence in obtaining the cooperation, that the insured failed, and that put it (the company) to some disadvantage."

Therefore, the main issue in this brief is Judge Hanson's conclusion covering the lack of Western's reasonable diligence in seeking the cooperation of its insured, Chuck Shim Lew, since according to the Montgomery case, the other two aspects of the test do not even come into play until the company has used reasonable diligence.

It is interesting to note that each of the two foregoing Utah decisions have relied upon the California case of *Jensen v. Eureka Casualty Company, et al.*, 1935, 52 P 2d 541, the facts of which involved an insured who was a traveling salesman. Process had been served upon him, which he delivered to the insurance adjuster, and notified the adjuster where he could be reached in the event of trial. The insurance representative attempted to locate its insured at trial time and was unable to do so.

On appeal in the direct action against the company, the California court concluded that the insured had not sufficiently been advised as to his obligation and the need for further cooperation at a time when he could have been more available for any requested assistance. Analogous and in accordance with respondent's position is *State Farm Mutual Insurance Company v. Farmers Insurance Exchange*, Oregon 1963, 387 P2d 825. Upon being sued, the insured was slow in turning over suit papers to his company. Letters were mailed from the company to the insured requesting cooperation and also acknowledgments of the letters. No acknowledgments were ever forwarded. The insured was requested to attend trial and an offer to pay expenses was of record but no acknowledgement ever came from the insured. The Oregon court in concluding that due diligence had not been exercised stated on page 830:

“It (the company) should not have been surprised when he did not appear at the trial in response to the January letter requesting him to appear.”

Further on page 830, the court observed the personal advantage that an insurance company could obtain for itself if permitted to exercise less than reasonable diligence in obtaining the assistance of its insured and stated:

“When the insured's cooperation was not to the insurer's benefit, it relied upon letters, not to personal contact. It should not be assumed that in every case, personal contact is essential to an

exercise of due diligence. However, in this case, under all circumstances the absence of an attempt to have a representative of the insurer personally attempt to secure the insured's presence at trial, is damaging to the defendant's defense."

On a rehearing of the above case, the Oregon court in 393 P2d 768, 1964, at page 769, stated in discussing its previous holding:

"We held that the insurer does not prove the exercise of due diligence simply by showing that one or more letters were directed to the insured requesting his attendance at trial. We believe that the insured received the written request (as we must in this case because of the presumption created by ORS 41.360 (24)). His failure to appear may still not constitute a breach of the cooperation clause of the policy under some circumstances. Thus it may be that after the insured received the request, he died or was incapacitated or could not attend without undue hardship. The cases generally support the view that the cooperation clause is not breached if the insured's failure to attend is not willful. In some cases, perhaps the majority, require the insurer to show prejudice to its position. We do not decide whether these latter cases are sound. In the present case, there is no evidence explaining why the insured did not appear. For the reasons expressed in our original opinion, we believe that the insurer should have the burden of showing the insured's failure to appear was in fact due to his noncooperation."

(The Oregon statute cited is merely a codification of the Connor Law rule presuming mailed and unreturned letters are received).

Another analogous case to the instant appeal is *Penhams v. Associated Indemnity Corporation* (Cal. 1935) 47 P2d 791, wherein the insured moved to Los Angeles from San Francisco. Several letters were mailed to him with no acknowledgment, except in one instance, where the insured wrote back, "Please advise as to the outcome of the trial?". Then it appeared as if the insured had vanished. About three months before trial, the company hired private investigators to attempt to locate him, which efforts were to no avail.

The court in sustaining the judgment against insurance company noted that the company previously to its being unable to locate their insured had, or should have had, adequate time to gain his cooperation in preparing their defense if they had so desired.

On page 794, the California court stated:

"It made no request whatever upon him during that time except to keep it informed of his whereabouts.

"It is clear therefore that King (the insured) committed no breach of the policy up to December 12, 1930, the time he left Los Angeles without notifying appellant as to his future whereabouts, and the issue narrows down to the single question of whether under the circumstances above stated his failure to attend the trial constituted a breach of a material provision of the policy, the effect of which was prejudicial to appellant."

In the instant appeal, Exhibit D-5 is the appellant's hand printed letter from Lew inquiring of appellant's

counsel if it would be necessary for him to appear at trial, to which inquiry the reply letter (Exhibit D-6) merely states:

"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.

with no specific reply to Lew's request until February, 1964, (Exhibit D-7).

Other cases discussing the question of reasonableness of efforts to obtain the assistance of their insured are *Johnson v. Doughty* (Oregon 1963) 385 P2d 760, in which the court states at pages 762 and 763:

"The evidence proved that the insurer did not make a reasonable effort to locate Doughty. The only letter sent to Doughty was directed to an address *known* to be incorrect at a time when the insurer had reason to know of a better address. The evidence creates a strong inference that the insurer did not want to locate Doughty under the circumstances of the case. Under such circumstances the mere fact that Doughty disappeared is insufficient to show lack of cooperation." (Relying on *Pennsylvania Thresherman and Farmers Mutual Casualty Insurance Company v. Owens*, 238 Fed. 2d 549 Fourth Circuit 1956) (Emphasis ours).

Another is *Pennsylvania Thresherman and Farmer's Mutual Casualty Company v. Owens* (Fourth Circuit) (South Carolina 1956), 238 Fed 2d 549, where the Federal court at page 550 stated:

“The problem of noncooperation has a dual aspect:

Not only what the assured failed to do but what the insurer on its part did to secure the cooperation from an apathetic inattentive or vanishing policy holder must be considered. Liability insurance is intended not only to indemnify the assured but also to protect the members of the public who may be injured through negligence. Indeed such insurance is made mandatory in many states. It would greatly weaken the practical usefulness of policies designed to afford public protection, if it were enough to show mere disappearance of the assured without full proof of proper efforts by the insurer to locate him.” (Citing *Tudor v Commonwealth Casualty Company* 163 At. 27, 10 NJ Misc. 1206)

Further on page 551, the court stated:

“We might add that the circumstances afford no hint to explain Wood’s disappearance. There is no suggestion of domestic discord; any effort to escape criminal prosecution or other reason to abscond. From all that the record shows, he may have been the victim of foul play or disability operate was willful. There was no evidence of any inquiries other than from the wife and the pastor. No inquiries were made from the police or Wood’s place of employment, where his employer or fellow workers might possibly have given a clue to his whereabouts or at the post office to learn if he had left a forwarding address. Requiring such additional efforts would not seem to impose an un-in which it could not be said that failure to co-reasonable burden.”

Six of the eight cases discussed at length in appellant's brief can be differentiated from the fact situation on appeal and from the cases hereinbefore cited in this brief:

A. *Pawlik v. State Farm Mutual Automobile Insurance Co.*, 302 Fed. 2d 255 (CA 7th 1962) was concerned with discussion of a fact situation where the insured *willfully* failed to appear after receiving *actual notice* of trial date;

B. *Rohlf v. Great American Mutual Indemnity*, 161 NE 232, 27 Ohio App. 208 (1927) involved *collusion* by the insured and the injured;

C. *Cooper v. Employer's Mutual Liability Insurance Company of Wisconsin*, 103 SE 2d 210, 199 Va 908 (1958) and *Grady v. State Farm Mutual Auto Insurance Company*, 264 Fed 2d 519 (CA 4th 1959) are decided under a unique Virginia rule of law where failure to attend the trial in and of itself is lack of cooperation sufficient to absolve a company from liability.

D. *Potomac Insurance Company v. Stanley*, 281 Fed 2d 775 (CA 7th 1960) and *Indemnity Insurance Company of North America v. Smith*, 78 A. 2d 461, Md (1951) are decided under a different rule of law than is in force in Utah, to wit, complete cooperation of the insured is a *condition precedent* to an insured's being entitled to the benefits of an insurance policy.



In comparing the foregoing cases with the instant appeal, it would appear to the writer that appellant should have been placed on notice of the itinerant character of its insured as when the subject matter insurance policy was written on January 24, 1963, Lew's address was 321 First Avenue, Salt Lake City, Utah (Exhibit D-1). The first correspondence after the accident involving appellant (dated July 25, 1963) was directed to 828 Jefferson Street, Salt Lake City, Utah (Exhibit D-3) which letter was returned. Then after being located by an independent insurance adjuster from a request by appellant's counsel, original correspondence was directed to Lew at 838 Jefferson, Salt Lake City, Utah, with carbon copy of the same to 301 Boyle Street, Los Angeles, California (Exhibit D-4). A hand-printed reply apparently from Lew under date of September 19, 1963, was directed to appellant's counsel giving an address of the Chung King Restaurant, 3817 Market Street, Riverside, California, together with a phone number of "OV6-2792", (Exhibit D-5), which merely resulted in a short letter from counsel to Lew, dated September 23, 1963, (Exhibit D-6).

In mid-October, 1964, actual notice of Lew's having left the Market Street address and probably California was given Mr. Herbert C. Papenfuss, one of appellant's agents, when Mr. Papenfuss went to California and while there attempted to locate Lew, only to find that he had gone to Canada, probably to Vancouver. The record is completely void of any attempts to locate him in Canada at that time.

In the first part of January, 1964, a remittance was received by Papenfuss from Lew giving a return address of "Club 13, Bienfait, Saskatchewan, Canada", (D-2, page 4, T-45). The record is further void of any attempt to verify this or to make contact with Lew at that address until after the pretrial held February 4, 1964.

Letters dated February 7, 1964, notifying Lew of the trial date were obviously useless as they were sent to Riverside, California, and 838 Jefferson, Salt Lake City, Utah, (D-7). When the California letter was returned, threatening letters dated March 6, 1964 were mailed to Lew once again at 838 Jefferson, Salt Lake City, Utah; % Chung King Restaurant; Riverside, California; and finally to the Club 13, Bienfait, Saskatchewan, Canada (D-8) all of which were returned.

It would seem only reasonable from the use of three Salt Lake addresses, two California addresses and possibly two Canadian addresses within a twelve month period that Western Casualty should have been on notice of the transient character of its insured. Its failure to obtain the insured's deposition under these circumstances; and, its failure in keeping the insured advised of the expected time lapse before pretrial and the expected time lapse from pretrial until the trial, hardly seems to be exercising reasonable diligence in maintaining contact with a nomadic Chinese restaurant worker. These facts indicate a similar situation to *Jensen v. Eureka*, *supra*.

In addition to all of these facts the record is absolutely void of any attempted contact with Lew by any private investigator, by any insurance adjuster, by any credit company, or through General Motors Acceptance Corporation, the loss payee on Lew's insurance policy.

Therefore, under the rules of *Oberhansley v. Travelers* supra, and *Montgomery v. Preferred Risk Insurance Company*, supra, and the tests contained in those cases, the principal question before this court is whether or not in viewing the facts most favorable to the appellant, did it use reasonable diligence in attempting to obtain the cooperation of its insured, with full knowledge of his wandering traits. The burden of obtaining Lew's assistance was left to appellant's counsel which Judge Hanson concluded was not a reasonable effort by the company to obtain cooperation; which conclusion should be sustained.

#### POINT II ON APPEAL

THE DISTRICT COURT DID NOT COMMIT ERROR IN TAKING JUDICIAL NOTICE OF THE FACT THAT THE DEFENDANT HAS "AGENTS IN VARIOUS PARTS OF THE COUNTRY WHO WERE ABLE TO AT LEAST DETERMINE THE ADDRESS OF THE INSURED."

Judge Hanson's memorandum decision made the statement in the above headnote and this conclusion was reached by him without any evidence being adduced in the proffer of proof proceedings. In 31 CJS, Evidence, Section 36, is found the following:

"Courts may take judicial cognizance of public or official records of general public interest, including public records in the Federal and State executive departments, and including public records in the Federal and State Administrative bodies, such as the office of the State Treasurer or the Secretary of State and records of other public officers, committees and administrative bodies at least to the extent that such records are required by law."

In *Keenan v. Price*, 195 P2d 662, (Idaho 1948) the Supreme Court of Idaho stated at page 668:

"We take judicial notice of the public and private acts of the legislature and the journals of the legislative bodies. . . ."

A case in point with the instant appeal is that of *Gully v. Lumberman's Mutual Casualty Company*, (Mississippi 1936) 168 So. 609, where in the Supreme Court of Mississippi, on page 610 stated in discussing whether a certain insurance company was authorized by its charter to do a certain type of business:

"Those facts are shown by the records of the office of the insurance commissioner. The office of the insurance commissioner is a coordinate branch of the State government. The courts will take judicial notice of its records and the contents thereof."

Therefore, Judge Hanson could properly take judicial notice of the records of the Utah Insurance Commissioner. It is interesting to note in its 1965 annual report,

appellant stated it was doing business in thirty seven states and the District of Columbia and the 1964 annual report shows thirty six states and the District of Columbia. Both annual reports show Western was doing business in California and Florida, and therefore, taking judicial notice of these public records is a reasonable basis for arriving at the conclusion of the presence of agents in various parts of the country.

### POINT III

#### THE COURT DID NOT ERR IN ITS ASSESSMENT OF INTEREST AGAINST THE DEFENDANT AND APPELLAINT.

Plaintiff in the lower court prayed for judgment on each cause of action together with interest on each cause of action. At the pretrial proceedings a specific motion for interest on the entire amount of the judgment was made (T-48).

Without professing to be an expert mathematician, the proper amount of interest on \$12,500.00 at eight percent per annum can be calculated, which sum seems to be \$1771.00.

The principal question for this court to decide is whether or not an insurance company is liable for interest at the judgment rate on the entire amount of a judgment until it pays the policy limits towards satisfying the judgment. In this appeal, Judge Hanson obviously intended to grant an award of interest at the rate of eight percent per annum on \$12,500.00, which respondent

contends is the proper rule of law for this court to sustain.

In the case of *Rivervalley Cartage Company v. Hawkeye-Security Insurance Company*, 1959, 17 Ill 2d 242, 161 NE 2d 161, 76 ALR 2d 978, judgment was rendered against the insured for the sum of \$175,000.00. The Illinois court in this case overruled its previous decision of *Watseka v. Bituminous Casualty Corporation*, 1952, 347 Ill App 149, 106 NE 2d 204, in construing what appellant has conceded to be the "standard interest clause" by noting at page 990 of the annotation, and the writer noted:

"The court noted to what it called the 'realities of the relationship between the insurer and the insured' namely, that under the terms of the policy, the insurer has complete control of any litigation from which it might incur liability; that the insured cannot settle with the injured person without relieving the insurer from its obligation; that any delay which may cause the accumulation of interest is therefore the responsibility of the insurer and that for this reason until the insurer has discharged its obligations under the policy, it should bear the entire expense of such delay. As a recognition by the insurers themselves of the validity of the last argument, the court referred to a recent change in the standard interest clause approved by the National Bureau of Casualty Underwriters, which made absolutely clear the liability of the insurer for interest on the entire judgment.

The principal that interest is recoverable on the full amount of the judgment is also supported

by some text writers. (See, i.e., *Risjord Underwriting Intent*, 7 *Federation of Insurance Counsel Quarterly* 41, as quoted in *United Service Automobile Association v. Russon* 1957, *Court of Appeals Fifth, Texas*) 241 Fed 2d 296: 'When the policy referred to all interest, the underwriters meant all interest on the judgment whatever its size in relation to the policy limits. . . . The September 1, 1956, Standard Family Automobile Policy makes this point clear by stating the company is liable for all interest on the entire amount of any judgment.'

Also, in support of respondent's position are the numerous other cases found in 76 ALR 2d 987.

Appellant in its brief on page 34 cites to this court the Ohio case of *Carlile v. Vari*, 113 Ohio 233, 177 NE 2d 694 (1961), as stating the Ohio rule; however, this overlooks the case of *Coventry v. Steve Koren, Inc.*, 1 Ohio App 2d 385, 205 NE 2d 18, which appears to this writer to overrule the earlier *Carlile* case.

The court's attention is directed to the provisions of Western's policy which states:

"... 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 Western has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of Western's liability thereon."

There is no conceivable way of construing the lan-

guage of the above clause in any other manner than to conclude that Western is obligated for interest on the entire amount of any judgment until it pays, tenders, or deposits the funds in the manner prescribed.

There are numerous decisions that vary from the rule which respondent seeks this court to uphold; however, generally these involved cases where the courts have been called upon to interpret other policy provisions other than what we now call the "standard interest clause."

A review of the cases in the Annotated Case Service of ALR indicates that a majority of the courts before whom this specific question has come, are now abiding by the rule stated above in *Rivervalley Cartage Company v. Hawkeye-Security Insurance Company*, *supra*.

## CONCLUSION

Respondent requests this court to sustain the judgment of the Honorable Stewart M. Hanson in concluding that as a matter of law in viewing the facts most favorable to Western Casualty and Surety Company, as the insurer of Chuck Shim Lew, Western did not exercise reasonable diligence in obtaining the cooperation of its insured; thereafter, directing its attorneys to withdraw as his counsel, when he could not be located two days before trial.



In addition respondent requests this court to sustain the judgment awarding interest at the rate of eight percent per annum on the entire amount of the judgment until Western complies with the provisions of the "standard interest clause" of its policy. Respondent further requests this court to award her costs of this proceeding.

Respectfully submitted,

HATCH & McRAE

516 Boston Bldg.

Salt Lake City, Utah

Attorneys for respondent