

equities of the parties. It is obvious that such relief cannot be granted in a summary proceeding.

Assuming plaintiff to have set forth a cause of action to quiet title merely as a necessary incident to the establishment of a defense in this action, the answer would have to be the same. The affirmative relief would have to be obtained in what, for the purposes of the summary judgment law, must be considered an independent action, whether set up by separate action, by counterclaim, or by cross-complaint, and if the summary judgment law is not applicable to such an action, defendant cannot have summary judgment upon his counterclaim or cross-complaint, but must proceed to a conventional trial upon this issue.

This view of the case makes it unnecessary to discuss the merits of this controversy. We are satisfied that the court properly denied the motion for summary judgment.

Order affirmed.



**EMPLOYERS' MUT. LIABILITY INS. CO.
OF WISCONSIN et al. v. TOL-
LEFSEN et al.**

Supreme Court of Wisconsin,
Nov. 5, 1935.

1. Insurance ⇨152(3)

Supreme Court must assume that automobile indemnity policy contained provisions required by statute relating to automobile indemnity insurance, one of which is that indemnity shall extend to any person legally responsible for operation of automobile covered (St. 1933, § 204.30).

2. Insurance ⇨146(3)

Ambiguities in insurance policies are construed most favorably to insured.

3. Insurance ⇨435

Under automobile indemnity policy insuring truck operator "and/or" his employer as the "named assured" and excluding from coverage accidents to employees of assured arising out of and in usual course of business, insurer *held* liable for injury to employee of truck operator's employer from operation of truck while operator was operating as independent contractor, as against contention that

word "assured" in exclusion clause of policy referred to both truck operator and employer (St. 1933, § 204.30).

[Ed. Note.—For other definitions of "Assured," see Words & Phrases.]

4. Insurance ⇨435

Under automobile indemnity policy insuring truck operator "and/or" his employer as the "named assured," insurer *held* not relieved from liability for injury to employee of truck operator's employer from operation of truck by operator as independent contractor because of clause exempting insurer from liability for injuries for which assured might be liable under Workmen's Compensation Act, since truck operator sustained no liability to employee under the Compensation Act, in that truck operator was the "assured" (St. 1933, § 204.30).

5. Insurance ⇨435

Under automobile indemnity policy insuring truck operator "and/or" his employer as the "named assured," insurer *held* not relieved of liability for injuries to employee of truck operator's employer from operation of truck because of contract requiring operator to carry insurance on trucks, protecting both operator and employer against damages to pedestrians and travelers on the highway, where insurer was not a party to the contract and contract was not made for its benefit (St. 1933, § 204.30).

Appeal from an order of the Circuit Court for Door County; Henry Graass, Circuit Judge.

Reversed.

Action by Employers' Mutual Liability Insurance Company and Frank Pichette against Oscar Tollefsen, C. D. Brower, and the Standard Accident Insurance Company. From an order entered dismissing the complaint as to the Standard Accident Insurance Company, the plaintiffs appeal.

The plaintiff Employers' Mutual Liability Insurance Company insured the Sturgeon Bay Company against liability under the Workmen's Compensation Act (St. 1933, § 102.01 et seq.). The plaintiff Pichette was an employee of the Sturgeon Bay Company, and was injured while performing service pursuant to his employment. The Industrial Commission awarded compensation to Pichette consisting of down and future monthly payments. The Employers' Mutual Liability Insurance Company under the subrogation provision of the Workmen's Compensation Act, section 102.29(2) Stats., sues the defendants Tollefsen and C. D. Brower as joint tort-

feasors by whose negligence Pichette was injured, and the Standard Accident Insurance Company as the insurer of Brower under an insurance policy indemnifying Brower against damage for injuries to persons inflicted through negligence in the operation of a truck while engaged in the conduct of his business, to recover for itself the amount of compensation which it has paid and must pay in the future upon the award of the Industrial Commission, and to recover for Pichette the amount of his damages, joining Pichette with it as plaintiff. The Standard Accident Insurance Company pleaded as a separate defense that the policy upon which the claim of its liability is based runs to Brower and the Sturgeon Bay Company jointly and excludes liability under the Workmen's Compensation Law and liability for injuries to employees of both Brower and the Sturgeon Bay Company. This defense was submitted to the court before trial of the other issues, and an order was entered dismissing the complaint as to the Standard Accident Insurance Company. From this order the plaintiffs appeal.

Bruemmer & Bruemmer, of Kewaunee, for appellants.

Lines, Spooner & Quarles, of Milwaukee, (M. U. Hayden, of Detroit, Mich., and Howard A. Hartman, of Milwaukee, of counsel), for respondents.

FOWLER, Justice.

[1] The only provisions of the policy in suit deemed by the parties material to the appeal are the coverage clause insuring the defendants "C. D. Brower, Jr. and/or the Sturgeon Bay Company," as the "named assured," and the exclusion clauses exempting from coverage (1) "any accident to any employee of the assured arising out of and in the usual course of * * * the business * * * of the assured," and (2) "any obligation assumed by or imposed upon the assured under any workmen's compensation agreement, plan or law." We must assume, in addition, that the policy contains the provisions required by section 204.30, Stats., relating to automobile indemnity insurance, one of which is that the indemnity shall extend "to any person * * * legally responsible for the operation" of the automobile covered.

It is manifest that we are confronted with the task of first construing "and/or," that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word

nor phrase, the child of a brain of some one too lazy or too dull to express his precise meaning, or too dull to know what he did mean, now commonly used by lawyers in drafting legal documents, through carelessness or ignorance or as a cunning device to conceal rather than express meaning with view to furthering the interest of their clients. We have even observed the "thing" in statutes, in the opinions of courts, and in statements in briefs of counsel, some learned and some not.

The appellants contend that the purpose and intent of the policy as to Brower is to indemnify him against damage through accidents caused by him or his employees in operating the truck in carrying on his business; that the word "assured" in the exclusion clause of the policy should be construed as referring only to employees of Brower. The respondents contend that the word "assured" in the exclusion clause refers to both Brower and the Sturgeon Bay Company, and that by that clause accidents causing injury to an employee of either are excluded.

[2, 3] We are of opinion that the policy should be construed as indemnifying Brower against damage through injuries to persons done by the truck while in operation in the conduct of his business, except as to injuries to his employees; as indemnifying the Sturgeon Bay Company against damage through injuries to persons done by the truck while in operation in the conduct of its business, except as to injuries to its employees; and as indemnifying both Brower and the Sturgeon Bay Company from damage through injuries to persons done by the truck when and if in operation in business being conducted by them jointly, except as to employees employed by them jointly. If Brower had been operating the truck as the agent of the Sturgeon Bay Company, instead of as an independent contractor, so that both were responsible for its operation, then it might be that each of them would be held to be a named assured, and the injury to Pichette, an employee of the Sturgeon Bay Company, would be excluded from coverage; but that case is not before us and is not decided. This gives to "and/or" all its implications. It renders somewhat inexact our reference to the "verbal monstrosity" as "Janus-faced," for it imputes to it more than two faces, but the appellation may stand for want of one better fitting. The "thing" is reasonably subject to that interpretation. If it is also subject to the interpretation contended for

by the respondents, it is ambiguous, and by familiar rule, ambiguities in insurance policies are construed most favorably to the insured. If the construction given differs from the meaning actually entertained and intended to be conveyed by the company when it issued its policy, the company has only itself or its draftsman to blame, and it is justly penalized for attempting to express—or perhaps to conceal—the meaning intended by the use of a mere mark upon paper.

We have referred to our construction of the policy as reasonable, and we should perhaps state the reason for it more in detail. Brower manifestly intended when he procured the policy in suit to secure indemnity against damage through injuries except to his own employees inflicted upon persons in the operation of his truck in his business. Such is the purpose of every such policy. It is the duty of insurers to provide such indemnity by their policies. Section 204.30 (1) and (3), Stats., provides that the indemnity furnished against loss or damage for injury to a person caused by any motor vehicle shall "extend to any person * * * legally responsible for the operation" of the motor vehicle. We may rightly infer that this provision is in the policy in suit. Brower was the person legally responsible for the operation of the truck, and the policy must provide the indemnity thereby secured. The purpose of the statute, and thus the purpose of the policy, was to indemnify the operator of the truck. Thus Brower, not the Sturgeon Bay Company, was the assured, while the truck was being operated in his business. The exclusions of coverage in the policy must of course be given force. But it is the employees of the assured that are exempted, and the assured, under the facts involved in the instant case, was Brower. If the Sturgeon Bay Company had been operating the truck, its employees would have been exempted from the coverage. But it was not operating the truck, and its employee Pichette was not exempted. Under the facts stated, Brower is liable in tort to compensate Pichette for all injuries sustained. Pichette is entitled to that compensation from the joint tort-feasors, except such part thereof as the workmen's compensation statutes secure to the plaintiff by reason of its payment of the award of the Industrial Commission against the Sturgeon Bay Company. The respondent is the insurer of one of the joint tort-feasor defendants, and the judgment herein may properly be framed to

provide the indemnity to which Brower is entitled.

The respondents contend that the decision in *Bernard v. Wisconsin Automobile Ins. Co.*, 210 Wis. 133, 245 N. W. 200, rules the case in its favor. A clause there involved was practically identical with (1), above stated, and was correctly construed as excluding injuries to the "named assured." Our construction of the policy in suit is not at all in conflict with that construction, but follows it, as under this policy there is only one "named assured" in any accident, except an accident occurring in carrying on a business being conducted by the two "named assureds" jointly or one occurring where the relation of principal and agent exists between them, and such an accident is not here involved.

[4] The respondents also contend that they are exempt from liability because the exclusion clause of the policy exempts them from liability for injuries for which the assured may be liable because of the Workmen's Compensation Act, and cite the *Bernard Case*, supra, in support of this contention also. The exclusion clause involved in that case was also identical with the exclusion clause (2), above stated. What is said next above as to exclusion clause (1) applies equally as to exclusion clause (2). Brower is the "assured" under the facts of the instant case. Brower sustained no liability under the Workmen's Compensation Act for the injury to Pichette, for Pichette was not his employee. It was the Sturgeon Bay Company who sustained liability under the act for Pichette's injury, for Pichette was its employee, but the Sturgeon Bay Company is not the "named assured" in the accident here involved.

[5] The respondents set out, in the part of their answer containing the separate defense involved, a contract between Brower and the Sturgeon Bay Company pursuant to which the work in progress when Pichette was injured was done, by which Brower was obligated to carry insurance on his trucks that would protect both the Sturgeon Bay Company and Brower against damages to pedestrians and travelers on the highway and "fully protect them both in all cases," and invokes this provision as somehow supporting their contentions. We do not perceive that the provision in any way does so. So far as it goes it indicates that its purpose was to protect against damages for injuries to pedestrians and travelers

that might be injured by the trucks upon the highway if not against other persons, and that automobile indemnity insurance, and not workmen's compensation insurance, was contemplated by the parties. But whatever its import, it is entirely beside this case, except as it shows that Brower's purpose in procuring the policy was to fully protect himself as well as the Sturgeon Bay Company against damages for injuries done by the trucks as specified in the contract. This was a contract between Brower and the Sturgeon Bay Company. The respondent was not a party to it. It was not made for the benefit of the respondent. The respondent has no rights under it or because of it. It is bound by the policy that it issued, regardless of whether that policy met the requirements or exceeded the requirements of Brower's obligation under the contract with the Sturgeon Bay Company.

The order of the circuit court is reversed, and the record is remanded, with directions to vacate the order of dismissal of the Standard Accident Insurance Company and for further proceedings according to law.



SCHWANTZ et al. v. MORRIS et al.

Supreme Court of Wisconsin,
Nov. 5, 1935.

1. Appearance \S 24(10)

Motion by defendant based upon whole record to set aside findings of fact, conclusions of law, and judgment, is "general appearance" and waives all defects in service of process, notwithstanding attempt to limit appearance for purpose of motion only.

[Ed. Note.—For other definitions of "General Appearance," see Words & Phrases.]

2. Appearance \S 9(8)

Motion to set aside judgment for want of service upon moving party and for relief upon other grounds constitutes "general appearance."

3. Appearance \S 9(3)

Party desiring to take advantage of want of service of process sufficient to give court jurisdiction of person by moving to set aside proceedings on that ground must appear specially for that purpose.

4. Appearance \S 24(10)

Motion in which five defendants united asking court to vacate judgment and dismiss action for want of service on three defendants based upon summons and return and admission of service therein, upon complaint and all other papers and records on file in proceeding, and affidavits held "general appearance" waiving defects in service of process, notwithstanding recitation that appearance was for purpose of motion only, and for no other purpose.

5. Appearance \S 9(8)

Appeal by defendants joining in motion to vacate judgment and dismiss action on ground of defective service on three of defendants from "order rendered" and "more particularly" from order permitting filing of amended return as to one of defendants held "general appearance" acknowledging jurisdiction of court, since, under form of appeal taken, defendants had right to attack parts of order requiring one defendant to show cause why she should not be bound by judgment which she had attacked on grounds other than defective service of summons (St. 1933, \S 269.12).

Appeals from an order of the Circuit Court for Waupaca County; Byron B. Park, Circuit Judge.

Reversed on plaintiffs' appeal; affirmed on defendants' appeal.

Action in equity by Louisa Schwantz and others against Roy Morris and others. The plaintiffs appeal from the portions of an order entered April 30, 1935, relating to the judgment as to the defendant Margaret Cady, an heir of William Schwantz, Sr., and Anna Schwantz, widow and sole heir of William Schwantz, Jr., a deceased heir of William Schwantz, Sr., made upon the motion joined in by said Anna Schwantz and the four surviving heirs of said William Schwantz, Sr., to vacate the judgment and dismiss the action for want of service of the summons on said Margaret Cady, on Alvina Young, an heir of said William Schwantz, Sr., and on said Anna Schwantz. The defendant heirs of William Schwantz, Sr., and Anna Schwantz appeal from the portion of the order made upon said motion amending the return of service of the summons upon Alvina Young, permitting her to answer within 20 days, and confirming the judgment as to her, in case she did not so answer, and requiring Margaret Cady to show cause why she should not be bound by the judgment.

The plaintiffs, Louisa Schwantz, the widow of William Schwantz, Sr., William An-